Exploring the Environmental Exceptions in GATT Article XX

Steve CHARNOVITZ*

INTRODUCTION

It would be convenient if the new crop of trade issues would wait for the existing fields to get harvested. But in 1991, the long-dormant topic of "trade and the environment" seems to be sprouting up everywhere.

In Geneva, the GATT Council is considering a proposal by the European Free Trade Association countries to convene the Group on Environmental Measures and International Trade. Although established by the Contracting Parties in 1971, this Group has never met.[1] The environment is also at issue in a trade dispute between Mexico and the United States now before a GATT panel. The Mexican complaint stems from the U.S. Marine Mammal Protection Act which bans imports of tuna from countries whose tuna-harvesting methods are more lethal to dolphins than the American standard permits.[2]

In Washington, the Bush Administration succeeded in gaining Congressional approval for a two-year extension of "fast track" procedures for the Uruguay Round and a proposed free trade arrangement with Mexico. Yet this approval came only after the Administration promised to include environmental issues "related to" trade within the Mexican accord and to invite environmentalists to participate on six of the official advisory groups to the U.S. Trade Representative.[3] Many environmental organizations have been critical of the GATT as an agreement and as an institution. They believe that the GATT views ecosystem protection as a nettlesome non-tariff barrier instead of an overriding goal.

In Tokyo, the Japanese government recently agreed to cease importing olive ridley and hawksbill sea turtles. The shells from these two endangered species are fabricated into jewelry, combs, and eyeglass frames. The Japanese government acted to head off possible trade retaliation by the Bush Administration against Japanese wildlife products such as furs and aquarium fish.[4]

* Legislative Assistant on the Steering and Policy Committee, U.S. House of Representatives, Washington, D.C., U.S.A.

[1] GATT Doc. L/3622/Rev. 1.

[2] Marine Mammal Protection Act amendments of 1988, codified at 16 USC 1371(a). Foreign imports are allowed a 25 per cent higher kill rate than domestic harvesting.

[3] "Exchange of Letters on Issues Concerning the Negotiation of a North American Free Trade Agreement", U.S. House of Representatives, WMCP 102-10, 1 May 1991, at 78-80.

[4] "Sea Turtle Trade Activities in Japan", U.S. House of Representatives Doc. No. 102-85. Letter to the Speaker of the House from the Secretary of the Interior and the Secretary of Commerce, 2 July 1991. Hawksbill imports will be phased-out by the end of 1992.

At the London Economic Summit earlier this year, the Heads of State and Government of the G-7 agreed to look to the GATT "to define how trade measures can properly be used for environmental purposes."[5]

Around the world, planning is underway for the UN Conference on Environment and Development to be held in Rio de Janeiro in 1992. The use of trade measures is likely to be discussed in relation to new agreements on global warming, deforestation, and biodiversity.

At this time, opinions differ as to whether the growing interest in the connection between trade and the environment should be viewed as a blooming of "sustainable development" or a weed of "eco-protectionism." But one conclusion seems clear. New attitudes about the GATT are definitely taking root.

In thinking about whether the GATT needs to be "greened", as some environmentalists have urged, one might start by exploring the environmental provisions currently in the GATT. Article XX (General Exceptions) states that:

> "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; . . ."

What does this Article have to do with environmental protection, it could be asked. The word "environment" is not even mentioned. According to one treatise on the "trade and environment" linkage, "Environmental protection was simply not a public issue in 1947" when Article XX was drafted "nor was this provision intended for that purpose".[6]

This article will offer a different interpretation of what the GATT says about the environment. Part I will review the history of Article XX to see what might have been the intention of those who wrote it. Part II will analyze some of the issues that arise in the adjudication of Article XX—in light of the handful of pertinent decisions by the Contracting Parties.

Part I. History of GATT article XX

Trade regulations to protect human, animal, or plant life began a long time ago, but it was not until the 1870s that major commercial disputes broke out over veterinary and quarantine restrictions. While this article will not attempt to cover sanitary and phytosanitary laws as such, one cannot always differentiate them from

[5] "Weekly Compilation of Presidential Documents", 22 July 1991, at 969.

[6] Steven Shrybman, *International Trade and the Environment: An Environmental Assessment of the General Agreement on Tariffs and Trade*, The Ecologist Vol. 20, No. 1, January/February 1990, at 33.

laws aimed at ecological protection. In a sense, all sanitary restrictions are environmental too. As used here, however, the term "environment" will not include trade measures primarily designed to promote agriculture or enhance food safety.

Early Environmental Efforts

Utilizing trade tools to achieve environmental objectives is not a new idea. From the advent of international environmental co-operation, governments have recognized how efficacious import and export measures could be in dealing with problems that flow beyond national borders. For example, one of the earliest multilateral treaties concerning the environment—the 1990 Convention for the Preservation of Wild Animals, Birds and Fish in Africa—called for a system of export licenses for certain species "because of their rarity and danger of disappearance".[7]

In 1906, an international conference convened by Switzerland adopted a treaty to stop the production and importation of matches made with white phosphorus, a chemical causing a loathsome occupational disease.[8] This Convention proved effective in allowing manufacturers to switch to safer, but more expensive, methods of match production without fear of being undercut by less scrupulous competitors. It is important to note that the objection to phosphorus matches was not that the product itself was unsafe in its normal use. The objection was that the production *process* constituted a health danger to domestic and foreign workers.

Following two decades of consultation, arbitration, and unsuccessful unilateral action, the nations engaged in seal hunting—Great Britain, Japan, Russia, and the United States—signed a treaty in 1911 for the "preservation and protection" of fur seals and sea otters.[9] The Convention outlawed "pelagic" sealing (i.e., hunting in the water) because this method endangered females disproportionately and left many wounded seals. To enhance enforcement, the Treaty pledged all four parties to prohibit the importation of seal skins taken in the North Pacific Ocean in violation of the Convention. This Agreement was the first successful realization of the principle that multilateral action was needed to protect marine resources which roam in and out of national jurisdiction.

In 1916, following the precipitous extinction of the passenger pigeon, Great Britain (for Canada) and the United States concluded a treaty to protect migratory birds that "are either useful to man or are harmless".[10] This Convention established specific closed seasons for bird hunting and prohibited the export of birds during such times. The Treaty also banned "international traffic" in birds taken in violation of provincial or State law. In 1921, Italy and the Kingdom of the Serbs, Croats and Slovenes (Yugoslavia) signed a Convention to prohibit trade in fish caught by methods having "an injurious effect upon the spawning and preservation" of

[7] 188 C.T.S. 420–421. The Treaty never went into force, but was put into practice in some regions.
[8] 203 C.T.S. 13. The Treaty remains in force.
[9] 37 Stat. 1542–1543. The Treaty remained in force until 1941 when Japan abrogated.
[10] 39 Stat. 1702–1704. The Treaty remains in force.

fisheries.[11] Among the proscribed methods were fishing with mechanically propelled dragnets and the use of explosives "calculated to stun or stupefy" fish.

In addition to supporting multilateral efforts, some nations took action alone. Consider the United States for example. By 1927, there were about one dozen federal laws that used trade instruments for environmental purposes. The Lacey Act of 1900 proscribed the importation of wild animals or birds except under permit.[12] A law passed in 1905 prohibited the importation of insect pests injurious to crops, forests, or "shade trees".[13] The Underwood Tariff of 1913 forbade the importation of plumes, aigrettes, and feathers coming from specified wild birds.[14] (Great Britain passed similar legislation in 1921 to prevent the loss of birds to millinery.[15]) The Alaska Fisheries Act of 1926 authorized federal regulation of the nets, boats, traps and other gear used in fishing, and made it unlawful to import salmon from waters outside American jurisdiction in violation of such regulations.[16]

Although most of these laws were aimed at imports, a few focused on exports. For example in 1891, the U.S. Secretary of Agriculture was authorized to establish rules for shipping cattle to foreign countries in order to assure the "humane treatment of such animals".[17] Vessel owners failing to meet the ventilation, space and related requirements could be denied export clearances for up to one year.

There were also laws aimed at safeguarding the public. For example in 1902, the Congress required a license to import (or export) any virus, serum, or toxin for the prevention or cure of human disease.[18] The Pure Food Act of 1906 established a new principle by prohibiting the importation of any food or drug forbidden to be sold in the producing or exporting country.[19]

Since each nation applied different sanitary and conservation standards to its imports, these inconsistencies became an issue in the negotiation of bilateral trade agreements granting most-favored-nation treatment and forswearing import and export restrictions. The initial approach—devised as early as the 1882 Commercial and Maritime treaty between France and Great Britain—was a declaration that each party "reserves to itself to decide" what restrictions are necessary for "sanitary reasons" or to prevent cattle disease or the destruction of crops.[20] Within a few years, this type of exception became customary in full-scale commercial agreements. The term "sanitary" was used in many but not all treaties. For instance, the International Customs Simplification Convention of 1923 excluded measures "which Contracting States may take to ensure the health of human beings, animals or plants".[21]

[11] 19 L.N.T.S. 49–51 and 82 L.N.T.S. 275. The Convention is not in force.
[12] 31 Stat. 187–188. Repealed but replaced by similar legislation codified at 18 USC 42(a)(1).
[13] 33 Stat. 1269. Repealed.
[14] 38 Stat. 114. Repealed but replaced by similar legislation codified at 19 USC 1202, HTS, Additional US Note 1 to Chapter 5.
[15] 39 and 40 Vict., c.36.
[16] 44 Stat. 752–753. Codified at 48 USC 224 (omitted upon statehood).
[17] 26 Stat. 833. Repealed but replaced by similar legislation codified at 46 USC 3901.
[18] 32 Stat. 728. Repealed but replaced by similar legislation codified at 42 USC 262.
[19] 34 Stat. 769. Repealed but replaced by similar legislation codified at 21 USC 381.
[20] 160 C.T.S. 147. The Treaty remains in force.
[21] 30 L.N.T.S. 399. The Treaty remains in force.

Unfortunately, these unconditional exceptions led to abuse. "Under the guise of biological protection," Percy Bidwell later observed, "it is very easy to introduce economic protection".[22] By the mid-1920s, many treaties began to impose conditions on their exceptions. For instance, the commercial treaty between Japan and Mexico of 1924 required animal and plant laws to be "applicable to all countries or to countries in similar circumstances".[23] The treaty between Czechoslovakia and Sweden of 1925 required animal and plant measures to be "in conformity with the universally recognized international regulations".[24] (this enigmatic standard was not defined). As the need for greater international discipline on "administrative protection" became more apparent, the League of Nations decided to convene a multilateral conference to examine these and other import restrictions.

International Convention of 1927

The International Convention for the Abolition of Import and Export Prohibitions and Restrictions was the world's first trade round. Though nearly forgotten today, the Convention is important not only for its influence on the GATT (particularly Article XX), but also for the lessons it leaves on the difficulty of achieving a liberal trading system. The Treaty called for no less than the abolition of all import and export restrictions (excluding tariffs) within six months.

To be sure, the Treaty did leave a loophole by permitting nations to maintain restrictions protecting "vital interests".[25] Recourse to this exception, however, was to occur only in "extraordinary and abnormal circumstances". The Treaty also allowed nations to grandfather in existing restrictions temporarily, which many of the twenty-nine signatories did (for example, Japan reserved on rice). Nevertheless, the Convention was a significant achievement in international law which might have cooled-off the protectionist impulses of the era had the agreement gone into full force. Although twenty-one nations ratified it, including the United States, the refusal of Poland to accede doomed the Treaty because so many of the ratifications were contingent on Poland's approval.

Eight types of restrictions did not have to be abolished under the Convention. According to the League's Economic Committee, these were the "exceptions which have been admitted through long-established international practice . . . to be indispensable and compatible with the principle of freedom of trade".[26] One of these exceptions covered restrictions "for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites."[27] According to a report by the U.S. delegation, this particular exception "aroused

[22] Percy W. Bidwell, *The Invisible Tariff. A Study of the Control of Imports into the United States*, New York: Council on Foreign Relations, 1939, at 17.
[23] 36 L.N.T.S. 278. The Treaty is no longer in force.
[24] 36 L.N.T.S. 293. The Treaty remains in force.
[25] 97 L.N.T.S. 405.
[26] League Doc. C.E.I.22, at 21.
[27] 97 L.N.T.S. 405.

almost as much discussion as any topic in the whole Treaty".[28] While most of this discussion revolved around sanitary matters, the debate did result in an addendum being added to the Treaty's Protocol which clarified that "the protection of animals and plants against disease also refers to measures taken to preserve them from degeneration or extinction."[29]

Although the Convention permitted the traditional exceptions, it made them subject to this condition:

> ". . . that they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade."[30]

Before the "disguised restriction" proviso was agreed to, the Draft Convention had required that measures not be "applied in such a way as to constitute a form of economic protection in favour of national production."[31]

To summarize, three principles from the 1927 Convention are especially noteworthy. First, even at a conference called to achieve the "final suppression" of import prohibitions, there was general agreement that legitimate action to protect public health, animals or plants was entirely proper. Second, in a break with the past practice of most trade treaties, the customary exceptions for national laws were no longer unqualified. Although dispute settlement remained voluntary, a multilateral standard for conditionality was established. Third, because of their interrelationships, the sanitary, veterinary, phytopathological and nature preservation objectives were encompassed under the same exemption.

In the twenty years following the International Convention, trade measures were regularly employed in pursuit of environmental goals. In 1929, a multilateral treaty pledged parties "to supervise the importation of plants" in order to prevent the spread of plant diseases or pests.[32] In 1933, the London Convention for the Preservation of Fauna and Flora in Their Natural State prohibited importing and exporting specified animals, trophies, or ivory horns from African territories without a certificate.[33]

In the United States, the Tariff Act of 1930 banned the importation of "any part or product of any wild animal or bird, whether raw or manufactured" if taken in violation of the laws of the exporting country.[34] After U.S. ratification of the Halibut Fishery Treaty with Canada in 1937, the Congress banned the importation of halibut caught in violation of the Treaty, and established penalties for possessing halibut "caught incidentally to fishing for other species".[35] The penalties included forfeiture of cargo and, after a second offense, the vessel itself.

---

[28] National Archives, 560 M2/120.

[29] 97 L.N.T.S. 427. Degeneration meant "an alteration for the worse". See B. Daydon Jackson, *A Glossary of Botanic Terms*, London: Duckworth and Co, 1928, at 105.

[30] 97 L.N.T.S. 403, 405.

[31] League Doc. C.21.M.12.1928.II, at 172.

[32] 126 L.N.T.S. 317. The Treaty was superseded by the Plant Protection Convention of 1951.

[33] 172 L.N.T.S. 254, 256. The Treaty was superseded by the African Convention of 1968.

[34] 46 Stat. 741–742. Codified at 19 USC 1527.

[35] 50 Stat. 326, 328. Repealed but replaced by similar legislation codified at 16 USC 773(e) and (h).

The vast majority of bilateral trade agreements of the period included an exemption for animal or plant laws. For example, the Sweden-Turkey commercial agreement of 1928 exempted "prophylactic measures against . . . diseases, deterioration or disappearance of useful plants".[36] The Canada-Mexico trade agreement of 1946 exempted restrictions "imposed for the protection of plants or animals, including measures for protection against disease, degeneration or extinction . . .".[37] Out of the twenty-eight reciprocal trade agreements negotiated by the United States between 1934 and 1946, two used the "degeneration or extinction" language, fifteen exempted restrictions "designed to protect human, animal or plant life or health", ten did not include the word "health", and one had no exemption. There was also wide variation with respect to disciplining national actions. Although some trade treaties after 1927 applied both the non-discrimination and disguised restriction conditions, most agreements applied only non-discrimination, and a few applied neither condition.

International Trade Organization

Article XX of the GATT is based on Article 43 of the Draft Charter for the International Trade Organization (ITO) approved at the second session of the preparatory committee of the UN Conference on Trade and Employment. A brief review of the chronology may be helpful. The first preparatory session produced the "London Draft" in November 1946. A special committee developed the "New York Draft" in February 1947. The second preparatory session approved the "Geneva Draft" in August 1947. The GATT was signed in October 1947. Finally, the UN Conference in Havana adopted the ITO Charter in March 1948.

Although there is no "legislative history" specifically for GATT Article XX, one can gain insight from the ITO deliberations regarding the same General Exceptions. Because the provisions of Article XX(b) and (g) are identical to the Geneva Draft except for technical points, a review of the evolution of the ITO charter is quite relevant in ascertaining preparatory intent.[38]

Article XX Preamble

The first Draft Charter for the ITO came in the U.S.–British proposal of December 1945, which provided for the customary trade exceptions but permitted them unconditionally.[39] At the London session, several delegates suggested applying conditions to the exceptions in order to guard against "indirect protection". The British delegate offered a specific amendment—that trade measures could not be

[36] 88 L.N.T.S. 163, 165. The Treaty is no longer in force.
[37] 230 L.N.T.S. 190. The Treaty remains in force.
[38] The technical differences are in the Preamble. Article 43 grants an exemption only to the Commercial Chapter of the ITO, whereas Article XX applies to the entire GATT. Article 43 refers to "member" countries, where Article XX refers to "contracting party".
[39] U.S. Department of State Bulletin Vol. XIII, No. 337, Point III G, 1945, at 923.

"applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".[40] Although this proposal was accepted at the subcommittee level, no agreement was reached on the General Exceptions as a whole in London. At New York, the two conditions were incorporated into the Preamble, which then remained intact (except for technical conformity) through Geneva and Havana.[41] It should be noted that the "arbitrary discrimination" proviso no longer applied to just *foreign* countries, as it did in 1927. This suggests that the proviso may incorporate the principle of national treatment as well as non-discrimination.

Article XX(b)

The U.S.–British proposal included an exception for measures "necessary to protect human, animal or plant life or health".[42] Based on a suggestion by the delegate from Belgium-Luxemburg, this provision was modified in the New York Draft to require "corresponding safeguards under similar conditions" in the importing country.[43] At Geneva, however, this modification (and a proposed explanatory note) was reconsidered and abandoned on the grounds that the language was confusing and that the Preamble accomplished the same purpose.[44] At Havana, no other changes were considered.

By looking narrowly at the drafting process for Article XX(b) between 1946 and 1948, one could reach the conclusion that the intent was to cover only sanitary restrictions.[45] During the limited debate on this provision, there was no explicit avowal of an environmental purpose. Moreover, the term "sanitary" was commonly used to characterize Article XX(b) and appeared in that context in the original GATT Article XXII (Consultation).[46]

But drawing such a conclusion from the ITO deliberations alone would neglect the historical background that so clearly shaped Article XX(b). The reason why there was no comprehensive debate on the scope of this exception at the UN Conference is that the debate had already taken place—twenty years earlier. Since the exception in the ITO charter was equivalent to what the 1927 Convention and many bilateral treaties had, there would have been little point in rehashing the obvious. ("Almost boilerplate" was the way that Clair Wilcox once described the exceptions.[47]) Certainly, no delegate argued that existing environmental treaties and laws should *not* be covered by the General Exceptions. Moreover, the United States—the author of

[40] UN Docs. E/PC/T/C.II/32 at 11 and E/PC/T/C.II/50 at 3–7.
[41] UN Doc. E/PC/T/34 at 31. The word "unjustifiable" was added at the New York session.
[42] U.S. Department of State Bulletin Vol. XIII, No. 337, Point III G 2, 1945, at 924.
[43] UN Docs. E/PC/T/C.6/41 at 3 and E/PC/T/34 at 31.
[44] UN Docs. E/PC/T/A/PV/30 at 7–15 and E/PC/T/W/245 at 1.
[45] For example, see William Bown, *Trade Deals a Blow to the Environment*, New Scientist 10 November 1990, at 21.
[46] GATT, BISD, I/50.
[47] *International Trade Organization*, Hearings Before the Committee on Finance, Part I, U.S. Senate, 80th Congress, 1st Session, at 412.

the language ultimately adopted—clearly believed that Article XX(b) would countenance existing U.S. trade laws, which included environmental as well as sanitary measures.

Article XX(g)

The United States "Suggested Charter" of September 1946 provided an exception for measures:

> ". . . relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption."[48]

The origin of this exception is obscure; it did not appear in any previous trade agreement. While there is some indication that it may have been drafted with oil in mind there is no official statement of purpose.[49] No change was made in this provision at London or New York. At Geneva, a proposal by Brazil was adopted to delete the words "taken pursuant to international agreements".[50]

Throughout the preparatory meetings, this exception was discussed in the context of *export* rather than import restrictions.[51] The natural resource to be conserved was typically described as a "raw material" or "mineral".[52] As a matter of definition, the term "exhaustible" natural resources meant stock resources, like metals, in contrast to "renewable" or flow resources like animals, plants, soil, and water.[53] While renewable resources can be exhausted if misused, categorizing them as "exhaustible" robs that term of any meaning. In other words, if exhaustible includes both renewable and non-renewable resources, what is left for the "inexhaustible" category?

Fish and Wildlife

The issue of fishery agreements arose several times in the drafting of the chapter on Intergovernmental Commodity Arrangements. While this chapter was not included in the GATT, the debate on exceptions to commodity rules merits examination because of its bearing on Article XX.[54] The first provision came in the New York Draft which added a complete exception for "international fisheries or wildlife conservation agreements with the sole objective of conserving and developing these resources".[55]

---

[48] *Suggested Charter for an International Trade Organization*, U.S. Department of State, September 1946, at 24.

[49] See U.S. Department of State Bulletin Vol. XIII, No. 337, Point V 9, 1945, at 926.

[50] UN Docs. E/PC/T/A/PV/25 at 31–32 and E/PC/T/A/PV/30 at 6.

[51] UN Docs. E/PC/T/C.II/50 at 4, E/PC/T/C.II/QR/PV/5 at 79, E/PC/T/A/PV/25 at 30, and E/PC/T/A/PV/30 at 18. See also *Analysis—Geneva Draft of Charter For an International Trade Organization*, U.S. Tariff Commission, November 1947, at 61.

[52] UN Docs. E/PC/T/C.II/QR/PV/5 at 79–80, E/PC/T/A/PV/25 at 30–32, and E/PC/T/A/SR/30 at 5.

[53] See for example, Jozo Tomasevich, *International Agreements on Conservation of Marine Resources*, Palo Alto: Stanford University, 1943, at 41. See also *Proceedings of the Inter-American Conference on Conservation of Renewable Natural Resources*. September 1948, at 714.

[54] The debate may also be relevant for interpreting the commodity exception in Article XX(h), but that question is beyond the scope of this study.

[55] UN Doc. E/PC/T/34 at 43–44.

At Geneva, this exemption went through several versions—at one point applying to agreements relating "solely to the conservation of exhaustible natural resources such as fisheries or wildlife".[56] Near the end of the Geneva meeting, the British delegate proposed dropping the words "such as fisheries or wildlife". Although the Norwegian representative had spoken in favor of retaining these examples, the temporary Chairman of the Working Group (Eric Wyndham White) suggested that the examples be deleted with the understanding that "fisheries and wild life were in fact covered by the language *conservation of exhaustible natural resources*".[57] This change was made in the Geneva text. Unlike the exception in the New York Draft, this conservation exception applied to only one section of the commodities chapter.

At Havana, Norway reintroduced the issue by pointing out that the Geneva Draft could be viewed as contradictory. On the one hand, the commodities chapter provided a complete exemption for agreements protecting animal life or health. On the other, agreements to conserve exhaustible natural resources were exempt from just one part of the chapter and regulated in the remainder. Under which of the two exemptions did fisheries fit, Norway wondered, particularly since "fisheries might be considered rather as renewable than as exhaustible resources".[58] To remedy this ambiguity, the Commodities Committee inserted a total exemption for "any inter-governmental agreement relating solely to the conservation of fisheries resources, migratory birds or wild animals".[59] The Committee also recommended adding an analogous exception to the Commercial Policy chapter. This change was made in the ITO Charter.

In summary, three points should be highlighted. First, since the very purpose of the GATT was to bring trade restrictions under international discipline, extreme caution is required in using such restrictions to limn the intention of GATT's authors. Yet if there are any GATT provisions whose scope and meaning can be inferred inductively by the national laws in existence at the time, surely it would be the General Exceptions. This approach seems particularly justified for sub-paragraph (b) of Article XX which appears in the GATT in exactly the same language as was proposed in 1945. While the UN Conference did seek to make it harder for countries to abuse the General Exceptions, the new discipline was attained by attaching two conditions to the Preamble of Article XX, not by narrowing the scope of the biological exception.

Second, while the term "exhaustible natural resources" appears to have started out as a reference to minerals, a good case can be made that since the Commodity Drafting Group at Geneva intended the term to cover living resources also, this same interpretation should carry over to the Commercial chapter. (The opposite

[56] UN Doc. E/PC/T/147 at 29–30.
[57] UN Doc. E/PC/T/B/SR/27 at 14.
[58] UN Doc. E/CONF.2/C.5/SR.7 at 2.
[59] UN Doc. E/CONF.2/C.5/9 at 21.

conclusion could also be supported—that the authors of Article XX(g) understood "exhaustible natural resources" to be finite raw minerals.)

Third, it is sometimes contended that the decision in Havana to add a fishery and wildlife exception implies that the GATT lacks such an exception. But this line of argument fails to take into account the fact that the Havana amendment on fisheries was the culmination of a long debate over the proper wording of the commodities exemption.[60] While the United States did not object to inserting an explicit fisheries exception in the Commercial policy chapter, the American delegation believed that the Geneva Draft (and hence the GATT) already included that exception implicitly.[61]

PART II. INTERPRETING ARTICLE XX

In the first thirty years of the GATT, almost nothing happened regarding Article XX(b) and (g). Although parties adopted new treaties and laws (and continued enforcing existing ones) that used trade tools to achieve environmental objectives, these actions engendered no controversy in the GATT. For example, in 1973 the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) restricted imports and exports of certain species.[62]

The "environment" entered the GATT regime in 1979 in the Agreement on Technical Barriers to Trade (the Standards Code). The protection of the environment was listed as one justification for not using relevant international standards.[63] It was not until the early 1980s, however, that trade disputes led to decisions by the Contracting Parties which delineated the meaning of the environmental exceptions. Part II will explore the main issues of Article XX(b) and (g) in light of these recent GATT panel reports.

PREAMBLE

"Discrimination"

Article XX provides for exceptions that permit GATT violations. To qualify for any of these exceptions, however, national measures must not involve "arbitrary or unjustifiable discrimination between countries where the same conditions prevail".[64] So far, no measure has been found in breach of this condition.

"Disguised Restriction"

The history of this condition suggests that it was intended as a check against attempts to mask protectionist pursuits in sanitary or environmental guise. A less

[60] UN Doc. E/CONF.2/C.5/SR.7 at 3.
[61] *Analysis of Changes Made in the ITO Charter at Havana Conference*, U.S. Department of State, National Archives, 57-D-284 (Box 6), at 3–4.
[62] 993 U.N.T.S. 243.
[63] GATT, BISD, 26S/8, Article 2.2. See also Article II(1)(f) of the Subsidy Code, 26S/56.
[64] GATT, BISD, 29S/108 and 30S/55.

stringent interpretation, however, has emerged in GATT conciliation. In the 1982 case "United States—Prohibition of Imports of Tuna and Tuna Products from Canada", the Panel found that since the U.S. restrictions "were taken as a trade measure and publicly announced as such", they should not be considered disguised.[65] In the 1983 case "United States—Imports of Certain Automotive Spring Assemblies", the Panel found that what needed to be examined was not the "trade measure itself, but rather the application of the measure". The Panel then concluded that since the exclusion order in question was "published in the Federal Register" and based on a valid patent whose infringement had been clearly established, there was no disguised restriction.[66]

By leaning so heavily on one connotation of "disguised", these GATT decisions suggest that the transparency of a trade measure can be an exonerating factor. In other words, a blatantly protectionist measure might pass the "disguised restriction" test precisely because of such blatancy. The United States has voiced disagreement with the interpretation that "a measure could not be considered to be a disguised restriction simply because it had been publicly announced".[67]

A more strictly interpreted "disguised restriction" condition would be an important bulwark against abuse of Article XX. Determining when an environmental measure is really a protectionist measure is not an easy task. (Perhaps that is why the panels avoided it.) But having a multilateral organization make such judgments was certainly an expectation of the authors of the GATT.

Article XX(b)

"Necessary"

Although the term "necessary" appears in many bilateral treaties in the context that it is used in Article XX(b), there is little historical evidence that helps in defining the term. Over the past few years, however, two GATT panels have constructed a far-reaching interpretation that could nullify this exception.

In a case decided in 1989 regarding Section 337 of the Tariff Act of 1930, the United States cited Article XX(d) to defend its enforcement of patent laws. Article XX(d) exempts measures:

> ". . . necessary to secure compliance with laws or regulations which are not inconsistent with provisions of this Agreement, including those relating to . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."

In reaching its decision the Panel established the following test: a measure would not be considered *necessary* under Article XX(d) if an "alternative measure" were "available" which was not inconsistent with other GATT provisions and which a Contracting Party "could reasonably be expected to employ". Furthermore, if no

[65] GATT, BISD, 29S/108.
[66] GATT, BISD, 30S/125.
[67] GATT, BISD, 35S/107–108. See also Canada's statement in GATT Doc. C/M/155 at 13.

GATT-consistent measure were reasonably available, the Contracting Party would have to use the measure that "entails the least degree of inconsistency with other GATT provisions". The Panel did concede, however, that "this does not mean that a Contracting Party could be asked to change its substantive patent law or its desired level of enforcement . . ."[68] But the Panel did not spell out the type of modifications that a Contracting Party could reasonably be asked to make.

Article XX(b) was a central issue in the 1990 case "Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes". The Panel concluded that "necessary" in Article XX(b) should be interpreted the way the Section 337 Panel did for Article XX(d).[69] Because other measures "were reasonably available to Thailand to control the quality and quantity of cigarettes smoked . . .", the Panel found that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was not "necessary" within the meaning of Article XX(b).[70]

Several observations can be made about this interpretation of "necessary". First, while a requirement that Parties use the measure that entails the least degree of GATT inconsistency may be a worthy objective, it is unclear how such a condition could so casually be read into the GATT. Although the 1927 Convention included a provision requiring Parties to frame any restriction "in such a way as to cause the least possible injury to the trade of the other Contracting Parties", a rule of this type was never considered for Article XX.[71] A better way to introduce the "least trade-restrictive" condition into the GATT would be through new codes, as is currently being done in the negotiations on Sanitary and Phytosanitary Measures and on Technical Barriers.[72]

Second, the Section 337 decision raises a question of how a Contracting Party can predictably determine what method entails the "least degree of inconsistency" with other GATT provisions. All GATT provisions presumably would count in such a calculation. But how should one weigh an action inconsistent with Article XI, for example, against an alternative inconsistent with Article XIII? Moreover, if the "nothing in this Agreement" clause in Article XX means what it says, why are *any* conditions outside the Preamble relevant?

Third, a new standard which states that only the least GATT-inconsistent method is "necessary" can lead to many kinds of mischievous results. Take Article XX(b) for example. Bans on importing ivory could be challenged on the grounds that a more effective (and more GATT-consistent) way to save African elephants is to privatize them.[73] Any quarantine could be vulnerable to the argument that domestic programs could yield equivalent or greater increments in improved public health. Or

[68] GATT, BISD, 36S/392–393.
[69] GATT Doc. DS10/R, at para. 74.
[70] *Id.*, at para. 81.
[71] 97 L.N.T.S. 407.
[72] GATT Doc. MTN. TNC/W/35/Rev. 1/168 at para. 21 and MTN. TNC/W/35/Rev. 1/46 at Article 2.2.
[73] See *Informal Encounter on International Trade and the Environment*, UNCTAD VIII/2, 1991 at para. 35 and Stephen M. Weaver, *The Elephant's Best Friend*, National Review, 12 August 1991, at 42–43.

consider Article XX(a) which permits measures necessary "to protect public morals". Bans on importing pornography could be challenged on the grounds that public morals could be better protected by inculcating "proper" values.

If the new rule leads to challenges like these, there would be dangers to the GATT from inside and out. Attempts by the Contracting Parties to specify substantive standards for the "adoption or enforcement" of environmental measures could easily lead to internal deadlock. Conversely, if GATT succeeds in overruling any legitimate environmental restriction, the institution could find itself embroiled in controversy.

Fourth, although the Thai Cigarette Panel saw no reason why "necessary" should not mean the same in Article XX(b) as in Article XX(d), there is a distinction which can be drawn. Since Article XX(d) applies to measures "necessary to secure compliance with laws or regulations . . .", considering other means of securing compliance seems appropriate. By contrast, Article XX(b) does not say "necessary to secure compliance with health regulations". It says necessary to protect health.

Fifth, it should be noted that the most straightforward mode of disqualifying the Thai law from Article XX—the "disguised restriction" condition—could not easily be used because earlier GATT decisions had taken the teeth out of it. Had that mode been available, the Panel might not have perceived the need to extrapolate from Article XX(d).

ARTICLE XX(G)

"Relating to the conservation"

The landmark case for this provision was "Canada—Measures Affecting Exports of Unprocessed Herring and Salmon", decided in 1988. In adjudicating this dispute, the Panel defined "relating to the conservation of exhaustible natural resources" to mean that a trade measure had to be "primarily aimed at" such conservation.[74] While the Panel did not offer any specific evidence from preparatory history to justify this definition, the new test does provide a constructive way to screen out measures with only a collateral relationship to conservation.

Unfortunately, this definition has had a potentially inimical influence on dispute settlement under the Canada—U.S. Free Trade Agreement (which incorporates GATT Article XX by reference). In a 1989 case involving "Canada's Landing Requirement for Pacific Coast Salmon and Herring", the binational Panel—inspired no doubt by the GATT Herring and Salmon Panel—decided that the time had come to write a definition for "primarily aimed at". Starting with the idealistic but dubious proposition that "governments do not adopt conservation measures unless the benefits to conservation are worth the costs involved," the Panel hypothesized that Canada would not have employed the landing requirement if its own nationals had to bear the full costs of that measure. For this reason, the Panel determined that the

[74] GATT, BISD, 35S/114.

requirement was not primarily aimed at conservation.[75] By applying a mode of analysis so inherently subjective, however, the Panel leaves environmental regulations vulnerable to a broad array of challenges.

"Domestic production or consumption"

This proviso has been applied in two GATT cases involving the United States and Canada. In both disputes, the parties agreed that the fish stocks in question were an "exhaustible" natural resource.[76] In the Tuna case, the Panel found that an Article XX exception was not justified because the United States did not have restrictions on domestic consumption of tuna and because its restrictions on production did not extend to every kind of tuna being barred from Canada.[77] In the Herring and Salmon case, the Panel interpreted the proviso to mean that a trade measure had to be "primarily aimed at rendering effective" the domestic restrictions.[78] In the opinion of the Panel, the Canadian export prohibition at issue failed to meet this test.

The Panel offered no rationale for why it looked for trade measures to bolster domestic restrictions rather than for trade and domestic measures to be complementary. But in requiring that trade measures facilitate a domestic program, the Panel adds to the existing difficulties in utilizing Article XX(g) for renewable resources. One problem occurs when there is no domestic production or consumption to restrict. Consider, for example, a ban on importing wild exotic birds into a country that has no tropical forests. Or a marine mammal protection law in a country that does no fishing. How can such bans possibly render a domestic program effective? Other problems arise when the product being prohibited (e.g., tuna) is not the same as the product being conserved (e.g., dolphins). In a strict sense, neither tuna nor dolphins are being "produced". Dolphins are not being consumed and tuna are not being conserved. Certainly, the facts of that case can be fitted on to the Article XX(g) framework. But not without a little contortion.

DIFFERENT PRODUCTS

One of the key legal issues facing the Tuna-Dolphin Panel is whether the imported product must be the same one needing "protection" or "conservation". For Article XX(b), an extensive history shows that the products can be entirely different. Long before the 1927 Convention, the United States had import restrictions on animals for the purpose of protecting the life or health of humans, plants, or other animals. Moreover, there were also treaties and laws that restricted the importation of dead animals or animal parts (e.g. trophies). Since an import restriction cannot protect

[75] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report, 16 October 1989, paras. 7.04–7.11 and 7.38.
[76] GATT, BISD, 29S/108 and 35S/113.
[77] GATT, BISD, 29S/108–109.
[78] GATT, BISD, 35S/114.

the life or health of a *dead* animal. Article XX(b) must logically be read as enabling restrictions that serve as a disincentive for animals to be killed.

Foreign v. domestic

Another key question being raised in the tuna-dolphin dispute is whether a trade measure can be used to protect *foreign* life or health. After noting the ambiguity in the GATT, most commentators have leaned toward the view that Article XX is limited to *domestic* life or health.[79] But it is hard to reconcile a reading of domestic-only with the long history of environmental laws and treaties concerned with seals, match workers, fisheries, etc.—in other countries as well as in the international "commons". In addition, foreign health has been protected with sanitary restrictions (e.g., inspection of meat exports), although many of these laws had commercial objectives too. At the Geneva meeting in 1947, an Explanatory Note was considered that might have limited the reach of Article XX(b) to domestic life or health, but this Note was not adopted.[80] With regard to conservation, it can be observed that intergovernmental fishery and wildlife agreements were made an exception to the Commodities chapter. Since these agreements, by definition, demonstrated a concern for foreign as well as domestic resources, this same concern, one could argue, applied to Article XX(g).

Quite apart from these legal points, the foreign/domestic distinction is being rendered obsolete by the increasing number of trans-border and global environmental problems. As it becomes more apparent that mankind shares one biosphere, the line between paternalism and domestic interests continues to fade away. One consequence has been a more frequent recourse to intrusive trade legislation.

During the early years of ecological awareness, the import restrictions were usually designed to assist foreign conservation efforts (e.g., the U.S. Tariff Act of 1930). In a few instances, nations did act unilaterally to stop environmentally harmful trade (e.g., feathers) or did act collectively against non-parties (e.g., the Phosphorus Match Treaty). But most environmental efforts were premised on co-operation.

Beginning in the 1960s, however, there has been a growing willingness to use trade instruments to influence foreign environmental policies. For example, under the U.S. Trade Expansion Act of 1962, the President is empowered to raise duties on fish in order to pressure foreign governments to participate in good faith in negotiations on fishery conservation.[81] The U.S. Pelly Amendment of 1971 authorizes trade retaliation against foreign actions which diminish the effectiveness of an international fishery program (but only if such retaliation is "sanctioned" by the GATT).[82] More

[79] For example, see John H. Jackson, *The World Trading System*, Cambridge: MIT Press, 1989 at 209; J. Owen Saunders, *Legal Aspects of Trade and Sustainable Development*, in Saunders, ed., *The Legal Challenge of Sustainable Development*, Calgary: Canadian Institute of Resources Law, 1990, at 375; Charles Arden-Clarke, *The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development*, Gland: WWF International, June 1991, at 17–19; and *Environment and International Trade*, Report of the Secretary-General of UNCTAD, UN Doc. A/CONF. 151/PC/48, 1991, para. 96.

[80] UN Doc. E/PC/T/245 at 1.

[81] 76 Stat. 883. Codified at 19 USC 1323.

[82] 85 Stat. 786. Codified at 22 USC 1978.

recently, the Montreal Protocol of 1987 obliges signatories to ban imports of chlorofluorocarbons (CFCs) (and by 1993 of products containing them) from nations that have neither ratified nor complied with the Treaty.[83]

Assuming that the GATT does allow import restrictions to protect a *foreign* environment, it has been suggested that limitations will be needed.[84] Otherwise, what would prevent a nation from banning all timber imports to save forests, or all meat imports to save animals, or all energy-intensive imports to save fossil fuels? If environmentalism runs rampant, the trading system may be put in jeopardy.

Of course, Article XX does set limits now. Any ban on imports must be done in a non-discriminatory and non-protectionist manner. If a country of vegetarians wants to prohibit all meat imports, that should not present any GATT problems. It is not GATT's role to insist on trade or to judge the appropriateness of a herbivorous lifestyle. GATT's role is to help prevent environmentally framed trade restrictions from being used for commercial purposes.

Processing standards

Another issue involved in the Tuna Dolphin case is whether a Contracting Party may establish standards for how products should be processed or manufactured, and then prohibit imports of "like products" not meeting these standards. For example, a law that discriminates between tuna harvested in a "dolphin-safe" manner and tuna harvested using dolphin encirclement techniques—when the tuna itself is otherwise indistinguishable—raises questions of conformity with the GATT obligations in Articles I, III, XI, and XIII. Presumably, Article XX could override these obligations if the specific processing standard meets the conditions in any of the General Exceptions.

There does not appear to be any ITO preparatory documentation on the question of whether Article XX(b) or (g) can sustain a processing standard. In view of the long history of trade measures that rely on processing standards, however, it would seem difficult to argue that the GATT precludes them. As noted above, there were many environmental treaties and laws pre-dating the GATT that conditioned animal imports on whether a product had: (1) received an export license; (2) been hunted pelagically; (3) been taken in season; or (4) been caught with prohibited dragnets or traps. Certainly, the ITO authors were aware of fishery and wildlife treaties.

The question of using processing standards in environmental trade measures goes far beyond the tuna-dolphin dispute. Earlier this year, the European Community outlawed fur imports (beginning in 1995) from countries that permit the use of painful "leghold" traps.[85] In July, a new U.S. law went into effect to ban the importation of fish from nations that allow "large-scale driftnet fishing".[86]

---

[83] Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1554–1555.
[84] *Free Trade's Green Hurdle*, The Economist, 15 June 1991, at 61–62.
[85] For the Draft Regulation, see EC Doc. COM(91)88, 25 March 1991.
[86] 104 Stat. 4467. Codified at 16 USC 1371(a)(2)(E). The ban goes fully into effect in 1992.

Processing standards are also being contemplated for pollution control. Under the Montreal Protocol, the Parties have agreed to determine the feasibility of an import ban on articles produced with (but not containing) CFCs. The ban would apply to nations that have neither ratified nor complied with the Treaty.[87] If determined feasible, this ban would go into effect by 1995. Another proposal being advocated by environmentalists is an import embargo on logs from countries that do not require "sustainable" forest management practices.

Similar issues would arise with regard to recycling and packaging laws under consideration by several governments. For example, an importing nation might establish a "recycled content" requirement for newsprint, bottles, or automobile parts.

International agreements

One classic study suggests that although the GATT may not allow individual governments to set pollution control standards for imports, "action taken on the basis of an intergovernmental agreement concerning maintenance of quality standards in a production process would be a different matter entirely . . ."[88] It is true that the Contracting Parties could grant a waiver under Article XXV for an intergovernmental environmental agreement like the Montreal Protocol. The Contracting Parties could also recognize that certain conventions of wide application (e.g., CITES with one hundred and ten parties) have precedence over the GATT as a more recent treaty.[89] But aside from these avenues, these does not seem to be any other basis for asserting that environmental trade restrictions pursuant to an international agreement have greater GATT blessing than restrictions conceived and carried out unilaterally.

It should be noted that some of the provisions in Article 43 of the Geneva Draft were linked to international agreement. For instance, the commodity exception had to be "undertaken in pursuance of obligations under inter-governmental commodity agreements". The short-supply exception required such measures to be "consistent with any multilateral arrangements".[90] So it would appear that the lack of any comparable linkage in Article XX(b) and (g) was not inadvertent. Indeed, the original reference to "international agreements" in Article XX(g) was dropped in the Geneva Draft. Although the new exception for fisheries, birds, and animals added at Havana did apply only to inter-governmental agreements, it would be hard to explain how a post-1947 amendment to the ITO Charter could delimit the GATT.

[87] 26 I.L.M. 1555.
[88] *Industrial Pollution Control and International Trade*, GATT Studies No. 1, July 1971, at 18.
[89] See Article 30 of the Vienna Convention on the Law of Treaties, 8 I.L.M. 679.
[90] UN Doc. E/PC/T/186 at 37.

Conclusion

A review of the history of Article XX demonstrates that it was designed to encompass environmental measures. There may be a few issues that do not fit the Article XX framework—the preservation of scenic vistas perhaps. But just about everything else relates squarely either to the life or health of living organisms or to the conservation of truly exhaustible resources like clean air, fossil fuels, and stratospheric ozone. Whether Article XX achieves its intended purpose will depend upon how the Contracting Parties administer the exceptions *vis-à-vis* increasingly vigorous tools of enforcement. There is a danger that Article XX will be eviscerated through interpretation and that this myopic stance will backfire by making the GATT appear to be an obstacle to environmental progress.

If the "greening" of the GATT means that the Contracting Parties should respect environmental objectives in administering Article XX, then greening is a good idea. But if greening means that the Contracting Parties should subordinate economic goals to ecological imperatives, then greening is a bad idea—for the environment and for the GATT. It is a bad idea for the environment because the GATT does not have the scientific expertise to judge what ecological measures are appropriate. It is a bad idea for the GATT because environmental policy would be too divisive for GATT's current decision-making structure.

The best thing the GATT can do for the cause of a more sustainable environment is to perform capably the function in which the GATT as an institution has a comparative advantage. That is, judging the legitimacy of non-tariff barriers proclaimed under the banner of the environment. Certainly, the Contracting Parties cannot turn freer trade into an antidote against an unhealthy environment. But they can attempt to identify protectionist policies that squander resources and diminish a society's capacity to pay for environmental rehabilitation. The challenge for the GATT in the 1990s will be to carry out this difficult role in the face of enormous scientific uncertainty, intense public scrutiny, and an awareness that there is no appeal from irreversible deterioration of our planet, save to God.