ENVIRONMENTAL TRADE SANCTIONS AND THE GATT: AN ANALYSIS OF THE PELLY AMENDMENT ON FOREIGN ENVIRONMENTAL PRACTICES

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INTRODUCTION

One can question, from an environmental and legal perspective, whether it is appropriate to use trade sanctions to achieve environmental goals. Although countries have yet to impose sanctions for this purpose, the United States has threatened such sanctions, engendering much concern in the trade policy community. The U.S. Pelly Amendment (Pelly or Pelly Amendment) is the most noted law of this type.[1] Because there is considerable experience in the implementation of this law, this Article will employ case studies to consider whether trade sanctions are appropriate.

Part I of this Article provides a conceptual framework for the role of environmental trade measures in attaining international environmental cooperation. Part II presents the history and operation of the Pelly Amendment. Part III analyzes the relevant issues in assessing the consistency of the Pelly Amendment with the General Agreement on Tariffs and Trade (GATT).[2]

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1. 22 U.S.C.A § 1978 (West 1990 & Supp. 1994).

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

I. TRADE SANCTIONS AND ENVIRONMENTAL COOPERATION

It has long been recognized that international cooperation is essential for solving many environmental problems.[3] There is nothing remarkable in this recognition. The same observation is true in many human endeavors, such as public health, trade, communications, monetary policy, and the maintenance of peace. Because many environmental problems cross national boundaries or involve areas beyond the regulatory authority of any one country, the environment is even more of an international issue than are others.[4] As Jozo Tomasevich, a professor at Stanford University, pointed out fifty years ago:

> if the concept of conservation is taken in its broad sense, meaning the most rational use of natural resources at the disposal of mankind over a period of time, the whole theory becomes closely related to the theory of international economic relations. Without doubt, conservation policies in various countries have international implications and repercussions that need to be taken into account in an appraisal of particular conservation policies.[5]

A. REASONS FOR COOPERATION

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

The global commons is one area of longtime concern, and longtime frustration. For example, in 1927, a League of Nations committee addressed the need for international rules regarding the exploitation of products of the sea.[6] The Committee pointed out that:

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3. "Long" is a relative term. With respect to the span of human government, the recognition is fairly recent, about a century old. But for as long as the environment has existed as a public policy concern, there has been an awareness that it is an international issue.

4. Of course, many environmental issues may not require joint action (e.g., safe drinking water).

5. Jozo Tomasevich, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES 42 (1943).

6. *See* League of Nations, Comm. of Experts for the Progressive Codification of Int'l Law, *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation*, League of Nations Doc. C.196.M.70 123

> the riches of the sea, and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race. To save this wealth, which, being to-day [sic] the uncontrolled property of all, belongs to nobody, the only thing to be done is to discard the obsolete rules of the existing treaties, which were drawn up with other objects, to take a wider view, and to base a new jurisprudence, not on the defective legislation which has failed to see justice done but on the scientific and economic considerations which, after all the necessary data has been collected, may be put forward, compared and discussed at a technical conference by the countries concerned. In this way, a new jurisprudence will be created of which to-day [sic] we have no inkling, owing to the fact that the necessity which now arouses our legitimate apprehensions was never contemplated.[7]

Whale hunting was of special concern to the Committee.[8] Although its recommendations did not have immediate impact, a group of whale hunting countries agreed to a limited treaty regulating whale hunting in 1931.[9] Although the Committee was overly optimistic about its ability to achieve agreement based on scientific and economic considerations, its forecast of a new jurisprudence, "of which today we have no inkling,"[10] may yet prove to be correct.

Another noteworthy attempt to achieve international cooperation occurred in 1922 when the U.S. Congress authorized the president to call for an international conference to prevent the pollution of navigable waters.[11] The Conference reached a common accord on preventing pollution by oil or oil mixtures, but its draft treaty never entered into force. Among the proposed rules, the treaty stated that tonnage duties "shall not be charged in respect of any space rendered unavailable for cargo by the installation of any device or apparatus for separating oil from water."[12] This was one of the earliest recognitions of the linkage between tariffs and pollution control.

(1927) [hereinafter *Report to the Council*] (recommending establishment of international regulations for exploitation of marine species).

7. *Id.*

8. *Id.*

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

10. *Report to the Council*, *supra* note 6, at 123.

11. *See* Act of July 1, 1922, 42 Stat. 821 (1922) (providing for the president to call a conference of maritime nations).

12. Final Act, Article VI(b). *Foreign Relations*, 1926, Vol. I, at 238-47.

Regional matters involving shared resource or trans-border damage is a second area of longtime concern. Although an initial proposal for a European convention for the protection of animals useful to agriculture came in 1868, it was not until 1902 that such a convention was signed.[13] This Convention only involved birds: They were viewed as a shared resource because of their migratory nature in Europe.[14] The earliest focus on trans-border damage involved the transmission of human, animal, and plant disease. Numerous international conferences were held on these issues beginning in the late nineteenth century.[15]

In many instances, international cooperation led to agreements using trade controls. For example, the International Convention of 1902 for the Protection of Birds Useful to Agriculture required parties to prohibit the importation and sale of certain eggs and nests.[16] The Convention Designed to Remove the Danger of Epizootic Diseases of 1887 between Austria-Hungary and Italy prohibited trade in animals suspected of being infected by a contagious disease.[17]

A third area of concern has been problems in other countries which were not global or regional in scope. Very often, these problems involved moral or competitiveness concerns. For example, in 1906, an international conference in Bern devised a treaty to regulate the use of phosphorus in match production and to prohibit trade in phosphorus matches.[18] The rationale for international cooperation was that even though the production of phosphorus matches was dangerous to workers, no country would confront this problem alone because phosphorus substitutes were more expensive. Acting collectively, however, concerned

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13. Convention on Protection of Birds Useful to Agriculture, Mar. 19, 1902, 191 CONSOL. T.S. 91, *reprinted in* 4 INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES & RELATED DOCUMENTS 1615 (Bernd Ruster & Bruno Simma eds., 1975); *see* SHERMAN S. HAYDEN, THE INTERNATIONAL PROTECTION OF WILD LIFE, 92-96 (1942) (discussing proposals leading up to the treaty).

14. HAYDEN, *supra* note 13, at 92-96.

15. *See* NEVILLE M. GOODMAN, INTERNATIONAL HEALTH ORGANIZATIONS AND THEIR WORK 39-79 (1952) (describing international sanitary conferences held in the 19th century).

16. Convention to Protect Birds Useful to Agriculture, *supra* note 13.

17. Convention Designed to Remove the Danger of Epizootic Diseases, Dec. 7, 1887, Aus.-Hung.-Italy, 15 Martens Nouveau Recueil (ser. [deuxieme]) 704, *reprinted in* 4 INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES & RELATED DOCUMENTS, *supra* note 13, at 1586.

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

nations could protect workers in each country and move jointly to strengthen labor standards.

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

B. BARRIERS TO COOPERATION

International cooperation is often unattainable.[19] There are several reasons for this. First, nations often place different values on protecting the environment vis-à-vis other goals. Poorer countries are more short-term oriented than richer countries.[20] Second, even countries sharing the same general environmental values will have different interests on particular issues. Land-locked nations, for instance, may have different views on fishing conservation than riparian nations. Countries below sea level may think differently about global warming than cold industrial countries. Third, some governments may not reflect the views of their populace. This is common in non-democratic countries. Fourth, some governments pursue policies that are not in their national interest.

In some cases, differences between countries could lead to situations where there is no zone of agreement.[21] In most cases, however, the non-attainment of international cooperation results from bargaining failure. There are potential agreements that could make participants better off, but the countries do not reach them because of bluffing. On many issues, countries do not even commence serious negotiations.

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19. *See generally* Scott Barrett, *The Problem of Global Environmental Protection*, OXFORD REV. OF ECON. POL., 68, 68 (1990) (discussing reasons why resource users may fail to cooperate even when cooperation is in each user's interest).

20. *Contra* Riley E. Dunlap et. al., *Of Global Concern: Results of the Health of the Planet Survey*, ENVIRONMENT, Nov. 1993 at 6, 9 (reporting that in a recent survey, the percentage of respondents who chose protecting the environment over economic growth was inversely related to national income in the three NAFTA countries: in Mexico, 71% chose the environment; in Canada 67% did; in the United States only 58% did).

21. Of course, with large side payments, an agreement is attainable.

C. TOOLS TO PROMOTE COOPERATION

Methods for countries and individual citizens to overcome barriers to international agreements is a core issue in environmental policy. Ignoring military tools, a country wanting to raise international environmental standards can influence the policies of other countries in two ways. First, countries can use political tools. For example, diplomats can try to persuade one another of the need for cooperation. Media attention plays an important intermediary role in this approach. Second, countries can use economic tools. A government, for instance, might condition its foreign aid or support for World Bank projects on the environmental policy of a country.[22] Groups of individuals can also launch boycotts.

Another common economic tool is the use of trade measures.[23] While this approach theoretically can include trade liberalization as an inducement for cooperation,[24] the trade tools most often called upon are trade restrictions. As William Phillips, chief of the international resources division of the U.S. Department of State, explained to the Senate in 1947, "Conservation, in my opinion, involves some sort of regulation of world trade; otherwise I just don't see how it might operate."[25]

In considering environmental trade restrictions, it is important to distinguish between import prohibitions and sanctions. An import prohibition—against endangered birds, for example—is a ban on a product that has a direct nexus to an environmental harm. By contrast, a sanction is a trade ban on unrelated products for the purpose of influencing a foreign country's policies or actions. Because sanctions are often im-

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22. *See* Canute James, *Whaling Controversy Threatens Tourism at 4 Caribbean Isles*, J. COM., Mar. 3, at 3A (noting the charge by environmentalists that Japanese financial aid is designed to influence positions taken by recipient countries in the International Whaling Commission).

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

24. *See* International Convention Concerning the Export and Import of Animal Products, Feb. 20, 1935, 193 L.N.T.S., art. 1 (1938) (using trade liberalization to encourage higher health standards by providing duty-free treatment for countries that ratified the International Convention for the Campaign Against Contagious Diseases of Animals).

25. *Trade Agreements System and Proposed International Trade Organization Charter, 1947: Hearings Before the Committee on Finance*, 80th Cong., 1st Sess 483 (1947) (statement of William Phillips).

port prohibitions, one can view sanctions as a discrete type of import prohibition rather than as a distinct instrument.

Both import prohibitions and sanctions can be applied by treaty to other parties.[26] They also can be applied by treaty to non-parties to encourage nations to become parties.[27] In the absence of a treaty, or when treaties do not have adequate enforcement mechanisms, both import prohibitions and sanctions can be applied unilaterally to prevent environmental harm.[28] For example, the U.S. Trade Expansion Act of 1962 authorizes the president to raise tariffs on fish from countries that do not negotiate in good faith for fishery conservation agreements.[29] Because this provision is dormant, this study instead will examine a subsequent unilateral trade sanction, the Pelly Amendment.[30]

D. OBJECTIONS TO SANCTIONS

So far, this Article has explained why the desired level of cooperation may not occur and how nations might respond. Before proceeding with a detailed discussion of the Pelly Amendment (Part II) and an analysis of its GATT implications (Part III), it is useful to consider the following queries: 1) whether unilateral trade measures achieve positive environmental results, and 2) whether unilateral measures improve the prospects for multilateral solutions.

The conventional wisdom is that both considerations should be answered in the negative. For example, the GATT Secretariat has pronounced that "negative incentives—in particular, the use of discriminatory trade restrictions on products unrelated to the environmental issue at hand—are not an effective way to promote multilateral cooperation."[31] Piritta Sorsa, a World Bank economist, has written that, "unilateral sanctions are unlikely to be effective in solving the cause of the environ-

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26. *See, e.g.*, Convention between the United States and Great Britain for the Protection of Migratory Birds, art. VI, Aug. 6, 1916, 39 Stat. 1702, 1704 (1916) (applying import restrictions); North American Agreement on Environmental Cooperation, art. 36, *done* Sept. 8-14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480, 1493 (1993) (permitting trade sanctions).

27. *See, e.g.*, Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987 30 I.L.M. 157, art. 4 (1987) (Montreal Protocol) (applying import restrictions).

28. *See, e.g.*, Marine Mammal Protection Act, 16 U.S.C.A. 1371 (West 1985 & Supp. 1994) (imposing a unilateral prohibition on imports of marine mammals and marine mammal products).

29. 19 U.S.C. § 1323 (1988).

30. 22 U.S.C.A. § 1978 (West 1990 & Supp. 1994).

31. GATT, INTERNATIONAL TRADE 90-91, Vol. I, at 21.

mental damage. The polluter can always direct exports to other countries."[32] W. Rob Storey, New Zealand's Minister of Transport, has stated that "[u]nilateral measures to reconcile trade and environmental objectives are likely to be ineffective or counterproductive."[33] Additionally, the National Consumer Council of the United Kingdom has declared that "[t]rade sanctions are also likely to sour relations, making multilateral cooperation much more difficult and international agreements harder to achieve."[34] No empirical evidence, however, was offered to support any of these statements.

II. PELLY AMENDMENT

Part II begins with a discussion of the legislative history of the Pelly Amendment. Next, it considers other laws which trigger the Pelly Amendment. Finally, it presents a case study of the Pelly Amendment.

A. LEGISLATIVE HISTORY

The Pelly Amendment of 1971[35] is named after Congressman Thomas M. Pelly, who proposed the law at the end of his twenty year career in the U.S. House of Representatives.[36] This law revised the Fishermen's Protective Act of 1967.[37] That Act, passed in 1968, did not have a trade provision.

Congress enacted the Pelly Amendment in response to unsuccessful U.S. efforts to persuade Denmark, Norway, and West Germany to comply with the ban on high seas salmon fishing that was promulgated by the International Commission for the Northwest Atlantic Fisheries.[38] All

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32. Piritta Sorsa, *GATT and Environment: Basic Issues and Some Developing Country Concerns, in* INTERNATIONAL TRADE AND THE ENVIRONMENT 337, 337 (1992) (Patrick Low ed.) (World Bank Discussion Papers No. 159).

33. W. Rob Storey, *Trade and the Environment: New Zealand's Experience, in* AGRICULTURE, THE ENVIRONMENT AND TRADE—CONFLICT OR COOPERATION 242 (Caroline T. Williamson ed., 1993).

34. NATIONAL CONSUMER COUNCIL, INTERNATIONAL TRADE: THE CONSUMER AGENDA 131 (1993).

35. The Pelly Amendment was based on a similar provision enacted in 1962. 16 U.S.C. § 955, Pub. L. No. 87-814 § 2.

36. Congressman Pelly died in 1973.

37. 22 U.S.C.A. § 1978 (West 1990 & Supp. 1994).

38. *See* Gene S. Martin Jr. & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. OF INT'L L. & POL'Y, 293-94 (1989) (stating that the Pelly Amendment was enacted because under the terms of ICNAF, member states were free

three countries agreed to phase out their salmon fishing after Pelly became law. As enacted, the Pelly Amendment provided that:

> [w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President. Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products of the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.[39]

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

In 1978, Congress added a new track to Pelly for "engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species whether or not such conduct is legal under the laws of the offending country."[40] This provision is triggered by a determination either of the U.S. Secretary of Commerce or Secretary of the Interior.[41] Following certification, the President could order an embargo of any or all wildlife products from the certified country.[42]

As a result of the 1978 law, Pelly was divided into two tracks:[43] diminishing the effectiveness of an international fishery program could lead to sanctions against fish products;[44] and diminishing the effective-

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to ignore the ban on salmon fishing).

39. Act of Dec. 23, 1971, § 8(a), 85 Stat. 786, 786 (codified at 22 U.S.C.A. § 1978 (West 1990)). For an international fishery program to qualify, the United States had to be a signatory party. *Id.* at § 8(g)(3).

40. Fishermen's Protective Act of 1967, 92 Stat. 714 (1978) (codified at 22 U.S.C.A. § 1978 (West 1990 & Supp. 1994)). The international program had to be in force with respect to the United States. *Id.* at § 8(g)(5). Thus, for both fishery and wildlife, Pelly is linked to international treaties which also bind the United States. It is not clear whether the Pelly Amendment could be applied to soft law such as the U.N. Driftnet Resolution. William T. Burke et al., *United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management*, *in* 25 OCEAN DEV. AND INT'L LAW 127 (April-June 1994).

41. *Id.* at § 8(a)(3).

42. *Id.* A certification means that a country fails to meet the U.S. standard.

43. *See id.* at §§ 8(a)(1) & (2) (creating separate certification procedures for fish products and endangered species).

44. *Id.* at § 8(a)(3).

ness of an international endangered species program could lead to sanctions against wildlife products.[45] Although the goal pursued is a multilateral one, the determination under Pelly of when actions diminish the effectiveness of international programs is solely unilateral.

A test based on "diminishing the effectiveness" is rather vague. Many factors could trigger a finding of diminished effectiveness. These factors include non-ratification of a treaty, non-observance of a treaty, or even actions unrelated to a treaty such as domestic sales of an endangered species. Pelly is not predicated on the violation of a treaty. For example, the Whaling Convention permits member nations to avoid being bound by a quota by entering an objection to it.[46] Such an objection is legal under the treaty and international law. It could still, however, trigger an adverse Pelly ruling.

Although Pelly certifications are mandatory once a determination is made, sanctions by the president are discretionary.[47] Nevertheless, the president is required to report to Congress within sixty days on any action he takes and on the reasons why a full embargo of fish or wildlife products was not ordered.[48] In 1988, Congress modified the fishery penalties to include "any aquatic species" exported from that country regardless of whose nationals caught the fish.[49]

In 1992, Congress revised the Pelly Amendment to expand the range of products against which a president could invoke countermeasures.[50] This change was needed, according to one House Committee, because Pelly was "drawn so narrowly that an embargo under it could quite

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45. *Id.* The use of fish products to retaliate against fishery violations does not make the Pelly Amendment an import prohibition rather than a sanction. There is no requirement that the fish product being retaliated against have anything to do with the fishing that is environmentally-insensitive. *Id.*

46. *See* International Convention for the Regulation of Whaling, 161 U.N.T.S. 72, art. V(3) (1953) (permitting any signatory nation to exempt itself from conservation regulations).

47. *See* Japan Whaling Ass'n v. American Cetacean Soc'y 478 U.S. 221, 231-32 (1986) (finding by a five to four decision that there is no mandatory obligation for a certification); *see also id.* (arguing that the regulation of future conduct is irrelevant to the certification scheme which affects future violations only by punishing past ones) (Marshall, J., dissenting).

48. 22 U.S.C.A. § 1978(h) (West 1990).

49. Marine Mammal Protection Act Amendments of 1988, § 8(h)(4), 102 Stat. 4755, 4772 (codified at 22 U.S.C. § 1978(h)(4) (1988).

50. High Seas Driftnet Fisheries Enforcement Act, § 201(a)(1), 106 Stat. 4900, 4904 (1992) (to be codified at 22 U.S.C. § 1978(a)(4)).

likely harm the United States more than the embargoed nation."[51] Under the new law, the president can craft trade sanctions to have maximum impact. With both tracks, the president can order an embargo against any products from the offending country.[52] The fish and wildlife tracks remain distinct, however. The fishery track relates only to fishery operations, not to trade.[53] The wildlife "track" relates both to "taking" wildlife and to trade in it.[54]

No legislative changes were made to the Pelly Amendment in 1993. The U.S. House of Representatives did, however, pass a Concurrent Resolution affirming the sense of Congress that non-compliance with recommendations of the International Commission for the Conservation of Atlantic Tunas[55] "will be considered by Congress to be certifiable" under the Pelly Amendment.[56]

B. DEEMED PELLYS

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

1. Under the Fishery Conservation and Management Act of 1976,[57] also known as the Packwood-Magnuson Amendment,[58] a certification by the Secretary of Commerce that foreign nationals are "engaging in trade or taking," which diminishes the effectiveness of the International Whaling Convention, is deemed a Pelly certification.[59] The only way this provi-

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51. H.R. REP. NO. 580, 101st Cong., pt. 1, at 4.

52. High Seas Driftnet Fisheries Enforcement Act, § 201(a)(1), 106 Stat. 4900, 4904 (1992) (codified at 22 U.S.C. § 1978(a)(4)).

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

54. *Id.*

55. *See* International Convention for the Conservation of Atlantic Tunas, art. 3, *done* May 14, 1966, 20 U.S.T. 2887 (establishing International Commission for the Conservation of Atlantic Tunas).

56. 139 CONG. REC. H8692-94 (1993).

57. Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801-1822).

58. SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 34 (1985).

59. 16 U.S.C. § 1821(e)(2) (1988); *see* Leonard F. Morley Jr., *Whaling Regulation—Pelly and Packwood-Magnuson*, 11 SUFFOLK TRANSNAT'L L. J. 287 (1989) (dis-

sion expands potential application of Pelly is by mandating certification for trade in whales even though they may not be endangered.

2. Under the Driftnet Impact Monitoring, Assessment, and Control Act of 1987,[60] if the Secretary of Commerce determines that a foreign government fails within eighteen months to enter into an international agreement on driftnet monitoring, that determination is deemed a Pelly certification.[61]

3. Under the African Elephant Conservation Act of 1988,[62] if the Secretary of the Interior finds that a country does not adhere to the Convention on International Trade in Endangered Species (CITES) Ivory Control system, that finding is deemed a Pelly certification.[63]

4. Under the Marine Mammal Protection Act (MMPA) amendments of 1988, the Secretary of Commerce must certify under Pelly any nation whose yellowfin tuna is embargoed whenever the embargo continues for more than six months.[64]

5. Under the Fishery Conservation Amendments of 1990, if the Secretary of Commerce finds that a nation is engaging in trade in unlawfully taken anadromous fish or fish products, that finding is deemed a Pelly certification.[65]

6. Under the Driftnet Act Amendments of 1990, if the Secretary of Commerce finds that a nation permits its "nationals to conduct large-scale driftnet fishing in a manner that diminishes the effectiveness of or is inconsistent with any international agreement governing large-scale driftnet fishing," that finding is deemed a Pelly certification.[66]

7. Under the High Seas Driftnet Fisheries Enforcement Act of 1992, the Secretary of Commerce must certify each nation whose nationals are conducting large-scale driftnet fishing.[67] If consultations are not satisfactory, the president must impose trade sanctions on fish, fish products

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cussing congressional intent).

60. Pub. L. No. 100-220, 101 Stat. 1477 (codified at 16 U.S.C. § 1822).

61. 16 U.S.C. § 1822 (1988). This provision has been used twice and is now

62. Pub. L. No. 100-478, tit. II, 102 Stat. 2315 (codified at 16 U.S.C. §§ 4201-4245).

63. 16 U.S.C. § 4242 (1988). No action has been taken under this provision.

64. 16 U.S.C. § 1371(a)(2)(D) (1988). There have been several Pelly certifications under this provision during the Bush and Clinton administrations. None, however, have resulted in the imposition of trade sanctions.

65. 16 U.S.C. § 1822 note (Supp. 1993). No action has been taken under this provision.

66. 16 U.S.C. § 1826(e)(6)(f) (Supp. 1993). This provision has been used twice.

67. 16 U.S.C. § 1826a(b)(1) (Supp. 1993).

and sport fishing equipment.[68] If the Secretary of Commerce determines that such sanctions are not sufficient to cause the nation to terminate such driftnet fishing or determines that the foreign nation has retaliated against the United States, then that determination is deemed a Pelly certification.[69]

C. PELLY EPISODES

This section provides a short case history of all Pelly episodes relating to fishery or wildlife agreements. This section includes all certifications except for the numerous "deemed Pelly" certifications for dolphin-tuna embargoes required by the MMPA. These certifications cover eight different countries from 1974 to the present. Each episode is rated as follows: successful, partly successful, or unsuccessful. If the episode is successful, the Pelly threat led to a significant concurrent change in the target country's policy in the direction sought by the U.S. Government.[70] Thus, a commitment to greater adherence to international standards by a foreign government would be deemed successful.

1. 1974–W–Japan and Soviet Union

In 1974, the Secretary of Commerce certified Japan and the Soviet Union for exceeding the International Whaling Commission's (IWC) quota for 1973-74 with respect to the minke whale.[71] Both countries had objected to the IWC quota, however, and were therefore not legally bound by it.[72] In announcing that he had decided against imposing sanctions, President Ford explained that both countries had voted for the 1974-75 quotas which incorporated conservation improvements.[73] He also explained that imposing sanctions against Japan would result in higher prices for American consumers.[74] These episodes are rated as successful because the two countries agreed to the IWC quota for the next year.[75]

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68. 16 U.S.C. § 1826a(b)(3) (Supp. 1993).

69. 16 U.S.C. § 1826a(b)(4) (Supp. 1993). No action has been taken under this provision.

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

71. GERALD R. FORD, PUB. PAPERS 47 (1975).

72. *Id.* at 48.

73. *Id.*

74. *Id.* at 49.

75. H.R. Rep. No. 1029, 95th Cong., 2d Sess. 9 (1978); *see* Lyster, *supra* note

2. 1978–W–Chile, Peru, and South Korea

In 1978, the Secretary of Commerce certified Chile, Peru, and South Korea for violating IWC quotas.[76] None of the three countries were members of the IWC.[77] As a result of negotiations with the Carter administration, all three countries agreed to join the IWC.[78] President Carter, therefore, decided not to impose trade sanctions.[79] These episodes are rated as successful because the countries joined the IWC.

3. 1985–W–Soviet Union

In 1985, the Secretary of Commerce certified the Soviet Union for violating the IWC's whale quota for the 1984-85 season.[80] The Soviet Union had objected to the IWC quota.[81] Nevertheless, the certification stated that the Soviet actions were "inconsistent with this international conservation standard."[82] President Reagan declined to impose trade sanctions against the Soviet Union.[83] His decision noted no remedial steps by the Soviets, but explained that a sanction would "have a negligible effect" as Soviet exports were marketable elsewhere.[84] It should be noted that the Soviet Union was also certified under the Packwood-Magnuson Amendment under which the Soviet fishing allocation in the United States exclusive economic zone had been cut in half.[85] Thus, contemporaneous countermeasures were already in place. This episode is rated as unsuccessful because the Pelly threat did not affect Soviet behavior.

58, at 35 (noting that the president's expectation that Japan and the Soviet Union would abide by future quotas was fulfilled).

76. JIMMY CARTER, PUB. PAPERS 265-66 (1979).

77. *See id.* at 266 (noting that the three countries are becoming members of the IWC).

78. *Id.* at 267.

79. *Id.* at 268.

80. RONALD REAGAN, PUB. PAPERS 704 (1985). The Soviet Union was also certified under the Packwood Magnuson amendment for whaling operations. LYSTER, *supra* note 58, at 35.

81. RONALD REAGAN, PUB. PAPERS 704 (1985).

82. *Id.*

83. *Id.* at 705.

84. *Id.* at 704-05.

85. *Id.* at 704.

4. 1986–W–Norway

In 1986, the Secretary of Commerce certified Norway for violating the IWC moratorium on commercial whaling.[86] Norway had objected to the zero quotas and was therefore not bound by them.[87] Less than a month after the Pelly certification, Norway announced that it would suspend commercial whaling after the 1987 season and would reduce its catch for that year.[88] President Reagan then decided not to impose sanctions.[89] This episode is rated as successful because Norway agreed to suspend commercial whaling after that season.

5. 1988–W–Japan

In 1988, the Secretary of Commerce certified Japan for conducting "research" whaling in violation of an IWC resolution.[90] Finding no evidence that Japan was bringing its whale hunting program into conformance with the IWC, President Reagan decided to deny fishing privileges to Japan in the United States exclusive economic zone under Packwood-Magnuson.[91] No Pelly sanctions, however, were imposed.[92] This episode is rated as unsuccessful because Pelly did not affect Japan's behavior.

6. 1989–DN–Taiwan

In 1989, the Secretary of Commerce certified Taiwan for failing to enter into the cooperative scientific monitoring and enforcement agreement called for in the U.S. Driftnet legislation.[93] Following certification, Taiwan entered into an agreement.[94] President Bush, therefore, did

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86. RONALD REAGAN, PUB. PAPERS 1051 (1968).

87. *Id.*

88. *Id.*

89. *Id.*

90. RONALD REAGAN, PUB. PAPERS 704 424-25 (1988). The whaling, however, apparently did not violate the Convention. Japan was also certified under Packwood Magnuson for whaling operations.

91. *Id.* at 425 (1988).

92. *Id.*

93. GEORGE BUSH, PUB. PAPERS 1112 (1989). Although Taiwan and Korea were included in the same certification and presidential decision, the two episodes are separated here because the outcomes are different. *Id.* Compare this to the 1974 and 1978 certifications where the outcomes were the same.

94. *Id.*

not impose sanctions.[95] This episode is rated as successful because the United States and Taiwan reached an agreement.[96]

7. 1989–DN–South Korea

In 1989, the Secretary of Commerce certified South Korea for failing to enter into the cooperative scientific monitoring and enforcement agreement called for in the U.S. Driftnet legislation.[97] Although Korea had not yet concluded an agreement, President Bush decided not to impose sanctions at that time.[98] President Bush did, however, intimate that he might impose trade sanctions at a later date if "significant movement" was not made.[99] Later that year, Korea concluded an agreement.[100] This episode is rated as partly successful. The Pelly threat was unsuccessful within the sixty-day period between certification and the presidential decision; but a rating of unsuccessful would seem too harsh because the U.S. goal was later attained. It is unclear, however, how much one can credit the latent threat of Pelly certification with success because the United States may have used other diplomatic leverage.

8. 1990–W–Norway

In 1990, the Secretary of Commerce certified Norway for taking minke whales in violation of IWC research criteria.[101] In announcing that he would not impose sanctions, President Bush stated that Norway was making progress in its "program and presentation" and noted current efforts to improve U.S.-Norwegian scientific consultations."[102] This episode is rated as unsuccessful because Pelly did not affect Norway's whale-hunting behavior.

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95. *See id.* (stating that no action is being taken).

96. *Jane Kathryn Jenkins, International Regulation of Driftnet Fishing: The Role of Environmental Activism and Leverage Diplomacy*, 4 IND. INT'L & COMP. L. REV. 197, 212-18 (1993).

97. *Id.* A president retains the power to impose sanctions at a later date when a final negative decision is not made.

98. GEORGE BUSH, PUB. PAPERS 1112 (1989).

99. *Id.* Bush did not explicitly threaten sanctions. Rather he said he would "be prepared to exercise my substantial authorities under the Pelly Amendment." *Id.*

100. *Id.* at 1214.

101. GEORGE BUSH, PUB. PAPERS 1811 (1990).

102. GEORGE BUSH, PUB. PAPERS 1811-12 (1990).

9. 1991–E–Japan

In 1991, the Secretary of the Interior and Secretary of Commerce certified Japan for engaging in trade in hawksbill and olive ridley sea turtles, both of which were listed in CITES Appendix I.[103] Japan had reserved on these turtles when it joined CITES in 1981 and, therefore, its action did not violate the treaty.[104] After the Bush administration announced a list of products upon which it might impose sanctions, Japan agreed to limit its imports of both turtles in 1991 and to end all trade by the end of 1992.[105] President Bush therefore decided not to impose sanctions.[106] This episode is rated as successful because Japan made a commitment to end its turtle trade.

10. 1991–DN–South Korea

In 1991, the Secretary of Commerce certified South Korea for violating the terms of its driftnet agreement with the United States.[107] Following certification, Korea recalled to port those national vessels that were fishing in contradiction to the agreement.[108] As a result, President Bush decided not to impose sanctions.[109] This episode is rated as successful because Korea took immediate action against its nationals.[110]

11. 1991–DN–Taiwan

In 1991, the Secretary of Commerce certified Taiwan for violating the terms of its driftnet agreement with the United States.[111] Following certification, Taiwan did not recall its vessels, but stated in a letter to

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103. GEORGE BUSH, PUB. PAPERS 521 (1991); Keith Schneider, *U.S. Moves to Punish Japan for Trade in Turtles*, N.Y. TIMES, Mar. 21, 1991, at A12.

104. *See id.* (noting that Japan reserved on hawksbill and olive ridley sea turtles and thus continued to trade in them).

105. David E. Sanger, *Japan, Backing Down, Plans Ban on Rare Turtle Import*, N.Y. TIMES, June 20, 1991, at D6.

106. GEORGE BUSH, PUB. PAPERS 521 (1991).

107. *Id.* at 1307. Although Korea and Taiwan were included in the same certification and Presidential decision, the two episodes are separated here because the outcomes were different. *Id.*

108. *Id.*

109. *Id.*

110. *See id.* (stating that besides recalling its vessels, the government imposed penalties on the owners and masters of 14 vessels that were in violation).

111. *Id.*

the United States that it would end driftnet fishing by June 30, 1992.[112] As a result, President Bush decided not to impose sanctions.[113] This episode is rated as partially successful. While Taiwan did not take immediate steps to abide by its agreement with the United States, it did agree to abide by the United Nations Driftnet Resolution in the future.

12. 1992–W–Norway

In 1992, the Secretary of Commerce certified Norway for killing whales for "research" purposes in a manner inconsistent with IWC criteria.[114] In issuing his decision, President Bush noted that he was "greatly concerned" that Norway had announced that it would resume commercial whaling.[115] Nevertheless, he declined to impose sanctions.[116] This episode is rated as unsuccessful because Pelly did not affect Norway's behavior.

13. 1993–W–Norway

In August 1993, the Secretary of Commerce certified Norway for violating the IWC zero catch limit on minke whales by killing 157 whales.[117] Norway argued that the minke whale was not endangered.[118] The IWC, however, included this whale in its zero catch limit.[119] Moreover, the minke whale is on CITES Appendix I.[120] Norway

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112. *Id.*

113. *Id.*

114. GEORGE BUSH, PUB. PAPERS 2213 (1992).

115. *Id.* at 2214.

116. *Id.*

117. Clay Erik Hawes, *Noregian Whaling and the Pelly Amendment: A Misguided Attempt at Conservation*, MINN. J. GLOBAL TRADE, Spring 1994, at 97; Cliff M. Stein, *Whales Swim for Their Lives as Captain Ahab Returns in a Norwegian Uniform: An Analysis of Norway's Decision to Resume Commercial Whaling*, TEMP. INT'L & COMP. L. J. Spring 1994 at 5; Commerce Department Certifies Norway for Commercial Whaling Resumption, Press Release, Aug. 5, 1993; INSIDE U.S. TRADE, Nov. 10, 1993, at 1912. Norway also killed 136 whales for "research" purposes. Abuses of research whaling was the subject of the 1992 Pelly certification. The 1993 certification covered only commercial whaling, not research whaling.

118. *See Brown Raises Threat of Sanctions Against Norway in Whaling Dispute*, INSIDE U.S. TRADE, Aug. 13, 1993, at 8.

119. International Whaling Commission, Schedule 10e.

120. Minke whales caught off the coast of west Greenland are on Appendix II.

also argued that it was not legally bound by the zero catch limit since it had entered a reservation under IWC procedures.

In October 1993, President Clinton stated that although "Norway's action is serious enough to justify sanctions," he would nevertheless not impose them.[121] This episode is rated as unsuccessful because Pelly did not affect Norway's behavior. According to press accounts, Norway's role in the Middle East peace process influenced the administration's decision against the imposition of trade sanctions.[122] Norway has announced that it will continue whale hunting in 1994.[123]

14. 1993–E–China and Taiwan

In November 1992, two environmental groups petitioned the Secretary of the Interior to invoke the Pelly Amendment against Taiwan, China, South Korea and the Republic of Yemen for continuing to engage in the trading of rhinoceros horns.[124] Following discussions with the United States, both Korea and Yemen agreed to accede to CITES and to close down their domestic rhino trade.[125]

In September 1993, the Standing Committee of CITES adopted a decision stating that:

> measures taken by the People's Republic of China and the competent authorities in Taipei are not adequate to sufficiently control illegal trade in rhinoceros horn and tiger parts, including failure to comply with measures outlined in Resolution Conf. 6.10. Parties should consider implementing stricter domestic measures up to and including prohibition in trade and wildlife species now.[126]

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121. Message to the Congress on Whaling Activities in Norway, WEEKLY COMP. PRES. DOC. 2000, 2001 (Oct. 4, 1993). President Clinton ordered that a list of potential trade sanctions in seafood products be drawn up. *Id.*

122. *See* Hugh Carnegy, *Norway Seeks US go-ahead for Whaling*, FIN. TIMES, Oct. 6, 1993, at 6 (stating that Norway will try to persuade the United States at the IWC meeting in May 1994 to support a resumption of commercial whaling); *see Is This Really a Good Time to Punish Norway?*, WASH. TIMES, Sept. 23, 1993, at A22 (urging President Clinton to take into account Norway's behind the scenes assistance to Israeli and Palestinian negotiators).

123. *Norway will Permit Limited Whale Hunt*, J. COM. June 13, 1994 at 5A.

124. *Administration Moves to Halt International Trade in Tiger and Rhino Parts*, DEPARTMENT OF THE INTERIOR NEWS RELEASE, June 9, 1993.

125. *See id.* (describing that as a result of the efforts of both Korea and Yemen to terminate effectively their rhino trading, the Interior Department is withholding Pelly Amendment certification).

126. *Rhinoceros and Tiger: Time For a Decision*, CITES PRESS RELEASE, Sept. 9,

An earlier resolution in 1987 urged all parties to ban completely all sales and trade, domestically and internationally, of rhinoceros parts and to destroy all government stocks of rhinoceros horns.[127] It also recommended that the parties "use all appropriate means, including economic, political and diplomatic, to exert pressure on countries continuing to allow trade in rhinoceros horn . . . "[128]

Concurrently with the CITES meeting, the Secretary of the Interior certified China and Taiwan for trade in both rhino horns and tiger bones.[129] Although China agreed to outlaw trade in rhinos, the United States Government had pressed for China to commit to the destruction of existing stockpiles, as recommended by CITES Conference Resolution 6.10.[130] Although Taiwan banned domestic and international trade of both species in 1985, the U.S. Fish and Wildlife Service found that Taiwan's enforcement efforts were "not sufficiently effective" and that its penalties were "weak."[131] The certification stated that both countries fell short of international conservation standards.[132]

In November 1993, President Clinton decided against imposing trade sanctions.[133] Although he noted that the rhino and tiger "population will likely be extinct in the next two to five years if the trade in their parts and products is not eliminated," he still concluded that both countries had, since the Pelly certification, "undertaken some positive legislative and administrative steps."[134] The President expressed his hope that China and Taiwan could "demonstrate measurable, verifiable, and

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1993.

127. *Trade in Rhinoceros Products*, CITES RES. OF THE CONF. OF THE PARTIES 6.10 (1987).

128. *Id.*

129. Letter from the Secretary of the Interior to the President Sept. 7, 1993.

130. Conference on International Trade in Endangered Species 1973, ¶ 6.10, 993 U.N.T.S. 243 [hereinafter CITES]; *see* Jeremy Mark, *China and Taiwan Face U.S. Sanctions for Trafficking in Endangered Species*, WALL ST. J., June 11, 1993, at A3 (describing a warning issued by the United States that it may consider trade sanctions against Taiwan and China unless the illegal trade in rhino horns and tiger body parts ceases).

131. U.S. Department of Interior, Press Release, Sept. 7, 1993.

132. CITES Article VIII: 1 requires that parties "take appropriate measures to enforce the provisions of the present Convention . . . . " This includes measures to penalize trade in, or possession of, specimens.

133. President's Message to the Congress on Rhinoceros and Tiger Trade by China and Taiwan, 29 WEEKLY COMP. PRES. DOC. 2300 (Nov. 8, 1993) [hereinafter President's Message].

134. *Id.*

substantial progress by March 1994." Otherwise, he said, "import prohibitions will be necessary, as recommended by the CITES Standing Committee."[135]

In March 1994, the CITES Standing Committee found that China had met the minimum requirements put forth in the September decision, but stated that further action by China was needed.[136] Regarding Taiwan, the Committee found that the minimum requirements had not been met.[137] In April 1994, President Clinton announced that because of Taiwan's lack of progress, he was ordering a ban on certain wildlife specimens and products from Taiwan.[138] This involves about twenty million dollars in annual trade.[139] As of August 1, 1994 this ban has not yet been imposed.

Since this episode continues to evolve, it is not easy to rate. Both countries have taken some actions, but the pace of reform may be too slow to save the rhinos and tigers.[140] As a provisional rating, this analyst will score Taiwan as unsuccessful and China as partly successful. Some wildlife experts deprecate this distinction, saying that the Chinese are among the worst offenders.[141] One hypothesis for why President did not impose sanctions on both countries is that he was facing an impending, controversial decision as to whether to reextend most-favored-nation privileges to China. If he imposed Pelly sanctions, that could make it harder to renew China's most-favored-nation status. Crit-

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135. *Id.*

136. CITES Standing Committee on Trade in Rhinoceros Horn and Tiger Specimens, March 25, 1994, ¶ 7 at 660. The matter will be reviewed at the meeting of the Conference of the Parties in November 1994.

137. *Id.* ¶ 8.

138. 59 FED. REG. 22043 (1994).

139. *See* Tom Kenworthy, President Imposes Sanctions on Taiwan, WASH. POST, April 12, 1994, at C1. Taiwan responded that "dialogue and cooperation, rather than sanctions, are the best means of achieving progress." *Id.*

140. According to Ginette Hemley of the orld Wildlife Fund, "Literally every day counts." *Clinton Threatens to Impose Sanctions on China, Taiwan for Tiger, Rhino Trade,* DAILY REP. EXEC. (BNA), § A (Nov. 9, 1993).

141. *See* James Sheehan, *Most Favored Fauna Treatment,* WASH. TIMES, May 31, 1994, at A12 (noting that environmentalists claim that China is a more egregious violator of CITES and requires far more animal-sensitivity training than Taiwan); *see also* Thomas L. Friedman, *U.S. Puts Sanctions on Taiwan,* N.Y. TIMES, April 12, 1994, at D1. There was some support in Congress for a ban on both countries. *Congress Urges Ban on Wildlife Imports from Taiwan, China,* INSIDE U.S. TRADE, April 1, 1994, at S-6.

ics would say that the Clinton Administration cared more about tiger rights than about human rights.

D. ASSESSMENT OF THE PELLY AMENDMENT

Because no Pelly penalties have ever been imposed, this section only evaluates the effectiveness of threatened trade countermeasures, that is, the extent to which Pelly led to policy reform or commitments to reform. It should be noted that a number of countries took action following a threat of Pelly certification, and thus were never certified.[142] These "successes" are not tallied here. It should also be noted that there are only a handful of data points, based on admittedly subjective judgments. Accordingly, the conclusions drawn here should be viewed as suggestive only.

Utilization of the Pelly Amendment increased in recent years. Between 1971 and 1978, the first eight years of the program, there were five episodes.[143] In the next eight years, there were two episodes. There were seventeen episodes over the past seven years. In these eighteen episodes, fifty percent were successful, seventeen percent were partly successful, and thirty-three percent were unsuccessful. The average success rate was fifty-eight percent.[144]

The second certification of a country for a particular issue has almost always been less successful than the initial one.[145] For example, the Soviet whale certification of 1974 was successful, but the 1985 certification was not. The Japan whale certification of 1974 was successful, but the 1988 certification was not. The 1986 Norway whale certification was successful, but the 1990, 1992, and 1993 certifications were not. The Bush administration's inaction on whale "research" in 1992 may have been an important factor in Norway's decision to follow through with its announcement that it would commence whaling.[146]

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142. *Japan Whaling Association v. American Cetacean Soc'y*, 478 U.S. 221, 229 (1986); *see* Martin Jr. and Brennan, *supra* note 38, at 299-301 (describing a 1985 Japanese whaling case where Japan agreed to withdraw its objection to the IWC moratorium if the United States did not complete its certification of Japan).

143. Certifications with three countries are counted as three episodes.

144. Successful is scored as 1.0, partly successful as 0.5, and unsuccessful as 0.

145. Nevertheless, one must note that there are not many data points. There are also many independent variables that could be more important than a repeat certification variable.

146. *See* Anthony D. Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT. L. & POL'Y 21, 48 n.192 (1991) (describing the number of whales killed in the name of research).

This pattern of declining effectiveness suggests that the "shock" of certification wears off quickly. One also might expect the Pelly Amendment to be less effective over time given the absence of any imposition of sanctions. Whether the Pelly reforms of 1992, expanding potential sanctions to all products, will increase the success rate remains unclear. So far it has not; at least three of the certifications under the new law have failed. The Clinton administration's decision to ban only wildlife imports from Taiwan and to draw up a list of seafood products for possible future sanctions against Norway is noteworthy because the administration appears to be avoiding any use of the expanded powers.[147]

The Pelly Amendment's overall fifty-eight percent success rate is impressive, particularly in the absence of any actual sanction. This success rate is also noteworthy when compared to the effectiveness of other economic sanctions. For example, Hufbauer, Schott, and Elliott found the overall success rate for foreign policy sanctions since World War I to be thirty-four percent.[148] For foreign policy sanctions imposed by the United States since 1973, coincident with the period of the Pelly Amendment, the success rate has been only seventeen percent.[149] The threatened use of Pelly sanctions also compares favorably to the threatened use of Section 301 trade penalties.[150] Data compiled by Bayard and Elliott show that since 1975, the overall success rate for Section 301 has been thirty-seven percent.[151]

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147. Message to the Congress on Whaling Activities of Norway, WEEKLY COMP. PRES. DOC. 2000-01 (Oct. 11, 1993).

148. 1 GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 108 (2nd ed. 1990).

149. *See id.*, at 108 (describing success with eight of forty-six foreign policy sanctions imposed by the United States since 1973).

150. Section 301 of the Trade Act of 1974 is designed to respond to foreign trade practices that are unjustifiable, discriminatory, or unreasonable. So far, it is mainly used to remove foreign barriers to U.S. exports of goods or services. Some commentators see similarities between the "aggressive unilateralism" of Section 301 and the use of unilateral environmental trade measures. There is some similarity, but far larger differences. Section 301 aims to change foreign commercial practices to help American exporters. Environmental trade measures do not have commercial goals and may hurt U.S. exports. Their purpose is to change foreign environmental practices to safeguard the environment.

151. The authors calculate a success rate of 52% using a different methodology that counts a partial success as a total success. The 37% figure is an adjustment to conform to weighted methodology used here.

Several objections are commonly raised against "pellying,"[152] in addition to the potential GATT violation. The principal objection is that Pelly is unilateral. Indeed, Pelly can be unilateral in three ways: setting the standard countries should apply; judging whether countries have met that standard; and determining what penalty should be impose. Clearly, the driftnet deemed Pellys are unilateral in all three ways because they had no direct connection to international agreements.[153] The situation is not as clear with regard to the other Pelly cases because they were linked to the standards of either the IWC or CITES. Because the certification is based on a U.S. judgment as to whether the foreign action diminishes the effectiveness of the treaty, even those Pellys could be viewed as unilateral in all three ways.

Critics claim that the "diminish the effectiveness" standard is too broad. It is one thing to pelly a country for violating a treaty, and another thing to pelly it for actions that may undermine the treaty but are, nonetheless, legal under the treaty. It can be argued that such non-violation pellys may reduce the incentive for joining a treaty. The same issue arose in 1919 during the drafting of the Treaty of Versailles. An early British draft for the International Labour Organization recommended trade sanctions for violating a labor treaty, but recommended against sanctions for refusing to adhere to a treaty on the grounds that "it would drive all the smaller and backward States to combine in order to prevent the conclusion of any Convention which, on a basis of equal voting, they would probably be able to do successfully."[154]

This discussion of Pelly points to several possibilities for reform of the legislation. First, Congress should make a distinction in Pelly between countries that fail to join a treaty, join but violate, and join and adhere, but nonetheless "diminish the effectiveness." Even if one wants to maintain countermeasures for all three types, it is useful, nevertheless, to recognize the distinctions. Countries with different records should not be lumped together. Some observers might view distinguishing between

152. To certify a country under the Pelly Amendment.

153. The 1990 Driftnet "deemed Pelly" mandates certification for fishing in a manner that diminishes the effectiveness of any international governing large-scale driftnet fishing. Yet, the 1991 certifications were for violating the bilateral monitoring agreement with the United States. (The 1989 certifications were for not signing bilateral agreements).

154. *Memorandum on the Machinery and Procedure for the International Regulation of Industrial Conditions, Document 25, in* 2 THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION, 125 (J. Shotwell ed., 1934).

countries that fail to join a treaty as the least objectionable of the three possibilities, while others might view it as the most objectionable.

Second, Pelly could have closer ties to international standard-setting and international decision-making about violations. Currently, the judgment about whether foreign actions impede the execution of a treaty is up to the secretaries of commerce and interior. Instead, one could look to an IWC or CITES conference to make such determinations. This is already happening to some extent under CITES, with recommendations to implement "stricter domestic measures"[155] and to "exert pressure" on particular countries.[156] Third, Congress might reduce the discretion of the president not to impose trade sanctions. It is interesting to compare the Pelly Amendment, where the president has complete discretion, with the MMPA, where the Secretary of Commerce was required by the law and by the federal court to impose a tuna embargo on countries like Mexico. Although there is a broad range of views as to the appropriateness of actions and inactions under both of the programs, it seems reasonable that the executive branch ought to have greater discretion with a sanction than with an import prohibition. Nevertheless, the continued unwillingness of presidents to impose Pelly sanctions combined with an apparent decline in the value of the Pelly threat will strengthen the position of those in the Congress who want to reduce the president's discretion.

Fourth, the United States should attempt to get other countries to impose similar actions by joint agreement. At this time, no other country has a Pelly-type amendment. The United States, therefore, would be less vulnerable to charges of arbitrary action if environmentally-necessary sanctions were coordinated by a group of countries.

III. GATT IMPLICATIONS OF THE PELLY AMENDMENT

Part III considers whether the imposition of a Pelly sanction violates the GATT. This section first addresses the relevant GATT rules and then considers implementation issues. Because of the vagueness of the GATT provisions and the lack of authoritative rulings, it is impossible to provide a definitive answer to the question of Pelly's GATT consistency. Whether or not it is consistent depends largely on the disposition of the controversial GATT Panel decision in the dolphin-tuna case of

155. CITES, *supra* note 130, art. XIV:1(a).

156. Of course, if Pelly action were made contingent on such determinations, it could become much more difficult for CITES to issue such determinations.

1991 (Dolphin I Report).[157] The Dolphin I Report has not been adopted by the GATT Council.

A. GATT RULES

Because the Pelly Amendment is either a trade sanction, or countermeasure,[158] it runs afoul of a basic GATT rule prohibiting trade discrimination—the most-favored-nation (MFN) principle in Article I.[159] GATT applies its non-discrimination rule in a discriminatory fashion because it permits discrimination against non-parties to the GATT.[160] For example, because China and Taiwan are not GATT members, parties have no obligations under GATT not to discriminate against them. Neither country could lodge a complaint in the GATT about the use of the Pelly Amendment.

If the trade sanction were an import ban, it would also violate GATT Article XI—the general elimination of quantitative restrictions. Article XI forbids prohibitions or restrictions other than certain duties and taxes. Article XI provides for three exceptions, but none of them are applicable to typical environmental trade measures.[161] Because a trade measure under Pelly applies exclusively to imported goods, such a sanction could not qualify as an internal measure under GATT Article III. Addi-

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157. *Gatt Dispute Settlement Panel Rep.: United States—Restrictions on Imports of Tuna,* GATT, Basic Instruments and Selected Documents, 39th Supp. 107 (1991), *reproduced in* 30 I.L.M. 1594 (1991) [hereinafter Dolphin I Report].

158. *See* ELISABETH ZOLLER, ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION 92-93 (1985) (suggesting that the Pelly amendment is not a true sanction because it aims merely to exercise enough pressure to prevent a foreign state from jeopardizing specific collective interests).

159. GATT, art. I. Discrimination means treating a specific product from one country unfavorably compared to a like product from another. *Id.* There is no general GATT rule against trade sanctions. It is interesting to note that the Charter of the International Trade Organization contained a commitment that members "will not have recourse to unilateral economic measures of any kind contrary to the provisions of this charter." *Charter for the International Trade Org.*, U.N. Conference on Trade and Employment, U.N. ICITO/1/4 (1948), at Art. 92:1.

160. Note further that even though the GATT permits discrimination against non-parties and the Montreal Protocol requires discrimination against non-parties, GATT rules could prohibit carrying out this Montreal Protocol obligation against GATT parties.

161. *See* Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, GEO. INT'L ENVTL. L. REV. 477, 513-15 (1991) (discussing agricultural and fisheries exception); *see also* GATT, art. III (requiring national treatment for imported goods).

tionally, because no treaty requires Pelly sanctions,[162] there is no way that U.S. action under Pelly could supersede U.S. obligations to other GATT members as a more recent treaty. The only way that a Pelly sanction could be GATT-legal, therefore, is through one of the general exceptions in GATT Article XX.

B. ARTICLE XX

Article XX cannot be invoked by a country merely because an imported product fails to meet an environmental standard, whether domestic or international.[163] It can be invoked only if commerce in, production of, or consumption of the traded good leads to a situation specifically covered by one of the listed exceptions. For example, the Pelly certification of China and Taiwan states that the government policies of these two countries "fall short of the international conservation standards of CITES."[164] This finding alone does not qualify a trade measure under Article XX(b) or (g), however, because neither of these exceptions hinge on the adherence of an import to an international standard. Unlike the GATT, other international trade conventions, such as the International Convention of 1923 on the Simplification of Customs Formalities, explicitly yield to existing or future international agreements intended to preserve the health of human beings, animals, or plants.[165]

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162. The declarations noted above by the CITES Standing Committee and Conference of the Parties are formulated as recommendations.

163. GATT, art. XX. Article XX provides:

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

Id.

164. *See* Letter from Bruce Babbitt, Secretary of the Interior, (Sept. 7, 1993) (on file with *The American University Journal of International Law & Policy*) (certifying that the People's Republic of China and Taiwan are engaged in trade in rhinoceros and tiger parts).

165. International Convention Relating to the Simplification of Customs Formalities,

Article XX is not administered on the honor system.[166] It is up to the GATT Contracting Parties to determine whether an Article XX exception is available for specific environmental trade measures.[167] Although Article XX does not state this explicitly, the intent of the drafters is evident by comparing Article XX to the national security provisions of Article XXI. Under Article XXI, a GATT member may use any trade restriction it considers necessary.[168]

Article XX does not state which party has the burden of proof when a dispute arises. In recent cases, GATT Panels have assigned the burden to countries whose trade measures are the subject of the complaint.[169] The provisions in the headnote can be viewed as gateway requirements to gain access to the exceptions in the Article XX subsections.

Professor John Jackson has described the provisions in the headnote as a "softer" form of GATT's rules regarding non-discrimination and national treatment.[170] The "arbitrary or unjustifiable" proviso is softer in two ways. First, non-arbitrary or justifiable discrimination is permitted.[171] Second, there is no "like product" requirement in Article XX. Rather than considering whether like products from different countries have equal opportunities in the domestic market, Article XX examines

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30 L.N.T.S. 373, 409 (1923) (Protocol).

166. In a 1947 analysis, however, the U.S. Tariff Commission suggested that the headnote requirements in the General Exceptions were not intended to be reviewable by the International Trade Organization. *See* U.S. TARIFF COMMISSION, ANALYSIS GENEVA DRAFT OF CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 61 (1947) ("There is, however, no provision for any determination by the Organization as to whether measures taken are unjustifiably discriminatory or constitute a disguised restriction on trade").

167. *See GATT Dispute Settlement Panel Report: United States—Imports on Certain Automotive Spring Assemblies*, *in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 30th Supp. 107, at ¶ 56 (1984) (explaining that the application of the measure rather than the measure itself should be examined).

168. GATT, art. XXI(b).

169. *See United States-Section 337 of the Tariff Act of 1930*, *in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 36th Supp. 345, at ¶ 5.27 (1990) (noting that the party seeking justification bears the burden of demonstrating that measures are necessary).

170. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 207 (1989).

171. The meaning of "unjustifiable" in the context of Article XX has not been sufficiently explored. For instance, one may question whether it is justifiable for the United States to ban tuna from countries where dolphin-unsafe harvesting methods are used, but to allow tuna imports from countries where dolphins are routinely caught and eaten. *See* Felipe Charat, *Mexico: No Threat to Dolphins*, 5 J. Comm., Nov. 5, 1991, at 8A.

whether countries "where the same conditions prevail" are treated in an arbitrary or unjust fashion. If so, that violates the headnote.

In countries where the same conditions do not prevail, arbitrary or unjust discrimination is not contrary to the headnote. Article XX was based on a very similar provision in the Trade Convention of 1927.[172] During its drafting, the League of Nations Economic Committee stated that this provision "in no way limits the right of States to take measures against a particular country where conditions are not the same . . . ."[173]

Although the meaning of "same conditions" is not clear from the drafting history, one can infer its meaning from the agricultural disputes that were common at that time.[174] For example, one condition might be whether an agricultural disease is endemic to a country. If Country Y had cattle trichinosis and Country Z did not, it would not be arbitrary for the United States to ban meat from Y but not from Z. Another possible Article XX condition, according to the GATT Secretariat, might be whether a country has ratified an international environmental treaty.[175] Yet another Article XX condition, according to the European Commission, might be whether a country complies with an international treaty.[176]

Under Article XX, the conditions considered in the headnote must be pertinent to the specific exception being implicated. In other words, under Article XX(b), the conditions considered in a trade measure have to relate to the health of humans, animals, or plants. For example, a government might ban CFC imports from countries that had not ratified the Montreal Protocol. A government could not, however, use Article

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172. International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, art. 4, 97 L.N.T.S. 393.

173. *See* League of Nations, "Commentary and Preliminary Draft International Agreement Drawn Up by the Economic Committee of the League of Nations To Serve as a Basis for an International Diplomatic Conference," 1927, League Doc. C.I.A.P. 1, at 27.

174. U.S. Tariff Commission, DICTIONARY OF TARIFF INFORMATION 603-04 (1924); LAWRENCE W. TOWLE, INTERNATIONAL TRADE AND COMMERCIAL POLICY 362-64 (1947).

175. *GATT, Trade and Environment, Factual Note by the Secretariat*, at 32 GATT Doc. L/6896, (Aug. 1991).

176. Specifically, whether or not a country applies "equivalent environmental guarantees" to those in the treaty. *See EC Proposal on Trade and Environment*, INSIDE U.S. TRADE, Nov. 27, 1992, at S-4.

XX(b) to ban CFC imports from countries that had not ratified the Convention Establishing the World Intellectual Property Organization.[177]

The "disguised restriction" prerequisite looks at the intent of the trade provision. It applies whether or not the same conditions prevail. This prerequisite is important because it enables the GATT to distinguish between legitimate environmental trade measures, which are GATT-legal, and contrived or veiled measures, which could be GATT-illegal. Because every trade measure—a tariff, tax or regulation—is qualified in some way, GATT can look at any questionable limitation to ascertain its relevance to health or conservation. Despite this broad authority, this anti-protectionism rule has been virtually ignored by the GATT.[178]

C. ARTICLE XX(B)

Commentators have suggested that Article XX(b) was meant to cover only sanitary or quarantine laws.[179] Former Senator Lloyd Bentsen once declared that "Article XX really refers to trying to protect against contaminated meat, against rabid dogs, and against infected plant life."[180] This argument, however, is inconsistent with GATT negotiating history because the Charter of the International Trade Organization (ITO) specifically took note of both the "operation of sanitary laws" and "regulations for the protection of human, animal or plant life or health."[181]

At least one commentator has suggested that Article XX(b) is too limited to cover many important environmental trade measures.[182] Arti-

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177. Convention Establishing the World Intellectual Property Organization, Apr. 26, 1970, 21 U.S.T. 1749.

178. *See, e.g., GATT Dispute Settlement Panel Report: Thailand—Restrictions on Importation of and International Taxes on Cigarettes, in* BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 37TH SUPP. 200, at ¶¶ 77-81 (GATT Secretariat ed., 1991) [hereinafter Thai Cigarette Report] (finding that the Thai ban on imported cigarettes could not be justified under Article XX(g); but failing to consider whether the cigarette ban was a disguised restriction on trade). Other panels have treated the disguised restriction proviso as merely a transparency requirement.

179. *See* Dolphin I Report, *supra* note 157, at ¶ 4.18, 5.26 (noting that several countries disagree on the appropriate application of GATT's art. XX to the tuna ban).

180. CONG. REC. § 3002 (daily ed. Mar. 22, 1990) (statement of Senator Bentsen); *see* Dolphin I Report, *supra* note 157, at ¶ 4.19 (providing similar views from Japan).

181. *Charter for the International Trade Org.*, U.N. Conference on Trade and Employment, U.N. Doc. ICITO/1/4 (1948), at Art. 41. The GATT was based on the draft commercial policy provisions of the ITO Charter.

182. *See, e.g.*, CAROLINE LONDON, ENVIRONMENT ET GATT, ECO-DECISION 37 (1993).

cle XX(b), however, could reach almost anything which affects the health of a living organism.[183] Although there are some environmental concerns that go beyond life and health, every critical international environmental issue would appear to be incorporated.[184]

It is generally agreed that under Article XX(b), GATT members "may give priority to human health over trade liberalization."[185] For instance, a country might ban the importation of hazardous waste—even though similar waste is produced domestically—and then claim justification under Article XX(b) on the grounds that transporting waste over populated areas is too dangerous. Whether Article XX(b) permits governments to give priority to animal or plant health over trade liberalization is somewhat in dispute.

The traditional view is that Article XX(b) applies equally to all living organisms. It is sometimes argued, however, that an animal has to be endangered to be covered by Article XX(b).[186] The text of the Article XX(b), however, says nothing about endangerment. Further, because Article XX(b) does not require that humans be endangered before a trade-related health measure is imposed, it is unclear why a different requirement pertains to animals.[187]

The term "necessary" in Article XX(b) means necessity in a scientific sense.[188] Despite this, in the Dolphin I case, the GATT Panel announced that so-called "extrajurisdictional" trade measures were not "necessary."[189] The Panel did not, however, define exactly what it

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183. *See* Michael Prieur, *Environmental Regulations and Foreign Trade Aspects*, 3 FLA. INT'L L. J., 85, 85-86 (1987) (discussing the broad scope of Article XX).

184. The Canadian government has stated that Article XX embraces "measures to protect the environment or endangered species." NAFTA WHAT'S IT ALL ABOUT?, EXTERNAL AFFAIRS AND INTERNATIONAL TRADE CANADA 98 (1993). The European Commission has stated that "the public policy objectives in XX(b) and (g) are broad enough to encompass the objectives of environmental protection." *EC Proposal on Trade and Environment*, INSIDE U.S. TRADE, Nov. 27, 1992, at S-4.

185. *See* Thai Cigarette Report, *supra* note 178, at ¶ 73 (noting that Art. XX(b) allowed this preference for any "necessary" measures).

186. *See* Dolphin I Report, *supra* note 157, at ¶¶ 3.37, 3.44, 4.29.

187. Mexico apparently recognized this logical difficulty because it argued in the Dolphin I case that Article XX(b) protected humans, animals and plants "solely as a population . . . and not as separate individuals." Dolphin I Report, *supra* note 157, at ¶ 3.37. But Mexico offered no evidence for this (anti-individual) interpretation which calls into question the GATT consistency of many trade restrictions relating to animal or plant disease.

188. U.N. Doc. E/PC/T/A/PV/30 at 8; U.N. Doc. E/Conf.2/C.3/SR.35 at 7.

189. *See* Dolphin I Report, *supra* note 157, at ¶ 5.27 (noting that panel based its

meant by an "extrajurisdictional" trade measure.[190] One can infer that it is a trade restriction relating to the life or health of organisms outside the country imposing the measure. The lack of a clear definition has led to many uncertainties. For example, it is unclear whether a trade measure aimed at maintaining global bio-diversity would be considered jurisdictional or extrajurisdictional.[191] While the Dolphin I decision was not adopted by the GATT Council, virtually every country except the United States supports it. Nevertheless, the Panel relied upon a distorted reading of GATT's negotiating history.[192]

Article XX provides exceptions for certain kinds of trade restrictions. Although an obvious analytic approach was available, the Dolphin I Panel made no effort to infer the meaning of Article XX(b) and (g) from the types of environmental trade measures in effect at the time the GATT was written.[193] Because numerous extrajurisdictional trade measures were used by many countries,[194] it is quite illogical to suggest

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judgment on inferences from the GATT's negotiating history).

190. Some commentators, such as Ted McDorman, take a very broad view of extraterritoriality to include any law aimed at remedying a situation in another country. From this perspective, any law linking a benefit to behavior of foreign nationals is extraterritorial.

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

192. *See* Eric Christensen, *GATT Sets its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System,* 23 U. MIAMI INTER-AM. L. REV. 569, 583-85 (1991-92) (arguing that the Panel's reliance on the drafting history is misplaced); Stephen J. Porter, *The Tuna Dolphin Controversy: Can the GATT Become Environment-Friendly?*, 5 GEO. INT'L ENVTL. L. REV. 91, 102-04 (1992) (noting the drawbacks of the Panel's interpretation of Article XX); Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy,* 66 TEMP. L. REV., 751, 769 (1993) (noting that the Panel limited its discussion of legislative history to a cursory and selective look at the UNCTE deliberations, without considering the 1927 Convention); Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order,* 23 ENVTL. L. 397, 432-33 (1993) (noting several reasons for criticizing the Panel's decision on the extraterritorial application of Article XX(b)'s health and safety exception).

193. For the Mexican Government's arguments see Dolphin I Report, *supra* note 157, at ¶¶ 3.31, 3.35; *see id.* at ¶ 3.36 (noting that Mexico prohibits the importation of Dolphins).

194. *See* Steve Charnovitz, *A Taxonomy of Environmental Trade Measures* 6 GEO. INT'L ENV. L. REV. 1 (1993) (providing examples of extrajurisdictional environmental

that the GATT's authors meant to preclude their coverage under Article XX. For example, consider the Canada-U.S. treaty of 1937 on the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea.[195] This treaty empowered an international fisheries commission to adopt conservation rules such as limitations on halibut catches and the character of fishing appliances.[196] To implement the treaty,[197] both Canada and the United States enacted laws prohibiting the importation of halibut by vessels of nations not parties to the treaty.[198] Consistent with the principles of national treatment and non-discrimination, both countries also banned the importation of halibut by nationals of either country if caught in violation of the treaty.[199]

The authors of GATT could have chosen to restrict the use of such environmental measures because the purpose of GATT was to discipline trade restrictions. There is no documentary evidence, however, that the GATT's authors sought to restrict such extrajurisdictional laws. Conversely, the evidence shows the opposite—that the GATT's authors intended Article XX to provide an exception for existing and future environmental laws. Interestingly, the U.S. Department of State's analyses of federal laws was inconsistent with the GATT and did not cite any health or environmental measures.[200] Because halibut import bans violated Article XI, they must have been viewed as legal under Article XX.

To assist in determining whether an environmental provision is necessary under Article XX(b), GATT panels have formulated a broad inter-

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trade measures in existence before 1947).

195. 50 Stat. 1351 (1937). This treaty has been superseded by a similar 1953 convention which remains in force. 5 U.S.T.S. 1953.

196. *Id.* at art. III.

197. *See id.* at art. IV (noting that the treaty required parties "to enact and enforce such legislation as may be necessary to make effective the provisions of this Convention . . .").

198. *See* Northern Pacific Halibut Act of 1937, Pub. L. No. 169, § 3(b), 50 Stat. 325 (1937) (noting that any person who transfers or receives halibut caught in Convention waters through the use of any vessel of a nation not a party to the Convention is in violation of the Convention).

199. 1 George VI, ch. 36 §11; Northern Pacific Halibut Act of 1937, Pub. L. No. 169, 50 Stat. 325 §3(b) (1937).

200. *See Trade Agreements Extension Act, 1951: Hearings Before the Senate Comm. on Finance,* 82nd Cong., 1st Sess., 1195-99 (1951) (commenting on the escape clause amendment without mention of health or environmental measures); *see also* U.S. Department of State, *U.S. Laws Inconsistent with the ITO Charter,* (1948) (on file at *The U.S. Department of State's Trade Library*).

pretation of this provision known as the least-GATT-inconsistent requirement. Under this requirement, a defendant government must use the least-GATT-inconsistent alternative it "could reasonably be expected to employ to achieve its' overriding public policy goals."[201] Such an alternative must be "available" to the government.[202]

What is not clear is the range of options a government must consider. For example, it is sometimes suggested that a government substitute a product labeling requirement for an environmental or health-related trade restriction.[203] The GATT Secretariat's report on trade and the environment raises the question of whether the discrimination in the Basel Convention and the Montreal Protocol is actually necessary.[204] Certainly, the armchair theorist will always be able to conceive of less-GATT-inconsistent alternatives that "might" achieve environmental goals—especially if one is not constrained by practicality.

The Dolphin I Panel opined that "international cooperative arrangements" could be a GATT-consistent approach and, therefore, held that the alternative of a national arrangement failed the least-GATT-inconsistent test.[205] The Panel did not, however completely follow its test. It offered no analysis as to whether the United States could "reasonably be expected to employ" such arrangements.[206] Nor did it consider whether such arrangements were "available" to the United States. The Panel ignored the long history of efforts by the United States, since the mid-1970s, to attain such international arrangements.[207] Interestingly, the

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201. *See Thai Cigarette Report, supra* note 178 at ¶ 74 (noting that Thailand had to use the least GATT inconsistent alternative to achieve its principal health objectives which included the following: protecting the public from harmful ingredients in imported cigarettes, and reducing cigarette consumption in Thailand). In addition, any inconsistencies with the GATT must be "unavoidable." *Id.*

202. *Thai Cigarette Report, supra* note 178, at ¶ 74. It is unclear how a panel would determine when an alternative is available. *Id.*

203. Piritta Sorsa, *GATT and Environment: Basic Issues and Some Developing Country Concerns, in* INTERNATIONAL TRADE AND THE ENVIRONMENT 330-31 (Patrick Low ed., World Bank Discussion Papers 159, 1992); *see* GATT Doc. C/M/250, at 9 (providing a suggestion from the representative of New Zealand).

204. GATT, INTERNATIONAL TRADE, Vol. I, at 25 (1990-91).

205. Dolphin I, *supra* note 157, at ¶ 5.28.

206. *See* Dolphin I Report, *supra* note 157, at ¶ 5.28 (noting that the Panel stated that the United States had failed to demonstrate that it had exhausted this option). It is interesting to note that under GATT practice, the panel had a responsibility to "make an objective assessment of the matter before it." BASIC INSTRUMENTS AND SELECTED DOCUMENTS 265/210 at ¶ 16.

207. Ted L. McDorman argues that the Panel did not ignore that point, but con-

idea of comparing the U.S. marine mammal law to a hypothetical international agreement originated with the government of Mexico.[208] This was a bold argument for Mexico to assert. For years Mexico stonewalled U.S. attempts to negotiate an international regime to protect dolphins.

The term "necessary" may soon be interpreted even more narrowly. In the U.S. Alcoholic Beverages case, a GATT panel found that certain state laws could not meet the "necessary" test under Article XX(d) because they were not the "least trade restrictive" enforcement measures available.[209] Article XX(d) is relevant to the environmental debate because its case law was used by a previous GATT panel in interpreting the term "necessary" in Article XX(b).[210] Thus, the GATT may be just one step away from adding a "least trade restrictive" requirement to Article XX(b). The Uruguay Round Agreement includes a trade-restrictiveness requirement for products standards.[211]

Returning to the issue of science, it is unclear when a scientific basis exists for nature protection.[212] Even if everyone accepted the goal that a maximum harvest could be permanently sustained, there may be various opinions on what constitutes a maximum harvest.[213] On the one

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sidered U.S. efforts immaterial because no other country has ever supported the United States in calling for a dolphin protection treaty. Yet the Panel cannot have it both ways. It can base its Article XX(b) decision on whether a country first exhausts the option of attaining an international agreement. The Panel can also base its decision on whether it thinks the measure is necessary or whether it believes that most GATT members think the measure is necessary. The Panel, however, should not shift from one to the other.

208. *See* Dolphin I Report, *supra* note 157, at ¶¶ 3.34, 5.24 (noting Mexico's claim that it had proposed the formation of an international conference to examine the interaction of fisheries and the incidental taking of marine mammals).

209. *Dispute Settlement Report: United States Measures Affecting Alcoholic and Malt Beverages, in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, at ¶¶ 5.41-5.43, 5.52 (June 19, 1992) (discussing the Panel's view that the United States did not demonstrate that the common carrier requirement was the least trade restrictive enforcement measure available to the various states and that less restrictive measures were not sufficient for tax administration purposes).

210. *See* Thai Cigarette Report, *supra* note 178, at ¶ 74 (discussing why under Article XX, the meaning of the term "necessary" under paragraph (d) should be the same as in paragraph (b)).

211. *Agreement on Technical Barriers to Trade*, GATT Doc. MTN/FA II-A1A-6, arts. 2.2 and 2.3 (1993).

212. Thus, the prescient League of Nations report, cited above, is a bit naive in this respect.

213. *See* William K. Stevens, *Biologists Fear Sustainable Yield Is Unsustainable*

hand, because future generations do not participate, there may be a bias in current judgments toward under-protection.[214] On the other hand, both CITES and the IWC require the same super-majorities, two-thirds and three-fourths respectively, to down-list a species from CITES Appendix I to Appendix II or to remove species from a whaling quota schedule. Thus, a species may retain protection longer than "scientifically" justified.

There is no consensus that a sustainable harvest should be the goal. There is an increasing aversion, at least in the United States, to the taking of certain species, such as whales, in any amount. This results, in part, from skepticism that regulators have enough information to know when whales are endangered. It also results, however, from a view that humans should not be predators of whales.[215]

A preference for banning whaling is no less scientific than a preference for the maximum sustainable harvest. Actually neither preference is "scientific." Both are based on certain values as are all public policy choices.[216] Similarly, some commentators have suggested that a desire to save all whales or dolphins is not an "environmental" objective, but rather a moral preference or a value judgment.[217] Certainly, one can define "environmental" to include species protection and exclude animal welfare issues; but the notion that protecting animals as a species rests

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Idea, N.Y. TIMES, Apr. 20, 1993, at C4 (noting how scientists who advise fishery managers have historically calculated a single, unvarying "maximum sustainable yield"). If the number is calculated on the basis of good ecological conditions for fish, however, fish stocks will be over-exploited when conditions turn bad. *Id.*

214. *See generally* Jon R. Luoma, *Listing of Endangered Species Said to Come Too Late to Help*, N.Y. TIMES, Mar. 16, 1993, at C4. (discussing the U.S. domestic listing process, which ought to be easier than multilateral listing).

215. *See* Anthony D.'Amato and Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 62 (1991) (noting that an entitlement to life for whales is already implicit in international law).

216. *See* Anne Batchelor, *The Preservation of Wildlife Habitat in Ecosystems: Toward a New Direction Under International Law to Prevent Species' Extinction*, 3 FLA. J. INT'L L. 307, 322-26 (1988) (analyzing the justifications for the protection of global wildlife).

217. *See* James M. Sheehan, *Whales Rock the Trade Boat*, J. COM., June 21, 1993, at 6A (arguing that Clinton Administration environmental policies to prevent Japan and Norway from hunting minke whales lack scientific foundation and are designed to show environmentalists that President Clinton is more concerned about environmental issues than previous presidents). *But see Genetic Testing Hits at Japanese Whaling*, BANGKOK POST, May 21, 1994, at 2 (stating that genetic testing shows that Japan is selling meat taken from protected species of whale).

upon science, while protecting animals as individuals rests "only" upon morals, misses the fundamental point that science does not supply values.

D. ARTICLE XX(G)

The meaning of Article XX(g) is also unsettled. The scope of Article XX(g) is potentially as broad as that of Article XX(b).[218] Most of the world's serious environmental issues—such as climate change, disappearing forests, driftnet fishing, waste dumping, and bio-diversity—can be viewed as natural resources lacking conservation.[219] Although the authors of the GATT saw a clear need for this exception, they wanted to prevent nations from using it as a restriction on market access or as an excuse for favoring domestic producers. Thus, to guard against abuse, the GATT required parallel restrictions on domestic production or consumption.[220]

In the Canada Herring and Salmon case of 1988,[221] however, the GATT Panel declared that an export restriction could qualify under Article XX(g) only "if it was primarily aimed at rendering effective" restrictions on domestic production or consumption.[222] The Panel offered no justification for its conclusion that the trade measure had to facilitate the domestic measure.[223] Nothing in the legislative history of

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218. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, J. OF WORLD TRADE, (1991) at 37, 45 (remarking that one may argue that the drafters intended that Article XX(g) apply only to export restrictions and then only to exhaustible, as opposed to renewable, natural resources); Dolphin I Report, *supra* note 157, at ¶ 3.43. Since it began to be invoked in GATT cases in 1982, however, this provision has been given much broader application. *Id.*

219. *See* Partha Dasgupta, *The Environment as a Commodity*, 6 OXFORD REV. ECON. POL'Y, 51, 52 (1990) (noting that production of every commodity is related to a natural resource).

220. *See Int'l. Trade Org.: Hearings Before the Comm. on Finance*, 80th Cong., 1st Sess. 135, 412 (1947) (statement of Clair Wilcox) (confirming that countries may not limit exports unless they also control domestic production and consumption); *see also* U.S. Department of State, *Background Material on Articles 13-15 and Chapter IV (Arts. 16-45) of ITO Charter*, Mar. 31, 1949, Art. 45, at 11. (stating that countries that restrict exports must also limit domestic use).

221. *GATT Dispute Settlement Panel Rep.: Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, in* BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 35TH SUPP. 114 (GATT Secretariat ed., 1989).

222. *Id.*

223. *See id.* (stating that Article XX(g) must comply with the purposes of the general agreement).

Article XX(g) suggests such an interpretation[224] and the syntax of Article XX(g) refutes the conclusion that any trade measure must augment a domestic measure.[225]

Because the GATT Council adopted this questionable interpretation, the Dolphin I Panel built upon it to limit Article XX(g) further. In sum, the Panel's line of reasoning is as follows: under Article XX(g), countries must aim any trade measure to conserve natural resources—even an *import* restriction—primarily at rendering domestic restrictions effective. Domestic restrictions on production necessarily involve resources under a country's jurisdiction.[226] Therefore, because a trade measure to conserve foreign resources cannot facilitate a domestic restriction to conserve domestic resources, no "extrajurisdictional" trade measure can possibly qualify under Article XX(g).

In pursuing this "judicial" activism, the Panel did not consider the drafting history of this provision which referred to the protection of wildlife and fisheries through treaties.[227] Because any treaty implies an international concern, the Panel disregarded the most obvious interpretation: measures under Article XX(g) were never meant to be applied to one's own territory.[228]

A panel could justify its refusal to allow Article XX(g) to protect natural resources, such as animals living in other countries, on policy grounds that those governments are responsible.[229] It is difficult, how-

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224. *See* U.N. Conf. on Trade & Employment Preparatory Comm., 2d Sess., at 18, U.N. Doc. E/PC/T/A/PV/30 (1947) (stating that export bans should be associated with restrictions on domestic production or consumption); U.N. Conf. on Trade & Employment Preparatory Comm., 2d Sess., at 30, U.N. Doc. E/PC/T/A/PV/25 (1947) (asserting that a required link to domestic production or consumption is unrealistic).

225. *See* McDonald, *supra* note 192, at 442 (1993) (explaining that the Panel did not consider the use of the words "production or consumption" in the exceptions syntax).

226. *See* McDonald, *supra* note 192, at 447 (elaborating that the Panel did not explain how a country might meet this test). The panel disregards the link to domestic consumption, or non-consumption, of dolphin-unsafe tuna.

227. *See* Charnovitz, *supra* note 194, at 45-47 (asserting that environmental laws and treaties support the view that Article XX is extrajurisdictional).

228. *See* Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law,* J. OF WORLD TRADE, Feb. 1993, at 43, 69 n. 50 (noting that "[t]he term 'extrajurisdictional application' is misleading in so far as the import restrictions were applied within the jurisdiction of the United States to products imported into the United States.").

229. *See generally* M.J. Bowman, *The Protection of Animals Under International Law,* 4 CONN. J. OF INT'L L. 487, 496-99 (1989) (chronicling recent attempts to protect animals with an international animal welfare instrument).

ever, to see any justification for not applying Article XX(g) to protect natural resources in the global commons, such as dolphins living in the ocean.[230] If the Dolphin I Panel is correct, then no country can act unilaterally to safeguard the global commons. Such an anti-environment stance by the GATT is neither required, nor even suggested, by the actual language in Article XX(g). Moreover, no country attempting to constrict Article XX through interpretation has come forward with any evidence that GATT's authors intended to disallow import measures relating to endangered species in foreign countries, let alone the global commons.[231]

Although the Dolphin I Panel used different reasoning to conclude that Article XX(b) and (g) were not extrajurisdictional, one cannot determine how either mode of analysis squares with other parts of Article XX, which appear to apply extrajurisdictionally. For example, Article XX(e) permits trade measures "relating to products of prison labour." At the time of GATT's inception, many countries banned the importation of products made with prison labor.[232] The connection between Article XX(e) and the laws in existence at the time the GATT was written seems clear. By disallowing extrajurisdictionality in Article XX(b) and (g), the Panel made no effort to reconcile its interpretation of these provisions with the health and conservation laws in existence in 1947.

Another interesting provision is Article XX(f), which permits trade measures "imposed for the protection of natural treasures of artistic, historic or archaeological value."[233] The laws in existence in 1947 were apparently restrictions on the export of such treasures.[234] The exception as written, however, also would seem to apply to imports.[235] For ex-

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230. *See* John Temple Lang, *Some Implications of the Montreal Protocol to the Ozone Convention, in* ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 183 (Winfried Lang et al. eds., 1992) (asserting that international law must permit states to take action in the interests of mankind and for the conservation of man's heritage and God's creation).

231. *See* Charnovitz, *supra* note 218, at 52-53 (analyzing GATT's negotiating history with respect to the foreign versus domestic environment).

232. *See* Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE, 61, 63 (1986) (remarking that countries such as the United States, Great Britain, Canada, Australia, and New Zealand observe bans on such products).

233. GATT, *supra* note 2, art. XX(f).

234. *See* Paul M. Bator, *An Essay on the International Art Trade*, 34 STAN. L. REV., 275, 313-14 (1982) (noting that such export restrictions began as early as 1464 A.D.).

235. *Cf.* Treaty of Amity and Commerce, Feb. 12, 1930, China-Czech., art. XIII, 110 L.N.T.S. 286, 290 (providing an exception for import and export bans related to culture and archaeology).

ample, the United States prohibits the importation of pre-Columbian artifacts without a certificate of lawful export.[236] If countries cannot use Article XX(f) to protect foreign artifacts, then the U.S. law would operate contrary to GATT.[237]

A fair reading of Article XX(g) does point to a requirement for parallel restrictions in domestic production *or* consumption and some link between the import restriction and the domestic measure. Commentators have argued that the restricted import must be the same as the product subject to the domestic restrictions. For example, if the United States prohibited the consumption of dolphin, then it could ban the importation of dolphin. Likewise, if the United States prohibited the consumption of dolphin-unsafe tuna, then it could ban the importation of dolphin-unsafe tuna, even if it does not prohibit the production or consumption of dolphin-safe tuna. A U.S. ban on widgets from countries that engage in dolphin-unsafe practices, however, would seem to run afoul of Article XX(g), in the absence of some parallel domestic product or process standard regarding widgets.

In summary, the applicability of Article XX to environmental trade measures largely depends on whether the Dolphin I decision becomes GATT law. In relying on its broad interpretation of GATT disciplines, the Panel warns that if Article XX(b) and (g) were extrajurisdictional, each importing country could unilaterally determine the environmental policies from which other contracting parties could not deviate.[238] Even though the Panel had good intentions, its view puts the GATT on a slippery slope. If the GATT's environmental exceptions can be denied for dolphin conservation laws, then the next GATT decision might undermine laws aimed at reducing the exploitation of prison labor or safeguarding Mayan sculpture. This action would jeopardize the Article XX "rights" of countries to prohibit certain kinds of traffic.[239]

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236. 19 U.S.C. § 2092(a) (1988) (controlling exports of pre-Columbian art); *see* 19 U.S.C. § 2606(a) (1988) (requiring State Parties to document the validity of exported archaeological material).

237. *See* GATT, *supra* note 2, art. XII (forbidding import and export restrictions on contracting parties, other than routine charges).

238. Dolphin I Report, *supra* note 157, at ¶¶ 5.27, 5.32.

239. WILLIAM ADAMS BROWN JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 415 (1950) (characterizing Article XX as reserved rights).

E. ANALYSIS OF PELLY AMENDMENT

For illustrative purposes, let us assume that the United States imposes a Pelly ban on widgets in response to actions by Country A, a GATT member, that diminishes the effectiveness of international conservation efforts such as programs involving whales or tigers. Because widgets are unrelated to whales, the Pelly ban is a trade sanction.[240] Because some confusion concerning this definition exists, another example may help to clarify the issue. Consider the U.S. law banning the importation of shrimp from countries that lack adequate conservation regimes to protect turtles during shrimp harvesting.[241] When countries embargo shrimp to protect turtles, that action is not a sanction on shrimp because the turtle killings stem from the shrimp harvesting. If, on the other hand, the United States embargoed widgets to penalize countries that fail to protect turtles during shrimp harvesting, that action would constitute a sanction on widgets.

GATT has never addressed the issue of the GATT-legality of a sanction because there has never been an environmental trade sanction imposed. The Dolphin I Panel did consider a complaint by Mexico regarding the Pelly Amendment, but the Panel issued no decision on that matter because no Pelly action had occurred.[242] In the absence of restrictions on domestic widget production or consumption, a widget sanction would probably not qualify under Article XX(g).[243] This situation differs from the dolphin-tuna dispute, where the U.S. import ban on tuna was accompanied by restrictions on domestic harvesting of tuna.[244]

Unlike Article XX(g), Article XX(b) does not require a parallel domestic provision.[245] Therefore, it may permit sanctions. In determining

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240. *See* Arvind Subramanian, *Trade Measures for Environment: A Nearly Empty Box?*, THE WORLD ECON., Jan. 1992, at 135, 139-40 (discussing what constitutes a trade sanction); *see also* ZOLLER, *supra* note 158 at 92-93 (suggesting that the Pelly amendment is not a true sanction because it aims merely to exercise enough pressure to prevent a foreign state from jeopardizing specific collective interests).

241. *See* 16 U.S.C. § 1537 note.

242. Dolphin I Report, *supra* note 157, at ¶¶ 5.20, 5.21.

243. *See* Kazuo Sumi, *The 'Whale War' Between Japan and the United States: Problems and Prospects*, 17 DENV. J. INT'L LAW & POL'Y, 317, 362 (1989) (stating that the restriction of imports must be connected to being conserved).

244. *See* Dolphin I Report, *supra* note 157, at ¶ 5.1 (pointing out that the restrictions on foreign tuna were not symmetric to the restrictions on domestic tuna).

245. *See* GATT, *supra* note 2, art. XX(b).

whether Pelly sanctions would meet Article XX(b), one should start with the headnote and then consider the requirements of the subsection.

First, one must consider if the hypothetical widget sanction qualifies as a disguised restriction. The Pelly Amendment is clear in this regard. Nothing in its legislative history suggests a commercial motivation. One factor that needs consideration, however, is whether the United States has a large widget industry that the Pelly action might help.

Second, one needs to consider whether the trade sanction is justifiable. It is unclear from GATT's drafting history what this condition means.[246] Perhaps a panel might inquire as to whether the United States is a party to the Whaling Convention. The U.S. record would seem acceptable on that point.[247] In addition, the Panel could ask whether the United States meets the standard it imposes on other countries.[248] Because there is no indication that U.S. nationals are engaging in whaling, giving attention to Norway would not constitute a double standard.[249] A panel might also look at the "diminish the effectiveness" standard imposed by the Pelly Amendment. As noted above, this is a rather vague test. One question, therefore, is whether it is justifiable to use a test so vague that other countries cannot reasonably predict the outcome.

Third, one must consider whether the trade sanction would be arbitrary. Here, two issues arise: One is whether the target *country* is being singled out arbitrarily. For example, whether it is fair to certify China but not Yemen. In other words, one must ask whether the conditions which prevail in China are absent in Yemen. More generally, because there have been eighteen Pelly cases that resulted without sanction, one must consider whether the first sanction would be arbitrary compared to previous cases where no sanction was imposed.

The other issue presents more difficulty—the arbitrariness in the selection of the target product.[250] One might wonder why widgets are

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246. *See* Charnovitz, *supra* note 218, at 41 (noting that the International Convention of 1927 influenced GATT, especially Article XX).

247. *See* 22 U.S.C. § 1978 (1988) (requiring that an agreement under Pelly be in force in the United States).

248. Norway could perhaps argue that eating whales is not as bad as keeping them in bondage in Sea World.

249. *See* 16 U.S.C. §§ 916c, 916d, 916i (1988) (prohibiting whaling by U.S. nationals, with minor exceptions).

250. *See Fisheries and Wildlife Conservation Promotion: Joint Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries and the Subcomm. on Trade of the Comm. on*

embargoed rather than trinkets. Certainly, this choice will make a big difference to the widget producers of Country A. To broaden the point: Any unrelated product could be viewed as arbitrary simply because it is unrelated.

Another factor in the adjudication of "arbitrary" would be the extent of the countermeasures. For commercial retaliation (e.g., Section 301), the extent of the countermeasures can be matched to the lost exports because of the foreign trade restriction; but for environmental countermeasures, there is no obvious benchmark for "making the penalty fit the crime," or for deterring future actions that undermine an international agreement. The "value" of Country A's whale trade might seem inappropriately low to environmentalists. All trade from Country A, however, might seem too high to others. Anything in-between might be challenged as arbitrary.

If trade sanctions are imposed, they could presumably be applied so long as the target country continued its alleged misbehavior, but not longer.[251] In 1989, the GATT Council suggested some guidelines for the use of Article XX(b), recommending that "[a] measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal or plant life or health involved, as provided in Article XX(b)."[252]

When countervailing or antidumping duties are imposed under GATT Article VI, they must be withdrawn as soon as the dumping or subsidizing ceases. These duties are not meant to punish, but rather to offset certain advantages.[253] The GATT does allow the Contracting Parties, acting jointly, to authorize trade retaliation "as they determine to be appropriate in the circumstances."[254] This retaliation, however, has been authorized only once in the history of the GATT.[255]

Ways and Means, 101st Cong., 1st Sess. 90 (1989) (statement of the Japan Fisheries Assoc.) (noting that arbitrary restrictions of imports would swallow the rule if permitted).

251. *See* Elisabeth Zoller, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 75 (1984) (explaining that counter-measures are temporary in nature).

252. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 365/367.

253. *See generally* KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 167-79 (1970) (discussing the purpose and use of both countervailing and antidumping duties).

254. GATT, *supra* note 2, art. XXIII, § 2.

255. DAM, *supra* note 253, at 260. The Netherlands never carried out the retalia-

If two nations are "pellyed" at the same time for the same reason—for example, China and Taiwan—it may be difficult to make the countermeasures non-arbitrary. Taiwan may view banning an equal amount of trade from each country as unfair because China is much bigger. Calibrating a trade ban relative to gross domestic product or to total exports, however, could be attacked by one or both of these countries as arbitrary. Moreover, if China and Taiwan are pellyed for the same reason, and the United States Government embargoes widgets from one and trinkets from the other, then both countries could allege discrimination.[256] In other words, widgets from China and widgets from Taiwan would be treated differently even though the same conditions prevail in both countries (i.e., the Pelly violation). Another issue is whether the government's administrative capacity should be taken into account in calibrating countermeasures. For example, the Clinton administration seemed to have expected more from Taiwan than from China. A final issue is whether a country whose government may be complicit (i.e., China) should draw a more stern penalty than a country where the violations occur in the private sector. As it turned out, the opposite may have occurred. Taiwan was at a disadvantage because its right of private property slowed down action by its government to confiscate and destroy specimens.

The two tracks of the Pelly Amendment have led to the proposition that embargoing fish products for fishery violations and wildlife products for wildlife violations would have a stronger GATT justification than embargoing widgets. There is no merit to that argument, however, because a product is either implicated or it is not. Had the Bush administration imposed countermeasures against Japan on sea turtles,[257] it would not seem relevant for the purposes of GATT Article XX whether the target was stereos or sturgeon.

The specified countermeasure under Pelly is an import ban.[258] This

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tion.

256. Because neither country is a GATT member, the complaint is hypothetical.

257. *See generally* John Lancaster, *Endangered Sea Turtle Seen Jeopardized by Japan; U.S. Agencies Study Scientists' Recommendations that Could Result in Trade Sanctions,* WASH. POST, Jan. 19, 1991, at A3 (reporting on the U.S. threat of trade sanctions against Japan).

258. *See* Pelly Amendment, Pub. L. No. 92-219, 85 Stat. 786 (1971) (amending 68 Stat. 883 (1954)) (authorizing the president to take measures to prohibit U.S. imports of fish products from the offending country); Tom Kenworthy, *U.S. Pressures China, Taiwan on Animal Trade,* WASH. POST, June 10, 1993, at A28 (suggesting that the president, under the Pelly Amendment, may prohibit all imports from an offending

differs from the environmental sanction provided for in the Trade Expansion Act of 1962: a tariff increase.[259] Such tariff increases would violate the GATT.[260] Nevertheless, governments on both ends may prefer tariffs to import bans because tariffs, at least at low levels, tend to be less disruptive.[261] From an environmental perspective, this virtue is a bane. Low penalty tariffs may not change foreign behavior because commerce adjusts too easily to them.

The purpose of a law like the Pelly Amendment is to send a message to other countries that the United States wants them to take international conservation issues seriously.[262] If a tariff is used as an environmental countermeasure, the country being targeted may misperceive the measure as simply disguised protectionism. By using an import ban, Pelly has a potential of sending a clearer signal to other countries about U.S. motives. Nevertheless, much of Pelly's impact depends on the target products. Certainly, the president must select a product that the United States imports; it would not signal seriousness to other countries by banning a product that the United States does not import. If the president selects an import that competes with U.S. domestic production, however, his actions could look like protectionism. Thus, the ideal target product is something which is not produced in the United States and may be imported from other countries that are not rendering environmental treaties less effective.

With regard to the "necessary" requirement in subsection (b), a panel might ask whether a measure has to be efficacious to be necessary.[263] For example, one might ask whether a trade sanction against Country A

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country).

259. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, § 201 (1962) (providing that the president may impose import restrictions on a foreign country that hinders U.S. trade).

260. Increasing any bound tariff generally violates GATT Article II. Increasing a tariff on a particular country violates GATT Article I.

261. A prohibitive tariff (e.g., 200% ad valorem) would seem equivalent to an import ban. *See* 19 U.S.C. § 1323 (1962) (limiting tariff increases to no more than 50% above the rates existing in 1934).

262. *See* Tom Kenworthy, *China and Taiwan Warned on Endangered Species*, WASH. POST, Sept. 8, 1993, at A21 (reporting that the Interior Secretary's threat of Pelly Amendment trade sanctions against China and Taiwan intended to warn other countries about the unlawfulness of trade in wildlife products).

263. Charles S. Pearson and Robert Repetto, *Reconciling Trade and Environment: The Next Steps*, *in* THE GREENING OF WORLD TRADE, REPORT TO EPA FROM NACEPT 100 (McAlpine et al. eds., 1993); Dolphin I Report, *supra* note 157, at ¶ 5.28.

would actually save whales, or whether Country A would continue whale hunting regardless of the sanction. It would seem illogical, however, to make the illegality of sanctions under GATT depend on the obduracy of the country violating the spirit, if not the letter, of an international environmental treaty. Moreover, this approach seems to invalidate sanctions against large countries that could resist such pressure.

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

The Panel might also take into account the irreversibility of species loss in determining the necessity of a sanction. Because the CITES trade ban has not succeeded in protecting the rhino, rapid actions are needed if the rhino is to be saved.[264] Thus, although GATT panels might prefer that the least-GATT-inconsistent approach be used, a panel might defer to the solution chosen by a government given the time-sensitivity involved. On the other hand, GATT panels may not want to treat emergencies differently than normal trade rules because that could encourage other countries to use trade sanctions to prevent species extinction. If the GATT were to adopt the Precautionary Principle, panels would have a basis for making this kind of judgment.

F. DIFFERENT JUSTIFICATIONS

The analysis so far presumes that a panel reviewing a Pelly sanction would follow the existing GATT precedents. A GATT Panel, however, is not actually bound by precedent. It is, practically speaking, free to devise an entirely new line of reasoning to justify or oppugn an environmental trade sanction.[265]

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264. *Save the Rhino,* ECONOMIST, Oct. 9, 1993, at 20.

265. *See* John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV., 1227, 1273 (1992) (noting that there is no official policy of *stare decisis* in international law). A GATT Panel report is not binding for future cases. *Id.*

Consider a situation where an international environmental agreement requires or calls upon its parties to impose a trade sanction against Country A.[266] Although Country A, assuming it is a GATT member, has a right under GATT not to be discriminated against,[267] the GATT Panel might overlook this right in deference to an *erga omnes*[268] treaty.[269] For whales, the IWC has not called for any trade sanctions;[270] but for rhinos and tigers, the CITES Standing Committee has unanimously called upon its parties to "consider" implementing import prohibitions against wildlife products from China and Taiwan.[271] Thus, a GATT panel might characterize a trade sanction targeting wildlife products as GATT-consistent due to the multilateral support for such action. This rationale, however, could not apply to a trade sanction targeting non-wildlife products.

Alternatively, the GATT might consider whether the trade of wildlife products violates an international conservation regulation. For example, if Country A imports rhino horn in contradiction to CITES, the Panel might deem a countermeasure against A not inconsistent with the GATT. In 1971, the U.S. Department of State told a congressional committee, during the drafting of the Pelly Amendment, that trade sanctions

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266. This example presumes that Country A is not a party to the environmental agreement. If Country A is a party to the agreement, it would be subject to retaliation. Consequently, the treaty might supersede country A's rights under the GATT.

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

268. *See* Oscar Schacter, *General Course in Public International Law, in* 5 RECUEIL DES COURS 199 (Académie de Droit International ed., 1982) (stating that the safeguarding and preservation of the human environment has been treated as an *erga omnes* obligation by the International Law Commission).

269. In the GATT case, EEC—Quantitative Restrictions Against Imports of Certain Products from Hong Kong, the European Community stated:

> Recent GATT experience had revealed a whole series of actions and measures that were not directly covered by the provisions of the General Agreement in the strict sense, and which had perhaps not been envisaged by its authors' . . . the Panel could not ignore that the General Agreement was an international agreement which had to be interpreted on the basis of generally accepted principles and practices of international law.

GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 30S/129, at ¶ 15. The Panel acknowledged that the principle of "law-creating force in the absence of law" could be relevant to the GATT. *Id.* at ¶ 29.

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

271. *Rhinoceros and Tiger: Time For a Decision*, CITES PRESS RELEASE, Sept. 9, 1993. One wonders whether the author of the press release is thinking about a decision in Beijing or Washington.

against nations breaching international conservation regulations would not violate GATT obligations.[272]

From a GATT-only perspective, it is difficult to defend these potential new interpretations.[273] There is nothing in Article I or Article XX which suggests that discrimination is more acceptable based on a multinational standard than a national one.[274] Thus, it would seem difficult for the GATT to yield to CITES. It is interesting to note, however, that the GATT does explicitly yield to the International Monetary Fund findings in support of import restrictions to safeguard a country's balance of payments.[275]

The European Union (EU) has suggested that the issue of extrajurisdictionality "is of no relevance in those cases in which the international community has agreed on the need to take action to address an environmental problem of common concern."[276] Leaving aside the practical problem of knowing when the "international community," has made such a determination,[277] the implication of this suggestion is that in reading multilateral treaties into Article XX, the EU favors reading out unilateral extrajurisdictional environmental measures.[278] Given

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272. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries*, 92d Cong. 1st Sess. 11-12 (1971) (letter from David M. Abshire, Assistant Secretary of State, in Commercial Fisheries).

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

274. Charnovitz, *supra* note 218, at 54; *see* RICHARD EGLIN, ENVIRONMENTAL PROTECTION AND INTERNATIONAL TRADE—GENUINE CONCERN OR DISGUISED PROTECTIONISM 8 (1992) (stating that the same arguments apply to trade measures in treaties designed to penalize countries as apply to the use by one country of measures to influence the environmental policies of another).

275. GATT, *supra* note 2, art. XII, § 1, § 2; art. XV, § 2; art. XVIII, § 9.

276. *See EC Proposal on Trade and Environment,* INSIDE U.S. TRADE, Nov. 27, 1992, at S-4.

277. Aside from the existence of a treaty (or perhaps "soft law" like U.N. Resolution), it is not easy to infer when the international community has agreed to take action. The international consensus on whales, however, has an opt-out clause which Norway now invokes. If the contemporary international community does not think that such an opt-out clause is appropriate, then it should amend the treaty or write a new one. It is incorrect, however, to cite the Whaling Convention as creating a norm that Norway violates.

278. *EC Proposal on Trade and Environment,* INSIDE U.S. TRADE, Nov. 27, 1992, at S-3 (stating that the basic rule according to which a country should not unilaterally restrict imports on the basis of environmental damage that does not impact on a

the difficulty of achieving multilateral agreements even when unilateralism plays a supportive role, there could be considerable danger for the environment in the EU's suggestions for a multilateral-only approach.

Because CITES does not require trade sanctions against violators, there is no way that it could supersede GATT as a more recent treaty. One possible argument is that because CITES *authorizes* trade sanctions, it clashes with the GATT. Consequently, a panel might choose CITES over GATT because the former is a more recent, or more relevant, treaty. Despite commentary to the contrary, however, CITES does not authorize trade sanctions. What CITES provides is that the treaty "in no way affect[s] the right of Parties to adopt . . . domestic measures restricting or prohibiting trade of species not included" in a CITES Appendix.[279] The purpose of this provision was to make clear that CITES did not preclude the protection of a species not on a CITES list. It was not meant to authorize unilateral or multilateral action against those who disregard treaties.

Nevertheless, the CITES Conference has advocated action against nations that do not follow the treaty.[280] For example, the CITES Conference recommended in 1987 that Parties, "use all appropriate means (including economic, political and diplomatic) to exert pressure on countries continuing to allow trade in rhinoceros horn."[281] It is unclear where the authority for this lies. Perhaps it is the provision in CITES that empowers the Conference of the Parties to "make whatever recommendations it deems appropriate" after reviewing a situation where the provisions of the treaty "are not being effectively implemented."[282] Because CITES does not require parties to adhere to such recommenda-

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country's territory needs to be upheld). The EU, however, does not practice what it preaches. For example, it has enacted a ban on fur caught in countries that permit leg-hold traps. European Council Regulation, 3254/91 (L308/1).

279. CITES, *supra* note 130, art. XIV, § 1(b). Nevertheless, the CITES Conference of the Parties relies upon this provision to encourage trade restrictions on non-CITES wildlife products by non-complying countries. If a country used this provision to ban all fish imports from a country, that would be a sanction.

280. *See* Hamilton Southworth III, *GATT and the Environment*, 32 VA. J. INT'L L. 997, 1011-13 (discussing the need for limited coercive trade measures to enforce multilateral environmental treaties); David Favre, *Debate Within the CITES Community: What Direcion For the Future?*, 33 NATURAL RESOURCES J. 875, 911 (1993) (describing the new CITES practice).

281. CITES Conference, Res. 6.10 (1987).

282. CITES, *supra* note 130, art. XIII.

tions by the CITES Conference, there is a questionable basis for a GATT panel to overlook a basic GATT rule like MFN.[283]

The same countries that are members of CITES and approve recommendations calling for trade sanctions are the same countries that are members of the GATT and regularly denounce U.S. environmental trade measures, even the non-sanctions, as being GATT-inconsistent. The explanation for this apparent paradox is that trade ministries are represented at the GATT while wildlife management agencies are represented at CITES. Accordingly, officials from the same country can and do take contradictory positions in the two organizations. This ability to assume contradictory positions points to the wisdom of the OECD in getting Trade and Environment Committees to work jointly on this issue since 1991.

The Pelly Amendment is not limited to CITES and the IWC. It applies to any international program for fishery conservation or for endangered or threatened species. Some of these other treaties might present better cases for GATT consistency. For example, consider a hypothetical Pelly sanction related to the Convention for the Conservation of Anadromous Fishing Stocks.[284] This Convention directs parties to take: "appropriate measures, *individually* and collectively, in accordance with international law and their respective domestic laws, to prevent trafficking in anadromous fish taken in violation of the prohibitions provided for in this Convention . . . ."[285] This provision might supersede the GATT as a more recent or specific treaty. A party pellyed under this provision, however, could argue that this treaty does not refer to trade sanctions because the sanctions are not GATT-consistent, and therefore are not consistent with international law. Another option for transcending the GATT would be where a country has violated an environmental treaty. A panel might find that unilateral countermeasures are permitted under the principles of international law as long as they are not dispro-

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283. *Cf.* Geoffrey W. Levin, *The Environment and Trade—A Multilateral Imperative*, 1 MINN. J. OF GLOBAL TRADE, 231, 247 (1992) (suggesting that the GATT itself is a multilateral agreement and that by definition other multilateral agreements may be permissible under GATT despite the fact that they violate GATT's tenet of nondiscrimination).

284. S. Treaty Doc. No. 30, 102d Cong. 2d Sess. (1991). A similar argument could be made with respect to the Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific. Convention for the Prohibition of Fishing With Long Driftnets in the South Pacific, arts. 3(1)(b), 3(3), Nov. 24, 1989, 29 I.L.M. 1453, 1457.

285. S. Treaty Doc. No. 30, 102d Cong., 2d Sess. art. 3.3 (1991).

portionate to the violation and injury suffered.[286] Following this approach, there would be a need to show injury. At issue is what injury the United States has suffered from Norwegian whaling or Chinese trade in rhino horn. There might be an injury if a rhino species became extinct, although the injury to the United States would be the same as the injury to every country. At this point a Pelly sanction would be too late to help.

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

Because Norway has taken a reservation on the minke whale, it is not violating the Whaling Convention.[287] Norway also could have been pellyed on the wildlife track for diminishing the effectiveness of CITES.[288] Norway is engaging in coastal whaling, however, and therefore it is not violating CITES.[289] Norway is neither importing whales nor introducing them from the sea. Considering the migratory nature of whales, one can argue that Norway is diminishing the effectiveness of CITES and the IWC by not joining in whale conservation.[290]

Taiwan, not a member of CITES, cannot violate a treaty obligation. Given Taiwan's ineligibility for membership in CITES, there would be a question as to whether an Article XX sanction was justifiable. Because Taiwan has no role in setting CITES standards, it is problematic for the United States to insist that Taiwan honor them.[291]

China may be in violation of CITES. They argue, however, that their rhino horn is pre-Convention. This may be a dubious claim, but one

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286. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905(a) (1980) Vol. 2, § 905(a); *see* GATT SECRETARIAT, GUIDE TO GATT LAW AND PRACTICE 670 (1994) (citing the general international law applicable to a Germany-Iceland dispute).

287. Milton M.R. Freeman, *U.S. Goes Overboard on the Whales*, THE PHILA. INQUIRER, Aug. 9, 1993, at A19.

288. *See* Cynthia T. Bright, Comment, *The Future of the International Whaling Commission: Can We Save the Whales?*, 5 GEO. INT'L ENVTL. L. REV., 815, 843-45 (1993) (discussing the intersection of CITES and the Whaling Convention).

289. DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES 89 (1989).

290. Iceland also diminished the effectiveness of the IWC by resigning. Pelly is based, however, on action by nationals, not on government policy.

291. CITES gives Taiwan the same rights to attend meetings as it gives to non-governmental organizations.

may question who is to judge. The CITES Standing Committee has pointed a finger at China, but it has not really convicted China of being in violation of CITES. The United States Government might consider China a treaty violator; but China does not get a hearing on the matter because the Pelly Amendment does not require administrative hearings for China.

Another road a panel might take is to acknowledge the GATT violation, but to state that the trade regime must yield to the environment regime.[292] Berlin and Lang recently suggested that "GATT should almost always give way to international environmental agreements because, compared to the GATT, these environmental provisions are . . . most of all, more popular."[293] Whether such a "more popular" rule will supplement the "more recent treaty" rule of international law remains to be seen.

G. AUTHORITY TO USE PELLY

If the Pelly Amendment violates the GATT, there are grounds for questioning the authority of the president to impose Pelly sanctions. Because GATT is an international agreement, the president has an obligation to follow GATT rules.[294] Under the U.S. Constitution, a more recent law trumps a treaty obligation in the event of an inconsistency. The Pelly Amendment of 1971, revised in 1992, is far more recent than the GATT of 1947, revised in 1965. Because Pelly is completely discretionary, however, trumping may not occur. Thus, one could argue that because the executive has discretion in applying Pelly sanctions, the president should yield to the GATT, which is an executive agreement.[295]

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292. In the rhino and tiger case, there are actually conflicting environmental regimes. The Chinese want these products for *medicinal* purposes. *See* Eugene Linden, *Tigers on the Brink*, TIME, March 28, 1994, at 44, 47 (commenting that affluent Taiwanese with flagging libidos pay as much as $320 for a bowl of tiger soup to enhance their sexual prowess). One may question how the GATT could place a value on rhino health in relation to human health of Chinese citizens. In other words, one wonders how the GATT decides whether Chinese folk medicine is more scientifically valid than judgments of a CITES committee.

293. Kenneth Berlin and Jeffrey M. Lang, *Trade and the Environment*, 16 THE WASH. Q., vol. 4 at 48 (1993).

294. GATT, *supra* note 2.

295. *Cf.* Suramerica de Aleaciones Laminadas, C.A. v. U.S., 966 F.2d 660, 661 (Fed. Cir. 1992) (holding that the GATT does not trump domestic legislation). If statutory provisions are inconsistent with the GATT, it is matter for Congress, not the

This view is further bolstered by the unusual language in the Pelly Amendment which appears to condition the president's countermeasure authority "to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade."[296] There are three ways to view this provision: the president can use Pelly only if the GATT approves; the president can use Pelly only if he thinks it GATT-legal; or the president can use Pelly unless the GATT contracting parties disapprove. No U.S. president has ever taken the first view. In congressional testimony in 1990, an official from the Office of the U.S. Trade Representative seemed to take the third view.[297] If a GATT panel ruled against the United States on Pelly, and if this were adopted by the GATT Council, then future use of Pelly could be foreclosed under this third view. The first use of Pelly sanctions also could be the last.

The recent statements by the Clinton Administration that it will seek Senate approval for U.S. accession to the U.N. Convention on the Law of the Sea (UNCLOS)[298] raise a new issue regarding trade sanctions under the Pelly Amendment. According to one recent commentator, Professor Richard J. McLaughlin, "The United States may have to relinquish its use of unilateral economic sanctions as a method of protecting dolphins, sea turtles, and whales if it chooses to become a party to UNCLOS . . . ."[299] In exclusive economic zones, UNCLOS gives coastal states jurisdiction over marine conservation policies (e.g. whaling).[300] On the high seas, UNCLOS may be read as suggesting that conservation measures must be multilateral.[301] UNCLOS also states that conservation measures "shall not discriminate in form or in fact against the fisherman of any State."[302]

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court, to decide and remedy. *Id.*

296. 21 U.S.C. § 1978(a)(4) (1988).

297. *Fisheries and Wildlife Conservation Promotion*, H.R. SERIAL NO. 60, 101st Cong., 1st Sess. 14 (1990) (statement of Leonard W. Condon).

298. United Nations Conference on the Law of the Sea, Dec. 10 1982, 21 I.L.M. 1261 [hereinafter UNCLOS].

299. Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, *in* 21 ECOLOGY L. Q. 1, 5 (1994).

300. *See id.* at 31-32 (noting that UNCLOS gives coastal states broad discretion to weigh scientific evidence); UNCLOS, *supra* note 298, art. 56.1, 61.1.

301. *See id.* at 34-38 (stating that international agreement is required before states can prescribe conservation measures for the high seas).

302. UNCLOS, *supra* note 298, art. 119.3. While UNCLOS governs the national regulation of fisheries, it is unclear whether UNCLOS also governs the use of trade restrictions.

If a dispute arises about a U.S. trade sanction, the affected nation can invoke the compulsory dispute settlement procedure of UNCLOS.[303] Decisions under this procedure are final.[304] Parties have an obligation to comply with them.[305] Thus, even if a GATT panel concludes that an environmental trade measure fits under Article XX, an UNCLOS tribunal may rule that the measure violates UNCLOS.

None of this applies to the United States at this time since it is not a party to UNCLOS. If, however, the United States were to become a party, the president might have an obligation to cease using (or threatening) his discretionary powers under the Pelly amendment.[306] This obligation would be more compelling if U.S. ratification of UNCLOS is more recent than the Pelly amendment (or changes to it). If UNCLOS had gone into force earlier (and assuming the United States were a party to it), all of the Pelly certifications discussed above, except rhinos and tigers, might have been foreclosed.

The potential relationship between UNCLOS and the Pelly amendment will undoubtedly be considered by the U.S. Senate. According to McLaughlin, "Support among some members of the executive branch for U.S. membership in UNCLOS may take on added urgency if they believe it may stop or slow the environmental matters."[307] The possibilities for using UNCLOS to tame the United States may be one factor in the recent rush of nations to accede to the treaty. As McLaughlin notes, "Many foreign nations will be inclined to support any institutional mechanism that prevent the United States from imposing unilateral economic trade sanctions . . . ."[308]

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303. UNCLOS, *supra* note 298, part XV.

304. UNCLOS, *supra* note 298, arts 296. UNCLOS Article 282 provides that UNCLOS will defer to dispute settlement procedures in other agreements if they entail a binding decision. McLaughlin argues that current GATT procedures are not binding. *See* McLaughlin, *supra* note 299, at 59-60. It is unclear whether the revisions in the Uruguay Round will render these procedures binding for purposes of Article 282.

305. It is unclear whether there would be a private right of action to enforce such a judgement in U.S. courts. If the United States ratifies the treaty, the implementing legislation might clarify this point.

306. RESTATEMENT, *supra* note 286, § 115 comment C. The treaty would supersede the Pelly amendment if self-executing but UNCLOS will need implementing legislation. That could clarify the status of Pelly. Certainly, ratification of UNCLOS would give the President an excuse not to invoke Pelly sanctions.

307. *See* McLaughlin, *supra* note 299, at 75.

308. *See* McLaughlin, *supra* note 299, at 76.

CONCLUSION

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

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

One view is that environmental proponents should just continue using reasoned persuasion. It would also be acceptable for a nation preferring greater whale protection to provide financial compensation to nations with different preferences. From this absolutist perspective, nations should not pressure each other.[309] Only purely consensual actions are legitimate.

Another view is that actions speak louder than words and sometimes non-consensual actions are needed.[310] From this perspective, a mix of carrots and sticks is likely to be more effective than just carrots. Negotiators who have only carrots at their disposal will soon run out of carrots.

The problem with a multilateral-only rule is that it defaults to inaction.[311] While national governments have rules that require the minority to adhere to the decision of the majority, no such rule obtains at the supranational level. It is easy to support multilateralism as an ideal.[312]

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309. *See generally* William C. Clark, *Environmental Imperialism, in* 35 ENVIRONMENT 1 (1991) (discussing repercussions of nationalistic environmental pressures).

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

311. *See* Robert F. Housman, *A Kantian Approach to Trade and the Environment,* 49 WASH. & LEE L. REV., 1373, 1380-81 (1992) (discussing implications of non-availability of environmental trade sanctions).

312. *See* Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience,* 49 WASH. & LEE L. REV. 1329, 1351-61 (1992) (arguing against the use of unilateral trade measures).

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

There is a wide divergence of views on the efficacy of a unilateral environmental trade measure.[313] Some commentators state that it can encourage cooperation and improve the environment, while others predict it can lead only to disunity.

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

This Article also considered whether environmental trade sanctions are consistent with the GATT. This is different from, but not unrelated to, the efficacy of such sanctions. If environmental trade sanctions contributed to a deterioration of the international trade system, that could have negative consequences. Conversely, the conventional wisdom that Pelly sanctions are GATT-illegal may increase the resistance of the country being pellyed. As one commentator has noted: "[m]ultilateral environmental agreements will be greatly weakened if signatories are unable to use trade measures to protect against free riders, and the [Dolphin I] Panel decision increases the incentive for nations to free ride."[314]

Because the interpretation of GATT Article XX[315] is in flux, the status of the Pelly Amendment remains unclear. This Article showed many ways in which the use of the Pelly Amendment could violate the GATT. This Article also showed, however, that a well-crafted Pelly action could perhaps fit under the Article XX(b) exception. In offering this analysis, whether a GATT panel is likely to affirm Pelly's legality

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313. *See* Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective,* 17 DENV. J. INT'L L. & POL'Y 317 (1989) (stating that unilateral actions are of either limited utility or create diplomatic friction); Martin Jr. and Brennan, *supra* note 37, at 315 (asserting that the Pelly and Packwood-Magnuson Amendments have unquestionably had salutary effect).

314. David J. Ross, *Making GATT Dolphin Safe: Trade and the Environment,* 2 DUKE J. COMP. & INT'L L., 345, 366 (1992).

315. GATT, *supra* note 2.

under the GATT remains undetermined. In all likelihood, a GATT panel would condemn a Pelly action by the United States. The mind-your-own-environment attitude is very strong in GATT today.[316]

In 1937, countries approving the Whaling Convention were confronted with the problem of what to do if enough nations did not join the new whaling controls. The Final Act noted:

> [t]he Conference recognises [sic] that the purpose of the present Agreement may be defeated by the development of unregulated whaling by other countries, in which case it would be a matter for consideration whether the present Agreement should be continued in force, or whether the contracting Governments should . . . permit their nationals to pursue whaling without regulation, so that they may derive from its pursuit such benefit as may be had before the stock of whales has been reduced . . . ."[317]

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

Statesmen do not need to accept this dilemma stoically. They can resort to a third alternative by using economic pressure, such as the Pelly Amendment, on non-cooperating nations.[318] These sanctions will be consistent with GATT rules if undertaken in a non-protectionist manner. Indeed, they may be consistent with an even higher law assigning mankind a special responsibility to protect the creatures who inhabit the Earth.

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316. *See* Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203 (1992) (commenting on the GATT Secretariat report).

317. Agreement for Regulation of Whaling, June 8, 1937, 52 Stat. 1460, 1469 (1937).

318. *See* Linden, *supra* note 292, at 44, 51 (stating that the Pelly amendment has the potential to become the world's most powerful piece of environmental legislation).