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GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy

Introduction

Recognizing that environmental protection and international trade policy are inextricably linked,¹ the United States has enacted legislation and entered into international agreements to protect the environment, utilizing trade measures to promote conservation.² Praised by many lawmakers as "a cornerstone of U.S. environmental policy,"³ the Marine Mammal Protection Act of 1972 ("MMPA") is a notable example of this legislative approach.⁴ Enacted in response to the public outcry over the slaughter of several species of marine mammals, the MMPA contains provisions which specifically seek to reduce the number of dolphins killed by tuna fishing vessels on the high seas. The MMPA regulates the domestic tuna fishing industry, limiting the number of dolphins American vessels may kill, and requires foreign fleets to meet U.S. standards in order to export to the U.S. The MMPA utilizes trade policy to enforce its provisions by mandating the imposition of various embargoes on imports from non-conforming countries.⁵

¹. The relationship between environmental conservation and trade policy manifests itself in various forms. International agreements, for example, have long utilized trade measures to protect endangered species and address transnational pollution problems that threaten the "global commons." In recent years, analyses of this relationship have increasingly focused on the issue of international competitiveness, as countries worry that strict environmental standards at home can disadvantage their domestic industries in the world marketplace. See generally General Agreement on Tariffs and Trade, Trade and the Environment, 1 INTERNATIONAL TRADE 90-91, at 19 (1992); 137 Cong. Rec. S13169 (1991) (statement of Sen. Baucus).

². See infra notes 151-73 and accompanying text.


⁵. For an analysis of the MMPA, see infra notes 13-33 and accompanying text.

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On August 28 and October 10, 1990, and then again on February 22, 1991, the United States, pursuant to court orders, cited Mexico's failure to meet the applicable standards for dolphin takings and imposed embargoes on Mexican yellowfin tuna imports in accordance with the MMPA. Complying that these actions violate the liberal trade provisions of the General Agreement on Tariffs and Trade ("GATT"), the international trade agreement to which both the United States and Mexico are parties, Mexico requested that the GATT Council ("Council") examine the MMPA for possible inconsistencies with GATT provisions. The Council established a dispute settlement panel ("Panel") to consider the complaint. After holding meetings with the U.S. and Mexico, and soliciting views from third parties, the Panel issued its Report ("Panel Report") in which it found the MMPA's embargo provisions to be inconsistent with the GATT.

In addition to threatening U.S. dolphin and marine mammal conservation policies, the Panel's sweeping opinion puts a host of domestic laws and international agreements which constitute the backbone of our environmental protection policies at risk of being GATT-inconsistent. While lawmakers state that the Panel Report heralds the "collision between domestic environmental and health laws [and international] trade agreements," interest groups declare that it will "seriously cripple . . . domestic environmental laws" and have a "potentially disastrous impact on international conservation efforts."

This Note analyzes the GATT Panel Report, examines its implications for U.S. environmental policy, and proposes an international conservation strategy that would reflect the Panel's concerns and be consistent with the GATT. Part I addresses the background to the dispute and examines the relevant provisions of the MMPA and the GATT. Part II discusses the Panel proceedings and examines the conclusions of the Panel Report as they relate to the MMPA embargo provisions. Part III examines the current status of the dispute and assesses efforts by the United States and Mexico to resolve their differences bilaterally. Part IV


7. Panel Report, supra note 6, para. 1.1. See infra notes 53-79 and accompanying text.

8. Id., para. 1.1. See infra notes 80-81 and accompanying text.


10. See infra notes 151-73 and accompanying text.


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analyses the Panel Report's implications for United States policy in terms of both its domestic laws and international obligations. It also examines proposals made by both government officials and private parties in response to the Panel Report. Part V assesses these current initiatives and then proposes an alternative way to address global environmental problems consistent with the Panel's interpretation of the GATT.

I. Background

A. Marine Mammal Protection Act of 1972

Congress enacted the Marine Mammal Protection Act of 1972 with the stated purpose of protecting "certain species and population stocks of marine mammals [that] are, or may be, in danger of extinction or depletion as a result of man's activities." Such species and population stocks "should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part . . . ." The MMPA prohibits the "taking" of marine mammals except as permitted by the Secretary of Commerce for certain scientific research or display purposes. With respect to the incidental taking of marine mammals by the commercial fishing industry, the MMPA requires that the "incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate . . . ." Accordingly, the MMPA directs the Secretary of Commerce to regulate the taking of marine mammals "in accord with sound principles of resource protection and conservation," and authorizes him to issue permits to domestic fishing operators.

In order to effectively meet its conservation goals, the MMPA also seeks to reduce the taking of marine mammals by foreign fishing vessels. Accordingly, the MMPA imposes a general moratorium on the importation of marine mammals and marine mammal products, and requires the embargo of fish or fish products from exporting countries employ-

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14. Id.
15. "Taking" is defined as "harassment, hunting, capture, killing or attempt thereof." Panel Report, supra note 6, para. 2.3. See also 16 U.S.C. § 1562 (1988).
ing tuna fishing techniques that violate standards articulated in both the MMPA and its implementing regulations.\textsuperscript{21} It instructs the Secretary of Commerce to solicit information from the exporting country about the fishing techniques employed by its fleets and their effects on marine mammal populations to determine whether or not the country satisfies these requirements.\textsuperscript{22}

The MMPA contains special provisions protecting dolphins from yellowfin tuna fishing vessels using purse seine nets\textsuperscript{23} in what is known as the Eastern Tropical Pacific Ocean ("ETP").\textsuperscript{24} While United States-
based vessels must obtain a permit from the Secretary of Commerce to operate in the ETP, foreign, exporting countries must demonstrate both that they have undertaken a comprehensive regulatory program to protect dolphins from commercial fishing operations and that their tuna fleets' average rates of incidental taking are comparable to that of the U.S. fleet.

In order to prevent loopholes in a "primary embargo," the MMPA also bans tuna and tuna products from "intermediary nations" under what is referred to as the "secondary embargo." Under this provision, added to the MMPA in 1988, and as interpreted by the courts, whenever the U.S. imposes a primary embargo, other nations that export tuna and tuna products to the U.S. must certify to the Secretary of Commerce that they have also banned the importation of these "tainted" goods. Unless an intermediary nation effects such a ban within sixty days of the U.S. primary embargo, the Secretary of the Treasury must embargo all tuna and tuna products from the intermediary nation as well.

supra note 6, para. 2.3 and 50 C.F.R. § 216.3 (1990). This is a five to seven million square mile area of ocean extending from southern California to Chile and extending west for almost three thousand miles. See Conner, supra note 25, at 772; see also Earth Island Institute v. Mosbacher, 746 F. Supp. 964, 966 (N.D. Cal. 1990) [hereinafter Earth Island I].

25. The American Tuna-boat Association currently holds the only such issued permit, covering all domestic tuna fishing activity in the ETP. See Panel Report, supra note 6, para. 2.4. Under the terms of the permit, a maximum of 20,500 dolphins may be taken annually in the ETP. See 50 C.F.R. § 216.24 (1990). The permit applies to all persons subject to United States jurisdiction and is enforced by the Secretary of Commerce. See 16 U.S.C. § 1377 (1988 & Supp. III 1991).


27. See Earth Island Institute v. Mosbacher, No. C 88 1380 (N.D. Cal. order filed Jan. 10, 1992) (copy on file with the Cornell International Law Journal), 785 F. Supp. 826 (N.D. Cal. 1992) [hereinafter Earth Island III]. In Earth Island III, the court defined an "intermediary nation" as "a nation which exports yellowfin tuna or tuna products to the United States, and which imports yellowfin tuna or tuna products." Id. at 831 (quoting 50 C.F.R. § 216.3 (1990)).


29. 16 U.S.C. § 1371(a)(2)(C) (Supp. III 1991). The Secretary of Commerce must receive notice of the intermediary nation's import ban within 90 days after the imposition of the U.S. primary embargo. If no proof has been received at this time, imports from the intermediary nation are to be banned beginning on the 91st day. Panel Report, supra note 6, para. 2.10.
B. The Pelly Amendment

Six months after the imposition of either a primary or secondary embargo, the MMPA requires the Secretary of Commerce to certify this fact to the President.30 This certification triggers the applicability of Section 8(a) of the Fisherman's Protection Act of 1967, known as the “Pelly Amendment.”31 The Pelly Amendment grants the President authority to embargo all fish or wildlife products from the country in question “for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.”32 Although a President has never imposed an embargo under these provisions, “Pelly certifications and the threat of sanctions have been effective negotiating and diplomatic tools.”33

C. The Embargo

On August 28, 1990, a United States district court ordered the U.S. government to ban yellowfin tuna imports from all countries for which the National Marine Fisheries Service (“NMFS”) had not made the comparability findings needed to measure rates of dolphin takings as required by the MMPA.34 The resulting embargo, imposed on September 6, 1990, affected several countries including Mexico, whose tuna fleet operates extensively in the ETP.35 On September 7, 1990, the NMFS announced positive comparability findings for Mexico, Venezuela and Vanuatu, and the United States accordingly rescinded the embargoes

34. See Earth Island I, supra note 24, at 969-76. The Earth Island Institute is a San Francisco-based environmentalist organization. With two other plaintiffs, it moved for a preliminary injunction to enjoin the United States from importing yellowfin tuna and tuna products caught in the ETP with purse seine nets unless the NMFS determined that the rate of dolphin taking by a country’s fleet did not exceed 2.0 times that of the U.S. fleet's rate in accordance with 16 U.S.C. § 1371(a)(2)(B)(ii)(II) (1988). At issue was the time period for which the comparability findings are made. Arguing that the MMPA required the comparability findings to be favorable during “the same period,” Earth Island persuaded the court that the MMPA required the embargo of tuna from any country that does not provide such favorable data at any one time. See id. at 970-71. See also 16 U.S.C. § 1371(a)(2)(B)(ii)(II) (1988) for “same period” language. The Court ordered an embargo pending such findings. See Earth Island I, supra note 24, at 970-74. See also 16 U.S.C. § 1371(a)(2)(B)(ii)(II) (1988).
35. See Earth Island Institute v. Mosbacher, 929 F.2d 1449, 1451 (9th Cir. 1991) [hereinafter Earth Island II]. The other affected countries were Venezuela, Vanuatu, Panama, and Ecuador. See Panel Report, supra note 6, at para. 2.7.
against these countries;{36} the United States also lifted the embargo against Panama and Ecuador when those countries prohibited their fleets from setting purse seine nets on dolphins.{37} On September 17, 1990, Earth Island again applied to the district court for a temporary restraining order.{38} The court granted the application on October 4, 1990, and on October 10 the U.S. reimposed the embargo on Mexico.{39} At the U.S. government's request, the district court, on October 19, 1990, converted the temporary restraining order into a preliminary injunction and the U.S. government appealed.{40} On November 14, a panel of the appeals court granted a government motion, and stayed the preliminary injunction pending appeal.{41} On February 22, 1991, the court lifted the stay and the embargo against Mexico again became operative.{42} On April 11, the appeals court affirmed the district court's order of October 4, 1990.{43} At the time of writing, this embargo remains in effect.

Six months after the imposition of the February embargo, the Secretary of Commerce, as required by the MMPA,{44} certified this fact to the President.{45} Under the Pelly Amendment, the President was therefore authorized to embargo all fish products from Mexico.{46} While some lawmakers encouraged the President to impose additional sanctions,{47} he declined to take such action, citing diplomatic efforts to

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36. See Panel Report, supra note 6, at para. 2.7. See also Earth Island II, supra note 35, at 1451. The United States lifted the embargo despite the fact that the NMFS determined that Mexico had exceeded the limits for both total dolphins killed and percentage of eastern spinner dolphins killed in 1989. Under a regulation allowing administrators to “reconsider” embargoes based on data from the first six months of a year, the NMFS declared that Mexico was within the limits of eastern spinner dolphin killed during this period. Earth Island II, supra note 35, at 1451.

37. See Panel Report, supra note 6, at para. 2.7.

38. See Earth Island II, supra note 35, at 1451. Earth Island claimed that NMFS data showed that Mexico had violated the eastern spinner dolphin kill comparability requirements for 1989, and that under the statute an embargo was required. Id.

39. The district court held that the regulation permitting reconsideration of the 1989 findings, which were based on data from the first six months of 1990, violated the MMPA. The court reiterated its interpretation of the MMPA as requiring the comparability finding to be based on a full year's data. Id. The embargo was reimposed on October 10, 1990. See Panel Report, supra note 6, at para. 2.7.

40. See Earth Island II, supra note 35, at 1452.

41. Id.

42. See Panel Report, supra note 6, at para. 2.7.

43. See Earth Island II, supra note 35, at 1453.


46. See supra note 32 and accompanying text.

47. See Letter from Congressman Billy Tauzin, Chairman, Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries, and Congressman Gerry E. Studds, Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, to President George Bush (Oct. 11, 1991) (copy on file with the Cornell International Law Journal). The Congressmen encouraged the President to ban the importation of Mexican shrimp.
resolve the issue amicably.\textsuperscript{48}

On May 24, 1991, the United States imposed secondary embargoes on yellowfin tuna products imported from Costa Rica, France, Italy, Japan, and Panama which were unaccompanied by a declaration that the tuna was not harvested in the ETP by purse seine vessels of Mexico, Venezuela, or Vanuatu.\textsuperscript{49} Later, on January 31, 1992, the United States imposed secondary embargoes on fifteen more countries.\textsuperscript{50} While the President declined to invoke the Pelly Amendment to prohibit the importation of all fish and fish products from these countries,\textsuperscript{51} pursuant to court order, the secondary embargoes were broadened to include all yellowfin tuna imports.\textsuperscript{52}

\textsuperscript{48} Message to the Congress on the Determination Not To Impose Sanctions Against Mexico Under the General Agreement on Tariffs and Trade, 27 \textsc{Weekly Comp. Pres. Doc.} 1479 (Oct. 21, 1991) ("After thorough review, I have determined that, given that an embargo is currently in effect and given the continuing negotiations with Mexico toward an international dolphin conservation program in the eastern tropical Pacific Ocean, sanctions will not be imposed against Mexico at this time.").


\textsuperscript{50} \textsc{Marine Mammal Protection Legislation Hearing, supra} note 49, at 26 (prepared statement of David Colson). The countries affected were Canada, Columbia, Ecuador, Indonesia, Korea (ROK), Malaysia, Marshall Islands, Netherlands Antilles, Singapore, Spain, Taiwan, Thailand, Trinidad and Tobago, United Kingdom, and Venezuela. The U.S. government has since lifted some of these embargoes. \textit{See infra} note 124 and accompanying text. The Administration imposed these embargoes in compliance with the January 10, 1992 order of the U.S. District Court for the Northern District of California. \textit{See} Earth Island III, \textit{supra} note 27.

\textsuperscript{51} \textit{See} Letter to Congressional Leaders, \textit{supra} note 49. In declining to impose additional sanctions on Venezuela, Vanuatu, Costa Rica, France, Italy, Japan, and Panama, the President reasoned that embargoes were currently in place and negotiations were being pursued toward a dolphin conservation program in the ETP.

\textsuperscript{52} The Earth Island Institute brought suit to challenge the U.S. government's interpretation of the MMPA secondary embargo provisions. The U.S. District Court for the Northern District of California determined that the Government's reading of \textsection 1371(a)(2)(C) of the MMPA was too restrictive and ordered an embargo on "any and all yellowfin tuna and tuna products" from an intermediary country unless that country provides reasonable proof that it has prohibited the importation from primary countries of the same products which are banned by the United States. Earth Island III, \textit{supra} note 27, at 831-35. The Bush Administration said it would appeal this ruling. \textit{See} Bush Administration Will Appeal Secondary Tuna Embargo, Notimex Mexican News Service, Jan. 29, 1992, \textit{available in} LEXIS, Nexis Library. Nevertheless, pursuant to this order, the U.S. extended the secondary embargo to cover fish and fish products from 20 countries.
D. The General Agreement on Tariffs and Trade

The GATT is a legal framework of rules and procedures governing international trade relations between its contracting parties.\textsuperscript{53} For the more than 100 countries that have signed the document,\textsuperscript{54} the GATT’s provisions represent an effort to provide order and stability to international commerce. It has worked to achieve this objective through the promotion of trade liberalizing principles including: most-favored-nation treatment, national treatment, and the elimination of quantitative restrictions.

1. General GATT Principles

a. Most-Favored-Nation Treatment

As articulated in Article I of the document, “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”\textsuperscript{55} Often referred to as the “cornerstone of the General Agreement,”\textsuperscript{56} this most-favored-nation principle establishes the general rule that similar trade products of all the CONTRACTING PARTIES will be treated equally.

b. National Treatment

The CONTRACTING PARTIES recognize that internal taxes, laws, regulations and requirements can be used as an effective substitute for tariff protection.\textsuperscript{6} Under Article III, therefore, the products imported from the territory of one contracting party to another “shall not be subject,
directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products."[58] The Article does provide, however, for "the applications of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."[59]

c. Elimination of Quantitative Restrictions

Article XI articulates the general rule prohibiting the use of quantitative import and export restrictions by a contracting party against products from, or destined for, another contracting party. It states that:

[no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."[60]

This general rule, however, is tempered by some important exceptions, such as restrictions on agricultural and fishery imports to stabilize national agricultural markets.[61]

Article XIII extends the principle of most-favored-nation treatment to the administration of permissible quantitative restrictions. According to its provisions, no such restriction may be applied "unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."[62] The Article further provides that the contracting party imposing the quantitative restrictions should apply them in a manner maintaining the market shares the various importers or exporters would be expected to have in the absence of the restrictions.[63]

2. General Exceptions

The GATT does articulate several general exceptions to its trade-liberalizing principles. Free-trade areas and customs unions, for example, are permitted under Article XXIV. Likewise, Article XXI provides for security exceptions. Article XX articulates several public policy excep-

58. Id. art. III:2. It should be noted, however, that customs duties and other border measures are outside the scope of these provisions and actually are permitted under Article XXVIII. Although the GATT aims to reduce them, the rationale for permitting their use is that they are a visible means of protectionism and clearly show the intent of the parties. See id. art. XXVIII; LONG, supra note 56, at 8, 10.
60. Id. art. XI:1.
61. Id. art. XI:2. Other notable exceptions include certain policies designed to safeguard a country's balance of payments or to promote a particular industry (in a developing country) in order to raise the country's general standard of living. See id. arts. XII, XVIII.
62. Id. art. XIII:1.
63. Id. art. XIII:2.
tions that generally serve to mitigate the prohibition against the use of quantitative restrictions set forth in Article XI. It states that:

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

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

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement;

[or]

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

3. Dispute Settlement

The GATT provides mechanisms for the adjustment and resolution of disputes arising under the General Agreement. While the GATT's central dispute settlement provisions are found in Article XXII, which authorizes consultation and conciliation procedures, and Article XXIII, which provides for formal investigations and rulings, some thirty other provisions in the document require consultations in specific instances. The CONTRACTING PARTIES have also adopted supplementary rules and procedures.

Article XXII requires that disputing parties give "sympathetic consideration" to each other's complaints or representations concerning any matter affecting the operation of the GATT. This Article also permits other contracting parties to help the disputing parties reach satisfactory solutions.

In the event of serious disputes where consultation does not produce an adequate solution, the GATT provides for a dispute settlement mechanism. If a contracting party believes that any benefit accruing to it under the GATT is being "nullified or impaired" or that the attainment...
of any of GATT's objectives are being "impeded" by the actions of another contracting party, Article XXIII states that "[t]he CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate."70

Under present GATT practice, parties refer their disputes to the GATT Council, which "is empowered to act for the CONTRACTING PARTIES,"71 and request a dispute settlement panel to hear and rule on the contested issue.72 The Council will then establish a panel of experts to examine the complaint.73 To be valid and binding, panel decisions must be adopted by the CONTRACTING PARTIES. The customary method of adopting panel reports is through consensus.74 A contracting party, therefore, may seek to "block" a decision by voting against its adoption. Practical considerations militate against a party's abuse of this power, however, as other parties may retaliate by blocking other panel rulings that are favorable to that first party. The GATT Council can survey the implementation of adopted Panel rulings at the request of the complaining party. In situations where a country does not adhere to the recommendations of an adopted panel report, the CONTRACTING PARTIES may vote to suspend that country's GATT privileges and obligations.75

4. Amendments, Side Agreements and Waivers

The GATT provides for the amending of its provisions and for the adoption of supplementary agreements. Under Article XXX, amendments to Articles I, II, XXIX and XXX itself become effective upon acceptance by all the contracting parties. Amendments to any other Articles become effective upon acceptance by two-thirds of the contracting parties. Effective amendments bind all contracting parties.76

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70. Id. art. XXIII:2.
72. It is widely accepted that a contracting party has a "right to a [dispute settlement] panel." Petersmann, supra note 65, at 357.
73. See id. at 357-60. For a critical discussion of panel procedures, see id. at 357-66.
74. Id. at 367-69. Consensus has been the traditional method used to adopt panel reports, except in some early "exceptional cases." Id. at 367. Some observers have proposed, however, that the adoption process be defined more clearly. Id. at 369-75. See also John H. Jackson, Restructuring the GATT System 56-69 (1990).
75. See Petersmann, supra note 65, at 370-73. Suspension of GATT obligations would be conducted under the authority of GATT Art. XXIII:2. In the history of the GATT, however, such a suspension has been authorized in only one dispute. See id. at 373. See also B.I.S.D., supra note 54, 1st Supp. 32, 62 (1953); 7th Supp. 23 (1959).
76. GATT, supra note 53, art. XXX. Those countries that refuse to accept the amendments may only remain a member of the GATT with the consent of the other contracting parties. Otherwise, such a party shall be free to withdraw from the GATT in accordance with the provisions outlined in Article XXXI. Id.
As a practical matter, however, it is difficult to amend the GATT. An alternative for effecting change in the GATT is through so-called “side agreements.” These agreements are negotiated between contracting parties within the context of the GATT. While side agreements can, by arrangement, be administered by the GATT as well, they only obligate their signatories. Article XXV permits the CONTRACTING PARTIES, “[i]n exceptional circumstances,” to “waive an obligation imposed upon a contracting party” by the GATT. For contracting parties unable to successfully amend the GATT, the waiver provision could possibly allow them to pursue actions otherwise inconsistent with the GATT.

II. The Panel Report

On January 25, 1991, Mexico requested that the CONTRACTING PARTIES establish a dispute resolution panel under Article XXIII:2 to examine the U.S. embargo of Mexican tuna imports under the MMPA to determine whether it is consistent with the GATT. The GATT Council agreed to establish the Panel and announced its formation on March 12. For three days in May and June 1991, the Panel held meetings with the United States and Mexico and entertained presentations from other interested member countries. In its presentation to the Panel, Mexico argued that the MMPA’s primary, secondary, and Pelly Amendment embargo provisions violate the General Agreement. The United

77. “It is generally considered today almost impossible to amend GATT because of the stringent vote and procedural requirements, coupled with the wide divergence of interests among the greatly enlarged membership.” JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 310-11 (1986).
78. Id. at 311. Contracting parties negotiated several “stand alone” side agreements during the GATT Tokyo Round. See id. at 324-32.
79. GATT, supra note 53, art. XXV:5. Motions to waive obligations require a two-thirds majority that also comprises more than half of the contracting parties. Id.
80. See Panel Report, supra note 6, para. 1.1. Previously, on November 5, 1990, Mexico had requested consultations with the United States regarding the MMPA embargo. When these consultations failed to resolve the dispute, Mexico petitioned the GATT to establish a formal panel to adjudicate the dispute. Id.
81. Id. The three-member panel consisted of András Szepesi (Chairman) of Hungary, Rudolf Ramsauer of Switzerland, and Elbio Rosselli of Uruguay. Id. at 1.2. See also GATT Said to Have Upheld Mexican Trade Charge Against United States, UPI, Aug. 23, 1991, available in LEXIS, Nexis Library, UPI File.
82. The Panel met with representatives from the United States and Mexico on May 14-15 and June 17, 1991. Australia, the European Community, Indonesia, Japan, Korea, the Philippines, Senegal, Thailand and Venezuela made oral presentations to the Panel on May 15, 1991; Canada and Norway submitted their views to the Panel in writing. See Panel Report, supra note 6, para. 1.3.
States accordingly sought to justify these policies as consistent with GATT principles.

The Panel issued its findings to the disputing parties on August 16, 1991. Later, on September 13, after distributing copies to the other contracting parties, the Panel publicly released its Report. The Panel determined that: 1) the primary embargo of Mexican tuna imports is an impermissible quantitative restriction; 2) the secondary embargo is also violative of the GATT; and 3) the Pelly Amendment, by itself, is not inconsistent with any GATT provisions.

A. The Primary Embargo Is an Impermissible Import Prohibition
   1. Quantitative Restriction in Violation of Article XI

The Panel first addressed the question of whether the primary embargo constitutes an illegal quantitative restriction under Article XI, as argued by Mexico, or an internal regulation consistent with Article III, as urged by the United States. The Panel examined the text of Article III and Article XI of the GATT. Article XI states that each contracting party shall accord treatment to the products of any country required to be accorded treatment by other contracting parties. Article III, on the other hand, provides for national treatment.

The Panel rejected the Article IX claim on the ground that the DPCIA does not regulate marks of origin of imported products, but rather the "marking of products generally." The Panel therefore determined that the DPCIA labeling provisions do not fall under Article IX. With respect to the Article I claim, the Panel rejected it on the grounds that the DPCIA neither restricts the sale of tuna products nor discriminates against a country's access to the label. The Panel emphasized the voluntary nature of the DPCIA. Tuna products bearing the "Dolphin Safe" label do not receive any special treatment or preference; "(a)ny advantage ... depends on the free choice by consumers." Likewise, the Panel found the right of access to the label determined not by the country of origin, but by the geographical area in which the tuna is harvested. The DPCIA does not distinguish between Mexican products and those of other countries.

The Panel thus upheld the DPCIA as consistent with the GATT. The remainder of this Note focuses on the challenges to the MMPA and Pelly Amendment embargo provisions.

84. See Panel Report, supra note 6, para. 1.3.
determined that "[it] covers only [those] measures applied to imported products that are of the same nature as those applied to the domestic products . . . ." The Panel accepted Mexico's argument that the MMPA does not regulate domestically-caught tuna as a product and is therefore not an internal measure. The Panel Report therefore declared the primary embargo provisions to be an import prohibition inconsistent with Article XI.

2. The Inapplicability of Article XX

The Panel found that Article XX can not justify measures applied extrajurisdictionally. The Panel further ruled, however, that even if Article XX could apply to such measures, the MMPA embargo provisions would not satisfy its substantive requirements.

The Panel first found that, in this case, the United States could not apply Article XX(b) to protect the life or health of humans, animals, or plants outside its jurisdiction. Likewise, Article XX(g) could not be applied extraterritorially. The Panel reasoned that contracting parties are free under the GATT to set their own environmental policies. If the Article XX exceptions were available for extra-jurisdictional measures, the Panel feared, a contracting party could establish trade measures based upon another party's different environmental policies and, in effect, infringe upon that second country's right to establish its own environmental programs. For these reasons, the Panel rejected the U.S. interpretation.

Alternatively, the Panel ruled that the MMPA provisions do not satisfy the substantive requirements that the measures be "necessary," under XX(b), or "primarily aimed at conservation," under XX(g). The Panel noted that a country fishing in the ETP does not necessarily know the maximum "kill per set" figure with which it must comply to avoid an embargo until after the fact, when the United States determines the number based on its own fleet's results. The Panel thus concluded that the MMPA is based on "unpredictable" factors and is therefore neither "necessary" within the meaning of Article XX(b) nor "primarily aimed at conservation" within the meaning of Article XX(g).

B. The Secondary Embargo's Inconsistency with GATT

The Panel found the secondary embargo to be GATT-inconsistent for the same reasons it found the primary embargo to be violative of the General Agreement. The Panel first designated the secondary embargo a quantitative restriction and therefore subject to analysis under Article

86. Panel Report, supra note 6, para. 5.11.
87. Id. para. 5.14.
88. Mexico also had argued that the MMPA provisions violate Article XIII. Given the violation of Article XI, the Panel deemed it unnecessary to examine this other claim. Id. para. 5.19.
89. Panel Report, supra note 6, paras. 5.27, 5.30-5.32.
90. Id. paras. 5.28, 5.33, 7.1(a).
XI. It then found that, as with the primary embargo, the secondary embargo measures represent import restrictions inconsistent with that Article. As with the primary embargo analysis, Article XX did not apply.91

C. The Pelly Amendment Is GATT Consistent

The Panel reasoned that a measure that can be applied inconsistently with the GATT, but that is not required to be so applied, is not, on its face, GATT-inconsistent. In the case of the Pelly Amendment, the Panel noted that an embargo imposed under its authority is not in effect. Accordingly, as the Pelly Amendment does not require trade measures to be taken, it is not inconsistent with the GATT.92 If the President had imposed additional trade measures in accordance with the Pelly Amendment, however, it is expected that the Panel would have ruled these measures inconsistent with the GATT. Therefore, while the Panel Report does not implicate the validity of the Pelly Amendment itself, it does threaten the effectiveness of the Amendment by questioning whether it can be employed without violating the GATT.

D. Concluding Remarks

The Panel concluded its Report by noting that the GATT imposes minimal restraints on a contracting party's ability to implement domestic environmental conservation programs. The Panel stated, however, that to permit the regulation of trade for environmental purposes would effectively allow a contracting party to "restrict imports of a product merely because it originates in a country with environmental policies different from its own."93 The Panel concluded that this would defeat the purpose of the GATT and is therefore unacceptable. The Panel further suggested that if the CONTRACTING PARTIES wished to "permit import restrictions in response to differences in environmental policies" and develop the criteria necessary to do this, it would be best to amend or supplement the GATT articles rather than re-interpret them.94

III. Current Status of the Dispute

The Panel Report must be formally adopted by the CONTRACTING PARTIES to become legally binding upon the United States.95 At the time of writing, the United States and Mexico have requested an indefinite postponement of the GATT vote so that they can work out a mutually satisfactory resolution to the dispute.96 If and when Mexico puts

91. Id. paras. 5.35-5.40, 7.1(b).
92. Id. paras. 5.21, 7.2.
93. Id. para. 6.2.
94. Id. para. 6.3.
95. See supra notes 74-75 and accompanying text.
96. See GATT Implications Hearing, supra note 11, at 22 (testimony of Joshua B. Bolten); Marine Mammal Protection Legislation Hearing, supra note 49, at 27 (prepared statement of David Colson).
the Report before the CONTRACTING PARTIES for adoption, the United States will have the option of blocking it. Many lawmakers, including a majority of the United States Senate, and environmental groups have urged President Bush to do so. The possibility of retaliatory actions by other contracting parties counsels against this strategy, however. Furthermore, as one of the GATT's strongest proponents, the United States does not want to risk weakening the system by unilaterally vetoing a panel report.

On September 24, 1991, in the spirit of reaching a satisfactory arrangement, Mexican President Salinas announced a ten-step program to step up the protection of dolphins by Mexican fishermen. U.S. environmentalists, however, called these measures "cosmetic" and merely an attempt by the two governments to save the proposed North American Free Trade Agreement.

On March 3, 1992, the Bush Administration sent Congress a proposal to amend the MMPA. The Administration proposed establishing as U.S. policy the "[promotion of] a five-year moratorium on sets on dolphins beginning March 1, 1994." It further proposed that "the next two years be dedicated to an intensive research campaign to find an alternative fishing method for catching large yellowfin tuna that does not involve sets on dolphins in a truly dolphin-safe manner." The Administration requested that Congress grant authority to lift any MMPA embargoes for all countries that formally communicate a commitment: 1) to participate in the dolphin observer and research programs of the Inter-American Tropical Tuna Commission ("IATTC"); 2) to continue to reduce dolphin mortalities until the onset of the moratorium on March 1, 1994; 3) to initiate a special program to protect eastern spinner and coastal spotted dolphins; and 4) to implement a

98. See supra notes 74-75 and accompanying text.
100. Salinas announced, among other things, that foreign observers would be allowed on all Mexican tuna boats starting in December 1991, and that a new law would set penalties for killing dolphins. He also declared a $1 million effort to develop tuna fishing methods that protect against incidental dolphin taking. See, Juanita Darling, Tuna Turnabout; Mexico Announces a Dolphin Protection Plan, L.A. TIMES, Sept. 25, 1991, at D6.
101. Id.
103. Id. at 47 (prepared statement of Curtis Bohlen).
104. Id.
105. The Inter-American Tropical Tuna Commission (IATTC) is an international research organization established by treaty in 1949. See id. at 74 (prepared statement of James Joseph, Director, IATTC).
moratorium for a five-year period beginning March 1, 1994, on all purse seine encirclements of dolphins except for scientific purposes. In this context, the Administration stated that it had already secured commitments from Mexico, Venezuela, and Panama to adhere to these guidelines.

Environmental groups and several lawmakers initially opposed the Administration plan. Claiming that the proposal was motivated by the desire to "assuage the concerns of the Mexican government," opponents argued that the proposal had "numerous loopholes" and "would seriously and substantively weaken the [MMPA] by removing [its] only true leverage . . . embargoes." After months of negotiations between the Administration, congressional officials, and environmental groups, however, this proposal was formally introduced before House and Senate committees in June and July 1992. Titled the "International Dolphin Conservation Act of 1992," the House and Senate bills received strong bipartisan support and a stamp of approval from environmental groups. The House debated and passed the final version of its bill on September 24, 1992. The Senate passed it on October 8, 1992. President Bush signed the bill into law on October 26, 1992.

In its final form, the International Dolphin Conservation Act amended the MMPA to prohibit the Secretary of the Treasury from banning the importation of yellowfin tuna or yellowfin tuna products from countries that formally commit to: 1) implementing a five-year moratorium, beginning March 1, 1994, on the use of purse seine nets to encir-

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106. See id. at 48 (prepared statement of Curtis Bohlen).
107. Id. at 5 (statement of Curtis Bohlen).
109. Id.
110. Administration Proposal Hearing, supra note 102, at 347 (prepared statement of John Fitzgerald, Counsel for Wildlife Policy, Defenders of Wildlife, on behalf of 25 environmental organizations).
112. The House bill, H.R. 5419, was introduced by Rep. Studds on behalf of himself and 49 other sponsors from both parties on June 17, 1992. See H.R. 5419, 102d Cong., 2d Sess. (1992). The Senate version of the bill, S. 3003, was introduced by Senator Kerry of Massachusetts on July 22, 1992. During hearings held before the Senate Committee on Commerce, Science, and Transportation, a representative of a coalition of 25 environmental groups announced the environmental community's support for the legislation, stating that "[w]e urge you to enact this legislation immediately and thereby provide the framework for the resolution of a critical issue which has for so long defied solution." Marine Mammal Protection Legislation Hearing, supra note 49, at 40 (prepared statement of David C. Phillips, Executive Director, Earth Island Institute).
cle marine mammals during tuna fishing operations; 2) requiring impartial observers on its tuna purse seine harvesting vessels; and 3) reducing significantly the dolphin mortality resulting from purse seine harvesting during the period prior to the moratorium. The Act provides for a re-imposition and extension of embargoes against countries that have committed to the moratorium and that the Secretaries of Commerce and State find to be violating these obligations. The Act requires the Secretary of Commerce to notify the President and Congress of that country's violation. Within fifteen days after this notification, the Secretary of the Treasury must ban all yellowfin tuna and yellowfin tuna products from the violating country. If the country does not certify and reasonably prove to the Secretary within sixty days that it is complying with its obligations, the Act requires the President to direct the Secretary of the Treasury to ban 40% of all fish and fish product imports from the offending country.

The moratorium may not be terminated prematurely, prior to December 31, 1999, unless the Secretary of Commerce submits to Congress a recommendation to do so and the recommendation is approved by joint resolution. The Act also issues guidelines and provides funding for an international research effort to develop effective ways to fish for large yellowfin tuna either without encircling dolphins or by encircling them with zero mortality. It imposes additional restrictions upon the American Tunaboat Association pertaining to permitted dolphin mortalities and purse seine net setting for the period preceding the 1994 moratorium, and, effective June 1, 1994, generally prohibits the sale, purchase or transport in the U.S. of tuna or tuna products that are not "dolphin safe."

Through its negotiations with ETP tuna fishing countries and the subsequent enactment of the International Dolphin Conservation Act, the United States may be able to amicably resolve the immediate controversies arising out of the implementation of the MMPA. Indeed, the need for action was urgent. By January 31, 1992, the United States Customs Service was enforcing secondary embargoes against twenty countries. At the time President Bush signed the International Dolphin Conservation Act into law, the United States enforced primary embargoes against three countries and secondary embargoes against eleven countries.
countries. The European Community, some of whose members were affected by the embargo, protested the U.S. action and issued a new GATT complaint against the MMPA. On July 14, 1992, the GATT council granted the EC's request for a panel to consider the secondary embargoes against Spain, France, Italy and the United Kingdom. As one Administration official remarked, "there is little reason to believe that the results of a second panel review will differ significantly from the first." Additionally, the domestic controversy sparked by the Panel Report immediately threatened to derail ratification of the North American Free Trade Agreement and interrupt negotiations in the GATT Uruguay Round.

The dispute surrounding the Panel Report, however, exemplifies the larger, broader problem of the collision between international trade and environmental policies. The Panel's interpretation of the GATT provisions effectively hinders the ability of environmentally conscious countries to pursue international conservation through both unilateral and multilateral initiatives. The remainder of this Note explores the possible implications of the Panel Report and proposes ways to address these concerns.

IV. Analysis

If the Panel Report is adopted by the CONTRACTING PARTIES, it will become legally binding upon the United States. In this situation, the U.S. will have the choice of either withdrawing from the GATT or eliminating the MMPA's embargo provisions to conform to the Panel's decision; if a contracting party does not comply with an adopted panel

124. Id. These countries were Canada, Columbia, Costa Rica, France, Italy, Japan, Malaysia, Netherland Antilles, Singapore, Spain, and United Kingdom. During 1992, the U.S. Customs Service lifted secondary embargoes against Ecuador, Indonesia, Korea (ROK), Marshall Islands, Panama, Taiwan, Thailand, Trinidad and Tobago, and Venezuela. Presently, at the time of writing, the U.S. enforces secondary embargoes against four countries: Costa Rica, Italy, Japan, and Spain.


127. Id.


129. As discussed, the United States, or any other contracting party, could block adoption of the Panel Report. This action, however, is unlikely. See supra notes 74-75, 97-99 and accompanying text.
ruling, the other contracting parties may vote to suspend its GATT obligations.\textsuperscript{130} As one commentator has stated, however, "[t]he GATT threat to dolphins is only the tip of the iceberg."\textsuperscript{131} The Panel Report's interpretation of Article XX and its broad declaration that contracting parties may not impose their environmental standards on other party countries through trade measures has sent chills through the conservation community.\textsuperscript{132} U.S. lawmakers have expressed their dismay over the Panel's findings, claiming that they relied upon a more liberal interpretation of Article XX when drafting many environmental laws.\textsuperscript{133}

This section will analyze the U.S. laws and international obligations potentially at risk of being GATT-inconsistent given the Panel Report. First, however, it will examine the Panel's interpretation of Article XX in previously adjudicated disputes. As one commentator has noted, while GATT panel adjudications do not have any formal precedential value, "there can be no doubt that in practice they do to some extent serve as precedents. In quite a number of panel proceedings, reference is made to the findings of previous panels."\textsuperscript{134} With this in mind, an analysis of some past panel reports is necessary to ascertain whether similar cases brought in the future, such as challenges to the U.S. laws and international agreements discussed below, would likely receive a similar analysis and be found inconsistent with the GATT.

A. Interpretation of Article XX

The CONTRACTING PARTIES have adopted eight panel reports involving interpretations of Article XX.\textsuperscript{135} Two of these panels, involving disputes between the United States and Canada, examined complaints where a contracting party imposed trade restrictions ostensibly for environmental conservation purposes. In both cases, the party defending the use of the restrictions invoked Article XX as a justification, implicitly claiming that the Article is properly applied extraterritorially.

1. \textit{United States—Prohibition of Imports of Tuna and Tuna Products from Canada}

In 1979, Canadian authorities seized several U.S. fishing vessels approximately 50 to 60 miles off their coast for fishing tuna without permission

\textsuperscript{130} Petersmann, supra note 65, at 370-73.
\textsuperscript{131} \textit{GATT Implications Hearing}, supra note 11, at 58 (statement of David Phillips, executive director of the Earth Island Institute).
\textsuperscript{132} See supra notes 10-12, 89, 93-94 and accompanying text.
\textsuperscript{133} See Letter from 63 Senators to President Bush, supra note 3.
\textsuperscript{134} Jan Klabbers, \textit{Jurisprudence in International Trade Law: Article XX of the GATT}, 26 J. WORLD TRADE 63, 65 (1992); see also \textit{GATT Implications Hearing}, supra note 11, at 29 (testimony of Joshua Bolten).
\textsuperscript{135} For an analysis of all these decisions and of Article XX(d) in particular, see Klabbers, supra note 134. See also Steve Charnovitz, \textit{Exploring the Environmental Exceptions in GATT Article XX}, 25 J. WORLD TRADE 57 (Sept. 1991) (arguing that Article XX should properly be interpreted to encompass environmental measures).
from the Canadian Government. At the time, the United States did not recognize Canada’s claim over tuna within 200 miles of their joint border. As a result of the seizure, the U.S. imposed an import ban on tuna and tuna products from Canada.136

Canada protested this action to the GATT which established a dispute settlement panel to hear the case. In its report,137 the panel concluded that the import ban was inconsistent with the Article XI prohibition against quantitative import restrictions.138 The United States, however, argued in the alternative that its action was fully consistent with the public policy exception articulated in Article XX(g). According to the United States, tuna was an exhaustible resource, the prohibition was not discriminatory in that similar embargoes had been imposed against several other countries, the action was taken in conjunction with other measures restricting domestic production of many of the items being embargoed, and the measure was related to conservation of tuna in that it was taken to protect an international management approach the United States believed necessary to conserve tuna.139

Although the panel noted that the embargo “might not necessarily have been arbitrary or unjustifiable” and that it “should not be considered to be a disguised restriction on international trade” because the prohibition was publicly announced, it found that while the U.S. embargo applied to all types of tuna, the corresponding domestic restrictions did not.140 The panel thus concluded that the U.S. action did not meet the Article XX(g) requirement that restrictions on domestic production and consumption be made in conjunction with an equally restrictive embargo, and that the import restrictions were therefore GATT-inconsistent.141

2. Canada—Measures Affecting Exports of Unprocessed Herring and Salmon

In 1987, the United States challenged a Canadian requirement that certain species of salmon and herring caught in Canada be processed before exportation. Canada claimed that this quantitative export restriction was an integral part of its west coast fisheries conservation regime, which also consisted of harvest limitations and which had as its goal the protection of these fisheries. Although the appointed GATT panel found that the prohibitions violated GATT Article XI,142 Canada

138. Id. at 106-07.
139. Id. at 97-98.
140. Specifically, the panel found that the U.S. did not restrict domestic production or consumption of albacore tuna. See id. at 108-09.
141. Id. at 108-09.
142. The panel declared the export requirement to be a quantitative restriction in violation of Article XI:1. See Canada—Measures Affecting Exports of Unprocessed
argued that they were justifiable under Article XX(g).143

The panel and the parties agreed that salmon and herring stocks were “exhaustible natural resources” and that the harvest limitations were a “restriction on domestic production” within the meaning of Article XX(g).144 The panel next interpreted the meaning of the “relating to” and “in conjunction with” requirements of XX(g). The panel found that the purpose of including Article XX(g) in the GATT “was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources.”145

For these reasons, the panel concluded that a trade measure did not have to be “necessary or essential” to the protection of such a resource but rather only “primarily aimed” at its conservation to be considered “relating to” within the meaning of Article XX(g).146 Likewise, the panel determined that for the trade restriction to be considered “in conjunction with” domestic restrictions, it had to be “primarily aimed at rendering effective these restrictions.”147 Examining the Canadian restrictions, the panel concluded that the prohibitions were not primarily aimed at the conservation of the fisheries and were therefore GATT-inconsistent.148

3. Conclusions

These cases involved import and export prohibitions justified on environmental policy-related grounds. In each case, the appointed panel struck them down as inconsistent with the GATT and not justifiable under Article XX. While these restrictions all involved one contracting party’s foisting of its environmental standards on the other party in a manner similar to that of the United States’ MMPA embargo provisions, none of the panels raised the issue of the extraterritorial application of Article XX. Instead, the panels held that the imposed restrictions failed to satisfy the substantive requirements of Articles XX(b) and XX(g).149

These previous rulings, however, did articulate tests designed to permit environmental-based restrictions that only minimally affected

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143. Id. at 101.
144. Id. at 113.
145. Id. at 114.
146. Id.
147. Id.
148. Id. at 115.
149. In “United States—Prohibition on Imports of Tuna and Tuna Products from Canada,” the appointed panel decided the complaint on the failure of the United States to impose sufficient domestic restrictions as required by GATT Article XX(g) and did not address the issue of extraterritoriality. In “Canada—Measures Affecting Exports of Unprocessed Herring and Salmon,” the panel found the Canadian export controls not “primarily aimed” at conservation and did not address any issues of extraterritoriality. See supra notes 136-48 and accompanying text.
international trade relations. The Panel Report, therefore, departs from the previous reports by boldly stating that domestic environmental programs may not infringe upon international trade and that one country may not unilaterally impose environmental standards on other countries.

Regardless of whether or not the Panel Report significantly departs from its predecessors, it clearly illustrates flaws in the GATT system as it presently exists. As more countries adopt environmental agendas, instances of collisions between trade and conservation policies will increase, and the Panel’s fear of contracting parties subjugating other parties’ domestic environmental policies to their own may be realized. The subsequent embracing of the Panel Report in official GATT publications further leads to the conclusion that the Panel’s interpretation will not become an aberration.\(^{150}\)

B. Ramifications of the Panel Report

The Panel Report’s rejection of the United States’ invocation of Article XX to justify the MMPA embargoes jeopardizes the efforts of countries to protect the environment outside their borders through domestic laws and international agreements that utilize trade controls.

1. Threatened United States Laws

While the Panel Report focused on the MMPA’s tuna embargo provisions, the MMPA requires the United States to embargo fish or fish products from countries whose fishing industries kill or seriously injure any species of marine mammal in excess of U.S. standards.\(^{151}\) In addition to dolphins, MMPA implementing regulations restrict the incidental taking of whales, seals, sea lions, polar bears, sea otters, walruses, and other mammals in the pinnipedia class.\(^{152}\) The Panel Report effectively destroys the United States’ ability to protect marine mammals living outside its borders.

The Panel Report’s conclusion that a country cannot “make access to its own market dependent on the domestic environmental policies or practices of the exporting country” has the potential to implicate other U.S. environmental legislation.\(^{153}\) An analysis of other United States environmental laws reveals that several of them contain mandatory or discretionary trade provisions which put them at risk of

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\(^{150}\) GATT, Trade and the Environment, supra note 1, at 22-24.


\(^{152}\) See 50 C.F.R. parts 18 and 216 (1992). In accordance with the MMPA, the United States currently forbids the importation of baby seal skins from Canada and South Africa. See GATT Implications Hearing, supra note 11, at 59 (testimony of David Phillips). Also, the Earth Island Institute has initiated court proceedings to require the Administration to embargo shrimp imports from French Guyana which, it is alleged, catches the shrimp using means that also trap and kill rare turtles.

\(^{153}\) GATT, Trade and the Environment, supra note 1, at 23. This quotation is taken from an official GATT document’s interpretation of GATT policy following the Panel Report.
being violative of the GATT as a result of the Panel’s findings. This list of threatened legislation includes laws considered by many to be the backbone of U.S. environmental policy.154

2. Threatened International Agreements

In addition to putting at risk numerous United States laws which unilaterally impose trade sanctions on foreign countries, the Panel Report threatens several international agreements, including some considered to be the vanguard of future environmental protection. While GATT doctrine, as reaffirmed by the Panel Report, permits parties to restrict internal sales of a product and restrict trade in the product as long as the restrictions do not discriminate on the basis of the product’s origin, destination, or process of production,155 the Panel’s prohibition of trade restrictions through which one country effectively imposes its environmental policies on another can be extended to international agreements as well. Agreements that subject imports to more rigorous standards than domestic products risk violating the national treatment provisions of Article III. Likewise, agreements with trade controls that distinguish between parties to the agreement and non-parties are at risk of violating the general prohibition against quantitative restrictions stated in Articles XI and XIII.156 To justify such measures, parties to these agreements have often looked to Article XX. Given the Panel Report’s restrictive interpretation of Article XX, however, through which it prohibits its extraterritorial application, several of these agreements appear indefensible.

A recent GATT-sponsored study of the trade-environment relationship has identified seventeen multilateral environmental agreements


155. See supra notes 86-94 and accompanying text. See also GATT, Trade and the Environment, supra note 1, at 22-23.

156. For a discussion of these GATT Articles, see supra notes 57-63 and accompanying text.
that contain trade provisions.\textsuperscript{157} Several of these agreements provide for the use of trade measures in ways that could discriminate against products based on their origin, destination, or process of production in violation of the GATT as interpreted by the Panel Report. The list of threatened agreements includes several conventions that are international in scope and generally considered to be the foundation for modern international conservation:\textsuperscript{158} the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),\textsuperscript{159} the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol"),\textsuperscript{160} and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("Basel Convention").\textsuperscript{161}

CITES is "probably the single most important agreement now in existence" for the protection of wildlife.\textsuperscript{162} At present, 107 countries are party to the Convention which protects over 20,000 species of plants and over 500 species of animals.\textsuperscript{163} CITES regulates trade in species that are either threatened with extinction or that may become endangered if conservation efforts to maintain them are not undertaken.\textsuperscript{164} This trade is regulated through a system of import and export permits.\textsuperscript{165} CITES requires its signatories to enforce these provisions without consideration for whether or not a particular species' country of origin or destination is party to the Convention.\textsuperscript{166} The extraterritorial

\textsuperscript{157} See GATT, \textit{Trade and the Environment}, supra note 1, at 24-25, 45-47. See also International Agreements to Protect the Environment and Wildlife, USITC Pub. 2351, at 5-1 (1991) (hereinafter "USITC Pub.").

\textsuperscript{158} See \textit{GATTery v. Greenery}, \textit{The Economist}: A Survey of the Global Environment 13 (May 30, 1992). Several regional agreements may also be at risk. See, e.g., Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Oct. 20, 1990, 29 I.L.M. 1453, at art. 3(2). Parties to the Convention are countries located in the southern Pacific Ocean. Although the United States is not a party to this Convention, it has passed legislation that complies with its provisions. See \textit{Driftnet Act Amendments of 1990}, supra note 154; see also Hurlock, supra note 154, at 2118-20.


\textsuperscript{160} Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter "Montreal Protocol"].

\textsuperscript{161} Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (not in force) [hereinafter "Basel Convention"]. The United States has not ratified the Basel Convention. At present, only three countries have ratified the document; twenty must sign it before it can enter into force. See GATT, \textit{Trade and the Environment}, supra note 1, at 47.

\textsuperscript{162} USITC Pub., supra note 157, at 5-29.

\textsuperscript{163} Id.

\textsuperscript{164} These species are listed in appendixes to the Convention. See CITES, supra note 159, apps. I, II, and III.

\textsuperscript{165} Id. arts. III-V.

\textsuperscript{166} Id. art. X.
nature of these provisions call the validity of CITES into question given the Panel Report.

The Montreal Protocol seeks to reduce the use of certain chlorofluorocarbons ("CFCs") that deplete the ozone layer. In addition to requiring its signatories to reduce their individual CFC usage, however, the Montreal Protocol seeks "global compliance." Article 4(1) of the Protocol stipulates that the parties not import any controlled substances from nonsignatories and Article 4(2) prohibits the export of any controlled substances to nonsignatories. Article 4(5) requires that the parties also "discourage" the export to nonsignatories of technology that can produce or utilize CFCs. And, under Article 4(4), if determined "feasible," the parties are to ban or restrict the importation from nonsignatories of products produced with controlled CFCs. The coercive nature of these extraterritorial provisions puts the Protocol at risk of violating the GATT in the wake of the Panel Report.

The objective of the Basel Convention is to limit the transboundary movement of hazardous wastes among party countries and to ensure that all such waste is disposed of in an environmentally sound manner. To these ends, the Convention grants its parties the right to prohibit the importation of hazardous waste; exporting parties must secure written permission from the importing country before transporting the material. Both the exporting and importing countries must ensure that the wastes to be transported will be managed and disposed of in an environmentally sound manner. Generally, transport of hazardous waste is to occur only when the exporting party does not have the means to properly dispose of the materials, or when the importing party has a legitimate need for the materials. In order to best achieve the Convention's objectives, article 4(5) prohibits parties from importing waste from, or exporting waste to, non-parties. Because this trade restriction discriminates against non-parties based on the origin or destination of the hazardous waste, this provision seemingly violates the GATT as interpreted by the Panel Report.

C. Reactions and Proposals

Lawmakers and critics were quick to address the Panel Report's implications. Looking beyond the immediate efforts to resolve the tuna issue through bilateral negotiations and legislation, Congress held hearings to discuss the Panel Report and to examine ways to protect

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170. Id. arts. 4(1), 5, 28 I.L.M. 661, 664.
171. Id. arts. 4(8), 8, 28 I.L.M. 663, 666.
172. Id. art. 4(9).
173. Id. art. 4(5), 28 I.L.M. 662.
174. See supra notes 100-21 and accompanying text.
threatened U.S. environmental laws and interests given the Panel’s interpretation of the GATT.\textsuperscript{175} As a result, both congressional and private interest groups have set forth proposals to address this larger issue.

1. Congressional Proposals

a. House of Representatives

Following Committee hearings in September 1991,\textsuperscript{176} representatives forwarded two different resolutions to the Ways and Means Committee for consideration. On November 21, 1991, twenty six representatives submitted a resolution which:

\begin{quote}
\textit{calls upon the President to initiate and complete negotiations, as part of the current Uruguay Round GATT talk, to make the GATT compatible with the [MMPA] and other United States health, safety, labor, and environmental laws, including those laws that are designed to protect the environment outside the geographic borders of the United States.}\textsuperscript{177}
\end{quote}

The Resolution further states that: “The Congress will not approve legislation to implement any trade agreement (including the Uruguay Round of the GATT and the United States-Mexico Free Trade Agreement) if such agreement jeopardizes United States health, safety, labor, or environmental laws. . . .”\textsuperscript{178} The House passed this resolution on August 6, 1992.

On April 30, 1991, members of the Committee on Merchant Marine and Fisheries proposed a separate amendment to the Fisherman’s Protective Act of 1967\textsuperscript{179} to require the president to actively address environmental issues in the international arena. Declaring it to be “the policy of Congress that the United States shall address environmental issues during multilateral, bilateral and regional trade negotiations,”\textsuperscript{180} the proposal stated that:

\begin{quote}
In implementing [this] policy . . ., the President shall direct the United States Trade Representative to actively seek to—

\begin{enumerate}
\item reform articles of the General Agreement on Tariffs and Trade 
\item to take into consideration the national environmental laws of the contracting parties and international environmental treaties; [and]
\item secure a working party on trade and the environment within GATT as soon as possible. . . .\textsuperscript{181}
\end{enumerate}
\end{quote}

The proposal sought to strengthen the Pelly Amendment by broadening the authority of the president to impose additional sanctions on embargoed parties; it expanded the scope of a permissible Pelly embargo from permitting the embargo of fish and wildlife products to allowing for the

\begin{itemize}
\item \textsuperscript{175} See Gatt Implications Hearing, supra note 11.
\item \textsuperscript{176} See id.
\item \textsuperscript{177} H. Con. Res. 246, 102d Cong., 1st Sess. (1991) Sec. 1.
\item \textsuperscript{178} Id., Sec. 2.
\item \textsuperscript{180} P.L. 102-582, 106 Stat. 4900, Sec. 203 (1992).
\item \textsuperscript{181} Id.
\end{itemize}
embargo of "any product."\textsuperscript{182} This bill passed the House and Senate, and President Bush signed it into law on November 2, 1992.

b. Senate

The Senate has also been active in addressing the ramifications of the Panel Report. On October 3, 1991, 63 Senators sent a letter to President Bush expressing "great concern" over the ruling and its potential effect on environmental conservation policy.\textsuperscript{183} The Senators urged the President to block adoption of the Report "for an appropriate time," consider pursuing international agreements to achieve the objectives of the MMPA, and work with the other contracting parties "to ensure that the GATT fully recognizes the legitimate objectives of protecting the environment . . . ."\textsuperscript{184} Two Senators have further addressed the broader issue of the collision between trade and the environment in the time following the establishment of the GATT Panel.

1) International Pollution Deterrence Act

Senator David Boren introduced the "International Pollution Deterrence Act of 1991" to the Committee on Finance in April 1991.\textsuperscript{185} Designed to "help U.S. companies compete with foreign manufacturers that do not meet adequate environmental standards [and] encourage polluting countries to enact more stringent pollution control measures,"\textsuperscript{186} the proposed bill would amend the Tariff Act of 1930\textsuperscript{187} to impose countervailing duties on imports that are produced without "effective pollution controls and environmental safeguards," as determined by U.S. law and as applied to domestic producers.\textsuperscript{188} The amount of the countervailing duty would be based on "the cost which would have to be incurred by the manufacturer of [sic] producer of the foreign articles of merchandise to comply with environmental standards imposed on United States producers of the same class or kind of merchandise."\textsuperscript{189} Under the amended Tariff Act of 1930, these duties would be determined by the United States International Trade Commission and administered by the Secretary of the Treasury.\textsuperscript{190}

Under the proposed bill, proceeds from the duties would go to two funds. Fifty percent of the monies would go to a "Pollution Control Research & Development Fund" which would be administered by the

\textsuperscript{182} Id. at Sec. 201. For discussion of current Pelly Amendment provisions, see supra notes 30-33 and accompanying text.

\textsuperscript{183} Letter from 63 Senators to President Bush, supra note 3.

\textsuperscript{184} Id.

\textsuperscript{185} S. 984, 102d Cong., 1st Sess. § 3 (1991).


\textsuperscript{188} S. 984, 102d Cong., 1st Sess. § 3 (1991).

\textsuperscript{189} Id.

Environmental Protection Agency and would be used to assist U.S. companies develop pollution control technology and equipment. The other fifty percent of the proceeds would go to a "Pollution Control Equipment Export Fund," to be administered by the Agency for International Development, which would assist less developed countries ("LDCs") purchase U.S. pollution control equipment. The Senate Subcommittee on International Trade held hearings on S. 984 on October 25, 1991, but has not taken any further action.

2) GATT Environmental Code

Taking a different approach, Senator Max Baucus would work within the GATT to negotiate a side agreement that would account for environmental issues. Senator Baucus has proposed the drafting of a GATT Environment Code that would be modeled on the current GATT Subsidies Code. Baucus envisions an agreement that would permit each party to set its own environmental protection standards. If imported products were found not to meet the importing country's standards, duties could be applied if three criteria were satisfied:

First, the environmental protection standards applied must have a sound scientific basis.
Second, the same standards must be applied to all competitive domestic production.
And, finally, the imported products must be causing economic injury to competitive domestic production.

Under Senator Baucus' proposal, a country could set the import duties at a "level sufficient to offset any economic advantage gained [by the exporting country] by producing the product under less stringent environmental protection regulations." A dispute settlement panel would hear and resolve complaints arising out of the application of these provisions.

2. Interest Group Proposals

In the congressional hearings conducted by the Subcommittee on Health and the Environment of the Committee on Energy and Com-

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192. Id.
196. Id.
197. Id.
merce, various environmental interest groups testified, uniformly requesting that Congress call for structural changes in the GATT to permit contracting parties to promulgate environmental laws with extraterritorial effect. David Phillips, of the Earth Island Institute, testified on behalf of fifteen organizations. He stated that:

[in] our view, nothing short of GATT reform is acceptable. . . . [We urge] Congress to press for full rejection of the [Panel Report] and to seek fundamental reforms which will ensure the rights of GATT Contracting Parties to take trade actions consistent with the protection of the global resources and recognizing the validity of worldwide environmental treaties. 198

Consumer advocate Ralph Nader similarly requested the Committee to reject any GATT or free trade agreement that might threaten U.S. environmental standards, to refuse any Administration request to amend the MMPA so to conform it with the Panel ruling, and to seek reform of the system by which GATT and other trade agreements are negotiated. 199 Another Committee witness suggested that Congress seek to amend the GATT to permit national governments to assert their "sovereign prerogative [of doing] what they believe is necessary in the public interest to protect the environment and conserve resources." 200 This witness articulated a model for a proposed article. 201

198. GATT Implications Hearings, supra note 11, at 62.
199. Id. at 73-74.
200. Id. at 95 (testimony of Steven Shrybman, Canadian Environmental Law Assn.).
201. See id. at 90. The proposed article reads:

1. Nothing in this agreement shall be construed to prevent any party from taking any action which it may deem necessary to protect the environment, including the establishment of import or export restrictions and the use of subsidies to:
   (i) prevent or remedy adverse environmental effects, and/or;
   (ii) conserve natural resources;

2. For greater certainty, "actions necessary to protect the environment" shall include national and international initiatives, including, but not restricted to:
   (i) the establishment of regulatory regimes including environmental standards, objectives, guidelines and codes of practice;
   (ii) approval processes relating to environmental impact assessment of projects or programs that may have significant environmental consequences, including the determination of whether approval for such projects or programs shall be granted;
   (iii) measures intended to encourage public participation and standing in the decision-making processes that may affect the environment, and;
   (iv) access to information on matters relating to the environment

3. For the purpose of resolving or adjudicating any dispute that may arise under this agreement with respect to any action taken to protect the environment, the onus shall be upon the complainant to prove that:
   (i) the action or measure was not taken in good faith, and;
   (ii) is unreasonable.
V. Proposal

The world community must recognize that, as evidenced by the Panel Report, the GATT cannot adequately address the growing international concern over environmental problems.\(^{202}\) The CONTRACTING PARTIES must update and modernize the GATT system to address environmental realities. In forging new proposals, however, draftsmen must carefully balance the twin goals of free trade and environmental protection. The world trading community must resolve to maintain and continue the economic stability and growth that the GATT has facilitated since the Second World War.\(^{203}\) Efforts to protect the environment must not be allowed to degenerate into non-tariff barriers and protectionism, the fear of which figured prominently in the Panel Report. The world trading community must also strike a balance between the responsibility of the world citizenry to protect its global commons and the right of sovereign states to seek to improve their standards of living by industrializing as efficiently as possible.\(^{204}\)

A. Assessment of Current Proposals

The proposals articulated by congressional and interest groups to address the ramifications of the Panel Report, unfortunately, fail to ade-

\(^{202}\) The international community, in recent years, has acknowledged the critical levels of environmental problems and resolved to confront them. See, e.g., Economic Declaration of the G-7 London Summit, Int'l Trade Daily (BNA) para. 52 (July 26, 1991), available in LEXIS, BNA Library, Intrad File; Paul Lewis, Environmental Aid for Poor Nations Agreed at the U.N., N.Y. TIMES, Apr. 5, 1992, at A1. In addition, the United Nations held an environmental summit meeting in Rio de Janeiro, Brazil to discuss environmental issues on June 3-14, 1992.

\(^{203}\) The GATT is generally credited with helping to “buil[d] the prosperity that much of the world now takes for granted.” GATT will build America, THE ECONOMIST, June 27, 1992, at 13.

\(^{204}\) Lesser developed countries (“LDCs”) argue that they cannot afford to industrialize with environmentally friendly equipment and processes. Instead, they accuse the industrialized countries as already having reaped the economic rewards of polluting and demand that these countries assist them monetarily and otherwise in any conservation efforts. See Stephen L. Kass & Michael B. Gerrard, Environmental Law: International Trade, N.Y. L.J., Jan. 24, 1992, at 29. In recent years, this argument has proved somewhat persuasive. At the U.N. Rio de Janeiro environmental summit, for example, industrialized countries pledged themselves to help LDCs develop in an environmentally conscious manner. See Lewis, supra note 202, at A1. Indeed, industrialized and environmentally conscious countries have already put this proposal into practice. In the Montreal Protocol, industrialized nations agreed to create a fund to help finance purchases by LDCs of modern, environmentally friendly equipment. See Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 539 (1991); Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 541. For a critical analysis of the Protocol’s funding mechanism, see Jason M. Patlis, Note, The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment, 25 CORNELL INT’L L.J. 181 (1992). The United States also used this financial assistance approach in its negotiations to resolve the tuna dispute, see supra note 119 and accompanying text, and the press has suggested it could be a feasible solution to prevent the feared resumption of commercial whaling. See Sell the Whale, THE ECONOMIST, June 27, 1992, at 16.
quately balance these concerns. Several of the proposals, as discussed above, demand that the United States seek reforms in the GATT to make it compatible with the MMPA and other U.S. environmental laws. Although these resolutions are somewhat difficult to evaluate for their lack of specificity, their general insistence that the international community accept the extraterritorial application of national (and, in particular, U.S.) standards make these proposals unworkable. The United States currently expends approximately $120 billion a year on environmental protection. This figure is expected to rise to approximately $180 billion annually, or 2.8% of the GDP, by the year 2000. LDCs will surely claim a financial inability to meet such high standards in rejecting these proposals.

Three more specifically-stated proposals deserve closer attention. In their present forms, however, they too lack the necessary ingredients for feasible, successful GATT reform. The GATT amendment proposed by one witness during the September 1991 congressional hearings, for example, fails to sufficiently balance the twin concerns of protecting the environment and promoting international development. Although it seeks a standard of fairness by sanctioning only “reasonable” and “good faith” environmental-based import restrictions, these criteria are simply too imprecise to be acceptable to LDCs. Although a GATT dispute settlement panel would presumably resolve disputes arising under the amendment, this imprecision would impose an aura of uncertainty on the world trading system.

Senator Boren’s International Pollution Deterrence Act would declare pollution an impermissible subsidy under the Tariff Act and require the unilateral imposition of countervailing duties on imports from countries whose production processes do not satisfy U.S. environmental standards. Such provisions most certainly would not garner sufficient support from contracting parties. Although the legislation would commit 50% of the collected duties to help LDCs purchase environmentally friendly equipment, many contracting parties would undoubtedly protest and reject the imposition of U.S. standards as an international benchmark, the mechanism by which the other 50% of

205. See supra notes 177-82, 198-99 and accompanying text. While these proposals do not indicate specifically how they will attain these reforms, it is evident that GATT contracting parties, especially LDCs, would not accept them because of their elevation of countries’ domestic standards to the international level. House Resolution 246, for example, “calls upon the President . . . to make the GATT compatible with the [MMPA and other U.S. environmental laws] . . . .” Public Law 102-582 likewise directs the President to “reform [the GATT] to take into consideration . . . national environmental laws.” The Earth Island and Ralph Nader approaches also demand that the GATT be reformed to respect national (or at least U.S.) environmental standards. In an international trading system, however, nations’ standards are not uniform; it is safe to say that contracting parties will not agree to subject their national interests to the standards of another party.


207. See supra notes 200-01 and accompanying text.

208. See supra notes 185-92 and accompanying text.
tariff proceeds would support U.S. industry research and development, and the requirement that they use the returned funds to purchase only U.S. equipment.

Senator Baucus would negotiate an Environmental Code as a side agreement to the GATT, similar to the current GATT Subsidies Code.209 The proposed Environmental Code would permit each country to set and enforce its own standards, so long as they are grounded in "sound scientific data." Unlike the proposed GATT amendment discussed above, the Environmental Code would eschew issues of "reasonableness" and "good faith" in favor of a standard for which scientists can presumably articulate acceptable tests and guidelines up front. In theory, this proposal would effectively address the twin goals of free trade and environmental protection; it would not sacrifice the liberal trading regime that the GATT has worked to establish, while it would motivate all parties to raise their individual environmental standards. In its present form, however, the proposed Code may well fall victim to the same protests that would preclude implementation of other proposals. LDCs will fight it because it would hinder their ability to compete against developed countries when duties are levied against their products.

While the proposal's assertion that a country's lower environmental standards can effectively subsidize its industries in competition with industries of countries with higher environmental standards is correct, equating this type of subsidization with the kinds addressed by the Subsidies Code is not accurate. The purpose of the GATT Subsidies Code is to level the trade playing field by counteracting the financial assistance given by a government to a corporation or industry; the Subsidies Code thus presumes that the subsidizing government has the financial resources to assist its industries. In the case of "environmental subsidies," however, it is not "positive" government assistance that is targeted but rather the lack of regulations that would negatively affect the competitiveness of the industry in question. Absent from the Environmental Code's equation is the issue of a country's national resources and ability to afford the costs of implementing higher environmental standards. The question arises whether it is fair and equitable to penalize countries for having lower standards when it is possible that they do not have the economic means to impose higher ones. LDCs will argue that it is not and will work to defeat the proposal.

B. Environmental Standards, Pollution Allowances & Allowance Trading

This author proposes that the CONTRACTING PARTIES, working within GATT to either amend the General Agreement or negotiate side agreements, undertake a two-prong initiative to address the environmental deficiencies of the GATT as revealed by the Panel Report. Con-

209. See supra notes 193-97 and accompanying text.
tracting parties should first seek to establish environmental standards for as many activities and processes as is feasible. For those activities for which no standards can be agreed upon, the parties should set targets for international reductions in environmentally unsound activities and establish a system featuring tradeable "pollution allowances" to achieve these goals.

1. Environmental Standards

The negotiation of international environmental standards is an essential first step toward satisfying the dual concerns of protecting the environment and encouraging international economic development. Environmental standards have already been successfully negotiated in areas such as endangered species—evidence that negotiators can reach agreement on standards through compromise and innovative solutions. In the CITES agreement, for example, parties pledged to prohibit or restrict trade in up to 20,000 plant and 500 animal species. In some situations, where parties could not agree upon standards, negotiators have engineered innovative solutions to resolve the deadlock. In the U.S.-Mexico tuna dispute, for example, impasse resulted from Mexico’s position that its tuna fishing industry could not afford the equipment necessary to meet the high dolphin taking standards proposed by the U.S. In its attempts to resolve the dispute, the United States has indicated its willingness to contribute to a fund to aid tuna fishing research. Negotiators of the Montreal Protocol also utilized a funding mechanism to entice LDCs to join the agreement. Some observers believe a similar approach could help resolve a current controversy involving whaling. The CONTRACTING PARTIES should aggressively negotiate international environmental standards where it is possible to convince LDCs to adopt newer production methods and, if necessary and feasible, establish funding mechanisms to aid LDCs in these endeavors.

2. Pollution Allowances and Allowance Trading

Efforts to negotiate environmental standards, however, even if pursued aggressively, will not resolve some of our most pressing environmental problems. This author, therefore, further proposes the establishment of an international system of tradeable pollution allowances as a means of regulating and reducing environmentally unsound activities. The notion of such an allowance system is not novel. Academics first articulated the idea of controlling pollutants through free-market principles in the early 1900s. The United States Environmental Protection

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210. See supra note 163 and accompanying text.
211. See supra note 119 and accompanying text.
212. See, e.g., Patlis, supra note 204.
Agency began implementing "pollution market" programs in the 1970s. The United States expanded upon these programs with amendments to the Clean Air Act in 1990.

a. Clean Air Act Amendments

Considered "the centerpiece of the Bush Administration's acid rain proposal," the allowance trading provisions of the 1990 Clean Air Act amendments seek to reduce the total cost to polluting utilities of complying with mandated emission limitations for sulfur dioxide. The provisions establish national goals for reductions in sulfur dioxide emissions by utility plants and calculate the emissions standard these plants must attain in order for this goal to be realized. By subjecting all affected plants to the same emissions standard, the reduction requirements effectively require larger plants to make the greatest cuts in pollution.

The provisions authorize the Administrator of the Environmental Protection Agency ("EPA") to allocate annual "allowances," defined as "limited authorization[s] to emit sulfur dioxide," to all affected utility units. The EPA Administrator distributes emissions allowances to utilities, basing allowance computations on the reductions a plant must make to satisfy the applicable standard at the end of the phase. Under the system, these facilities can use their allowances, save them for future use, or trade them. If a facility exceeds its allowance limit and has not


217. Parker et al., supra note 216, at 2035.


219. The provisions seek a 10 million ton reduction in annual sulfur dioxide emissions by the year 2000. Accordingly, the plan is divided into two phases. Phase I begins on January 1, 1995 and affects 110 of the largest coal-fired utility plants in the country. For these plants, the amendments mandate an annual emissions standard of 2.5 lbs. sulfur dioxide per million BTUs of fuel consumed, based on the average fuel consumed during a baseline 1985-1987 period. 42 U.S.C. § 7651c (Supp. III 1991). Phases II begins on January 1, 2000. At that time the provisions both expand their coverage to include smaller utility units and reduce the applicable emissions standard to 1.2 lbs. sulfur dioxide per million Btu. 42 U.S.C. § 7651d (Supp. III 1991).

220. Id. § 7651b(f).

purchased allowances from another source, it must pay a sizable fine. In theory, the allowance trading system will hold costs of complying with national emission standards to a minimum. Proponents view this mechanism as "a model for future pollution control legislation" and advocate its extension to other environmental problems.

b. International Application

This author proposes that the CONTRACTING PARTIES establish an international allowance system, similar in approach to the U.S. Clean Air Act, to address environmental problems for which standards cannot be successfully negotiated. A well-devised program would provide the most efficient way of promoting conservation without sacrificing economic development. Working within the GATT structure, these countries should either amend the General Agreement or negotiate a separate side agreement to set reduction goals for environmentally-harmful activities and allocate transferable allowances.

In designing an international allowance system, negotiators would have to resolve such questions as the scope of the program and the manner in which it is overseen and enforced. Most importantly, however, they would have to devise a formula for the equitable determination of reduction requirements to ensure acceptance of the plan by both developed countries and LDCs.

1) Scope

In theory, market-based allowance systems can be employed to regulate any pollutant or environmentally unsound activity that can be measured and the cost of its reduction valued. Given the ability of negotiators to draw upon the U.S. experience, the reduction of acid rain-causing sulfur dioxide emissions is a logical starting point for an international initiative. The system, however, could also cover emissions of other air polluting and "greenhouse gases" such as carbon dioxide, nitrogen oxide, chlorofluorocarbons, and methane. Conceivably, as the ability to measure both production processes and costs of reduction improves, the allowance system could be broadened and adapted to address other environmental concerns such as the protection of endangered plants and wildlife and the production and disposal of hazardous waste.

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223. Parker et al., supra note 216, at 2023. Proponents, for example, seek to extend allowance trading to reduce carbon dioxide emissions. Id.
224. Two economists have already proposed establishing international allowances and allowance trading for carbon dioxide emissions from fossil fuel and forest burning sources. See Daniel J. Dudek & Alice LeBlanc, Preserving Tropical Forests and Climate: The Role of Trees in Greenhouse Gas Emissions Trading 12-16 (Presented at the UNCTAD Workshop on Sustainable Development, Rio de Janeiro, Brazil, June 1-4, 1992) (on file with the Cornell International Law Journal). See also Rice, supra note 206.
2) Oversight and Enforcement

The Clean Air Act provisions authorize the EPA to oversee the emissions allowance system. An international system would require similar oversight. The determination of what organization would oversee the system depends in large part on the form the multilateral agreement takes. If the agreement is a side agreement to the GATT, negotiators can either create a new entity or broaden the responsibilities of an already-existent organization. If, however, the agreement is in the form of an amendment to the General Agreement, the GATT would be the de facto overseer of the system. In either situation, it would be advisable for the parties to take advantage of the collective expertise of existent international organizations that deal with trade and environmental issues. The recently activated GATT Group on Environmental Measures and International Trade, for example, could play a role in the international allowance system. The United Nations Environment Programme ("UNEP") has also been actively involved in issues involving both trade and the environment. Most notably, UNEP played a major role in the negotiations leading to the Montreal Protocol.

The U.S. Clean Air Act provisions also impose monetary penalties on utilities that exceed their emissions allowances. An international system would likewise need some enforcement mechanism. If the system were organized under the auspices of the GATT, it could adopt the traditional GATT rules for the resolution of disputes.

3) Allowance Allocation

As discussed above, the U.S. Clean Air Act model allocates sulfur dioxide emission allowances to affected facilities based on the reductions each facility must make to conform with the predetermined national standard for sulfur dioxide emissions. In developing such a system on the international level, however, this author suggests two deviations from the United States approach to facilitate the program's implementation and improve its chances for necessary international acceptance.

First, the international system should allocate allowances on a country-by-country basis, rather than on a facility-by-facility basis as in the U.S. model. While the Clean Air Act allowance provisions affect 110 utility plants in the first phase and approximately 2000 in the second, the number of utilities that an international version would cover would make management of the system on a facility basis unduly burdensome and the administrative costs prohibitive. In addition to addressing these concerns, operating the system on a country, rather than facility, basis would allow each individual country the opportunity to develop its own national conservation strategy.

225. See GATT, Trade and the Environment, supra note 1, at 24.
226. See supra notes 65-75 and accompanying text.
227. Husband, supra note 216, at 881-82.
Second, the formula for determining an emissions standard and calculating countries' corresponding emissions allowances must also consider countries' abilities to effect the required reductions. As discussed, the U.S. legislation propounds one uniform emissions standard and requires that all affected utility plants meet it without considering their relative technological base or financial strength. For an international program to be feasible, however, it must address the arguments of LDCs that they do not have the financial capabilities to raise their environmental standards to the same levels as the more developed countries.

As discussed above, the U.S. sulfur dioxide emissions standard is based on the ratio of sulfur dioxide emitted to the amount of fuel consumed by the plant. For the purpose of creating a more equitable and acceptable formula, this author suggests the infusion of a new variable into this equation. In addition to emissions and total fuel consumed, the formula should also consider the relative wealth of the country, so that countries with greater wealth, all things being equal, must reduce emissions levels more than relatively poorer countries. One estimate of national wealth is through the ratio of a country's GNP per capita. As this variable and a country's wealth are directly proportional, its inclusion in the emissions standard formula can ensure that relatively richer countries have higher emissions per fuel consumed reduction requirements.

Including this variable in the emissions standard calculation would make the proposed international allowance system more equitable for all parties. While it would assuage the financial-based concerns of LDCs, the ability to regularly recalculate and readjust reduction requirements to account for changes in countries' relative wealths could also ensure that this equitable solution does not evolve into unfair advantages for LDCs as they develop.

Conclusion

The Panel Report's broad declaration that contracting parties may not use trade measures to influence environmental policies outside their borders has put many environmental laws and agreements at risk of being inconsistent with the GATT. This prospect has sent chills through environmentalists, who over the past twenty years have successfully advocated legislation in the U.S. and multilateral agreements abroad that utilize the coercive threat of trade sanctions to promote conservation.

The Panel Report's conclusions pointedly illustrate a serious shortcoming in the GATT as it currently operates. The importance that the international community has given to conservation in recent years, coupled with the newly-emphasized relationship between trade and the environment, makes it imperative that the CONTRACTING PARTIES

228. See supra notes 217-23 and accompanying text.
modernize their trading rules to account for these concerns. In seeking to update the GATT, however, these countries must take care to balance their desire to protect the environment with the need to preserve the GATT's liberal trading policies and promote international economic development.

The active negotiation of environmental standards is an essential first step toward achieving this goal. Where negotiation of standards proves unsuccessful, however, the CONTRACTING PARTIES, working within the GATT, must seek to establish a new framework to address environmental issues. An international allowance trading system would address these dual concerns of protecting the environment and promoting economic development. It would provide an efficient means of reducing environmentally unsound activities. Likewise, its international acceptance and effectiveness would be secured by employing allocation formulas that account for the relative wealth of participating countries.

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