ARTICLES

A Taxonomy of Environmental Trade Measures

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Over the past few years, advocates for trade and for the environment have engaged each other in debate over the propriety of using restrictions on international trade for environmental purposes.[1] Since the use of such environmental trade measures (ETMs) in treaties and national laws dates back many decades, it is not readily apparent why the issue has become so controversial in the 1990s. Whatever the reason, it is important to seek rapprochement. This article takes a step toward that end by offering an analytical framework for discussing ETMs.

Judging the desirability of ETMs requires a multidimensional analysis. The economic analysis focuses on the most efficient way to achieve the policy purpose and assesses the ETM in comparison with that policy analysis. The environmental analysis seeks the most effective measure in light of political feasibility. The legal analysis considers whether the imposition of the ETM is consistent with the rules of the General Agreement on Tariffs and Trade (GATT) and other international norms.[2]

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1. *See generally*, OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, OTA-BP-ITE-94, May, 1992; INTERNATIONAL TRADE AND THE ENVIRONMENT: WORLD BANK DISCUSSION PAPERS 159 (Patrick Low ed., 1992); THE GREENING OF WORLD TRADE ISSUES (Kym Anderson and Richard Blackhurst eds., Harvester Wheatsheaf 1992); Symposium *Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992); *Trade and the Environment, Symposium*, 23 ENVTL. L. 387 (1993); THE GREENING OF WORLD TRADE (Jan McAlpine ed., National Advisory Council for Environmental Policy and Technology 1993); and TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY (Durwood Zaelke et. al. eds., Island Press 1993).

2. The General Agreement on Tariffs and Trade [hereinafter GATT] is an international agreement setting rules on trade restrictions. For the text of the original GATT agreement, see 55 U.N.T.S. 187. All references to the current text of the GATT are from Basic Instruments and Selected Documents [hereinafter BISD], IV/1. The GATT's official organizational status is somewhat tenuous as it was meant to be a temporary agreement pending the establishment of the International Trade Organization (ITO). Although the ITO was never established, the GATT remains. For most purposes, the governing body of the GATT is the GATT Council. The GATT has a Secretariat headed by a Director-General. GATT members are called "Contracting Parties."

This multidimensionality becomes even more complicated when one recognizes that there is often little agreement among interest groups or among countries about the proper goal of environmental policy.[3]

Although treaty-based ETMs have received some criticism, much of the current controversy is focused on so-called "unilateral" measures. The Rio Declaration on Environment and Development states that "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."[4] The GATT Secretariat's Report on Trade and the Environment declares that:

> [i]n principle, it is not possible under GATT's rules to make access to one's own market dependent on the domestic environmental policies or practices of the exporting country.[5]

Stephan Schmidheiny, chairman of the Business Council for Sustainable Development, writes that:

> [t]he greatest danger to this [international trading] system is not from international agreements but from the passage by individual nations of measures that affect trade for environmental purposes, either global, pending the negotiation of agreements, or, more probably, local.[6]

Although all three of these statements are debatable, this study will not attempt to assess them on economic, environmental or legal grounds. Instead, this article will address more fundamental (and antecedent) issues. For example, what is a "unilateral" ETM? How does one determine the "jurisdiction" of an ETM? Are there any characteristics of ETMs that may be significant in determining the merit of such measures?

The methodology employed here is to construct a taxonomy of ETMs. This approach demonstrates the diverse variety of such measures. Implications drawn from various categories of ETMs are likely to be more helpful than general statements about unilateralism. In addition to providing analytical benefit, a taxonomy also provides semantic benefit by giving policymakers a common technical lexicon.

Although there will be no systematic examination of the GATT-legality of ETMs, the GATT implications of some of the distinctions introduced will be briefly discussed to make clear why such distinctions matter.[7] When

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3. For example, consider the current controversy of Norway's resumption of commercial whaling. The goal for some is the maintenance of whaling stocks at a sustainable level. The goal for others is the protection of all whales from human predators.

4. *Rio Declaration on Environment and Development*, 31 I.L.M. 874, 878 (June 14, 1992).

5. 1 GATT, INTERNATIONAL TRADE 23 (1990-1991).

6. STEPHAN SCHMIDHEINY, CHANGING COURSE 73 (Massachusetts Institute of Technology Press 1992).

7. For an early landmark study of environmental trade measures and their GATT consistency, see Frederic L. Kirgis Jr., *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 859, 860 (1972).

some of the specific laws or proposals discussed have been involved in GATT or other trade disputes, that point may also be noted.

Section I of this article will define some key terms. Section II will explain the main taxonomy and discuss the two dimensions being used to classify ETMs. Section III will illustrate the taxonomy with specific examples of historical, current, or proposed ETMs. Section IV will consider other possible means of classification and show how they might be useful.

I. DEFINITIONS

In presenting a taxonomy, this article draws upon many terms used in a very specific way.[8] To enhance clarity, several important terms will be presented before moving on to an explanation of the taxonomy. The reader who is new to the field need not master all of the definitions at once. The key terms will be re-explained as they are introduced throughout the article.

An ETM is a restriction on international trade with the announced purpose of promoting an environmental objective. Environmental objectives are meant broadly to include efforts that protect human, animal, or plant life or health (including food and product safety) and efforts to conserve renewable natural resources. A unilateral ETM is any trade measure carried out other than multilaterally.[9] As will be discussed below, almost all ETMs have some degree of unilateralism.[10] It should be noted that the term "unilateral" is not meant to have a negative connotation. People establish governments to undertake unilateral action. A world where governments could not act unilaterally would probably be an inhospitable world.[11]

Four types of ETM will be covered in this article; standards, taxes, trade restrictions, and sanctions.[12] (See Table 1.) The first two types are laws regulating internal commerce which apply similarly to imports.[13] One is a

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8. The author is the first to admit that many of the distinctions and categories introduced are imperfect and have fuzzy borderlines.

9. A hypothetical example of a multilateral ETM would be a United Nations (U.N.) trade sanction against Iraq (Iraq being a U.N. member) for eco-terrorism. *See generally* Katherine M. Kelly, *Declaring War on the Environment: The Failure of International Environmental Treaties During the Persian Gulf War*, AM. U. J. INT'L L. & POL'Y 881, 921 (1992).

10. *See* Peter H. Sand, *International Cooperation: The Environmental Experience, in* PRESERVING THE GLOBAL ENVIRONMENT 257-261 (Jessica Tuchman Mathews ed., 1991).

11. For further discussion, see Steve Charnovitz, *Achieving Environmental Goals Under International Rules*, 2 REV. EUR. COMMUNITY & INT'L ENVTL. L., 45, 50-51 (1993).

12. Two other ETMs, not covered here, are subsidies and trade conditionality. For a discussion of these types, see Steve Charnovitz, *The Environment Versus Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 490-92 (1993).

13. There are several reasons why a country might want to apply its internal standards to imports. For a discussion, see Steve Charnovitz, *The Regulation of Environmental Standards By International Trade Agreements*, 16 Int'l Env't Rep. (BNA) 631 (Aug. 25, 1993).

TABLE 1
TYPES OF ENVIRONMENTAL TRADE MEASURES

	Domestic Standard	Domestic Tax	Import or Export Restriction	Sanction
Nondiscriminatory	Catalytic Converter Requirement	Fuel Excise Tax	Ban on Import of Starlings	None
Discriminatory	None	Tariff	Ban on Import of Tuna to Save Dolphins	Restriction on Import of Beer to Save Seals

standard — for example, a requirement for catalytic converters in automobiles. The other is a *tax* — for example, an excise tax on automobile fuels. The third type of ETM consists of laws expressly regulating international trade. Such a law can be an *export* restriction — for example, a ban on the export of hazardous substances. It can also be an *import* restriction — for example, a ban on the import of diseased meat. Unlike standards, export and import restrictions have no domestic counterpart.

The fourth type of ETM is a *sanction*. A sanction is not a standard. Rather, it is special type of import or export prohibition, namely one that restricts trade in a product unrelated to the environmental purpose of the sanction.[14] For example, if the United States restricts the import of starlings, and Canadian starlings are thereby denied entry, that is an import ban, not a sanction against Canada. Alternatively, if the United States restricted the imports of beer from Canada because Canadians kill too many seals, that would be a sanction. Sanctions are typically aimed at punishing another country. However, since motivation is subjective, an intent of punishment is not incorporated into the definition of sanction used here.

In some cases, the product being restricted will be related to, but not identical to, the environmental goal. For example, a ban on the import of sealskin shoes to save seals is an import ban, not a sanction, because sealskin shoes and seals are related. A ban on the import of tuna from countries that use dolphin-unsafe methods is also an import ban. It is not a sanction because the tuna are implicated in the dolphin killing. Although the beer and tuna examples are clear-cut, there will be cases where the

14. *See* Arvind Subramanian, *Trade Measures for Environment: A Nearly Empty Box?*, THE WORLD ECON. Jan., 1992, at 135, 139-40. Tariffs may also be used as sanctions.

classification of an ETM either as an import ban or as a sanction will be ambiguous.[15]

Although all ETMs are ultimately applied to a specific article being traded, it is common to distinguish between ETMs based on a *product* and those based on a *process*. A product standard reflects tangible characteristics, such as size, design, purity, or measurable performance. In principle, the characteristics are verifiable by inspection. For example, a law setting a minimum size for marketable lobsters, or prohibiting the sale of opium, or setting a limit on pesticide residues would be a product standard. When product taxes apply only to imports and not to domestic products, they are tariffs.

By contrast, a process standard is concerned with how a product is harvested, extracted, manufactured, or shipped. For example, a law predicating the sale of fish on the fishing method used or the sale of timber on whether it was harvested with sustainable production methods would be a process standard. Process controls are often aimed at goods that are not in themselves harmful, but rather are created through an environmentally harmful process. Generally, process standards are opaque to border verification. Therefore, those who administer process standards must rely on some type of certification as to how the product was made.

The distinction between a product and process standard may sometimes be ambiguous. As analytical techniques improve (e.g., chemical and nuclear), more process standards may be converted to product standards.[16] For purposes of this study, standards will be classified based on how a particular law is written. Terms like "made with" or "produced by" signify a process standard. Import restrictions, export restrictions, and sanctions can be based on either the product or the process.

For an environmental measure to be an ETM, it must have an actual or potential impact on international trade. To be consistent with GATT rules, and ETM must not be "discriminatory." The GATT requirements in that regard are two-fold: First, an imported product must be treated no less favorably than the "like" domestic product.[17] Second, a product imported from a GATT member country must be treated no less favorably than a like product imported from any other GATT member.[18] An ETM that

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15. One such case is the ban on Yellowfin Tuna and Yellowfin Tuna products from intermediary nations under the Marine Mammal Protection Act. *See* 16 U.S.C. § 1371(a)(2)(C) (1972) (amended 1973, 1981, 1984, 1986, 1988, 1990) (Supp. 1992). More work is needed to delineate the distinction between related and unrelated products.

16. For further discussion, see Charnovitz, *The Regulation of Environmental Standards by International Trade Agreements, supra* note 13, at 631-32.

17. GATT, *supra* note 2, art. III. "Like products" is a term not defined in the GATT. It has been taken to be broader than "identical," but narrower than "competing" or "substitutable." *See EEC Measures on Animal Feed Proteins*, BISD 25S/49, para. 4.20.

18. GATT, *supra* note 2, art. I.

TABLE 2
TAXONOMY

External Reach \ Degree of Unilateralism	Treaty Obligation	Treaty Authorization	National Support of Plurilateral Agreements	National Law
Domestic Territory	#1	#2	#3	#4
Global Commons	#5	#6	#7	#8
Foreign Territory	#9	#10	#11	#12

violates either of these requirements by mistreating a like product is discriminatory.

Applying this criterion to the four types of ETMs defined above, one finds that environmental "standards" and taxes are generally non-discriminatory. Import or export restrictions may or may not discriminate. Sanctions always discriminate because they are aimed only at particular countries, not all countries.

II. EXPLAINING THE TAXONOMY

The taxonomy will be presented as a two-dimensional matrix. (See Table 2.) The horizontal scale is the degree of unilateralism of the ETM. The vertical scale is the external reach of the ETM.

By the degree of unilateralism, one means the extent to which an ETM is reflective of solely national goals or preferences. The spectrum goes from low (on the left) to high (on the right). The lowest degree of unilateralism is a multilateral treaty obligation. The highest degree of unilateralism is a national law.

By the degree of external reach, one means the extent to which an ETM concerns environmental or health impact beyond the country imposing the trade measure.[19] The impact sought to be addressed can arise as a result of production, consumption, or disposal. The scale goes from low (on the top) to high (on the bottom). The lowest degree of external reach is an ETM

19. It should be noted that the ETMs are not being categorized by whom they intend to influence. That approach is not taken for several reasons: (1) It is hard to ascribe intent; (2) If intent could be self-implicating, one would expect countries to disguise their real intent; and (3) ETMs often have multiple intents. For example, is the U.S. Marine Mammal Protection Act, 16 U.S.C. § 1371 (Supp. 1992), seeking to influence Mexican fishing practices or to prevent U.S. consumers from buying dolphin-unsafe tuna?

aimed solely at one's domestic territory.[20] The highest degree of external reach is an ETM aimed at a foreign country's territory.[21]

With respect to GATT legality, the categories on the top left are commonly perceived as more likely to be GATT-legal while the categories on the bottom right are commonly perceived as less likely to be GATT-legal. Of course, some analysts might view all 12 categories in Table 2 as GATT-illegal.[22] Others might view every category in the Table as GATT-legal.

A. DEGREE OF UNILATERALISM

The first column (on the left) of the unilateralism axis shows ETMs based on obligations in multilateral, regional, plurilateral, or bilateral treaties.[23] The plurilateral ETMs included in the first column are treaty obligations to impose ETMs on non-parties in the same manner they are imposed on parties. Although it could be argued that the mere existence of the treaty makes such ETMs non-unilateral, unilateralism, as used here, does not mean an action done by one nation only, it means the extent to which actions reflect solely national goals.[24] Thus, it is important to consider whether a trade measure is done on a non-consensual basis.[25]

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20. Territory is used purely in a geographical sense, not to imply an authority to prescribe legislation.

21. External reach is meant to be a geographical classification locating the activity at issue. Section IV of this article will present a different geographical classification based on the beneficiary, or the degree to which the impact is shared.

22. The import or export restrictions would violate GATT Article XI (quantitative restrictions). Process (and some product) standards or taxes could fail to qualify for Article III (governing national treatment). Whether these would be GATT-illegal would depend on the interpretation of Article XX (exceptions to the GATT). GATT, *supra* note 2, arts. III, XI, XX. Some ETMs passed prior to a country's accession to the GATT would not be GATT-illegal under the Protocol of Provisional Application. Protocol of Provision Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, para. 1:(b), 55 U.N.T.S. 308.

23. There may be monist regimes in which a treaty is self-implementing and provides sufficient authority for trade controls. For a discussion of the legal point, *see* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992). In most cases, however, GATT surveillance would not be directed at a treaty, but rather at a nation's actions to implement the treaty.

24. This is a taxonomic, not a legal, point. From the perspective of international law, one would judge the degree of multilateralism by factors such as (a) whether the ETM was based on a treaty, (b) whether the treaty was negotiated under U.N. auspices, (c) whether the treaty has a large number of parties, and (d) whether these parties control a large portion of the market being regulated. Thus, an action based on a U.N. treaty with a large number of parties that constitute most of the key players might be viewed as multilateral (or non-unilateral) even if it applies certain rules to non-parties (especially minor players).

25. For example, if Country A imposes a trade restriction on Country Z that Z does not want, that is a unilateral act. So if Countries A, B, and C impose the same restriction on Z, one cannot define the unilateralism away. The restriction is still unilateral from Z's perspective. Yet at some point, the attainment of a critical mass of countries could be viewed as de-unilateralizing the action.

The second column shows ETMs taken pursuant to an authorization made by treaty. The column reflects the common view that treaties "authorize" the use of ETMs. It should be noted however, that, in reality, treaties only acknowledge or clarify such rights generally. The right to impose an ETM is an aspect of sovereignty. For example, some analysts have written that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) "authorizes" parties to take "stricter domestic measures regarding the conditions for trade, . . ." for species listed under CITES and "domestic measures restricting or prohibiting trade, . . ." for species not listed under CITES.[26] But what CITES actually says is that "[t]he provisions of the present Convention shall in no way affect the right of Parties to adopt: stricter domestic measures. . . ."[27] Nevertheless, this column adopts the view that treaties, in some cases, sanctify ETMs.

The third column shows ETMs which are enacted to support plurilateral agreements,[28] but which are neither required (first column) nor authorized (second column) by the treaty. Therefore they are not multilateral by law. Such action, however, is not purely unilateral either. It is multilateral in spirit because it is specifically aimed at fostering participation in a treaty or furthering its purposes.

The fourth column shows national laws not tied in any way to international agreements. Such laws are purely unilateral. In some instances, the adoption of such laws results from a failed attempt to negotiate an international agreement. In many instances, international agreements may not even have been attempted. Such laws may be in the form of standards, taxes, import restrictions, export restrictions, or sanctions.

B. DEGREE OF EXTERNAL REACH

The top row of the matrix is a country's domestic territory, a categorization that might also be described as zero external reach. This row shows ETMs designed to protect domestic life or health, or to conserve domestic natural resources. Since standards and taxes apply equally to domestically-made and imported products, they do not fit squarely within any one row. To simplify the taxonomy, each measure will be included in one row only:

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26. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 2, 1973, art. XIV, 993 U.N.T.S. 243, [hereinafter CITES].

27. *Id.* In other words, to the extent that countries have that right, CITES does not vitiate it.

28. This is sometimes referred to as "enforcement," but that term is properly used only when the agreement itself has enforcement provisions (e.g., dispute settlement).

the row that seems to be the best fit given the facts behind the particular law.[29]

The middle row is the global commons, areas outside of any national boundary. Although the global commons does not include the territory of a country using an ETM, it does not have the greatest external reach. Each nation has both the right, and the responsibility, to be concerned about the global commons.[30] The opposite proposition, that no country has any business seeking to safeguard the global commons, defies logic. As Lynton K. Caldwell has noted, "[s]overeignty is a poor barrier against the death of the oceans, or the contamination of the atmosphere, or the impoverishment of man's global environmental heritage."[31]

The bottom row is the territory of a foreign country. An ETM directed at a foreign environment has the greatest external reach. Why would a country utilize an ETM to protect a foreign environment? Although altruism may play a role, the rationale for using an ETM for such a purpose is basically the same as that for using an ETM to protect one's native environment or the global commons. That is, the country employing the trade measure believes that it has a significant interest in foreign life or health, or in a foreign country's use of "its" resources. The extent to which the international community perceives as legitimate the protection by one or more countries of another country's environment continues to evolve. A century ago, the survival of a species native to one country was considered a matter for that country to decide. Today, the maintenance of biodiversity is considered a proper concern for all nations. For example, under CITES, a double-permit framework has been developed to protect endangered or threatened species regardless of whether the country of habitat chooses to cooperate. Thus, Kenya has no veto power over whether one of "its" elephants is placed under CITES' protection.[32]

Within these degrees of external reach, one should be aware that standards, as well as some import restrictions, can fit into more than one row. For example, CITES may protect a species that migrates through one's own territory, the high seas, and a foreign territory. In such cases, the ETMs

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29. A more complex taxonomy might place such measures in more than one row. For instance, consider a U.S. law requiring all cheese sold, including imports, to be properly pasteurized. Since such a law aims to change foreign manufacturing behavior, it could be classified in the foreign territory row. This taxonomy would classify it in the domestic territory row because it is directed at cheese consumption by domestic consumers.

30. The global commons is, after all, common to all countries.

31. Lynton K. Caldwell, *Concepts in Development of International Environmental Policies*, IUCN, Twelfth Annual Meeting, 1972, at 98.

32. Kenya can take a reservation on the species and fail to prevent exports. But the double permit system prevents the import of the elephant by CITES parties once the elephant is listed in CITES Appendix I. *See* CITES, *supra* note 26, art. III:3.

are classified in the row of highest external reach (where the GATT problems are likely to be most difficult).

III. ILLUSTRATING THE TAXONOMY

The 3 × 4 matrix yields 12 separate categories, as numbered in Table 2. Each will be discussed below in numerical order, which begins in the top row, left column of the matrix. Within each category, product measures will be presented before process measures. To simplify the presentation, only selected aspects of treaties or laws will be addressed. For example, a law might have both an import and an export restriction, but only one or the other will be discussed.

A. FIRST ROW

The first row relates to the domestic territory of the country imposing the trade restriction.

1. Domestic Territory-Treaty Obligation

This category consists of ETMs which are directed at the environment in one's domestic territory and are imposed pursuant to a treaty obligation. Consider, for example, the International Convention of 1881 respecting measures to be taken against *Phylloxera Vastatrix*, a plant louse.[33] This convention required parties to pass legislative measures against the introduction and propagation of *Phylloxera*.[34]

Another example is national action to implement the Mexico-U.S. Livestock Convention of 1928.[35] This convention prohibits either party from issuing permits for the importation of domestic ruminants or swine from foreign countries where highly infectious diseases have occurred within the past 60 days.[36] For such "regional" issues, the reach is greater than for a domestic ETM, but not so great as for a foreign territory ETM. Under the 1990 Protocol to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, the parties are required to ensure "total protection and recovery" of species listed in the protocol through several actions including a prohibition on "commercial trade in such species, their eggs, parts or products."[37]

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33. Convention respecting Measures to be taken against Phylloxera Vastatrix, Nov. 3, 1881, 159 C.T.S. 203 (no longer in force).

34. *Id.*

35. Convention to Safeguard Livestock Interests by Prevention of Infectious and Contagious Diseases, Mar. 28, 1928, U.S.-Mex., 46 Stat. 2451 (1928) [hereinafter Livestock Convention].

36. *Id.* art. IX, at 2454.

37. Senate Treaty Doc. 103-5, art. 11(1)(b), Message from the President of the United States

2. Domestic Territory-Treaty Authorization

This category consists of ETMs which involve the environment in one's domestic territory and are authorized, but not mandated, by a treaty. The International Convention Concerning the Export and Import of Animal Products states that:

> [s]hould cattle plague appear in the territory of one of the High Contracting Parties, the other High Contracting Parties shall have the right, as long as the danger of infection lasts, to prohibit the import of parts of animals and animal products which might convey infection.[38]

Note the contrast to the Mexico-U.S. Livestock Convention which imposes an obligation upon each party to act.[39]

CITES authorizes each party to place any species "subject to regulation within its jurisdiction" on Appendix III,[40] which triggers two CITES requirements: first, that exports of that species require an export permit issued by the government's Management Authority;[41] and second, that no other Party may import that species in the absence of such an export permit.[42] While a two-thirds vote is needed to add a species to Appendix I and II of CITES, a species can be added to Appendix III by the unilateral action of one country.[43] The practical effect of these requirements is that CITES "authorizes" export restrictions.

3. Domestic Territory-National Support

This category consists of national action to help support an existing plurilateral agreement. An example is the first international bird treaty signed in 1902 by several European states, the Convention for the Protection of Birds Useful to Agriculture.[44] The convention prohibited the killing,

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Transmitting the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Senate Treaty Doc. 103-5, 103d Cong., 1st Sess. (1993). This provision applies to domestic as well as foreign commerce. *Id.*

38. International Convention Concerning the Export and Import of Animal Products (Other than Meat, Milk Preparations, Fresh Animal Products, Milk and Milk Products), Feb. 20, 1935, art. 2, 193 L.N.T.S. 61, 65; *see also id.* arts. 1 & 5.

39. *See* Livestock Convention, *supra* note 35, art. IX, at 2454.

40. CITES, *supra* note 26, arts. II:3 & XVI. *See* DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES 302-04 (Martinus Nijhoff 1989).

41. CITES, *supra* note 26, art. V:2. If a government uses this procedure to prohibit all exports, this action could be classified under Category 4.

42. *Id.* art. V:3.

43. *Id.* art. XV. There is nothing to prevent a party from placing a non-indigenous species on Appendix III, but the requirements for an export permit only apply when a species is indigenous. *Id.* art. III.

44. Convention for the Protection of Birds Useful to Agriculture, March 19, 1902, 191 C.T.S. 91 (no longer in force).

transit, sale, or importation of certain birds.[45] Although Cyprus was not a party to the treaty, it took action in 1904 to forbid the export of bird skins or eggs of any kind.[46]

In 1916, the Convention for the Protection of Migratory Birds between Great Britain and the United States established closed seasons for certain birds.[47] The treaty also required parties to prohibit the export of such birds during a closed season.[48] To give effect to that convention, the U.S. Congress enacted the Migratory Bird Treaty Act in 1918.[49] By prohibiting the export at all times of any migratory bird included in the terms of the convention (unless provided otherwise by regulation),[50] the United States did more than the treaty required.

4. Domestic Territory-National Law

This category consists of national laws which involve the environment in one's domestic territory. Six kinds of ETMs will be discussed within this category: (1) product standards, (2) process standards, (3) product taxes, (4) process taxes, (5) import restrictions, and (6) export restrictions. When import restrictions are accompanied by analogous disciplines on domestic sale or production, the ETM will be classified as a standard rather than a restriction.[51]

Product Standards

Product standards for moral or health purposes have been in use for a long time. In 1873, the U.S. Comstock Act banned the importation of any drug, medicine, or article "for the prevention of conception, or for causing unlawful abortion."[52] Because the law also banned the sale of such articles in places within the exclusive jurisdiction of the federal government,[53] this law qualifies as a standard.

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45. *Id.*

46. Implementation of Convention to Protect Birds Useful to Agriculture, Act of 1904, No. 13 (current status unavailable).

47. Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-U.K. 39 Stat. 1702 (1916) (Presidential Proclamation). Great Britain signed the treaty for Canada.

48. *Id.* art. VI.

49. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918).

50. 16 U.S.C. § 703 (1918) (amended 1936, 1974) (Supp. 1992) (incorporating Section 2 of the Migratory Bird Treaty Act, *id.*). The initial regulations did not specifically permit exports. *See* A Proclamation by the President of the United States, July 31, 1918, 40 Stat. 1812 (1918); A Proclamation by the President of the United States, October 25, 1918, 409 Stat. 1863 (1918).

51. This approach is used because such a measure is likely to be portrayed that way to a GATT panel. An import ban would violate GATT Article XI. But a product standard, applying similarly to imports, could be legal under GATT Article III. GATT, *supra* note 2, arts. III, XI. As used here, import restrictions have no domestic counterpart.

52. 17 Stat. 598, § 1-3 (1873) (repealed 1933).

53. *Id.*

Product standards are also used to promote recycling. Several states in the United States, such as California, have imposed "recycled content" requirements on newsprint, bottles, or plastic containers.[54] The European Community (E.C.) has complained about the application of these restrictions to imports on the grounds that the damage from a failure to recycle occurs in the country of origin, not the state of consumption (i.e., California).[55] Canada has complained about the resulting need to import used newsprint from the United States in order to meet that content standard.[56]

Germany imposes a special kind of product standard, namely, a disposal standard.[57] Under the Ordinance on the Avoiding of Packaging Waste of 1991, producers and distributors (including importers) must accept the return of transit, secondary, and sales packaging for reuse or recycling.[58]

Process Standards

Process standards are often used to protect food safety (a key aspect of the domestic environment) by regulating the methods by which food is produced rather than regulating the condition of the final product. This is sometimes known as the "processes and production methods" (PPM) issue.[59] For example, the U.S. Import Milk Act of 1927 prohibits the importation of milk and cream when certain requirements are not met. The requirements include a physical examination of the cows during the past year, a demonstration that the cows are free of tuberculosis, and adequate inspection of sanitary conditions at the foreign dairy farm.[60] In addition, the U.S. Federal Food, Drug, and Cosmetic Act of 1938 prohibits commerce in

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54. *See* MARK REISCH, U.S. CONGRESSIONAL RESEARCH SERVICE, ENCOURAGING RECYCLING: STATE MINIMUM CONTENT LAWS (1991). These laws are classified as product rather than process standards because they mandate input use. To the extent that the use of recycled material cannot be determined by analysis, these laws should be classified as process standards.

55. COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON UNITED STATES TRADE AND INVESTMENT BARRIERS 51-54, 62-63 (1993). Two possible reasons for California's application of such a requirement on imports: (1) concern regarding excessive buildup of foreign-origin waste; and (2) concern regarding the competitiveness of local bottlers.

56. For a discussion of recycled newsprint standards from a Canadian perspective, see J. Christopher Thomas, *The Future: The Impact of Environmental Regulations on Trade*, 18 CANADA-UNITED STATES LAW JOURNAL 383, 389-92 (1992).

57. Alternatively, this could be classified under Category 4 process standards. Process standards are usually oriented toward production, but a disposal standard might be viewed as consumption or production. The German law ties production and consumption together by giving the producer a responsibility for disposal.

58. Verordnung über die Vermeidung von Verpackungsabfällen (Verpackungsverordnung — VerpackV), 12 Bundesgesetzblatt (Federal Law Gazette) 1234, Teil (Part) I, (1991) (Germany).

59. The regulation is on the product, but focuses on the process of production.

60. 21 U.S.C. § 142 (1927) (1988). This could be considered a prohibition rather than a process standard because there were no comparable *federal* requirements for milk production. At the time, milk safety was deemed a local or state government function. *See* WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION, MILK PRODUCTION AND CONTROL 1-41 (The Century Co. 1932).

food that has been "prepared, packed or held under insanitary conditions."[61] Finally, the U.S. Poultry Products Inspection Act bans the importation of poultry which has not been subject to the same inspection, sanitary, and species verification standards applied to poultry raised in the United States or that has not been "processed in facilities and under conditions that are the same as those under which similar products are processed in the United States."[62] Under the U.S. Federal Meat Inspection Act, no meat or meat food products may be sold or imported unless the livestock from which they were produced was slaughtered in a "humane" way in accordance with the U.S. Humane Methods of Slaughter Act.[63]

A recent PPM controversy involved an E.C. ban on all commerce (Community and foreign) in meat treated with growth hormones.[64] The Reagan and Bush Administrations objected to this ban on the grounds that hormones were safe, and brought a complaint to the dispute settlement mechanism under the GATT Standards Code. The E.C. blocked this complaint, however, on the grounds that the Standards Code lacked any commitments regarding PPMs.[65] Thus, since there were no international commitments, the E.C. saw no point in convening a scientific panel to further explore the matter, as proposed by the United States.[66] The E.C. probably realized as well that a scientific panel was not likely to find grounds for viewing the hormones as unsafe.

Process standards can also be used to address pollution. For example, Germany is considering a restriction on the use of chlorine in the bleaching of wood pulp.[67] The use of chlorine introduces dioxin into the environ-

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61. 21 U.S.C. § 342 (1938) (amended 1950, 1954, 1956, 1958, 1959, 1960, 1966, 1968, 1986) (1988).

62. 21 U.S.C. § 466(d) (1957) (amended 1985) (1988). The many domestic standards include, for example, whether the poultry was held under unsanitary conditions or whether the poultry died other than by slaughter. *See* 21 U.S.C. § 453(g) (1957) (amended 1962, 1968) (Supp. 1992). For further discussion, see *U.S. Poultry Industry Wins Ruling on Foreign Inspection Standards*, 9 Int'l Trade Rep. (BNA) 923 (May 27, 1992).

63. 21 U.S.C. § 620(a) (1988); 7 U.S.C. § 1902(a) (1988).

64. Council Directive 85/649, art. 6, 1985 O.J. (L 382); Council Directive 81/602, art. 2, 1981 O.J. (L 222). If the presence of hormones was detectable, this would be a product standard. But both sides agreed that in many cases, the presence of hormones was undetectable in the final product (or when detectable was at a level no higher than for E.C.-produced meat).

65. *See* Agreement on Technical Barriers to Trade, General Agreement on Tariffs and Trade, Mar. 1980, BISD 26S/8, arts. 1.1, 14.25.

66. It was this omission in the GATT Standards Code that motivated the Reagan Administration to seek new disciplines in the Uruguay Round Standards and S&P codes to restrict PPMs. Some environmentalists have misperceived this situation and infer that the Dunkel Text would break new ground by permitting the use of PPMs — for example, when they are justified by science. The government officials involved have not sought to correct this erroneous impression. Perhaps they prefer environmentalists to believe that PPMs are currently GATT-illegal and that the Dunkel Text constitutes an environmental breakthrough.

67. *See* Antoine St.-Pierre, *Industrial Competitiveness, Trade and the Environment in Canada*, *in* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, ENVIRONMENTAL POLICIES AND

ment.[68] While it may reduce dioxin levels, such a restriction could have a significant impact on the Canadian forest products industry.

Product Taxes

The application of environmental product taxes to imports has been a controversial issue in trade policy. Under the Superfund Amendments and Reauthorization Act of 1986, the United States imposed a tax on certain feedstock chemicals.[69] The Act also imposed a tax on imported substances containing such chemicals at the same tax rate that would have applied had the chemical been sold in the United States for use in the manufacture of the imported substance.[70] Several countries objected to this tax as being GATT-illegal.[71] Nevertheless, a GATT panel found the tax on imports to be consistent with GATT rules on border adjustment.[72]

The ten-cent environmental levy on non-refillable beer cans imposed by the province of Ontario in 1991 is another example of a product tax.[73] Although the tax applies equally to Canadian cans as well as to American cans, most Canadian beer is sold in bottles.[74] The Bush Administration protested this tax as discriminatory. The long-running dispute over Canadian beer practices was seemingly settled in August 1993, with the Clinton Administration acquiescing in the environmental levy following a U.S. Canada agreement on the exclusively commercial aspects of the dispute.[75]

Yet another illustration is the recent Belgian approval of an "eco-tax" on several products such as batteries, disposable razors, and pesticide packaging.[76] This tax will be remitted or reduced if recyclable materials are used.[77] Similar eco-taxes have been proposed in the United States for virgin materials.

Other product taxes are pollution taxes. Under the U.S. fuel economy law, known as the Corporate Average Fuel Economy (CAFE) standard,

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INDUSTRY COMPETITIVENESS 96 (1993). If the chlorine is detectable in the final product, this standard should be classified as a product standard.

68. *See* Bill Richardson, *Why Clinton Should Take Chlorine Out of Paper 'Pool'*, THE CHRISTIAN SCIENCE MONITOR, Oct. 4, 1993, at 19.

69. 26 U.S.C. § 4661 (1980) (amended 1986) (1988).

70. 26 U.S.C. § 4671 (1986) (amended 1986) (1988).

71. General Agreements on Tariffs and Trade, June 17, 1987, BISD 34S/136, 161.

72. *Id.*

73. See Leo Ryan, *Ontario's Can Tax Angers Aluminum, Beer Industries*, J. OF COM., May 26, 1992, at 1A. Canadian producers have an advantage in bottles because foreign suppliers lack access to the local distribution and recycling system.

74. *Id.*

75. Keith Bradsher, *U.S. and Canada Make Deal on Beer Amid Trade Talks*, N.Y. TIMES, Aug. 6, 1993, at D1.

76. *See Energy Tax Clears Parliament; Green Party Says Measure Short on Environmental Focus*, Int'l Env't Rep. (BNA) 518 (July 14, 1993). If the usage of recyclable materials is undetectable other than by certification, this could be classified as a process tax.

77. *Id.*

vehicle taxes are imposed on automobile producers whose average fleet mileage (i.e., miles per gallon) exceeds certain limits.[78] Because the tax is related to mean fleet economy, American producers are able to average together large and small cars.[79] But European producers, who do not sell many small cars in the United States, cannot average in the small cars they sell in Europe.[80]

Process Taxes

An example of a process tax is the 1993 enactment by the U.S. House of Representatives of an imputed British Thermal Unit (BTU) "tax on certain imported products that contain significant levels of direct energy inputs that would be taxable if the products were manufactured in the United States."[81] In setting the tax rate, the U.S. Customs Service was to presume that the imported product was made with the same amount of energy as the domestically produced like product, but the foreign manufacturer could have sought a lower tax by documenting actual energy inputs. This proposal went further than the Superfund case (discussed previously) by adjusting for a non-incorporated input.[82] Although the energy tax might be viewed as a product tax, the traditional view in the GATT has been that an energy tax is a factor tax akin to a tax on labor (e.g., social security), land (e.g., extraction), or capital (e.g., income). Thus, it is classified here as a process tax.

Import Restrictions

The utilization of environmental import restrictions has a long history and examples are plentiful. In 1848, the United States banned the importation of drugs and medicines which were inferior in strength and purity to the

78. 15 U.S.C. § 2001-2003 (1975) (amended 1980, § 2001 amend. 1992, § 2002 amend. 1988, 1992, § 2003 amend. 1984) (Supp. 1993). Because this is based upon a fleet, it might be viewed as a process tax related to how the fleet is produced. Note that automobiles with "like" miles-per-gallon performance are being treated differently depending on the country of origin.

79. *Id.*

80. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 55, at 51-54.

81. HOUSE COMM. ON THE BUDGET, OMNIBUS BUDGET RECONCILIATION ACT OF 1993, H.R. NO. REP.103-111, 103d Cong., 1st Sess. 746 (1993). The tax was later dropped because of its unpopularity.

82. The use of taxes as instruments for environmental protection raises concerns about international competitiveness. For example, if a country imposed a BTU tax on energy used in each stage of manufacture, the price of the final product would include these cumulative energy taxes. Imports, however, would not be subject to the same taxes, unless the country of origin imported a similar tax. Because of the potential competitive difficulties of "untaxed" imports, it has been suggested that border adjustments be made for cumulative BTU taxes in the same manner that they are made for cumulative value added taxes. Such a border adjustment would break new ground in the GATT because historically such adjustments have been made only for taxes on inputs physically incorporated into the final product.

international pharmacopoeia standard.[83] In 1877, Great Britain authorized landing restrictions on potatoes and other vegetables when they posed the risk of introducing the Colorado Beetle.[84] In 1890, the United States embargoed the importation of "any adulterated or unwholesome food or drug or any vinous, spirituous or malt liquors, adulterated or mixed with any poisonous or noxious chemical drug or other ingredient injurious to health."[85] In the Dingley Tariff Act of 1897, the United States prohibited the importation of eggs of game birds.[86] In 1922, the United States embargoed the importation of the honeybee because of the danger to indigenous honeybees.[87] In 1962, Vanuatu banned the importation of any device for capturing birds.[88] Japan currently bans apples from the United States out of fears that such apples harbor Coddling Moths and suffer from Fire Blight.[89]

In recent years, one of the most controversial "sanitary" issues has involved the importation of waste. Several countries or subnational units of government have banned or considered banning imported waste. For example, France bans all imports of household waste.[90] The Walloon Region of Belgium imposed a ban on waste imports into Wallonia, which was recently upheld, in part, by the European Court of Justice.[91]

It is interesting to compare a ban on waste to the other examples noted above. Excluding waste is quite different from excluding beetles. Great Britain was not producing Colorado Beetles and did not want any. By contrast Wallonia does produce waste, and yet refuses to accept more. Wallonia's ban on foreign waste thus appears discriminatory as between the importing state and other states.[92]

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83. 9 Stat. 238, § 3 (1848) (revised version at 19 U.S.C. § 134) (repealed 1922).

84. The Destructive Insect Act, 1877, 40 & 41 Vict., ch. 68, sec. 1 (repealed) (Eng.).

85. 26 Stat. 414, 15 (1890) (repealed 1956 by 70 Stat. 947) (current version at 19 U.S.C. 18 (1988)).

86. 30 Stat. 151 (1897) (repealed except §§ 9, 10 current version at 19 U.S.C. 145 (1988)). But see similar provision codified at 16 U.S.C. § 702 (1902) (1988).

87. 7 U.S.C. § 281 (1922) (amended 1962, 1976) (1988).

88. Joint (Wild Bird Protection) Regulation No. 5 of 1962, *cited in* DAVID G. NICHOLS, JR. ET AL., WORLD WILDLIFE FUND, WILDLIFE TRADE LAWS OF ASIA AND OCEANIA Vanuatu-3 (1991).

89. *See* Yumiko Ono, *Japan's Ban on American Apples Draws Growing Complaints From U.S. Officials*, WALL ST. J., June 3, 1993, at A11. It should be noted that American apples cost less than half of what Japanese apples do. Japan responds that several U.S. states restrict Japanese mandarin oranges and tangerines. *See* Mark Magnier, *Wash. Apple Growers Threaten To Seek Sanctions on Japan*, J. COM., June 4, 1993, at 3A.

90. Paul Demaret, *Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community*, *in* THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION 337 (M. Maresceau ed., Kluwer Academic Publishers, 1993).

91. *Id.* at 339-42 (unpublished case).

92. If a country can say, "We already have enough waste; we don't want yours," then why can it not say, "We already have enough automobiles; we don't want yours"? Is telling a foreign country to dispose of the waste it produces any different than telling it to consume the automobiles it

An import restriction can also relate to the production process. For example in 1889, Great Britain banned the landing of Herring caught using illegal fishing methods such as "beam trawling."[93]

Export Restrictions

As with import restrictions, there is a long history of export restrictions to conserve national resources or to preserve them for domestic exploitation. The United States first banned the export of timber from public lands in its territories in 1878.[94] Similar bans have been used in many countries such as Canada, Indonesia, and the Philippines.[95]

Long before the advent of CITES, many countries used export prohibitions to protect their indigenous animal species. For example, in 1922, Australia banned the export of Birds of Paradise and their plumage.[96] In 1940, the U.S. Congress noted that "the Bald Eagle is now threatened with extinction," and in response, levied civil and criminal penalties on the exportation of Bald and Golden Eagles.[97] In 1948, Sri Lanka banned the export of elephants.[98] In 1953, the New Zealand Wildlife Act restricted the export of any bat, bird, reptile, or amphibian.[99] Since 1982, Australia has prohibited the export of live native animals except for use in zoos or for scientific research.[100]

Another use of export restrictions would be to prevent the transfer of dangerous pesticides which appear later in imported food. This issue is known as the "circle of poison" problem. A related export restriction is an export tax. Guyana, for instance, levies taxes on wildlife exports.[101] Indonesia imposes an export tax on logs.[102]

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produces? The difference cannot be that waste is bad and automobiles are good. Someone must want to import the waste; otherwise no dispute would arise.

93. The Herring Fishery (Scotland) Acts, 1889, 52 & 53 Vict., ch. 23, sec. 6, 8 (Eng.). The law applied only to fish caught along the coast of Scotland, so it is classified here as domestic territory.

94. 16 U.S.C. § 602 (1878) (1988).

95. *See generally* CHARLES ARDEN-CLARK, WORLD WILDLIFE FUND, THE GENERAL AGREEMENT ON TARIFFS AND TRADE, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: A WWF DISCUSSION PAPER (1991)

96. List of Prohibited Exports, Jan. 22, 1922, Gazette 6 (Austl.).

97. 16 U.S.C. § 668 (1940) (amended 1959, 1962, 1972) (Supp. 92).

98. DAVID G. NICHOLS, JR. ET. AL., WORLD WILDLIFE FUND, WILDLIFE TRADE LAWS OF ASIA AND OCEANIA Sri Lanka-2 (1991).

99. The Wildlife Act 1953, 7 R.S.N.Z. § 56 (1953) (New Zealand).

100. Wildlife Protection (Regulation of Exports and Imports) Act of 1982, §§ 21(b) and 28(c) (Austl.). As with the U.S. Endangered Species Act, this law is more stringent than CITES in several respects.

101. KATHRYN S. FULLER ET. AL., WORLD WILDLIFE FUND, LATIN AMERICAN WILDLIFE TRADE LAWS 216 (1985).

102. *See* SUBCOMMITTEE ON UNFAIR TRADE POLICIES AND MEASURES, URUGUAY ROUND COMMITTEE, INDUSTRIAL STRUCTURE COUNCIL, REPORT ON UNFAIR TRADE POLICIES BY MAJOR TRADING PARTNERS 91 (1993) [hereinafter REPORT ON UNFAIR TRADE POLICIES].

B. SECOND ROW

The second row consists of ETMs which reach beyond a nation's own territory into the global commons. It should be noted that the defining characteristic of this row is purely geographical. That is, a trade measure aimed at an activity or situation in a foreign territory (e.g., producing CFCs) which in turn affects the world environment is classified in the third row (foreign territory) rather than in this row.

5. Global Commons-Treaty Obligation

This category consists of ETMs which involve the global commons and are imposed pursuant to a treaty obligation. In 1978, for instance, the International Whaling Commission (IWC) approved a resolution stating that:

> member nations ... should take all necessary steps, including such amendments to their laws and regulations as may be required, to prevent the import into their countries of whale products from non-member nations.[103]

Many nations implemented this resolution. In 1979, Japan agreed to impose this trade discrimination and notified the GATT of its action.[104] No complaints were lodged in the GATT regarding this discriminatory embargo.

Another IWC resolution in 1978 stated that member nations:

> should take all practicable steps to prevent the transfer of factory ships, whale catchers, or gear, apparatus or appliances used in the conduct of whaling operations ... to any nation which is not a member of the International Whaling Commission.[105]

Compliance with this request was widespread. For example, Norway prohibited the export of whaling equipment to non-members of the IWC and so notified the GATT.[106] As with the discriminatory ban on the importation of whale products, no complaints were lodged in the GATT.

Another example is the 1991 Protocol on Environmental Protection to

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103. Prevention of Importation of Whale Products, International Whaling Commission Resolution, Appendix 7 (1978) (International Whaling Commission, 29th Annual Meeting). Technically this is a non-binding recommendation, not a legal obligation.

104. Communication from the Delegation of Japan, GATT Doc. L/4814 (July 6, 1979).

105. Prevention of the Transfer of Whaling Vessels, etc., International Whaling Commission Resolution, Appendix 8 (1978) (International Whaling Commission, 29th Annual Meeting).

106. Notification in Pursuance of Paragraph 3 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Communication from Norway, Import Licensing for Whale Products; Export Licensing for Equipment for Whaling, GATT Doc. L/5165 (July 6, 1981).

the Antarctica Treaty.[107] The protocol controls imports (into Antarctica) of non-native species and non-native microorganisms.[108] In addition, dogs, live poultry, PCB, and non-sterile soil are specifically prohibited.[109] Unlike the IWC resolutions, however, this treaty is non-discriminatory.

6. Global Commons-Treaty Authorization

This category consists of ETMs which involve the global commons and which are authorized, but not mandated, by a treaty. The Wellington Convention of 1989 for the Prohibition of Fishing with Long Driftnets, for example, states that:

> Each party may also take measures consistent with international law to:
> (a) prohibit the landing of driftnet catches within its territory; . . .
> (c) prohibit the importation of any fish or fish product, whether processed or not, which was caught using a driftnet.[110]

Similarly, in 1991, New Zealand banned the landing of "any fish or marine life taken using a driftnet."[111] The United States also bans the importation of any driftnet-caught fish.[112] Under the U.S. ban, nations which engage in high seas driftnet fishing must provide documentary evidence that any fish or fish product "was not harvested with a large-scale driftnet."[113]

7. Global Commons-National Support

This category consists of national action to support a plurilateral agreement. The earliest examples occur with respect to international regulation of fishing and whaling. In 1931, the League of Nations succeeded in completing the first Whaling Convention.[114] The U.S. Congress imple-

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107. Antarctic Treaty Consultative Parties: Final Act of The Eleventh Antarctic Treaty Special Consultative Meeting and The Protocol on Environmental Protection to The Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455 (not yet in force).

108. *Id.* Annex II, art. 4.

109. *Id.* Annex II, Appendix C and Annex III.

110. South Pacific Forum: Final Act of The Meeting on a Convention to Prohibit Driftnet Fishing in the South Pacific, Including Text of Convention for the Prohibition of Fishing With Long Driftnets in the South Pacific and Its Protocols, Nov. 24, 1989, art. 3:2, 29 I.L.M. 1454. The measures must be "consistent with international law." In Table 6, this measure would be treated as regional rather than global.

111. An Act to Prohibit Driftnet Fishing Activities and to Implement the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, April 14, 1991, § 8, 31 I.L.M. 218, 220 (New Zealand).

112. 16 U.S.C. § 1371(a)(2)(E)(i) (1972) (Supp. 1992).

113. 16 U.S.C. § 1371(a)(2)(E), *supra* note 109. Note that the New Zealand and U.S. laws are process controls.

114. Convention for the Regulation of Whaling, Sep. 24, 1931, 49 Stat. 3079 (1931), 155 L.N.T.S. 349.

mented this convention in the Whaling Treaty Act of 1936.[115] Under that act, it became unlawful to import or export certain whales (such as young whales) or whale products including oil, meat, bone, or fertilizer.[116] This law is classified in the national support category because the convention neither required nor authorized such trade embargoes.[117]

In 1946, a new International Convention for the Regulation of Whaling was negotiated which established the International Whaling Commission (IWC).[118] The Commission is empowered to adopt regulations on the types of gear and apparatus which may be used for whale harvesting.[119] Like the treaty of 1931, this treaty has no provisions regarding trade.[120] In 1950, the U.S. Congress implemented the new treaty with the Whaling Convention Act.[121] This law prohibits the import and export of any whale or whale products taken or processed in violation of the convention or of any regulation of the IWC.[122]

In the Atlantic Tunas Convention Act of 1975, the U.S. Congress authorized the Secretary of Commerce to prohibit the import of fish from any country "when the vessels of such country are being used in the conduct of fishing . . . in such manner or in such circumstances as would tend to diminish the effectiveness" of the recommendations of the International Commission for the Conservation of Atlantic Tunas.[123] The United States is a member of the Commission and a party to the International Convention for the Conservation of Atlantic Tunas.[124] The Commission allocates fishing quotas (but the convention does not require any import bans).[125] The Secretary of Commerce could, therefore, implement an import ban against tuna from countries that had violated their own fishing quotas.

In the U.S. Antarctic Marine Living Resources Convention Act of 1984,[126] the United States banned the possession, sale, import, or export of

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115. 49 Stat. 1246 (1936) (replaced by current version at 16 U.S.C. § 901-915(c) (1988)) (*see infra* note 122).

116. *Id.* § 2.

117. *Id.*

118. Convention Respecting the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716 (1946), 161 L.N.T.S. 72.

119. *Id.* art. V.

120. *Id.*

121. 64 Stat. 421 (1950) (current version at 16 U.S.C. § 916 (Supp. 1992)).

122. 16 U.S.C. § 916(c) (1950) (1988). It is interesting to note that this process-related prohibition was enacted just a few years after the drafting of the GATT.

123. 16 U.S.C. § 971(c)(4)(B) (1975) (1988). This applies to fish in any form of the species subject to regulation by the Commission and taken in the Atlantic Ocean. This authority apparently has never been used. Although the phraseology is similar to the Pelly Amendment, this provisions is not a sanction because only fish under regulation by the Commission can be subject to the import ban.

124. The International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 20 U.S.T. 2887, T.I.A.S. 6767.

125. *Id.*, art. VIII.

126. 16 U.S.C. § 2435(3) (1984) (1988).

any Antarctic marine living resource (or part thereof) harvested in violation of a conservation measure promulgated under the Convention on the Conservation of Antarctic Marine Living Resources.[127] Under this convention, the Antarctic Marine Living Resources Commission may make regulations concerning matters such as methods of harvesting (including fishing gear) and "matters concerning the effects of harvesting . . . on components of the marine ecosystem other than the harvested population."[128] In other words, the United States will ban an imported product because of the environmental effect of the harvesting of that product on the global environment.[129]

In the U.S. International Dolphin Conservation Act of 1992, Congress authorized 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.[130] To help enforce such an agreement, the law requires the Secretary of Commerce to ban the importation of all Yellowfin Tuna and tuna products from any country that fails to honor its new international commitment.[131] At this time, no such agreements have been negotiated.

A plurilateral agreement can be supported with national trade sanctions in addition to national trade restrictions. Under the U.S. Pelly Amendment, for example, whenever the U.S. Secretary of Commerce finds that a foreign country is "conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program," or whenever either the Secretary of Commerce or the Secretary of the Interior finds that a country is "engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species," the Secretary must "certify" such finding to the President.[132] The President must then issue a determination within 60 days.[133] The President is not required to impose a sanction, but is authorized to do so "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General

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127. For the Convention, see T.I.A.S. 10240. For the statutory ban, see 16 U.S.C. § 2435(3), *supra* note 126.

128. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, T.I.A.S. 10240, art. IX.

129. This might be viewed as a process standard, but there are no indigenous Antarctic resources in the United States.

130. 16 U.S.C. § 1412(a) (Supp. 1992). As of November, 1993, no such agreements have been reached.

131. 16 U.S.C. § 1415(b)(1) (1988).

132. 22 U.S.C. § 1978(a) (1954) (Supp. 1992). This is an amendment to the Fishermen's Protective Act. The Pelly Amendment has been amended several times since 1971. To simplify the discussion, only the current law will be described.

133. 22 U.S.C. § 1978(b) (1954) (Supp. 1992).

Agreement on Tariffs and Trade."[134] As retaliation, the President may impose an import ban on any product from the "offending" country.[135]

In 1991, Japan was certified under the Pelly Amendment to import Hawksbill Sea Turtle shells and Olive Ridley Turtle skins. Because these turtles were listed under CITES Appendix I, the U.S. government found that the Japanese commerce was diminishing the effectiveness of CITES.[136] It should be noted that Japan was not violating CITES; it had insisted on a reservation on these species upon joining the convention in 1981.[137] In the face of highly probable U.S. sanctions, however, Japan agreed to end its trade in these sea turtles.[138]

Another sanction was recently adopted in the U.S. High Seas Driftnet Enforcement Act of 1992.[139] Under this provision, the President must impose a trade sanction against any country whose nationals or vessels violate the United Nations (U.N.) driftnet moratorium.[140] This is the first mandatory environmental trade sanction in U.S. law. The sanction would be an import embargo on fish, fish products, and sport fishing equipment.[141] In view of the provision in the U.N. resolution encouraging "all members of the international community to take measures individually and collectively to prevent large-scale pelagic drift-net fishing operations . . .,"[142] this trade sanction might also be classified as a treaty obligation for requiring discrimination (Category 5).

8. Global Commons-National Law

This category consists of national laws involving the global commons. Three kinds of ETMs will be discussed: (1) product standards, (2) process standards, and (3) import restrictions.

Product Standards

One illustration of a national product standard involving the global commons is Germany's ban on the marketing of *Corallum Rubrum*, a coral

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134. 22 U.S.C. § 1978(a)(4) (1954) (Supp. 1992).

135. *Id.* Before the 1992 amendments, the President had less latitude as to what products to ban. But the earlier ban was also a sanction because it was not limited to fish or wildlife under regulation by the treaty.

136. *See* SEA TURTLE ACTIVITIES IN JAPAN, H.R. Doc. No. 102-85, 102d Cong., 1st Sess. (1991).

137. *Id.*

138. David E. Sanger, *Japan, Backing Down, Plans Ban on Rare Turtle Import*, N.Y. TIMES, June 20, 1991, at A1.

139. 16 U.S.C. § 1826a (Supp. 1992).

140. G.A. Res. 46/215, U.N. GAOR, 46th Sess. U.N. Doc. A/46/645/ADD.6 (1991).

141. 16 U.S.C. § 1826a (Supp. 1992).

142. G.A. Res. 46/215, *supra* note 140, at para. 4.

which lives in the Mediterranean Sea.[143] This coral is used in Italy for making jewelry.

Process Standards

An example of a process standard under this category is the U.S. International Dolphin Conservation Act, which prohibits (effective June, 1994) the sale or transport in the United States of any tuna or tuna product that is not "dolphin safe."[144] This is a standard, not an import prohibition, because it applies equally to domestic and foreign commerce.

Import Restrictions

One of the earliest import restriction ETMs was the 1887 U.S. ban on the importation of mackerel during the spawning season.[145] Other examples of national import restrictions affecting the global commons abound. In 1897, the United States prohibited the importation of fur seals from the North Pacific Ocean.[146] In 1919, Australia banned the importation of seal skins caught in the North Pacific Ocean.[147] In 1981, the E.C. banned the importation of products from whales, dolphins, and other cetaceans for commercial purposes.[148] This regulation applies to some cetaceans not protected by CITES Appendix I.[149]

In 1983, the E.C. issued a directive requiring member states to ban the importation of fur skins from baby (pup) seals.[150] The ban was imposed following diplomatic efforts to persuade Canada and Norway to prohibit the

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143. See Ludwig Krämer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV. 111, 118 (1993). If the coral is off a foreign shore, then this should be classified as Category 12 (Foreign Territory-National Law).

144. 16 U.S.C. § 1417(a)(1) (Supp. 1992). 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).

145. 24 Stat. 434 (1887). This ban expired after five years.

146. 30 Stat. 227 § 9 (1897) (repealed 1912).

147. Pelagic Sealing in the North Pacific, July 1, 1927, General Orders, Department of Trade and Customs, 144 § 919(iii) (Austl.).

148. Council Regulation 348/81, 1981 O.J. (L 39) 1. The Council notes that member states continue to be competent for taking measures relating to imports of products not covered by this regulation. *See id.*

149. Demaret, *supra* note 90, at 325-26.

150. Council Directive 83/129, 1981 O.J. (L 91) 30. The restriction applies to Harp and Hooded Seals. *See id.* The directive was made permanent in Council Directive 89/370, 1989 O.J. (L 103) 1. The Community action came after at least two nations, Italy and the Netherlands, took their own action to restrict such imports. *See* Demaret, *supra* note 90, at 328.

killing of baby seals off their shores.[151] In recommending the action, the E.C.'s Economic and Social Committee stated that the restriction "should make hunting less profitable."[152] A complaint was apparently lodged in the GATT, but was never taken to dispute settlement.[153] It should be noted that these seals are not listed under CITES Appendix I.[154]

Some import restrictions hinge on the production process. In 1906, the United States prohibited the landing of any sponge taken from the Gulf of Mexico by means of diving or diving apparatus.[155] This is a rare example of a "pure" process control in which the implicated product (whose trade is being controlled) is identical to the product receiving environmental protection.

By contrast, the Marine Mammal Protection Act of 1972 (MMPA) bans the importation of commercial fish or fish products from countries lacking a regulatory program governing the incidental taking of marine mammals that is comparable to that of the United States.[156] This law has been used numerous times since the mid-1970s to embargo tuna caught in association with dolphins.[157] Such a ban, however, is discriminatory since it is imposed only on particular countries.

C. THIRD ROW

The third row consists of ETMs which reach into the environment of a foreign territory. Although some of the ETMs listed in this row are often considered to be "global issues," for example, protecting endangered or threatened species, they are classified here as foreign because the resource being safeguarded by a trade measure (typically an import) is in the territory of a foreign government.

9. Foreign Territory-Treaty Obligation

This category consists of ETMs which involve a foreign territory and are imposed pursuant to a treaty obligation. Many of the measures in this

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151. To the extent that the killing occurs in the territory of Canada, this could be reclassified in category 12 (Foreign Territory-National Law) under import restrictions.

152. 1982 O.J. (C 346) 1, para. 3.

153. *See* Robert E. Hudec, et. al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. OF GLOBAL TRADE 1, 112 (1993).

154. *See* 50 C.F.R. § 23.23 (1992). Indeed, the E.C. Economic and Social Committee suggests that the motivation was "strong moral reasons." *See id.* at 1, para. 2.

155. 34 Stat. 313 § 1 (1906) (repealed 1914). The law provided for an exception between October 1 and May 1.

156. 16 U.S.C. § 1371(a) (1972) (amended 1973, 1981, 1984, 1986, 1988, 1990) (Supp. 1992).

157. For a discussion of the early years of the MMPA, see Laurel Lee Hyde, *Dolphin Conservation in the Tuna Industry: The United States' Role in an International Problem*, SAN DIEGO L. REV. 665, 682-704 (1979).

category relate to endangered species. Under the London Convention for the Preservation of Fauna and Flora of 1933, for instance, each party was required to ban imports of wildlife trophies unless the trophies were accompanied by a certificate of lawful export.[158] The provision thus prohibited parties from failing to honor the conservation policies of other countries. In other words, if a foreign country refused to give its consent to an export permit, then the importing country could not bypass that judgment.

The double-permit system in CITES goes further by depriving the exporting country of an exclusive right of decision making.[159] CITES places a responsibility for making a determination about the foreign species on the importing country.[160] Among other requirements, the receiving country must allow the import of a species only if it determines that the "import will be for purposes which are not detrimental to the survival of the species involved."[161] It should be noted that the CITES rules normally apply independent of whether the exporting country is a CITES member or not.[162] Thus, the rules in the CITES treaty are not discriminatory.

On several occasions, the CITES Conference of the Parties has called on member governments to take action against particular countries for undermining the control system. However, these actions and other CITES Conference recommendations listed here are not strictly obligatory. Thus, they might be listed under Category 10. As an example of such action, the CITES Conference in 1987 urged parties to "use all possible means (including economic, diplomatic and political) to exert pressure on countries continuing to allow illegal trade in ivory, in particular Burundi and the United Arab Emirates, to take the necessary action to prohibit such trade."[163] In response, the United States has prohibited all ivory importations from any country that permits the importation or transshipment of unregistered Burundi ivory.[164] The United States has also urged other countries to join in this effort.[165] Such actions are discriminatory.

Other CITES examples abound. In 1991, the CITES Conference, noting

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158. Convention Relative to the Preservation of Fauna and Flora in Their Natural State, Nov. 8, 1993, art. 9:3, 172 L.N.T.S. 242 (no longer in force). This prohibition applied to certain territories of both parties and non-parties. *Id.*

159. CITES can also fit under Categories 1 and 5 depending on where the species habituates.

160. CITES, *supra* note 26, art. III:3.

161. CITES, *supra* note 26, art. III:3(a).

162. *Id.* art. X.

163. *Resolution of the Conference of the Parties: Trade In African Elephant Ivory*, CITES, Conference 6.11 (July 12-24, 1987).

164. 53 Fed. Reg. 15,468 (1988). Note the similarity to the intermediary embargo provision of the Marine Mammal Protection Act, *supra* note 19.

165. *See id.* Note that the determination that Burundi was out of compliance was multilateral, while the decision to impose trade measures was unilateral.

that "trade from and through states not parties to the convention jeopardizes the effectiveness of the Convention," called on parties to trade with non-parties "only in special cases where it benefits the conservation of the species."[166] Also in 1991, the Standing Committee of CITES recommended that parties ban the trade of covered species with Thailand because that nation had become "a revolving door for illegal trade."[167] In response, the United States announced that it would refuse to clear such imports from Thailand.[168]

Yet another example of this type of ETM appears in the 1973 International Agreement on the Conservation of Polar Bears.[169] This agreement requires parties to prohibit not only the importation and exportation of polar bears, but also the "traffic within" its territory of polar bears "taken in violation of this Agreement."[170] Thus, it has a greater scope than CITES which is a convention pertaining only to international trade.

The E.C.'s plurilateral Lomé Convention is yet another illustration of this type of ETM. Under that convention, the E.C. prohibits the direct or indirect export of hazardous or radioactive waste to the African, Caribbean, and Pacific states.[171] In turn, the states have agreed to prohibit the importation of such waste from the E.C. or other countries.[172]

10. Foreign Territory-Treaty Authorization

This category consists of ETMs which involve a foreign territory and are authorized, but not required, by a treaty. The 1953 Protocol for the Limitation and Regulation of Poppy Plant Cultivation and Production of, Trade in, and Use of Opium, for example, required parties to use a permit system for international trade in opium and to cease opium imports from non-parties.[173] The protocol also stated that parties "may, however, impose" more restrictive conditions.[174] As a party to the protocol, the United States imposed more restrictive conditions on opium exports. To be eligible to import opium from the United States, a foreign country was required to: (1)

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166. CITES Conference 8.22.

167. *Thailand Ban on Wild Fauna and Flora*, CITES STANDING COMMITTEE OF THE PARTIES, PRESS RELEASE, Apr. 12, 1991.

168. 56 Fed. Reg. 32,260 (1991). This order remains in effect.

169. Agreement on the Conservation of Polar Bears, Nov. 15, 1993, 27 U.S.T. 3918.

170. *Id.* art. V.

171. African, Caribbean and Pacific States — European Economic Community: Final Act, Minutes, and Fourth ACP — EEC Convention of Lomé, 29 I.L.M. 783, art. 39(1) (1990).

172. *Id.*

173. Narcotic Drugs: Limitation and Regulation of Poppy Plant Cultivation and Production of, Trade In, and Use of Opium, June 23, 1953, art. 6, 14 U.S.T. 10 (no longer in force). The treaty is being classified here, rather than under domestic territory, because of its applicability to exports.

174. *Id.*

be a party to the treaty, (2) enforce the permit rules required under the Protocol in an adequate manner as judged by the U.S. government, and (3) show that the drug would be applied exclusively to medical and legitimate use in the foreign country and would not be re-exported.[175]

11. Foreign Territory-National Support

This category consists of national action to support a plurilateral agreement. An example is the 1906 International Convention Respecting the Use of White Phosphorus in the Manufacture of Matches.[176] This convention prohibited the manufacture, importation, and sale of matches made with white (or yellow) phosphorus.[177] Although the United States did not ratify the treaty, and thus was not obliged to take action, the U.S. Congress did join international efforts to support the purposes of the treaty.[178] (At the time, there was a question as to the constitutional authority of Congress to regulate intrastate commerce in matches.[179]) Specifically, Congress levied a prohibitive excise tax on the manufacture of such matches within the United States.[180] Congress also prohibited imports of matches made with white (or yellow) phosphorous.[181]

The action taken by the United States and other countries to restrict the manufacture and trade in phosphorus matches is a fascinating episode in the history of international health legislation.[182] It is important to note that the matches were not hazardous to the consumer in normal use. What was hazardous was the production process, which left workers severely debilitated. Thus, the import ban was aimed at protecting foreign health, but was enacted in conjunction with equivalent action by other countries so that it effectively protected U.S. workers as well. The U.S. ban on phosphorus match imports had no direct effect on the domestic environment, but it made the excise tax (which did help American workers) commercially

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175. 21 U.S.C. § 182 (1958) (repealed 1970 and replaced by provision at 21 U.S.C. § 953 (1970) (amended 1978, 1984) (1988)). In addition, the export of smoking opium was banned absolutely. *Id.* Note that this is a discriminatory, consumption-oriented export prohibition.

176. Convention Respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches, Sept. 26, 1906, 203 C.T.S. 12.

177. *Id.* art. 1.

178. *See* John B. Andrews, *Beginnings of International Labor Standards, in* WHAT THE INTERNATIONAL LABOR ORGANIZATION MEANS TO AMERICA, 8, 9 (Spencer Miller, Jr. ed., 1936).

179. *See* TAXING WHITE PHOSPHOROUS MATCHES, H.R. REP. No. 406, 62d Cong., 2d Sess. 1-3 (1912).

180. 37 Stat. 81 § 3 (1912) (repealed 1976)). This would be classified as a product tax because the use of phosphorus can easily be determined from analysis.

181. *Id.* § 10. Importation is still prohibited by regulation. *See* 19 C.F.R. § 12.34 (1988).

182. For further discussion, *See* Steve Charnovitz, *Fair Labor Standards and International Trade*, 27 J. WORLD TRADE L. 61, 61-63 and note 4 (1986).

palatable by leveling the playing field with foreign producers from countries that were not parties to the treaty.

Another illustration of this type of ETM is the U.S. ban, announced in 1986, on wildlife imported from Singapore until Singapore complied with CITES.[183] This unilateral action had its desired effect. Singapore agreed to enact legislation to prohibit trade in rhinoceros products (an Appendix I species) and agreed to join CITES in 1987.[184] In response, the United States rescinded its ban.[185] The E.C. now bans all wildlife trade from Indonesia due to concerns about Indonesia's wildlife certification practices.[186]

Similarly, in September, 1993, the Standing Committee of CITES recommended that parties consider prohibiting trade in all wildlife species with China and Taiwan because of insufficient action by those countries to control wildlife trade in rhinoceros horns and tiger parts.[187] At the same time, the U.S. Department of the Interior certified Taiwan and China under the Pelly Amendment for trade in rhinoceros and tiger products.[188] The Department of the Interior had also reviewed the policies of the Republic of Korea and the Republic of Yemen, but as a result of the U.S. investigation, both of those countries agreed to accede to CITES and to take steps to close down their domestic rhinoceros trade.[189]

Another national action to support multilateral agreements is the U.S. Hazardous and Solid Waste Amendment of 1984.[190] This law criminalizes the knowing exportation of hazardous waste in violation of any international agreement between the United States and the receiving country.[191]

12. Foreign Territory-National Law

This category consists of national laws which involve the environment of a foreign territory. Five kinds of ETMs will be discussed: (1) product standards, (2) process standards, (3) product taxes, (4) import restrictions, and (5) export restrictions.

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183. Endangered Species Convention, Foreign Law Notification, Singapore, 51 Fed. Reg. 34,159 (1986).

184. 51 Fed. Reg. 47,065 (1986).

185. *Id.*

186. Council Regulation 3626/82 List of Prohibited Species and Countries, 1982 O.J. (L 384) Annex C2.

187. CITES PRESS RELEASE, Sept. 9, 1993, Geneva. The CITES recommendation is intended as a sanction.

188. Letter from the Secretary of the Interior to the President, Sep. 7, 1993. President Clinton did not impose any trade sanctions, however. *See* Letter from the President to the Congress, Nov. 8, 1993.

189. U.S. DEPARTMENT OF THE INTERIOR, PRESS RELEASE, June 9, 1993.

190. 42 U.S.C. § 6928 (1976) (amended 1978, 1980, 1984, 1986) (1988).

191. *Id.*

Product Standards

A labeling requirement is one type of product standard.[192] An example of national product standards directed at the environment of another country is Austria's 1992 requirement that products containing tropical wood carry a label to that effect.[193] This law was rescinded in 1993, however, after Malaysia and other Association of South East Asian Nations (ASEAN) members threatened GATT-illegal trade sanctions against Austria.[194]

As another example, the E.C. Commission is currently considering a directive that would set a required minimum content of recycled wood fiber in European paper.[195] Although the directive would be facially non-discriminatory, it would be aimed mainly at imported paper since eighty percent of all new wood fiber used in European pulp and paper is imported.[196]

Process Standards

In 1991, the E.C. prohibited the use of leg-hold traps in the Community and (in order to "avoid distortion of competition") banned the importation of certain furs from countries that do not prohibit these traps.[197] Both bans become effective in 1995.[198] The E.C. has also enacted a directive (effective in 1998) to prohibit the use of animal testing for cosmetics research and to ban the marketing of cosmetics containing ingredients tested on animals.[199] Although the application of many domestic standards to imports is commonly justified on "level playing field" grounds, the cosmetics regulation would seem to lack that justification. Instead, it appears to be based on moral grounds.

The United States has also taken such action. In 1987, it began requiring

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192. If the labeling concerns the production process, such a requirement might instead be viewed as a process standard.

193. *See generally Tropical Wood Labeling Law Rescinded Following Threats to Ban All Imports,* 16 Int'l Env't Rep. (BNA) 220 (Mar. 24, 1993). A voluntary labeling program remains in effect.

194. *Id.*

195. *ECC Studying Proposal to Lift Use of New Wood Fiber in European Paper,* 16 Int'l Env't Rep. (BNA) 80 (Feb. 10, 1993).

196. *See id.* According to one member of the European Parliament, the level of imports from North America is so high because producers there do not have to abide by the strict laws of reforestation and environmental protection that exist in Europe. *Id.*

197. Council Regulation 3254/91, 1991 O.J. (L 308) 1. This is a government policy rather than a defiled item standard. See Section IV below.

198. *Id.* This import ban may be averted if a foreign country meets internationally agreed trapping standards (which do not currently exist). *Id.*

199. Council Directive 93/35/EEC (amending for the 6th time Directive 76/768/EEC on the Approximation of the Laws of the Member States Relating to Cosmetics Products) 1993 O.J. (L 151) 32. The Commission is specifically authorized to present a proposal to the Council at a later date to defer the entry into force of this prohibition. *Id.*

the domestic shrimp industry to use turtle excluder devices to safeguard turtles.[200] Because of complaints that this regulation disturbed the competitive equilibrium with foreign producers, however, the U.S. government later mandated that, beginning in 1991, the importation of shrimp would be made contingent on a finding that a foreign nation adopted a regulatory program comparable *de jure*, and in practice, to that of the United States.[201] In its 1993 certifications, the U.S. Department of State banned shrimp from French Guiana, Honduras, Suriname, and Trinidad and Tobago.[202] In a similar vein, Canada has considered an import ban on dogs which are in transport for more than 36 hours when going from kennel to market.[203]

Product Taxes

An example of a national product tax involving a foreign country's environment is Austria's 1992 imposition of a 70 percent tax on tropical wood and wood products.[204] This tax was later repealed.[205]

As noted above, when product taxes apply only to imports and not domestic products, they are tariffs. No such tariffs have been imposed regarding environmental standards,[206] but such "eco-dumping" duties or "green" countervailing duties (CVD's) are often raised as possibilities. An "eco-dumping" duty would respond to a situation in which producers sell products abroad at less than their cost of production, taking into account the "true" environmental costs of that production. A "green" CVD would respond to a situation in which a foreign government implicitly subsidizes the production of a good by failing to regulate its pollution externalities. In 1991, Senator David Boren proposed a "green" CVD in his International Pollution Deterrence Act.[207] The duty would be set equal to the cost which

200. 50 C.F.R. 227.72(e)(2) (1992).

201. 16 U.S.C. § 1537 (1973) (amended 1979) (Supp. 1992). This is classified here rather than in Category #8 Process Standards because most shrimping is done in coastal waters. Since Sea Turtles are protected under CITES Appendix, I, this measure could be classified in Category 11. Note that the classification here is based on where the shrimping occurs, that is, mainly within territorial waters, rather than on where the turtles swim. Sea Turtles are highly migratory.

202. 58 Fed. Reg. 28,428 (1993). The ban has since been lifted from Trinidad and Tobago and Honduras after these countries took action to meet the U.S. standard. 58 Fed. Reg. 30,082 & 40,685 (1993).

203. Clyde H. Farnsworth, *Next Trade War Target May be Dogs*, N.Y. TIMES, Dec. 2, 1992, at D1.

204. *Parliament Rescinds Tropical Wood Tax, Maintains Product Eco-Label Requirement*, 15 Int'l Env't Rep. (BNA) 830 (Dec. 16, 1992). If this tax applies only to imports, it is a tariff. Of course, since Austria has no indigenous tropical wood, a product tax might be viewed as a disguised tariff.

205. *Id.* The tax appeared to be non-discriminatory, but it could be argued that singling out one type of wood (i.e. tropical) amounts to discrimination.

206. Such taxes have been enacted against a failure to meet international labor standards. *See* Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 INT'L. LAB. REV. 565, 571, 576-77 (1987).

207. S. 984, 102d Cong., 1st Sess. (1991).

would be incurred by the producer of the foreign article if the foreign government imposed the same environmental standards placed on U.S. producers.[208]

When imposing product taxes which involve the environment of a foreign country, the importing country, in accordance with GATT rules on antidumping and CVDs, should first make a unilateral judgment as to the existence of injury.[209] But for such offsetting "green" taxes, the criterion might be changed to environmental injury, rather than material injury, as provided in the GATT rules. It should also be noted that such eco-taxes could not be border adjustments as generally applied under the GATT.

Import Restrictions

The most common use of import prohibitions in this category relates to endangered species.[210] In 1904, for instance, Switzerland banned the import, transit, and sale of live quail.[211] In 1937, Great Britain enacted the Quail Protection Act to establish a closed season and to prohibit the importation of live quail during that season.[212] Several years earlier, the International Ornithological Congress had recommended a prohibition of trade in live quail.[213] The British action did not go that far, but did help to slow the traffic in quail from Africa through Europe.[214]

In 1911, Australia became the first country to ban the importation of plumage and skins of certain birds. [215] The United States followed in 1913 and Canada in 1914.[216] In 1936, the Netherlands prohibited the importation of a number of European wild birds.[217] The Netherlands' wild bird law became the subject of a recent lawsuit when an importer of a Red Grouse from the United Kingdom challenged the law as a violation of the E.C.'s

208. *Id.*

209. GATT, *supra* note 2, art. VI.

210. Foreign animals might also be viewed as part of the global commons on the grounds that they are not voluntary citizens of any nation. If animals have intrinsic importance, then those who live in mountains should receive no less protection than those who live in salt water. Ancient trees should not receive diminished protection because their roots are in land.

211. Switzerland, banning the import, transit and sale of live quail, Loi Fédérale sur la chasse et la protection des oiseaux, June 24, 1904, art. 5 (repealed).

212. The Quail Protection Act, 1937, 1 & 2 Geo. 6, ch. 5, §§ 1-2 (repealed) (Eng.).

213. SHERMAN STRONG HAYDEN, THE INTERNATIONAL PROTECTION OF WILD LIFE 91-100 (Columbia University Press 1942). The Congress was an experts group, not an intergovernmental meeting.

214. *Id.*

215. Proclamation, Mar. 25, 1911, Gazette, at 882 (Austl.).

216. 38 Stat. 114, 148 (1913) (repealed) (current version at 19 U.S.C. § 1202 (1988)). Customs Tariff Act, 1914, 4-5, Geo. 5, ch. 26 § 3 [codefied at ch. 54, sched. 4 (Prohibited Goods), 99212-1] (Eng.).

217. Volgelwet, Dec. 31, 1936, art. 7 (The Netherlands, prohibiting the import of several European wild birds).

Directive on Wild Birds.[218] The European Court of Justice ruled in 1990 that the Dutch ban was inconsistent with the Directive and could not be justified under Article 36 (of the Treaty of Rome) because the Red Grouse was "neither migratory nor endangered."[219]

That case is noteworthy for three reasons. First, the Court implied that Article 36 can be extrajurisdictional when dealing with migratory or endangered species.[220] Second, the case involved a conservation issue which had been "regulated exhaustively" by the E.C. Directive.[221] Had the E.C. Directive not existed, the Dutch law presumably would have been permitted as national legislation consistent with the Common Market.[222] Third, the E.C. Commission sided with the Netherlands, by taking the position that Article 36 justified the import ban because a member state may "take measures to protect bird life not only in its own territory but even outside it."[223] The E.C. has a number of import bans to protect foreign species. For example, the Commission restricts commercial imports of certain species of wild cats not listed in CITES Appendix I.[224] The E.C. also banned the importation of raw and worked African Elephant ivory before these items were added to CITES Appendix I.[225] Import restrictions in this category can also be based on production practices or government policies. In 1930, for instance, the United States prohibited the importation of any wild mammal or bird acquired or exported in violation of the laws of the exporting country.[226] In 1954, Suriname banned the importation of all wildlife illegally taken or exported from its country of origin.[227] In the U.S. Marine Mammal Protection Act of 1972, imports of marine mammal products are prohibited if the sale of such products in the country of origin is illegal.[228] In 1964, the United Kingdom restricted the importation of wild animals "in need of

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218. Council Directive 79/409, 1979 O.J. (L 103) 1.

219. Criminal Proceedings Against Gourmetterie Van den Burg, Case C-169/89, para. I-2143 (1990).

220. The interpretation of Article 36 is of relevance beyond the E.C. because this Article was modeled on Article XX(b) of the GATT. *See* GATT, *supra* note 2, art. XX(b).

221. Council Directive 79/409, *supra* note 218.

222. In this regard, note that the GATT lacks any directive on wild birds. GATT, *supra* note 2.

223. *Supra*, note 219, at I-2149. It is interesting to note that the E.C. Commission has taken a contrary view of extrajurisdictionality inside the GATT. *See* The GATT and the Trade Provisions of Multilateral Environmental Agreements, GATT Doc. TRE/W/5, Nov. 17, 1992 (*reprinted in* INSIDE U.S. TRADE, Nov. 27, 1992, at S-2).

224. Council Regulation 3626/82 Annex C, Part II, 1989 O.J. (L 384) 1.

225. Commission Regulation 2496/89 1989 O.J. (L 240) 5.

226. 19 U.S.C. § 1527 (1930) (1988). Imports were permitted for scientific or educational purposes. *Id.*

227. Game Law of 1954, art. 15 (Jachtwet 1954, Gouvernements Blad 1954, No. 25) (Suriname), *cited in* KATHRYN S. FULLER ET AL., WORLD WILDLIFE FUND, LATIN AMERICAN WILDLIFE TRADE LAWS 326 (1987).

228. 16 U.S.C. § 1372(c)(2)(B) (1972) (amended 1973, 1977, 1981, 1988) (Supp. 1992).

conservation."[229] That British law was one of the key national laws that gave momentum to the negotiation of an international treaty on wildlife trade (i.e. CITES).

Several members of the U.S. Congress have proposed adding environmental sanctions to "Section 301."[230] For instance, Senator Daniel P. Moynihan once introduced a bill to treat as "unjustifiable" acts practices of foreign countries that "diminish the effectiveness of international agreements on the environment."[231] Senator Frank R. Lautenberg introduced a bill to treat as an "unreasonable" practice a foreign country's "failure to establish effective natural resource protection and effective pollution abatement and control standards to protect air, water, and land."[232]

Another U.S. law provides for import restrictions in the form of trade sanctions aimed at safeguarding foreign health. The Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 requires the President to impose sanctions on countries that use lethal chemical or biological weapons against their own nationals.[233] The President must choose at least three of six listed sanctions if the foreign country fails to take remedial action within three months after a Presidential determination that the country is using such weapons against their own nationals.[234] Among the listed sanctions is an import restriction on any product of that country.[235]

Export Restrictions

An example of national export restrictions directed at a foreign government's environment is the 1884 authorization by the U.S. Congress of federal officials to prohibit the exportation of livestock affected with any disease.[236] Another example, one century later, is the U.S. Hazardous and

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229. Animals (Restriction of Importation) Act 1964, ch. 61 (repealed) (Eng.). This did not apply to birds. *Id.*

230. 19 U.S.C. § 2411 (1979) (amended 1984) (1988). Called Section 301 of the Trade Act of 1974 because it was so designated in the corresponding public law, the provision authorizes the U.S. Trade Representative to impose sanctions against other countries for unjustifiable, unreasonable or discriminatory trade practices. *Id.*

231. S. 59, 102d Cong., 1st Sess. (1992).

232. S. 2887, 101st Cong., 1st Sess. (1991).

233. Although one might argue that this is a foreign policy rather than a health measure, it is placed on the taxonomy because it is similar in many ways to the E.C. leg-hold trap regulation. The E.C. is not prohibiting the importation of furs generally, only furs from animals killed in a painful way. Similarly, the United States is not sanctioning countries that injure their nationals, only countries that injure their nationals using chemical or biological weapons. In both cases, it is the morbidity of the technique that is at issue. Of course, the U.S. law differs from the E.C. regulation in two ways. First, the U.S. law is aimed at humans not muskrats. Second, the U.S. law is a more active instrument than the E.C. process control.

234. 22 U.S.C. § 5604-05 (Supp. 1992).

235. 22 U.S.C. § 5605(b)(2)(D) (Supp. 1992).

236. 21 U.S.C. § 113 (1884) (amended 1928) (Supp. 1992). Certainly there is a commercial reason

TABLE 3
TAXONOMY

External Reach	Degree of Unilateralism: Treaty Obligation	Treaty Authorization	National Support of Plurilateral Agreements	National Law
Domestic Territory	Phylloxera Convention	Export and Import of Animals Convention	Cyprus Bird Export Law	E.C. Beef Hormone Regulation
Global Commons	Antarctica Protocol	Wellington Driftnet Convention	U.S. Whale Import Ban	German Coral Ban
Foreign Territory	London Fauna and Flora Convention	Opium Convention	U.S. Pelly Amendment	E.C. Leghold Trap Regulation

Solid Waste Amendments Act of 1984, which bans the export of hazardous waste from the United States to another country without the consent of that country's government.[237] Similarly, in 1986, the U.S. Congress mandated that federal officials ban the export of any drug to an unlisted country when that drug "presents an imminent hazard to the public health in such country."[238] The listed countries are industrial nations.[239]

Summary

Table 3 above summarizes the 12 categories presented above.

IV. OTHER CLASSIFICATIONS

Although the taxonomy above is the best overall approach, other classifications are useful in highlighting certain aspects. This section will show a few such alternative classifications based first on scope of discrimination, second on degree of intrusiveness, and third on beneficiaries of trade restrictions.[240]

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for a country to prevent such exports (just as there is a commercial reason to prevent global warming). Nevertheless, this law is classified as promoting foreign health.

237. 42 U.S.C. § 6928(d)(6) (1988).

238. 21 U.S.C. § 382(e)(3) (1938) (1988). Because this relates to the process by which a drug might be used within a particular country, it is discriminatory.

239. *Id.*

240. An additional classification, according to the authorship of the ETM, can be found in Steve Charnovitz, *Environmental Trade Measures: Multilateral or Unilateral?*, ENVTL. POL'Y & L., June/Aug., 1993, at 154-56. One might also classify according to the legitimacy of the government power being used.

A. SCOPE OF DISCRIMINATION

ETMs differ in their scope of discrimination, that is, the way in which they treat "like" products from various countries (including one's own) differently.[241] This factor is especially important in determining the GATT-legality of an ETM whether prescribed by treaty or by national law. When discrimination exists, it can involve either related products or unrelated products.[242]

Some treaty-based ETMs are entirely non-discriminatory. For example, in 1946, a multilateral convention was signed to regulate the meshes of fishing nets and to prescribe fish size limits.[243] All parties under the treaty agreed to prohibit the landing of any sea fish smaller than the minimum size prescribed.[244]

Other treaty-based ETMs mandate discrimination, but only against products related to the environmental purposes of the treaty. For example, the Bamako Convention of 1991 obligates parties to "prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties."[245] Since the Convention is not open to non-African countries, it would treat "like" waste from another African country differently than it would treat "like" waste from France.

Some treaties mandate discrimination using unrelated products. Under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, parties must not permit hazardous or other wastes to be imported from a non-party.[246] Although hazardous wastes are related products, the treaty also requires action against non-hazardous wastes (e.g. scrap metal) which may have market value.

Other treaties merely authorize such discrimination. Under the NAFTA supplemental agreement, for example, if a panel makes an affirmative finding of "a persistent pattern of failure by the Party complained against to effectively enforce" its own national environmental law, the panel can

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241. A "discriminatory" measure uses the country of origin (or destination) as a basis for determining the acceptability of the commerce.

242. The sufficiency of the relationship is, of course, a subjective judgment. For example, is a ban on imports produced in the habitat of an endangered species a *process prohibition*? Or does that tenuous connection constitute a *sanction*?

243. Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish, Apr. 5, 1946, 231 U.N.T.S. 200.

244. *Id.* art. 4.

245. Organization of African Unity: Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 29, 1991, art. 4:1, 30 I.L.M. 773.

246. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 20-22, 1989, arts. 4:2(d), 4:5, 28 I.L.M. 657, 662.

recommend an action plan.[247] If the panel later makes a determination that the party has failed to implement an action plan or to pay a monetary enforcement assessment, the complaining party is authorized to impose an additional tariff on goods from the other party.[248] Such a tariff would qualify as a sanction because it could be imposed on any product, not just environmentally harmful or implicated ones.[249]

Turning to ETMs based on national laws, many national product standards involve no discrimination. For example, U.S. law bans the importation of pesticides "injurious to health or the environment."[250] This law qualifies as a standard because U.S. legislation prohibits the domestic sale of an unregistered pesticide and predicates registration on, inter alia, a determination that the pesticide will not generally cause unreasonable adverse effects on the environment.[251]

Other national laws mandate discrimination, but only using related products. In 1938, the United States prohibited the importation of drugs or devices when the sale of such articles is forbidden or restricted in the country in which it was produced or from which it was exported.[252]

Some national laws, on the other hand, authorize discrimination which can apply to unrelated products. For example, the U.S. Narcotics Control Trade Act directs the President to impose trade sanctions, "to the extent considered necessary," on uncooperative major drug producing or drug-transit countries.[253] Among the available sanctions is the imposition of a 50 percent ad valorem tariff on otherwise duty-free imports from that country.[254]

Many proposals have been offered in the United States for new ETMs involving unrelated products. For example, a bill by Congressman John

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247. North American Agreement on Environmental Cooperation, art. 31:2b, U.S. Government Printing Office (1993). Sanctions may be imposed against Mexico and the United States, but not against Canada. *Id.* This agreement is not technically a treaty.

248. *Id.* art. 36.

249. The best classification for such a tariff would be Category 10. Category 2 might also seem appropriate, however, since the purpose of the provision is to improve Mexican enforcement of its environmental laws. That way, U.S. companies will not migrate to Mexico, thereby putting pressure on the United States to lower its own environmental standards in order to save jobs. Seen in this way, the beneficiary of such a trade restriction in Table 6 would be local.

250. 7 U.S.C. § 136o(c) (Supp. 1992).

251. *Id.* § 1360o(a).

252. 21 U.S.C. § 381(a) (1938) (amended 1949, 1962, 1968, 1970, 1976, 1988) (Supp. 1992). This kind of process standard reflects not how a product is made, but rather how it is regulated. It differs from laws making imports contingent on export government approval (or exports contingent on importing government approval) because it looks at foreign internal regulation, not at foreign trade regulation.

253. 19 U.S.C. § 2492 (1986) (amended 1987, 1988, 1989, 1992) (Supp. 1992).

254. *Id.* § 2492(a)(3).

TABLE 4
SCOPE OF DISCRIMINATION

	None	Related Products	Unrelated Products
Treaty	Fish Size Treaty	Bamako Treaty	NAFTA Supplemental Agreements
National Law	U.S. Pesticide Laws	U.S. Narcotics Act	MFN-Elephants Linkages

Kasich would have required the President to revoke most-favored-nation (MFN) status for countries that did not have, or did not enforce, appropriate protection of elephants.[255] Such a measure would be a sanction because it would apply to imports other than those related to the endangered species. Furthermore, unlike Pelly sanctions, this bill would have penalized a foreign country for its domestic production and internal trade.

These distinctions are summarized in Table 4.

B. DEGREE OF INTRUSIVENESS

ETMs also differ in their degree of intrusiveness into the policies or activities of a foreign country.[256] Although ETMs are sometimes described as violating the sovereignty of the country on the receiving end, this is an overstatement. ETMs simply set conditions for trade. Thus, their maximum effect is to prevent trade. ETMs cannot force another country to take any action.[257]

The use of trade leverage can, however, influence the behavior of other countries. Even the simplest product standard, metric measurement for example, subtly encourages behavioral modification.[258] But many process controls (either standards or prohibitions) exert more direct pressure.

Consider three types of measures. First are measures imposed against imports of *defiled items* made using environmentally damaging methods.

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255. H.R. 2519, 101st Cong., 1st Sess. (1989).

256. Some commentators have tried to classify ETMs according to whether they are intended to influence another country. That approach is not followed here because of the difficulty of gauging intent. A country could use very intrusive ETMs, but hold that they are governing purchases by domestic citizens, not trying to influence foreign behavior.

257. Setting standards is completely different from governing behavior through national or extraterritorial laws. For example, a country can set a standard for importing products from the ocean even though it lacks the legal authority to impose a code of behavior on foreign fishing vessels beyond its economic zone.

258. A ban against unhealthy (or immoral) pornography is probably more of an attempt to shield domestic consumers (some of whom may not want to be shielded) than to change the behavior of foreign pornography producers. But such judgments are subjective.

TABLE 5
DEGREE OF INTRUSIVENESS

	Product	Process-Defiled Item	Process-Production Practice	Process-Government Policy
Treaty	Canada-U.S. Raccoon Dogs	International Fur Seals	Basel Convention	Montreal Protocol
National Law	U.S. Lobster Size	U.S. Salmon	Netherlands Sustainable Forests	U.S. Trade Expansion Act Conservation Sanction

Second are measures imposed against imports produced within countries engaging in environmentally damaging production practices. Third are measures against imports from countries whose governments fail to adopt environmentally-sound government policies.[259] As used here, a restriction is a process control if the environmental concern is related to the product being traded.

These distinctions are summarized in Table 5.

The least intrusive ETM is a product standard.[260] Some product standards are mandated by treaty. An example is the 1981 Agreement between the United States and Canada to prohibit the importation of Raccoon Dogs into North America.[261]

Product standards are also regularly mandated by national law. In 1989, for instance, the United States prohibited interstate and foreign commerce in lobsters smaller than the minimum size established under the American Lobster Fishery Management Plan.[262] The ostensible purpose of the law was to sustain the lobster fishery by preventing the taking of immature lobsters.[263] Since the regulation also applied to lobsters from Canadian waters being shipped to U.S. markets, the Government of Canada complained that the law was an unjustified trade barrier because Canadian lobsters were typically shorter (being in warmer waters).[264] A dispute panel under the Canada-U.S. Free Trade Agreement ruled in favor of the United

259. These distinctions are drawn from Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 206 (1992).

260. Intrusive is meant to connote meddling, not intervention.

261. Conservation: Raccoon Dog Importation, Sep. 1-4, 1981, U.S.-Can., 33 U.S.T. 3764.

262. 16 U.S.C. § 1857(1)(J) (1976) (amended 1978, 1982, 1983, 1986, 1988, 1989, 1990, 1992) (Supp. 1992).

263. UNITED STATES-CANADA FREE TRADE AGREEMENT, ART. 1904 BINATIONAL PANEL, FINAL REPORT OF THE PANEL: LOBSTERS FROM CANADA 11 (1990).

264. *Id.* at 5, 7; *Canadian Uproar Over Lobster Law*, CHICAGO TRIBUNE, March 11, 1990, at 110.

States, but did not consider whether the measure met GATT's national treatment obligation.[265]

Process controls are more intrusive than product standards. The least intrusive process prohibition relates to defiled items. In 1911, for example, Great Britain, Japan, Russia, and the United States agreed to a multilateral treaty to preserve and protect fur seals in the North Pacific Ocean.[266] The treaty obligated each party to prohibit the importation of seals and sea otters caught in the ocean or in violation of the control regime established by the convention.[267] In 1912, Great Britain implemented the treaty with an import ban.[268]

Process controls imposed by national law can also be aimed at a defiled item. In the Alaska Fisheries Act of 1924, for example, the U.S. Congress authorized the Secretary of Commerce to establish a closed season for salmon.[269] The act also banned the importation into Alaska of salmon from international waters when caught during the closed season.[270] In 1944, Congress prohibited the sale or importation of skins of sea otters taken by Indians, Aleuts, or other aborigines unless marked and certified as having been taken in accordance with that law.[271] The law listed several specific requirements for sea otter hunting, for example, no firearms could be used.[272] Process controls can also be directed at a production process deemed morally unacceptable. The Marine Mammal Protection Act prohibits the importation of any marine mammal taken in a manner deemed "inhumane" by the Secretary of Commerce.[273]

A process control related to foreign production practices is much more intrusive than other product standards. For example, the Basel Convention prohibits parties from exporting hazardous or other wastes to a foreign country if the party "has reason to believe that the wastes in question will not be managed in an environmentally sound manner."[274]

The most intrusive ETM is a process control or product standard imposed because of a foreign government policy. The Montreal Protocol on Sub-

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265. *Id.* at 33.

266. The Convention for the Preservation and Protection of Fur Seals, July 7, 1911, 214 C.T.S. 80 (no longer in force).

267. *Id.* art. III.

268. Seal Fisheries (North Pacific) Act, 2 & 3 Geo. 5., ch. 10, § 4 (1912) (Eng.).

269. 48 U.S.C. § 224 (1921) (1958 omitted) (1988).

270. *Id.*

271. 58 Stat. 100-101 (current version at 16 U.S.C. § 631 b-c (1964)) (repealed 1966). But the same prohibition still exists in regulation. *See* 19 C.F.R. § 12.60 (1993). For the current statutory provisions prohibiting the importation of skins of fur seals, see 16 U.S.C. § 1152-53 (1966) (amended 1983) (1988).

272. 16 U.S.C § 631, *supra* note 271, § 3.

273. 16 U.S.C. § 1372(b)(4) (1988).

274. Basel Convention, *supra* note 246, art. 4:2(d). Note that this is a consumption-oriented process control.

stances that Deplete the Ozone Layer, for example, requires parties to prohibit trade in controlled substances (mainly CFCs and halons) with non-parties.[275] The treaty also requires parties to prohibit the importation of products *containing* controlled substances from non-parties.[276] Thus, the import is predicated on the policy, that is, membership in the protocol, of the other government. Another process control linked to policies of foreign governments was contained in the U.S. Trade Expansion Act of 1962, the earliest explicit authorization for an environmental trade sanction.[277] This law directs the President to seek to persuade countries to engage in negotiations concerning the conservation of international fishery resources.[278] Whenever a foreign country refuses to engage in such negotiations in good faith, the President may raise tariffs on fish (in any form) from that country.[279] This authority for a process-related sanction has never been used.[280]

Some ETMs are conditioned on both a particular government policy and a defiled item standard. For example, the Montreal Protocol requires parties to determine the feasibility of banning or restricting, from nations not party to the protocol, the import of products produced with, but not containing, CFCs and other controlled substances.[281] The defiled item would be one made using CFCs; the government policy would be non-ratification of the treaty.

Similarly, the U.S. African Elephant Conservation Act of 1988 bans the importation of ivory from ivory producing countries unless the U.S. Government can find that: (1) the country is a party to CITES, (2) the country

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275. United Nations: Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, 26 I.L.M. 1541, arts. 4:1, 4:2 [hereinafter Montreal Protocol]. Under Article 4:8, the Parties to the Convention (acting collectively) may permit trade with a non-party if it is in compliance with the Convention. *Id.* art. 4:8. At the Fourth Meeting of the Parties in November, 1992, the parties agreed that Colombia, although not a party, was in full compliance with the protocol. Other countries are to be reviewed at the fifth meeting in November, 1993. *See* Fourth Meeting of the Parties Dec. IV/17 B, Nov., 1992. The current version of the U.S. implementation of the Montreal Protocol is at 40 C.F.R. § 82.4(d) (1992).

276. *Id.* art. 4:3. It is important to note that these restrictions are not product standards. The domestic production and sale of controlled substances is regulated by the Treaty, but there is no absolute ban at this time. *See id.* art. 2. Thus, non-parties are treated differently from domestic users and producers.

277. 19 U.S.C. § 1323 (1962) (1988).

278. *Id.*

279. *Id.* The tariffs may not be more than fifty percent above the non-MFN rates. *Id.* Today this would be a very tough penalty.

280. Virtually all sanctions are government policy controls as defined above, but not all government policy controls are sanctions.

281. Montreal Protocol, *supra* note 275, art. 4:4. The parties are to make this determination by January 1, 1994. It appears as though the parties will determine that such a restriction is not feasible in view of the difficulty of detection and is not necessary in view of the fact that there are now 125 parties to the original protocol and none of the non-parties are producers. Telephone interview with Paul Horwitz, Environmental Protection Agency, Sept. 30, 1993.

effectively controls and monitors the taking of elephants, and (3) the country adheres to the CITES Ivory Control System.[282] In addition, the law bans the importation of ivory from "intermediary" countries unless the U.S. government can find that (1) the country is a party to CITES, (2) the country adheres to the CITES Ivory Control System, (3) the country does not import ivory from other intermediary countries, (4) the country does not import ivory from non-parties to CITES, (5) the country does not import ivory from an ivory producing country in violation of the producing country's laws, and (6) the country has not substantially increased its imports from a country under a U.S. import ban.[283] In view of these complex requirements, which combine both production practices and government policies, the U.S. Department of the Interior has never found that any ivory-producing or intermediary country qualified for an exemption from the ban.[284] As a result, the United States banned most ivory imports outright after June 1989.[285]

C. BENEFICIARIES OF TRADE RESTRICTIONS

Another way to classify ETMs is according to whether the recipients of the environmental benefits engendered by the ETM are global, regional, or local.[286] All ETMs, presumably, convey local benefits to the country of imposition or they would not be imposed, but broader positive impacts can move the ETM into a different classification.[287] Such ETMs can be imposed pursuant to treaties or national law.

Many trade restrictions are intended to produce global environmental benefits. Treaties are one instrument available to accomplish such goals. The most obvious instance is the Montreal Protocol.[288] National laws are also employed to produce global environmental benefits. In 1979, a U.S. Food and Drug Administration regulation went into effect prohibiting the introduction into interstate commerce of self-pressurized containers containing certain fluorocarbons used as propellants.[289] This action by the United States as well as earlier action by Sweden led to increased interest in attaining an international treaty on ozone protection. More recently the

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282. 16 U.S.C. § 4221 (1988).

283. 16 U.S.C. § 4222 (1988).

284. 54 Fed. Reg. 24,758 (1989).

285. *Id.*

286. A counter-argument to this definition is that a trade restriction itself produces no direct environmental benefit and therefore has no beneficiaries. Instead, one might look at the location of the negative impact (or commercial burden) engendered by the ETM.

287. One might also characterize this as the incidence of the ETM or its non-parochialness.

288. Note that this prohibition has low unilateralism, high external reach, is a related product, and a government policy control.

289. 53 Fed. Reg. 11,301 (1988).

Netherlands has announced that, effective 1995, it intends to ban the import of tropical hardwoods from regions whose forests are not managed on a sustainable basis.[290] This discriminatory law would be implemented by requiring a label stating that a wood product originated from a sustainably managed forest.[291]

Some ETMs provide regional benefits.[292] In 1932, Great Britain and Italy agreed to control traffic in ivory and rhinoceros horn across the frontiers of their colonies in Kenya and Somaliland.[293] All trade was made contingent on a permit issued by competent authorities in the country of origin.[294] Similarly, in 1936, Mexico and the United States agreed by treaty to prohibit cross-border transportation of migratory game mammals without a permit from the government of each country.[295] On the U.S. side, this treaty was implemented by a 1936 law forbidding the export and import of such mammals to and from Mexico without a permit.[296] In 1937, Denmark, Norway, and Sweden approved the Convention Concerning the Preservation of Plaice and Dab in the Skagerrak, Kattegat, and Sound.[297] The parties agreed not to permit the catching of fish shorter than the minimum length specified in the treaty.[298] In 1972, Japan and the United States agreed by treaty to protect birds which migrate between the two countries.[299] The Treaty requires each party to "[e]ndeavor to take measures as may be necessary to control the importation of live animals and plants which it determines to be hazardous to the preservation of such birds."[300] Japan implemented the treaty by banning the import of special birds without a certificate of lawful capture.[301]

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290. GOVERNMENT OF THE NETHERLANDS, THE DUTCH GOVERNMENT'S POLICY PAPER ON TROPICAL RAIN FORESTS, Dec., 1992, at 29-46. The European Parliament passed a resolution in 1989 urging the E.C. to enact a law of this type.

291. The International Tropical Timber Organization has recommended that by the year 2000, trade in tropical timber should originate from "sustainably managed" forests. *See id.* at 336. Thus, the measure could be classified as treaty supportive in Category 11.

292. Some analysts will consider several of these examples such as ivory, rhinoceros horn, and wild birds, to be global rather than regional because the whole world benefits from species diversity.

293. Exchange of Notes Constituting an Agreement for the Control of Illicit Traffic in Ivory and Rhinoceros Horn Across the Frontiers of Kenya Colony and Italian Somaliland, Nov. 26, 1932, Great Britain-Northern Ireland, 136 L.N.T.S. 386 (no longer in force).

294. *Id.*

295. Convention for Protection of Migratory Birds and Game Mammals, U.S.-Mex., 50 Stat. 1311, art. V (1936).

296. 49 Stat. 1555-56 (current version at 16 U.S.C. § 703-711 (Supp. 1992)).

297. Convention Concerning the Preservation of Plaice and Dab in the Skagerrak, Kattegat and Sound, Sep. 6, 1937, 186 L.N.T.S. 429 (no longer in force).

298. *Id.* arts. 2-3.

299. Convention of the Protection of Birds and Their Environment, Mar. 4, 1972, U.S.-Japan, 25 U.S.T. 3329.

300. *Id.* art. VI.

301. Law No. 49 *cited in* DAVID G. NICHOLS, JR. ET. AL., WORLD WILDLIFE FUND, WILDLIFE TRADE LAWS OF ASIA AND OCEANIA, Japan-7 (1991).

TABLE 6
BENEFICIARIES OF TRADE RESTRICTION

	Global	Regional	Local
Treaty	Montreal Protocol	Mexico-U.S. Game	Animal Disease
National Law	Netherlands Timber	E.C. Bird Directive	EPA Procymidone

Some efforts to improve a regional environment do not stem directly from a treaty. In 1979, the E.C. approved the Directive on the Conservation of Wild Birds.[302] The directive noted that the wild birds of Europe were mainly migratory and declared that "effective bird protection is typically a trans-frontier environment problem entailing common responsibilities."[303] To deal with this problem, the directive requires member states to prohibit the sale or transport of the listed birds.[304]

ETMs are sometimes intended to produce only local benefits. An example of a treaty-imposed ETM is an 1881 treaty between Austria-Hungary and Germany authorizing either party to limit importation of animals or animal products if certain contagious diseases broke out in the other country.[305] An example of an ETM imposed by a national law is the U.S. ban on imports of certain French and Italian wines because of the presence of the pesticide procymidone above the maximum tolerance permitted by the U.S. Environmental Protection Agency.[306] Some laws that respond to domestic sensibilities have a high degree of external reach, but a low degree of intrusiveness. The E.C. ban of fur from baby seals is an example.

These distinctions are summarized in Table 6.

V. CONCLUSION

What can be learned from these taxonomies? First, any generalization about unilateral ETMs is apt to be inconclusive. A great deal of complexity and variety must be considered. While few would take the view that all of the ETMs are good or all are bad, there seems to be no obvious way to characterize any particular ETM as good or bad.

Second, the longtime, widespread use of unilateral ETMs should give pause to anyone who thinks that unilateralism was invented by modern-day

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302. Council Directive 79/409, 1979 O.J. (L 103) 1.

303. *Id.* pmbl.

304. *Id.* art. 6.

305. Convention entre l'Autrich-Hungrie at l'Empire d'Allemagne au sujet de la peste bovine, Jan. 25, 1892, Aus./Hung.-Fr., 175 C.T.S. 486 (no longer in force).

306. At the time, procymidone was unregistered and therefore had a tolerance level of zero. *EPA Would Defend its Registration Process in International Trade Disputes, Report Says*, 7 Int'l Trade Rep. (BNA) 1812 (Nov. 28, 1990).

"green" activists or is an outgrowth of an aggressive U.S. trade policy. Moreover, such use of unilateral ETMs raises the question of whether the Rio Declaration's admonition against unilateralism (noted above) is truly a useful rule for this planet.

Third, it is often suggested that the key distinction between various ETMs is product versus process. The taxonomy, however, shows that this distinction can blur. Moreover, there are many other distinctions which can be useful.

Fourth, it is often suggested that multilateral ETMs can be separated from other ETMs. Yet the taxonomy shows that there are many shades of gray in such treaty-based measures, raising the question of what exactly constitutes a multilateral ETM.

Fifth, it is often suggested that trade instruments should be used for trade goals and environmental instruments for environmental goals. But the taxonomy demonstrates that it is not easy to distinguish between trade and environmental instruments. Given that the intermingling of these instruments began many decades ago, one wonders how practical it would be to separate them now. Moreover, following the Brundtland Commission, it is not clear that trade and environment should continue to be viewed as separate goals. Instead, perhaps they should be viewed as two components of an overall sustainable development strategy.[307]

In developing international rules concerning ETMs, policymakers may want to draw upon the taxonomy and suggested alternative means of classification presented here to evaluate the use of ETMs. One important question is whether unilateralism is effective. Some commentators have suggested that unilateralism does not work and indeed may hinder multilateral cooperation. Does Table 3 show measures on the left to be more effective than those on the right? Taking any particular environmental issue, one could compare the impact of the relevant ETMs in the different columns. Is there any chronological trend? In other words, does unilateralism lead to multilateralism (moving left)? Or does multilateralism lead to unilateralism (moving right)?

The distinctions shown in Table 5 regarding intrusiveness offer a powerful tool for separating the various ways that ETMs interact with other countries. This author believes that these distinctions may prove very important for determining the GATT-compliance of ETMs. If so, the conceptualization in Table 5 can help legislators in drafting new ETMs.

Anyone reflecting on the history of trade policy discovers that most of the issues are never resolved. Does trade create jobs or destroy them? Can two countries with different economic systems fruitfully trade with each other?

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307. *See* THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 1-23 (1987).

Do regional trade preferences create trade or divert trade? These issues were as important 60 years ago as they are today. The intersection of trade and environment, however, is a relatively new issue in trade policy. Yet if past practice is any guide, the issue will be topical for some time. It is hoped that these taxonomies will raise the debate to a more rigorous level by providing a means of categorizing and evaluating ETMs.