

**Ending the Siege on America's  
Bears: Implementing GATT-  
consistent Pelly Sanctions  
Against Bear-Trading Nations**

**Paul C. Lin-Easton**

**<http://www.hawaii.edu/aplpj>**

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**William S. Richardson School of Law**

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- I. INTRODUCTION
- II. AMERICA'S BEARS UNDER SIEGE
  - A. *Culinary Uses of Bear*
  - B. *Medicinal Uses of Bear*
- III. THE FAILURE OF DOMESTIC REMEDIES
- IV. INTERNATIONAL REMEDIES: CITES AND PELLY AMENDMENT SANCTIONS
- V. THE WTO CHALLENGE
  - A. *Analysis of Environmental Trade Restrictions in the WTO Dispute Settlement System.*
  - B. *The Shrimp-Turtle Decision*
- VI. PELLY SANCTIONS AFTER SHRIMP-TURTLE
- VII. CONCLUSION

I. INTRODUCTION

America's bears are under siege. As Asian and Russian bear populations dwindle, sophisticated and well-funded racketeers are increasingly targeting North American bear populations to feed East Asia's insatiable demand for bear parts.<sup>1</sup> Current remedies under U.S. domestic law have proven ineffective in combating this lucrative and global trade.<sup>2</sup> Ultimately, effective protection of North American bears requires the cooperation of China, Japan, Korea, and Taiwan, which

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<sup>1</sup> The greatest demand for bear parts by far is from China, Japan, Korea, and Taiwan. See ELIZABETH KEMPE, ET. AL., WANTED ALIVE! BEARS IN THE WILD: 1999 WORLD WIDE FUND FOR NATURE SPECIES STATUS REPORT 2, 22 (1999), <http://www.panda.org/resources/publications/species/bears/index.html> (listing South Korea and Japan as "principal markets" for bear gall bladders); PETER KNIGHTS & SUE FISHER, HUMANE SOCIETY INTERNATIONAL, FROM FOREST TO PHARMACY: A REPORT ON THE TRADE OF BEAR PARTS 14-19 (1995), <http://www.animalalliance.ca/bac/pharmacy.htm> (last visited May 02, 2000) (lists South Korea, Hong Kong, Taiwan, and Japan as the major bear consuming nations, and Korea as having the world's greatest market for bear parts); KEITH HIGHLEY & SUZIE CHANG HIGHLEY, BEAR FARMING AND TRADE IN CHINA AND TAIWAN, under heading *Natural History: Status of the Eight Bear Species*, Earthtrust, <http://planet-hawaii.com/earthtrust/bear.html> (visited Mar. 23, 2000) (Japanese customs records indicate that between 1988-1990 1,051 kg of bear gall bladders, representing 10,000 bears, were imported from China).

<sup>2</sup> See *infra* Section III.

comprise the largest markets for bear parts.<sup>3</sup> This cooperation has proven difficult to obtain.

A 1994 U.S. embargo, imposed on Taiwan for its trade in rhinoceros and tiger parts, provides a model for the protection of bears. The embargo, which was authorized by the Convention on the International Trade in Endangered Species ("CITES") Standing Committee,<sup>4</sup> was significant in helping the world's rhinoceroses and tigers take a step back from the brink of extinction. Prior to the U.S. embargo, Taiwan was generally seen "as the principle driving force behind international wildlife trade."<sup>5</sup> A year later, Taiwan was recognized by environmentalists for its significant progress in fighting the trade in endangered species.<sup>6</sup> Environmentalists have hailed these sanctions as proof of the Pelly Amendment's<sup>7</sup> effectiveness in furthering the goals of wildlife protection.<sup>8</sup> Many wildlife advocates have called upon the United States to use sanctions to protect other species endangered by the Asian trade in wildlife parts.<sup>9</sup>

Bears are deserving candidates for similar protections. Like rhinoceros and tiger populations, world bear populations are being decimated to supply Asian apothecaries and restaurants.<sup>10</sup> The World

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<sup>3</sup> See KEMPF, *supra* note 1; KNIGHTS, *supra* note 1.

<sup>4</sup> See *Worldview Species: U.S. to Impose Trade Sanctions Against Taiwan*, AM. POL. NETWORK GREENWIRE, Apr. 12, 1994, available at WL 4/12/94 APN-GR 22. See also *Taiwan Wildlife Products To Face U.S. Import Ban*, WALL ST. J., Apr. 12, 1994, at A13.

<sup>5</sup> Julie Cheung, *Implementation and Enforcement of CITES: an Assessment of Tiger and Rhinoceros Conservation Policy in Asia*, 5 PAC. RIM. L. & POL'Y J. 125, 141 (1995).

<sup>6</sup> See Ginette Hemly, World Wildlife Fund Director of International Wildlife Policy, Statement on U.S. Government Lifting Pelly Amendment Certification Against Taiwan, Sept. 11, 1996, available in 14 CHINESE Y.B. INT'L AFF. 56 (1995-96).

<sup>7</sup> Pelly Amendment to the Fisherman's Protection Act, 22 U.S.C. § 1978 (1988). See *infra* notes 83-106 and accompanying text.

<sup>8</sup> World Wildlife Fund (WWF), Press Release, *Tigers Still at High Risk Despite Reduction in Bone Trade: WWF Calls for International Body to Act* (Mar. 30, 2000), <http://www.worldwildlife.org/news/headline.cfm?newsid=117>. The WWF claims that "[i]ncreased enforcement of international and domestic trade bans . . . has helped reduce the sale and use of tiger-bone medicines. For example, made-to-order raw bone preparations were available at 59% of pharmacies surveyed in Taiwan in the early 1990s, but availability dropped to less than 1% in the late 1990s." *Id.*

<sup>9</sup> See *id.*

<sup>10</sup> See *infra* Section II.

Conservation Union lists all bear species on its Red List of Threatened Species.<sup>11</sup> Six of the world's eight bear species are threatened with extinction, and nearly all have undergone dramatic population declines in recent decades.<sup>12</sup>

Korea and Taiwan are the two largest markets for poached bear parts.<sup>13</sup> Korean and Taiwanese nationals have been linked to poaching and smuggling operations within the United States.<sup>14</sup> Increasingly, the United States will need the cooperation of the Taiwanese and South Korean governments in order to tackle bear poaching in its territory. A threat of repeat U.S. sanctions could be effective in getting Taiwan's cooperation to halt its trade in bear parts. Yet, South Korea, the world's largest consumer of bear parts,<sup>15</sup> has shown much less interest in cooperating with international efforts to protect bears.<sup>16</sup> It exempted itself from CITES regulation of trade in Appendix II bear species until 1996 and continues to resist efforts at regulating the trade in animal parts for traditional medicinal use.<sup>17</sup> In addition, Korea lacks adequate legislation for implementing its obligations under CITES, and CITES has no

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<sup>11</sup> World Conservation Monitoring Centre, *Threatened Animals of the World*, at [http://www.wcmc.org.uk/species/animals/animal\\_redlist.html](http://www.wcmc.org.uk/species/animals/animal_redlist.html) (based upon a search of *ursidae* under the family table for all countries). This database is used to generate the World Conservation Union's ("IUCN") Red List of Threatened Animals. The IUCN claims that its Red List "is the world's most comprehensive inventory of the global conservation status of plants and animals." *The IUCN Red List of Threatened Species*, at <http://www.iucn.org/themes/ssc/redlists/rlindex.htm> (last visited Sept. 23, 2000). The 2000 IUCN Red List of Threatened Species was not available at the time this article was being written. The new red list will be searchable on its own website at <http://www.redlist.com/>.

<sup>12</sup> See *id.* at 12.

<sup>13</sup> See *supra* note 3.

<sup>14</sup> See KNIGHTS, *supra* note 1, at 14-19.

<sup>15</sup> See EnviroNews Service, *Korea Leads Illegal Trade in Bear Parts* (May 16, 1997), available at <http://www.envirolink.org/archives/enews/0405.html> [hereinafter *Korea Leads Illegal Trade*] ("South Korea and Korean people abroad represent the bear's worst enemy after habitat loss"). See also Associated Press, *Bear Parts Still in Demand in Asia* (Oct. 26, 1999, 11:23 EDT), available at [The Tigers Paw](http://www.tigerspaw.org/news/10-26-99.htm) <http://www.tigerspaw.org/news/10-26-99.htm> (last visited May 6, 2000) [hereinafter *Bear Parts Still in Demand*].

<sup>16</sup> See KNIGHTS, *supra* note 1, at 14-19.

<sup>17</sup> See *id.* In 1997, Korea banned the practice of bear farming. In 1999, however, the legislation was amended to allow for the slaughter of bears over 25 years of age. The gall bladders of these bears are entering into the traditional medicine market. E-mail from Jill Robinson, Director of Animals Asia Foundation, to author (Sept. 02, 2000, 10:01 Hawaiian) (on file with author).

specialized wildlife enforcement capability.<sup>18</sup> An embargo of South Korean wildlife products, including traditional medicinal items and cosmetics, therefore, may be necessary to ensure that Korea's wildlife trade policies comport with the letter and spirit of CITES. Unlike Taiwan, however, South Korea is a member of the World Trade Organization ("WTO"). Such an embargo would likely be challenged as an unfair barrier to trade, in violation of the General Agreement on Trade and Tariffs ("GATT").<sup>19</sup>

This article argues that, in light of the WTO Appellate Body decision in the Shrimp-Turtle Dispute,<sup>20</sup> a Pelly Amendment sanction carefully implemented against Korea for its illegal trade in bear parts would not violate the GATT. Section II provides a general background to the international trade in bear parts and its effect on U.S. bear populations. Section III explains why the United States has been unable to effectively counter the poaching of bears and the smuggling of bear parts at the domestic level. Section IV examines the United States use of sanctions to force other nations to comply with international environmental treaties. Section V discusses how environmental actions affecting trade are analyzed under the WTO's dispute settlement system ("DSS") and examines previous U.S. trade sanctions levied against countries whose economic activities have threatened endangered species and have failed WTO scrutiny. Section VI considers how a Pelly sanction could be implemented to pass WTO scrutiny.

## II. AMERICA'S BEARS UNDER SIEGE

Bears are used for culinary and medicinal purposes throughout East and Southeast Asia, the major markets being China, South Korea, Japan, and Taiwan.<sup>21</sup> Of these, South Korea and Taiwan are the largest importers of bear parts.<sup>22</sup> Accordingly, the demand for bear parts in these two countries poses the greatest threat to the survival of the world's

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<sup>18</sup> See *Bear Parts Still in Demand*, *supra* note 15.

<sup>19</sup> Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>20</sup> WTO Appellate Body Report on United States Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, *reprinted in* 38 I.L.M. 118 (1999), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.DOC> (last visited Feb. 2, 2001) [hereinafter *Shrimp-Turtle Appellate*].

<sup>21</sup> See *supra* notes 1-2 and accompanying text.

<sup>22</sup> *Id.*

bears.<sup>23</sup> The increased affluence of these countries has made it possible for greater percentages of their populations to pay exorbitant prices for bear products, creating a lucrative market that has led to a worldwide siege on wild bear populations.<sup>24</sup>

A. *Culinary Uses of Bear*

Bear meat is highly sought after in Asia as an elite culinary dish in upscale restaurants. Connoisseurs particularly prize the meat from the bear's paws, which is eaten primarily in a soup.<sup>25</sup> Dating back thousands of years in China,<sup>26</sup> bear paw soup remains a delicacy for the rich and famous. In some upscale Korean and Taiwanese restaurants, a bowl of bear paw soup sells for up to US\$1,500.<sup>27</sup> The high prices fetched for bear paws have led to poachers cutting off only the paws of killed bears and leaving the rest of the carcass in the woods to rot.<sup>28</sup> Many Taiwanese and South Koreans travel to China or Thailand where they banquet on the whole bear for the same price.<sup>29</sup> These bear feasts can be particularly cruel events. The bears are often bludgeoned to death, boiled alive, or lowered alive in cages onto hot coals to get their "fear juices" flowing,

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<sup>23</sup> See HIGHLY, *supra* note 1, under heading *Modern Decline*.

<sup>24</sup> See WORLD WILDLIFE FUND, *INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK* x (Ginette Hemley ed., 1994).

<sup>25</sup> Bear paw meat is thought to contain special medicinal properties, particularly its front paws, because the bear most often licks them. In 1992, thirty Sun Bears were shipped from Thailand to South Korea and their paws used as a doping substance to enhance South Korean athletes' performance at the Olympic Games. See HIGHLEY, *supra* note 1, under heading *China: Bear Paws*.

<sup>26</sup> Bear paw soup dates back to China's Ming (1368-1643 C.E.), or perhaps as far back as the Qin (221-206 B.C.E.) dynasty. See KNIGHTS, *supra* note 1, at 15 (citing a Korean newspaper claiming that bear paw soup originated during the Qin Dynasty). *But cf.* Joonmoo Lee, *Poachers, Tigers and Bears...Oh My! Asia's Illegal Wildlife Trade*, 16 J. NTL. L. BUS. 497, 500 (1996) (claiming that the dish originates back to the Ming Dynasty).

<sup>27</sup> See KNIGHT, *supra* note 1, at 14-19; *Korea Leads Illegal Trade*, *supra* note 15. Earthtrust Taiwan's 1994 study on bear farming provides detailed information on prices for various bear products in China and Taiwan. See HIGHLEY, *supra* note 1.

<sup>28</sup> See, e.g., Associated Press, *Ringleader of Bear-poaching Gang Sentenced* (Sept. 29, 1999), available at Seattle Post-Intelligencer, <http://www.seattlepi.com/local/hunt29.shtml> (last visited Mar. 23, 2000) [hereinafter *Ringleader sentenced*].

<sup>29</sup> See KNIGHTS, *supra* note 1, at 14-19

which is believed to enhance the flavor of the meat.<sup>30</sup> South Korean and Taiwanese nationals operate or have invested in bear farms, many of which are illegal, in Thailand and China to supply bears for such feasts.<sup>31</sup> Bears have also been shipped into Korea, ostentatiously for display in zoos, only to end up as menu items in upscale restaurants.<sup>32</sup>

### B. *Medicinal Uses of Bear*

The Chinese have probably used bear parts for medicinal purposes for over 5000 years.<sup>33</sup> With the spread of traditional Chinese medicine (“TCM”),<sup>34</sup> other East Asian countries have adopted the medicinal use of bear parts.<sup>35</sup> Although TCM practitioners value various parts of the bear, they consider the gall bladder to be its most potent part.<sup>36</sup> For over 2000 years, TCM practitioners have used bile from bear gall bladders to treat a wide variety of illnesses.<sup>37</sup> The active ingredient in bear bile is ursodeoxycholic acid (“UDCA”),<sup>38</sup> used in Western medicine to treat

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<sup>30</sup> See HIGHLEY, *supra* note 1, under heading *Modern Decline*, para. 6. See also KNIGHTS, *supra* note 1, at 15. “It is a widely held belief in many parts of Asia that bears, primates, and other cherished endangered species taste better when adrenaline is forced to flow during drawn out, violent beatings just before the animal is killed.” See HIGHLEY, *supra* note 1, under heading *Modern Decline*, para. 6; also KNIGHTS, *supra* note 1, at 15.

<sup>31</sup> See HIGHLEY, *supra* note 1, under heading *Modern Decline*, para. 8; *China: Bear Farms*, paras. 8-9; *North Korea and South Korea*, para. 3-5.

<sup>32</sup> *Korea Leads Illegal Trade*, *supra* note 15.

<sup>33</sup> KEMPF, *supra* note 1, at 6.

<sup>34</sup> Traditional Chinese Medicine [hereinafter TCM] refers to the philosophy and practice of medicine that originated in China around 3,500 BC, which was later adopted in Korea and Japan. See KEMPF, *supra* note 1, at 22.

<sup>35</sup> See *id.* at 6. Furthermore, “[w]ith the diaspora of ethnic Chinese and other Asian peoples this century, TCM has spread to Asian communities around the world including North America, Europe, Australia, and New Zealand.” *Id.* at 22.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 6. See also World Society for the Protection of Animals, *Inside China's Torture Chambers: Introduction* (2000), <http://www.wspa.org.uk/liberty/bearbile2.html> (stating that TCM has prescribed derivatives of bear gall bile for medicinal purposes for the past 3,000 years) [hereinafter WSPA]. Bear bile is used in TCM to treat various intestinal, liver, fever, and cardiac-related illnesses, and also bruises, abscesses, hemorrhoids, and cataracts. See Michael Tennesen, *Poaching, Ancient Traditions, and the Law*, AUDUBON MAG., July-Aug. 1991, at 7; KEMPF, *supra* note 1, at 22.

<sup>38</sup> See *id.*

hepatitis and gallstones,<sup>39</sup> though its efficacy is debated.<sup>40</sup> Bear bile is also used in a variety of cosmetics, health-care products, and herbal teas.<sup>41</sup> Synthetic and herbal alternatives to bear bile are available,<sup>42</sup> but many TCM adherents prefer actual bear bile to available alternatives.<sup>43</sup> Furthermore, the bile from wild bears is considered to be more potent than that from farmed bears.<sup>44</sup> An average-sized bear gall bladder sells for between US\$1,200-3,000, making it worth more than its weight in gold.<sup>45</sup>

As bear populations in Asia are decimated, North American bears are increasingly falling prey to poachers harvesting bear gall bladders for the Asian market.<sup>46</sup> Also, the increasing Asian population in the United States and Canada has created a domestic market for bear gall bladders, which are often made available through traditional apothecaries in major North American cities, despite the illegality of the trade.<sup>47</sup> For instance, in the late 1980s, U.S. wildlife officers began finding dead bears in national

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<sup>39</sup> *See id.*

<sup>40</sup> William Carroll Muffett, Note, *Regulating the Trade in Bear Parts for Use in Asian Traditional Medicine*, 80 MINN. L. REV. 1283, 1286 n.23 (1996) (“UDCA is effective against gall stones only when taken in prohibitively large quantities . . . . The other curative effects attributed to bear gall remain unsubstantiated”).

<sup>41</sup> *See* KEMPF, *supra* note 1, at 22.

<sup>42</sup> J.A. Mills et. al., *New Information on East Asia's Market for Bear Gall Bladders*, TRAFFIC BULL., March 1997, at 107-12. “At least 54 herbal alternatives [to bear bile] exist including ‘a type of gardenia, rhubarb, peony root, and the Madagascar periwinkle.’” *Id.*

<sup>43</sup> *See* HUMANE SOCIETY, *supra* note 1, at 2-3 (attributing the lack of acceptance of alternatives to profit-motivated TCM doctors and pharmacists, who are reluctant to sell alternatives with much lower profit margins and the belief that bear bile possesses mystical properties).

<sup>44</sup> *Id.* at 18. “Many consumers believe that the poor diet, confinement and constant milking of captive bears makes farmed bile inferior; other just want the ‘real thing.’ “The Human Society International predicts that as the number of consumers in China move “up the economic ladder [they] will wish to upgrade their consumption from farmed to free-range bile.” *Id.*

<sup>45</sup> In Taiwan and Korea, bear galls sell for US\$20-50 per gram. *See* HIGHLEY, *supra* note 1, at Table 1 (Import of Bear Gall Bladder in Taiwan). At the time this was being written, gold bar was selling for roughly US\$9 per gram. *See* Kitco Minerals & Metals, *Precious Metals Order Details*, at <http://online.kitco.com/sellprice/selling.html> (last visited Aug. 27, 2000).

<sup>46</sup> *See* HIGHLEY, *supra* note 1, under heading *North America*.

<sup>47</sup> *See* Tennesen, *supra* note 37, at 5-6.



parks with their gall bladders cut out and their paws chopped off.<sup>48</sup> Currently, an estimated 40,000 black bears are illegally killed in North America each year for their gall bladders and paws.<sup>49</sup> Although most American bear populations remain healthy, the increased levels of poaching coupled with continued loss of habitat could permanently damage genetically distinct populations within several years.<sup>50</sup> Recent prosecutions involving members of several bear poaching and smuggling rings around the country have called attention to the threat that international trade in bear paws and gall bladders pose to American bear populations.<sup>51</sup>

### III. THE FAILURE OF DOMESTIC REMEDIES

Controlling the illegal trade in bear parts within the United States has proven exceedingly difficult. Laws regulating the trade in bear parts differ from state to state, creating a “‘patchwork’ of jurisdiction.”<sup>52</sup> Some states allow parts from legally hunted bears to be sold, enabling bear traders to launder bear gall bladders and bear paws taken from states that

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<sup>48</sup> See David Madison, *Bear Bile Bust*, SALT LAKE CITY WEEKLY, Apr. 13, 1998, [http://www.desert.net/ww/04-13-98/slc\\_cb\\_b.html](http://www.desert.net/ww/04-13-98/slc_cb_b.html).

<sup>49</sup> See Wildlife Forensic DNA Laboratory Home Page, at <http://www.trentu.ca/academic/forensic/labservices.html> (last visited Mar. 23, 2000) [hereinafter *Wildlife Forensics*]. See also David Dickenson, “Fuzzy Wuzzy Was a Bear,” *Will American Black Bears Go the Way of Their Asian Cousins?*, 9 COLO. J. NAT’L ENVTL. L. & POL’Y 167, 172 (1998). This is on top of the 40,000 bears killed legally. Some estimates for Canada put the ratio of poached bears to legally hunted bears at 2:1. See *id.*

<sup>50</sup> See Muffet, *supra* note 40, at 1293.

<sup>51</sup> For example, in September 1999, the ring-leader of a nine-member bear poaching gang was convicted in Oregon. See *Ringleader sentenced*, *supra* note 28. On January 18, 1999, twenty-two people were arrested in Virginia for 107 state wildlife violations. The arrests were the result of a major, ongoing, undercover investigation into the illegal hunting and commercialization of black bears in Virginia and Shenandoah National Park. “At the heart of [the operation were] concerns about an international problem that has a toehold in Virginia.” Virginia Department of Game and Inland Fisheries, Press Release, *Successful Joint Effort Tackles Poachers, Illegal Bear Trade*, Jan. 19, 1999, [http://www.dgif.state.va.us/pr-011999-bear\\_poaching.html](http://www.dgif.state.va.us/pr-011999-bear_poaching.html) (last visited Mar. 23, 2000) [hereinafter VA Dept. Game]. In April, 1998, a man was arrested in Utah for purchasing bear galls from local hunters to resell in Korea. See Madison, *supra* note 48.

<sup>52</sup> See KEMPF, *supra* note 1, at 23. Eighteen states allow the sale of bear parts, while in thirty-two states trade in bear parts is prohibited. Kellie M. Smith, *Penalty Increase for the Poaching of Bear Parts: Is it Enough?*, 30 MCGEORGE L. REV. 623, 628-29 (1999).

prohibit such trade.<sup>53</sup> Forensic DNA testing may eventually provide the technical means to address the problem of bear part laundering, but such a solution fails to address the concerns of environmentalists who claim that any legal trade of bear parts only encourages their use by fueling the demand and indirectly supporting illegal trade.<sup>54</sup>

Environmental and animal rights organizations advocate for a federal law banning all domestic trade in bear parts. Congress is currently considering a bill for such a law. The “Bear Protection Act” would prohibit the trade in and possession of “bear viscera or products that contain or claim to contain bear viscera.”<sup>55</sup> Supporters claim that the bill will prevent poachers from undermining state regulations protecting bears and would insulate such regulations from possible Commerce Clause challenges.<sup>56</sup>

Even with such a law, the illegal traffic in bear parts is certain to continue. Anti-poaching efforts are costly, and the Fish & Wildlife Service is already overburdened and understaffed.<sup>57</sup> With only several

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<sup>53</sup> See *id.* at 629 (inconsistent state laws encourage the interstate laundering of bear parts). The Lacey Act prohibits the interstate and international trafficking of illegally obtained wildlife. 16 U.S.C. § 3372(a)(1) (2000). See generally Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27 (1995) (providing an in-depth background on the history, purpose, and application of the Lacey Act). Also, a lack of systematic registration of bear parts makes it difficult to prove the illegality of bear parts. See Dickenson, *supra* note 49, at 174-75.

<sup>54</sup> See Wildlife Forensics, *supra* note 49. For example, in Canada, Trent University's Wildlife Forensic Laboratory is currently evaluating the possibility of developing a database of bear DNA that would be used to determine whether bear parts were obtained from protected bear populations in Canada. *Id.* Also, Taiwan has recently developed technology that can determine whether a gall bladder is from an Asian or North American bear. See *Taiwan Makes Breakthrough in Wildlife Conservation Effort*, CENT. NEWS AGENCY TAIWAN, Feb. 7, 2000, available in 2000 WL 2359271; see generally George Sensabaugh & D.H. Kaye, *Non-human DNA Evidence*, 38 JURIMETRICS J. 1 (1998) (discussing the factors a court should look at when determining the admissibility of non-human DNA evidence).

<sup>55</sup> S. 1109, 106<sup>th</sup> Cong. (1999). See also Humane Society of the United States, *HSUS Urges Senate to Pass Bill Protecting Bears* (May 25, 1999), at <http://www.hsus.org/news/pr/052599.html> (arguing that the new federal law will protect bears by closing up the loopholes in U.S. law regulating the sale of bear parts).

<sup>56</sup> See Smith, *supra* note 52, at 636.

<sup>57</sup> Chris Gillis, *Dead or Alive: United States Fish and Wildlife Service Struggles with Inadequate Budget*, AM. SHIPPER 55 (Aug. 1, 2000), available at 2000 WL 18252823. See Dickson, *supra* note 49, at 175-76. See also Muffett, *supra* note 40, at 1285 (1996) (discussing the Fish and Wildlife Service's opposition to bills proposing federal regulation of traffic in bear parts, because “it would impose unnecessary and unwelcome administrative burdens on already overwhelmed wildlife officials”).

hundred federal wildlife agents nationwide<sup>58</sup> who are working under shrinking budgets, assigning park rangers to time-consuming and dangerous anti-poaching operations is often impossible.<sup>59</sup> The number of wildlife inspectors in U.S. customs is likewise inadequate. As a result, the majority of all imported goods entering into this country are not inspected at a designated port of entry.<sup>60</sup> Furthermore, the agents inspecting wildlife shipments are often inadequately trained to distinguish between prohibited and non-prohibited products.<sup>61</sup>

Attempts at controlling illegal trafficking of bear parts involve facing obstacles analogous to those that impede anti-narcotics efforts.<sup>62</sup> The street value of bear gall bladders surpasses that of cocaine.<sup>63</sup> In the United States, the smuggling of wildlife and wildlife products is the second largest illegal trade after drug trafficking,<sup>64</sup> and both activities often involve the same criminal organizations.<sup>65</sup> As long as the demand is high, there will be those willing to take the rather small risk of being caught in order to smuggle out the gall bladders and paws of America's bears. Ultimately, America's bears will not be safe until the demand is curtailed. Unfortunately, those countries with the greatest demand for

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<sup>58</sup> Dickson, *supra* note 49, at 175. In 1993, there were "only 216 officers from the Fish and Wildlife Service working to enforce all federal wildlife protection laws." *Id.* As of August 2000, the agency is "43 short of what's required to be fully staffed to conduct undercover investigations nationwide." Gillis, *supra* note 57.

<sup>59</sup> BOB R. O'BRIEN, OUR NATIONAL PARKS AND THE SEARCH FOR SUSTAINABILITY 100-01 (1999).

<sup>60</sup> See Muffett, *supra* note 40, at 1298.

<sup>61</sup> See Dickson, *supra* note 49, at 1299.

<sup>62</sup> International Fund for Animal Welfare, IFAW Releases Video of Major Wildlife Crime Ring Busted in Undercover Sting by Russian Police: Criminals Caught with Endangered Tiger Pelts, <http://www.ifaw.org/press/pr041300b.html> (13 April 2000) (stating that "[t]rafficking in wild animals and their parts has become as dangerous and as profitable as international drug trafficking."). See also HUMANE SOCIETY INTERNATIONAL, *supra* note 1, at 5.

<sup>63</sup> VA Dept. Game, *supra* note 51.

<sup>64</sup> See Lee, *supra* note 26, at 497 (1996). Internationally, the illegal wildlife trade is the third largest illegal trade after drugs and weapons. *Id.*

<sup>65</sup> See Dickson, *supra* note 49, at 1290. For example, some of the bear trade in Canada has been linked to "underworld groups, operating out of Vancouver's fast-growing Asian community, which find trafficking in bear parts to be as lucrative, and less risky, than drugs." Associated Press, *Poaching Surges for Bear Parts* (Apr. 10, 1996), available at EnviroLink Network, [http://arrs.envirolink.org/news/poaching\\_surge.html](http://arrs.envirolink.org/news/poaching_surge.html) (last visited Mar. 23, 2000).

bear parts do not have much enthusiasm for fighting the ancient cultural practices and beliefs that support the bear trade.

International cooperation is necessary to properly address the problem of bear poaching and the illegal trade in bear parts. Economic sanctions, or the threat of such sanctions, have proven effective in pressuring other nations to implement policies that discourage the trade in endangered species. The next section discusses how the United States has successfully levied sanctions against Taiwan for its trade in rhinoceros and tiger parts, in contravention of CITES, a situation that is analogous to the trade in bear parts.

#### IV. INTERNATIONAL REMEDIES: CITES AND PELLY AMENDMENT SANCTIONS

Any U.S. effort to pressure Korea, or other East Asian nations, to implement policies to curb their nationals' trade in bear parts would be based on those nations' obligations under CITES. CITES is the only global treaty designed to regulate international wildlife trade to protect certain species of plants and animals from overexploitation.<sup>66</sup> All the major consumer nations of bear parts, except Taiwan,<sup>67</sup> are signatories to CITES.<sup>68</sup> Species protected under CITES are listed under three appendixes.

Appendix I lists "all species threatened with extinction which are or may be affected by trade."<sup>69</sup> CITES permits trade in these species only

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<sup>66</sup> See Mark C. Trexler & Laura H. Kosloff, *International Implementation: the Longest Arm of the Law?*, in BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE 114, 118 (Kathryn A. Kohm ed., 1991); also RICHARD LITTELL, ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION 101 (1992) (citing *Man Hing Ivory and Imports v. Deukmejian*, 702 F.2d 760, 762 (9th Cir. 1983)). The preamble of CITES recognizes "that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade." CITES, *infra* note 68, 1976 27 U.S.T. at 1090. See also James Cameron, *The GATT and the Environment*, in GREENING INTERNATIONAL LAW 100, 107 (Philippe Sands ed., 1994).

<sup>67</sup> Taiwan is not recognized as an independent country by the United Nations and is, thus, ineligible to join CITES. "The treaty views Taiwan as a territory of China, which acceded to CITES in 1981. It is also important to note that due to this unique political situation, trade between Taiwan and China is viewed as a domestic issue and therefore does not technically fall within the purview of CITES." See HIGHLEY, *supra* note 1, under heading *CITES and the Two Chinas*.

<sup>68</sup> 1976, 27 U.S.T. 1087, T.I.A.S. No. 8249, amended June 22, 1979, T.I.A.S. No. 11079.

<sup>69</sup> *Id.* art. III(1).

in “exceptional circumstances” and only if such trade will not threaten their survival.<sup>70</sup> Any trade in these species requires an export permit from the country of origin or a re-export certificate from the re-exporting country and an import permit from the recipient country.<sup>71</sup> The Asiatic Black Bear, Spectacled Bear, Sun Bear, Sloth Bear, Giant Panda, and some species of brown bear are listed under Appendix I.<sup>72</sup>

Appendix II includes species that are not currently threatened with extinction but may become so if trade is not strictly regulated.<sup>73</sup> Export permits or re-export certifications are required, but import permits are not. Appendix II also covers “look-alike species,”<sup>74</sup> which are those that “must be subject to regulation in order that trade in [protected species] may be brought under effective control.”<sup>75</sup> For example, the United States was pressured to list its black bears, which are not endangered, because smugglers could easily claim that bear parts from endangered Asiatic black bears came from their non-threatened American cousins. The American black bear, polar bear, and all species of brown bear not listed in Appendix I are listed in Appendix II.<sup>76</sup>

Appendix III allows a party to list species that its law protects within its own boundaries. Its purpose is to help nations obtain the cooperation of other nations in protecting species of special concern within their own borders.<sup>77</sup> No bear species are listed under Appendix III.

The United States sponsored CITES and has continued to be a leader in its application.<sup>78</sup> Trade in species contrary to CITES, or possession of such species, violates U.S. domestic law.<sup>79</sup> Trade in Appendix II species, however, is permitted if they are not listed as

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<sup>70</sup> *Id.* Examples of exceptional circumstances include scientific or zoological purposes. See WORLD WILDLIFE FUND, *supra* note 24, at 2.

<sup>71</sup> See CITES, *supra* note 68, art. III.

<sup>72</sup> CITES Appendix I, available at <http://www.wcmc.org.uk/CITES/common/append/fauna12-correct.shtml> (last visited Sept. 9, 2000).

<sup>73</sup> CITES, *supra* note 68, art. II(2)(a).

<sup>74</sup> See WORLD WILDLIFE FUND, *supra* note 24, at 4.

<sup>75</sup> CITES, *supra* note 68, art. II(2)(b).

<sup>76</sup> CITES Appendix I, *supra* note 72.

<sup>77</sup> CITES, *supra* note 68, art. III(3).

<sup>78</sup> See LITTELL, *supra* note 66, at 101-03.

<sup>79</sup> See 16 U.S.C. §1538(c)(1) (1988); also 50 C.F.R. § 23 (1990); LITTELL, *supra* note 66, at 104.

“endangered” under U.S. law, are not imported for commercial purposes,<sup>80</sup> and comply with CITES and U.S. import licensing requirements.<sup>81</sup> The United States has taken measures against foreign governments whose practices contravene CITES.<sup>82</sup>

Under the Pelly Amendment,<sup>83</sup> the President may impose trade sanctions against a foreign country whose practices diminish the effectiveness of any international program for endangered or threatened species, regardless of whether such conduct is legal under the law of the offending country.<sup>84</sup> The Secretary of Commerce or the Secretary of the Interior begins a Pelly action by “certifying” to the President that a country is acting in violation of an international environmental treaty.<sup>85</sup> The President may then place prohibitions on imports from the certified country, subject to U.S. obligations to the World Trade Organization.<sup>86</sup> After making its certification, the Secretary conducts periodic reviews to see if the conditions have changed and can terminate certification when appropriate.<sup>87</sup> Within the Department of the Interior, the U.S. Fish and Wildlife Service conducts reviews and makes recommendations for Pelly certifications under CITES.<sup>88</sup>

Threats of Pelly Amendment sanctions have been effective in influencing other nations to change trade practices that threaten endangered species.<sup>89</sup> Actual sanctions, however, are rarely applied and

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<sup>80</sup> Museums and cultural or historical organizations are exempted. *See* 16 U.S.C. 1532(3).

<sup>81</sup> 16 U.S.C. §1538(c)(2). *See also* LITTEL, *supra* note 66, at 104-05.

<sup>82</sup> For example, in 1991, Japan was certified for its trade in hawksbill and olive ridley sea turtles, both of which were listed in CITES Appendix I. *See* Steve Charnovitz, *Recent Developments: Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT’L L. & POL’Y 751, 767 (1994). In 1994, trade sanctions were levied against Taiwan for its trade in rhinoceros and tiger products. *See infra* notes 92-106 and accompanying text.

<sup>83</sup> 22 U.S.C. § 1978.

<sup>84</sup> *See* Charnovitz, *supra* note 32, at 760.

<sup>85</sup> 22 U.S.C. § 1978(a)

<sup>86</sup> 22 U.S.C. § 1978 (a)(4).

<sup>87</sup> 22 U.S.C. § 1978 (d).

<sup>88</sup> *Taiwan: CITES Implementation Status Report Pursuant to Pelly Certification for the Period June 30, 1995 to June 30, 1996*, in 14 CHINESE Y.B. INT’L AFF. 46-55 (Hungdah Chiu ed., 1995-96) [hereinafter *Taiwan CITES Implementation*].

<sup>89</sup> For example, President Bush was successful in pressuring Japan to phase out its trade in shells from the endangered Hawksbill turtle. *See* LITTEL, *supra* note 66, at

efforts by environmentalists to force the Administration to impose sanctions have been unsuccessful.<sup>90</sup> In the past twenty-two years, sanctions have only been imposed once.<sup>91</sup> In September 1993, the U.S. Secretary of the Interior certified Taiwan as undermining the effectiveness of CITES by trading in rhinoceros and tiger parts.<sup>92</sup> In August 1994, President Clinton announced his decision to ban all “wildlife specimens, parts and products thereof, that are products of Taiwan.”<sup>93</sup>

Florsheim Shoe Company challenged the scope of the Taiwan embargo after the Fish and Wildlife Service seized a shipment of the company’s Taiwan-manufactured elk skin shoes.<sup>94</sup> Florsheim argued that the embargo did not ban the shoes, which were made of Finnish elk leather, because the embargo only prohibited trade in those products from wildlife native to Taiwan. Florsheim contended that the words “of Taiwan” in the Presidential Proclamation modified the word “wildlife.”<sup>95</sup> The Court of International Trade held that the Fish and Wildlife Service properly interpreted the scope of the Proclamation to cover products made in Taiwan from fish and wildlife components even if not taken from the wild in Taiwan.<sup>96</sup> In reaching its holding, the court stated that the purpose of the Pelly Amendment was “to prevent trade in endangered species, whether or not those species originated in the home country.”<sup>97</sup> It pointed out that Taiwan has no wild rhinoceroses or tigers and if “Florsheim’s interpretation [is] accepted, the embargo would not apply to trade in these endangered species, although this is the Proclamation’s very purpose.”<sup>98</sup>

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101, 105. Threats of Pelly sanctions were also used to pressure Russia into ending its whale trade. See Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U.J. INT’L L. & POL’Y 751, 763 (1994).

<sup>90</sup> See LITTELL, *supra* note 66, at 106.

<sup>91</sup> See *Summary Fact of the Day*, AM. POL. NETWORK GREENWIRE, Oct. 7, 1994, available in WL 10/7/94 APN-GR2.

<sup>92</sup> See *The Republic of China’s Compliance with the Convention on International Trade in Endangered Species (CITES)—Taiwan Off U.S. Wildlife Watch List Under the Pelly Amendment*, 14 CHINESE Y.B. INT’L L. 41 (1995-96).

<sup>93</sup> Letter from President Clinton to the Speaker of the House (Apr. 11, 1994).

<sup>94</sup> See *Florsheim Shoe Co. v. United States*, 880 F. Supp. 848 (Ct. Int’l Trade, 1995).

<sup>95</sup> *Id.* at 850-51.

<sup>96</sup> *Id.* at 850-52.

<sup>97</sup> *Id.* at 852.

<sup>98</sup> *Id.* at 853.

The embargo was effective. Taiwan increased wildlife seizures, imposed stricter penalties for trafficking in tiger and rhinoceros parts, amended Taiwan's Wildlife Conservation Law,<sup>99</sup> and implemented technical and legal training efforts.<sup>100</sup> The United States lifted the embargo in June 1995,<sup>101</sup> and, in September 1996, Secretary Babbitt terminated Taiwan's certification because of significant improvements in its conformance to CITES.<sup>102</sup>

Although the embargo was imposed to protect rhinoceroses and tigers, it also benefited other species, including bears. As part of its implementation of CITES obligations, Taiwan's Department of Health and its Council of Agriculture began working with TCM practitioners to phase out the use of bear bile in Taiwan. This effort has led to research in substitute medicines, improved forensic capabilities, a crackdown on smuggling, and a public awareness campaign.<sup>103</sup>

Many environmentalists viewed Taiwan's progress in developing better wildlife protection policies as proof that Pelly Amendment sanctions were effective in getting other countries to meet international wildlife protection goals.<sup>104</sup> Yet, the success of the sanctions against Taiwan had little to do with their economic impact. Only twenty million dollars in Taiwanese products were affected, an insignificant loss considering that Taiwan's overall trade with the United States exceeds twenty-five billion dollars a year.<sup>105</sup> Considering the nominal affect that

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<sup>99</sup> See *Taiwan's CITES Implementation*, *supra* note 88, at 48-49.

<sup>100</sup> See *News from the Fish and Wildlife Services*, Sept. 11, 1996, in 14 CHINESE Y.B. INT'L AFF. 42-44 (1995-96).

<sup>101</sup> *Worldview Species: Clinton Lifts Trade Sanctions Against Taiwan*, AM. POL. NETWORK GREENWIRE, July 5, 1995, available in WL 7/5/95 APN-GR 19 [hereinafter *Clinton Lifts Trade Sanctions*].

<sup>102</sup> See Bruce Babbitt's Letter to President Clinton Regarding the Termination of the Certification of Taiwan, Sept. 10, 1996, available in 14 CHINESE Y.B. INT'L AFF. 45 (1995-96).

<sup>103</sup> See *Taiwan's CITES Implementation*, *supra* note 88, at 53. Environmental and animal rights activists, however, have recently called upon the Taiwanese government to further tighten customs inspections to thwart the smuggling of endangered animals and their products. Central News Agency, *Taiwan Urged to Crack Down on Wildlife Smuggling* [hereinafter *Taiwan Urged to Crack Down*], Nov. 21, 2000, available at Taiwan Headlines, [http://th.gio.gov.tw/show.cfm?news\\_id=6304](http://th.gio.gov.tw/show.cfm?news_id=6304) (last visited Jan. 29, 2001).

<sup>104</sup> See, e.g., Hemley, *supra* note 6, at 56.

<sup>105</sup> *Worldview Species: U.S. to Impose Trade Sanctions Against Taiwan*, AM. POL. NETWORK GREENWIRE, Apr. 12, 1994, available in WL 4/12/94 APN-GR 22.



the sanctions had on Taiwan's trade with the United States, it might seem unusual that the trade sanctions were effective at all. Yet, Taiwan's leaders were embarrassed by the displeasure of a long-time ally.<sup>106</sup> Taiwan's reasons for responding positively to the U.S. sanctions levied upon it were diplomatic, not economic.

The United States' decision to impose Pelly sanctions on Taiwan alone was also based on diplomatic, rather than environmental or economic, concerns. Taiwan is not the only country with significant trade in tiger and rhinoceros parts. China and South Korea are also major markets for the endangered species trade.<sup>107</sup> Taiwan, however, made a more convenient target. Although the U.S. Administration's decision to impose Pelly Amendment sanctions should be based on conservation factors alone,<sup>108</sup> the United States, at the time, was seeking to "maintain solidarity with Seoul amid the nuclear showdown with North Korea . . . , and also wanted to avoid conflict with China."<sup>109</sup>

Furthermore, South Korea was a member of the newly formed World Trade Organization ("WTO"), which enjoys significant enforcement powers. The United States had had similar embargoes successfully challenged under the General Agreement on Trade and Tariffs ("GATT"), including scrutiny of the Pelly Amendment. It was justifiably cautious about exposing the Pelly Amendment to further challenges. With South Korea's current status as a member of the WTO and the possibility of China and/or Taiwan's admission in the near future, the ability of the Pelly Amendment to withstand a challenge brought within the WTO Dispute Settlement System ("DSS") needs to be assessed. The next section provides a description of the WTO DSS and examines how WTO panels and appellate bodies have analyzed environmental actions affecting trade.

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<sup>106</sup> See *Clinton Lifts Trade Sanctions*, *supra* note 101.

<sup>107</sup> See e.g. Hemley, *supra* note 6, at 56. See also *Taiwan Urged to Crack Down*, *supra* note 103.

<sup>108</sup> See LITTELL, *supra* note 66, at 106.

<sup>109</sup> *Worldview Species: Clinton May Sign Taiwan Sanctions Order this Week*, AM POL. NETWORK GREENWIRE, Apr. 12, 1994, available in WL 4/12/94 APN-GR 22. See also John Copeland Nagle, *Why Chinese Wildlife Disappears as CITES Spreads*, 9 GEO. INT'L ENVTL. L. REV. 435, 442 (1997) (arguing "[t]hat the United States decided not to penalize China was viewed as an exercise in diplomacy unrelated to China's actual progress in enforcing the treaty").

## V. THE WTO CHALLENGE

Seen by many environmentalists as the archnemesis of international environmental protection, the WTO/GATT<sup>110</sup> has several times found U.S. environmental actions affecting trade to be in violation of the GATT. A Pelly Amendment sanction imposed on a WTO member whose trade in bear parts is in contravention of CITES is also likely to be challenged under the WTO DSS as an unjustified trade restriction. Of the major bear-trading nations, Korea and Japan are currently WTO members, and China and Taiwan may join in the near future.<sup>111</sup> In order to predict the effectiveness of a Pelly sanction on any of these countries, it is necessary to understand the WTO DSS and how similar sanctions have failed GATT scrutiny.

A. *Analysis of Environmental Trade Restrictions in the WTO Dispute Settlement System.*

When determining whether environmental measures affecting trade are justified, WTO/GATT panels have used a two-prong test: (1) are the challenged environmental measures linked to trade burdens and, if so, (2) are they justified under an exception to the GATT/WTO rules?<sup>112</sup> Step one requires scrutinizing the environmental measure against Article III's National Treatment requirement<sup>113</sup> and Article XI's prohibition of

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<sup>110</sup> WTO/GATT refers to the GATT system prior to 1994 together with the current WTO system established upon completion of Uruguay round of trade negotiations in 1994.

<sup>111</sup> Taiwan's entry into the World Trade Organization is expected later this year. *Small Change*, ECONOMIST, Jan. 6, 2001, available at 2001 WL 7317098. Taiwan's entry, however, has been postponed with delays in China's entry procedure, due in large part to the dispute between China and the WTO working group over agricultural subsidies and the establishment of quarantine units. *Taiwan's WTO Entry May be Postponed to Yearend*, CENT. NEWS AGENCY, Jan. 18, 2001, available at 2001 WL 2895083.

<sup>112</sup> See C. FORD RUNGE, FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS 17-19 (1994). See also Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. 333, 346.

<sup>113</sup> Article III's National Treatment requirement prohibits member nations from practicing internal discrimination by requiring that imported products be treated the same as like domestic products. See GATT, *supra* note 19, art. III. See e.g. United States—Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) 155-205 ¶¶ 5.8-5.16 (1993), LEXIS, ITRADE Library, BISD File [hereinafter *Tuna I*] (finding that U.S. import prohibitions on tuna based upon comparisons of the incidental killing of dolphins, which “could not possibly affect tuna as a product,” did not meet the requirements of Article III).

quantitative restrictions on trade.<sup>114</sup> If the trade measures are found to have violated Article III and XI, the panel then must determine if the trade measures fall under an Article XX exception.

Two exceptions under Article XX are used to legitimize environmental measures burdening trade. Article XX(b) exempts measures “necessary to protect human, animal or plant life or health,”<sup>115</sup> and Article XX(g) exempts measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption[.]”<sup>116</sup> These exceptions are subject to Article XX’s chapeau,<sup>117</sup> which requires that the measures do not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade[.]”<sup>118</sup> These exceptions define the scope of allowable environmental trade restrictions under the GATT. Article XX does not use the word “environment.”<sup>119</sup> It expressly covers only those measures that are necessary to protect human, animal, and plant life, under subsection (b), or those implemented to conserve natural resources, under subsection (g).<sup>120</sup> The term “natural resources” has been interpreted to include both non-living and living resources, including highly migratory species. If arguing that a measure is within the scope of a XX(b) exception, the measure must be shown to be “necessary” to further legitimate health goals.<sup>121</sup> If arguing a XX(g) exception, the measure must be shown to be “related to” conservation.<sup>122</sup> Finally, the

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<sup>114</sup> See GATT, *supra* note 19, art. XI. See, e.g., *Tuna I*, *supra* note 113, ¶¶ 5.17-5.18 (finding that the United States’ imposition of sanctions on tuna products under the MMPA constituted impermissible quantitative restrictions under Article XI). See also Trachtman, *supra* note 112, at 346.

<sup>115</sup> GATT, *supra* note 19, art. XX(b).

<sup>116</sup> *Id.* art. XX(g).

<sup>117</sup> The preamble of Article XX is commonly referred to as its “chapeau.”

<sup>118</sup> GATT, *supra* note 19, art. XX. See, e.g., *Tuna I*, *supra* note 113, ¶¶ 3.53-3.59 (U.S. law setting dolphin-kill limits on foreign tuna, based upon U.S. industry levels, held to be a disguised restriction on international trade).

<sup>119</sup> The GATT was drafted before the modern environmental movement and has been criticized for not properly addressing environmental concerns. See generally Annie Taylor, *The Trade and Environment Debate*, in GLOBAL TRADE AND GLOBAL SOCIAL ISSUES 72, 72-78 (Annie Taylor & Caroline Thomas eds., 1999).

<sup>120</sup> See GATT, *supra* note 19, art. XX(b),(g).

<sup>121</sup> See *id.* art. XX(b).

<sup>122</sup> See *id.* art. XX(g).

trade burden created by the measure must be proportional to the environmental risk being addressed and have a scientific basis.<sup>123</sup> WTO/GATT panels and appellate bodies have expounded upon each of these tests, in some cases relying upon differing interpretations.

WTO/GATT panel and appellate body decisions have expressed two different interpretations of “necessary” in Article XX(b). The first and stricter of the two is the “least GATT-inconsistent” interpretation. It considers a “necessary” measure, where no other less GATT-inconsistent means of achieving the stated environmental goal is reasonably expected to be used.<sup>124</sup> The second interpretation of “necessary” addresses whether the measure is the “least trade-restrictive” and the most reasonably available.<sup>125</sup> The least trade-restrictive test sets a lower hurdle than the least GATT-inconsistent test and is seen by environmentalists to be the superior interpretation in that it involves tradeoffs between the costs of trade disruption and environmental concerns.<sup>126</sup>

In applying the language under Article XX(g), WTO/GATT panels and appellate bodies have interpreted “related to” as “primarily aimed at.”<sup>127</sup> This test asks whether the trade-burdening measures are primarily aimed at conservation and not some other protectionist objective.<sup>128</sup> Mixed motives are allowed so long as the main purpose is conservation.<sup>129</sup>

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<sup>123</sup> See RUNGE, *supra* note 112, at 17-19. See also DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 48-49 (1994).

<sup>124</sup> See Thailand Cigarettes Tax, GATT B.I.S.D. (37th Supp.) 200-28 (1990), LEXIS, ITRADE Library, BISD File. See also Daniel C. Esty, *Integrating Trade and Environment Policy Making: First Steps in the North American Free Trade Agreement*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 45, 51. See also ESTY, *supra* note 123, at 267-68.

<sup>125</sup> See Jagdish Bhagwati, *Trade and the Environment: The False Conflict*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 159, 179-80 (Durwood Zaelke et al., 1993). See also ESTY, *supra* note 123, at 249-55. Esty provides the following scale of environmentally related trade measures, from most to least restrictive: trade sanctions, import bans on environmentally harmful products, import restrictions that stop short of being a complete ban, differential tariffs or taxes, labeling requirements, environmental education, technology transfers, financial assistance, diplomatic warnings, and informal consultations. *Id.*

<sup>126</sup> See, e.g., Bhagwati, *supra* note 125, at 179-80.

<sup>127</sup> See Canada—Measures Affecting Exports Of Unprocessed Herring And Salmon, GATT, B.I.S.D. (35th Supp.) 98-115, ¶ 3.34 (1989), LEXIS, ITRADE Library, BISD File.

<sup>128</sup> See United States—Prohibition Of Imports Of Tuna And Tuna Products From Canada, GATT B.I.S.D. (29th Supp.) 91-109 (1982) [hereinafter *Canada-Tuna*] (U.S. ban on Canadian Tuna not covered by Article XX(g) because there were no comparable efforts by the U.S. to restrict domestic consumption of Tuna, therefore the

Two Uruguay round agreements augment the GATT analysis of environmental measures affecting trade: (1) the Agreement on Technical Barriers to Trade (“TBT Agreement”)<sup>130</sup> and (2) the Sanitary and Phytosanitary Standards Agreement (“SPS Agreement”).<sup>131</sup> Under the TBT Agreement, trade burdens imposed by environmental measures protecting “human health or safety, animal or plant life or health, or the environment” may not be “more trade restrictive than necessary” to reduce the risks that non-fulfillment would create.<sup>132</sup> This assessment takes into account “available scientific and technical information, related processing technology, or intended end-uses of products.”<sup>133</sup> This language establishes a requirement that environmental measures protecting trade have a scientific basis.<sup>134</sup> This scientific basis test is mirrored in the SPS Agreement, which allows members to impose measures more stringent than those applied by international standards where such measures have “scientific justification.”<sup>135</sup> A measure is scientifically justified if, “on the basis of an examination and evaluation of available scientific information

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ban was held not primarily aimed at conservation). *See also* RUNGE, *supra* note 112, at 81-91.

<sup>129</sup> *See* ESTY, *supra* note 123, at 49.

<sup>130</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1994 WL 761483 (G.A.T.T.), *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) (last visited Feb. 2, 2001) [hereinafter TBT Agreement].

<sup>131</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1994 WL 761483 (G.A.T.T.), *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) (last visited Feb. 2, 2001) [hereinafter SPS Agreement].

<sup>132</sup> TBT Agreement, *supra* note 130, art. 2.2. (stating that “[t]echnical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create”). The TBT Agreement was adopted during the Uruguay round “to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade.” *Id.* at preamble.

<sup>133</sup> TBT Agreement, *supra* note 130, art. 2.2.

<sup>134</sup> The TBT scientific basis test has been likened to the U.S. *Daubert* test. *See* ESTY, *supra* note 123, at 119. *See also* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (holding that evidence constitutes “scientific knowledge” when it can be reliably tested, has been subjected to peer review, is generally accepted, is subject to professional standards, has been prepared independent of the dispute, and has a low rate of error).

<sup>135</sup> SPS Agreement, *supra* note 131, art. 3.3.

in conformity with the relevant provisions of [the SPS Agreement], a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of [protection].”<sup>136</sup>

On the basis of these tests, WTO/GATT panels and appellate bodies have found U.S. laws and environmental actions affecting trade to be in violation of the GATT on several occasions.<sup>137</sup> Several of these actions involved embargoes or other sanctions designed to pressure other countries into adopting policies that would protect endangered animals.<sup>138</sup> Perhaps the best known of such decisions is the Tuna-Dolphin decision, which found that embargoes of tuna caught with a higher dolphin by-catch than U.S. levels were in violation of the GATT.<sup>139</sup>

In 1991, the United States banned the importation of Mexican tuna after a federal judge found that the U.S. government had failed to uphold its obligations under the Marine Mammal Protection Act.<sup>140</sup> Mexico challenged the ban under the pre-WTO DSS. The GATT panel ruled against the United States, holding that the U.S. law violated GATT Article III’s National Treatment requirement and that the U.S. actions could not be justified under the GATT Article XX exceptions for measures relating to actions necessary to protect human or animal life, or those that provide for the conservation of natural resources.<sup>141</sup> Although never adopted,<sup>142</sup>

<sup>136</sup> *Id.* n.2.

<sup>137</sup> See generally *Tuna I* *supra* note 113; GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, June 16, 1994, DS29/R, reprinted in 33 I.L.M. 839 (1994), available at 1994 WL 907620 [hereinafter *Tuna II*]. (Mexico & E.U., affecting the Marine Mammal Protection Act); *Canada-Tuna*, *supra* note 128 (U.S. ban on Canadian Tuna not covered by Article XX(g) because there were no comparable efforts by the U.S. to restrict domestic consumption of Tuna, therefore the ban was held to be not primarily aimed at conservation); Report of the Appellate Body, U.S. Standards for Reformulated and Conventional Gasoline, April 29, 1996, WT/DS2/9, reprinted in 35 I.L.M. 603 (1996), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/2-9.WPF> (last visited Feb. 2, 2001) [hereinafter *Reformulated Gas*] (Venezuela; affecting the U.S. Clean Air Act); *Shrimp-Turtle Appellate*, *supra* note 20 (affecting the Endangered Species Act).

<sup>138</sup> See, e.g., *Tuna I*, *supra* note 113; *Tuna II*, *supra* note 137 (dolphins); *Shrimp-Turtle Appellate*, *supra* note 20 (sea turtles).

<sup>139</sup> See *Tuna I*, *supra* note 113.

<sup>140</sup> See *Earth Island v. Mosbacher*, 929 F.2d 1449 (1991). See also U.S. Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972).

<sup>141</sup> See *infra* Section IA for discussion of GATT articles.

<sup>142</sup> Under the pre-1994 GATT dispute settlement system, a Panel decision had to be adopted by consensus vote of all members. See JEFFREY J. SCHOTT, *THE URUGUAY ROUND: AN ASSESSMENT* 125 (1994). Mexico did not push for adoption of the *Tuna I*

the Tuna-Dolphin decision brought into question the ability of the United States to impose unilateral sanctions to pressure other countries to change their environmental policies. The recent WTO Appellate Body ("Appellate Body") decision on the U.S. Import Prohibition of Certain Shrimp and Shrimp Products ("Shrimp-Turtle"), however, seems to indicate that such a sanction, if carefully implemented, could pass GATT scrutiny.

### B. *The Shrimp-Turtle Decision*

The recent Shrimp-Turtle decision represents a significant evolution in WTO jurisprudence relating to unilateral actions imposed to protect endangered species.<sup>143</sup> This case involved a challenge to a U.S. embargo on shrimp from countries that do not require commercial shrimp vessels to use Turtle Excluding Devices ("TEDs").<sup>144</sup>

All species of the world's sea turtles are threatened with extinction. Drowning in shrimp trawling nets represents the greatest cause of turtle fatalities. Section 609 of the U.S. Endangered Species Act prohibits the importation of foreign shrimp from nations that do not impose measures to save sea turtles similar to those measures taken in the United States, specifically the use of TEDs.<sup>145</sup> Section 609 directs the U.S. Secretary of State, in consultation with the U.S. Secretary of Commerce, to enter into negotiations with foreign governments to develop agreements for the

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decision as it was in negotiations with the United States for the North American Free Trade Agreement. The GATT dispute settlement system was revamped during the Uruguay Round. In the current WTO DSS, decisions are automatically adopted unless appealed. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 16(4), in Marrakesh Agreement Establishing the World Trade Organization, Annex 2, reprinted in 33 I.L.M. 112, available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf) (last visited Feb. 2, 2001).

<sup>143</sup> See also Dukgeun Ahn, *Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case*, 20 MICH. J. INT'L L. 819, 822 (1999) (stating that the *Shrimp-Turtle Appellate* case "made significant developments in both procedural and substantive aspects of WTO jurisdiction for trade disputes with environmental implications").

<sup>144</sup> See Joseph Robert Berger, *Unilateral Trade Measures to Conserve the World's Living Resources: Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 COLUM. J. ENVTL. L. 355, 359-60 (1999). TEDs are an inexpensive and effective way to save the turtles. They can decrease turtle fatalities by up to 97%. *Id.*

<sup>145</sup> Conservation of Sea Turtles; Importation of Shrimp, Pub. L. No. 101-162, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 (1994)) [hereinafter Conservation of Sea Turtles]. See Gregory Shaffer, *International Decision*, 93 AM. J. INT'L L. 507, 508 (1999); Ahn, *supra* note 143, at 836 (1999); generally Brett Grosko, *Just When is it That a Unilateral Trade Ban Satisfies the GATT?: The WTO Shrimp and Shrimp Products Case*, 5 ENVTL. LAW. 817 (1999).

protection of sea turtles.<sup>146</sup> Section 609 establishes a certification system that is similar to the Pelly Amendments' certification system.<sup>147</sup> In certifying shrimp exporting nations in 1996, the State Department called for those nations to establish guidelines requiring TEDs on all shrimp vessels, comparable to U.S. guidelines.<sup>148</sup>

As a result, a number of countries whose shrimp and shrimp products were banned challenged the U.S. measure before the WTO Dispute Settlement Body.<sup>149</sup> Eleven countries filed third-party submissions, all opposing the U.S. position.<sup>150</sup> The WTO panel found the U.S. embargoes to be inconsistent with GATT Article XI:1 and not justified by any Article XX exceptions.<sup>151</sup> It held that the U.S. measure constituted a threat to the multilateral trade system because "it conditioned trade access on the conservation policies of foreign countries."<sup>152</sup> The United States appealed to the WTO Appellate Body.

On appeal, the Appellate Body accepted the design of the U.S. law but not its application.<sup>153</sup> First, it held that the Article XX (g) exception

<sup>146</sup> Conservation of Sea Turtles § 609(a). See Shaffer, *supra* note 145, at 508; also Ahn, *supra* note 143, at 836.

<sup>147</sup> See *supra* notes 85-88 and accompanying text.

<sup>148</sup> See Berger, *supra* note 144, at 360; also Ahn, *supra* note 143, at 837.

<sup>149</sup> WTO Dispute Panel Report on U.S.—Import Prohibition of Certain Shrimp and Shrimp Products, Nov. 3, 1998, WT/DS58/R, reprinted in 37 I.L.M. 832, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58R00.WPF> (last visited Feb. 2, 2001) [hereinafter *Shrimp-Turtle Panel*]. The countries who challenged the U.S. ban on their shrimp products were: India, Malaysia, Pakistan, and Thailand. *Id.* at ¶ 1.1.

<sup>150</sup> Australia, Ecuador, El Salvador, European Communities, Guatemala, Hong Kong, Japan, Nigeria, Philippines, Singapore, Venezuela. *Shrimp-Turtle Panel, supra* note 149, ¶¶ 4.1-4.73.

<sup>151</sup> See *Shrimp-Turtle Panel, supra* note 149, ¶ 7.65.

<sup>152</sup> See Berger, *supra* note 144, at 361-62 (citing *Shrimp-Turtle Panel, supra* note 149, ¶ 7.45); also Shafer, *supra* note 145, at 509.

<sup>153</sup> The Appellate Body reasoned that Article XX, "by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied . . . The analysis is . . . two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX." *Reformulated Gasoline*, 35 I.L.M. at 626; also Berger, *supra* note 144, at 362 n.25; Ahn, *supra* note 143, at 843-45. In other words, first determine the legitimacy of the measure's policy goal under Article XX(g). See *id.* at 845. If the measures can be justified under Article XX (b) or (g), then analyze the measure's application under the chapeau's criteria. *Id.* "[T]he Appellate Body rejected the Panel's focus on the design, rather than application, of the U.S. law, and made the crucial leap that indicates a tacit acceptance of the law's design."



did cover the U.S. sea turtle law.<sup>154</sup> It stated that the term “natural resources” in Article XX incorporates the protection of living species<sup>155</sup> and that the term was to be interpreted in an evolutionary fashion.<sup>156</sup> In doing so, the Appellate Body “amended the prior GATT analysis in light of contemporary perspectives.”<sup>157</sup> The Appellate Body also held that Section 609 relates to conservation within the meaning of XX (g).<sup>158</sup>

Nevertheless, the Appellate Body ruled against the implementation of the U.S. law, criticizing the law as coercive, overbroad, unilateral, unequal in its application, and lacking due process. The Appellate Body found that the United States’ inflexible implementation of Section 609 had a coercive effect on foreign governments’ policy making.<sup>159</sup> It explained that although it is permissible for unilateral measures to manifest a general intent to influence foreign conservation policies, “coercive effects on foreign policy decisions may reach too far if mandating the adoption of an inflexible, comprehensive regulatory program.”<sup>160</sup>

Although hardly a ringing victory for environmentalists, this holding was a substantial development from the *Tuna-Dolphin* case. Unlike *Tuna-Dolphin*, which held that measures enacted to force a member nation to change its environmental policies violated the GATT,<sup>161</sup> the Appellate Body in *Shrimp-Turtle* held that requiring exporting countries to adopt certain policies prescribed by the importing country

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<sup>154</sup> See *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 145.

<sup>155</sup> *Id.* ¶ 128.

<sup>156</sup> See *id.* ¶ 130.

<sup>157</sup> See Shafer, *supra* note 145, at 511. Professor Shafer argues that by interpreting “natural resources” in an evolutionary fashion, the AB significantly departed “from earlier GATT jurisprudence, particularly the reasoning in the two *Tuna-Dolphin* cases . . . .” *Id.* at 513.

<sup>158</sup> *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 133. The Appellate Body, in *Shrimp-Turtle Appellate*, found a “sufficient nexus between the migratory and endangered marine populations involved and the United States.” *Id.* at ¶ 187(c). It, therefore, held that the U.S. measures were within the scope of the Article XX(g) exception and were “provisionally” justified subject to Article XX chapeau. *Id.* See also Shafer, *supra* note 145, at 510; Berger, *supra* note 144 at 363-64.

<sup>159</sup> See *Shrimp-Turtle Appellate*, *supra* note 20, ¶¶ 161, 164; Berger, *supra* note 144, at 364; Shafer, *supra* note 145, at 511.

<sup>160</sup> *Shrimp-Turtle Appellate*, *supra* note 20, ¶¶ 143-45, 161.

<sup>161</sup> *Tuna I*, *supra* note 113, ¶¶ 6.2-6.3.

does not automatically violate the GATT.<sup>162</sup> A violation occurs only if the measure or its application requires the exporting country to adopt not merely a comparable but essentially the same measures as the importing country's laws.<sup>163</sup> The distinction between "merely comparable" and "essentially the same" is vague and needs to be clarified in future opinions.<sup>164</sup>

Because the embargo was applied to entire export shipments, including turtle-safe catches,<sup>165</sup> the Appellate Body also found that the United States implemented the regulations too broadly,<sup>166</sup> and implied that the United States was more interested in influencing foreign governments' policy making than in protecting the turtles.<sup>167</sup> According to the Appellate Body, feasible multilateral procedures were available and, therefore, the unilateral action by the United States violated the GATT.<sup>168</sup> The Appellate Body criticized the United States' unequal treatment of the various shrimp-exporting nations.<sup>169</sup> Because the United States had negotiated an Inter-American Convention for the Protection of Sea Turtles, the Appellate Body found that it could have entered into similar negotiations with other countries.<sup>170</sup> Fourteen countries in the Caribbean and the West Atlantic were given a three-year grace period, whereas all other countries were only given four months notice. Furthermore, technological transfers were more aggressive with the fourteen countries than with others.<sup>171</sup>

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<sup>162</sup> See Ahn, *supra* note 146, at 847 (discussing how the Appellate Body in *Shrimp-Turtle* has broadened "the scope of extraterritoriality beyond the limit contemplated in *Tuna II*).

<sup>163</sup> See *id.* at 848.

<sup>164</sup> See *id.*

<sup>165</sup> See *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 164

<sup>166</sup> See *id.* ¶ 165; Berger, *supra* note 144, at 365; Shaffer, *supra* note 145, at 511; Ahn, *supra* note 143, at 850; Grosko, *supra* note 145, at 831-32

<sup>167</sup> See Shafer, *supra* note 145, at 511 (citing *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 165).

<sup>168</sup> See *Shrimp-Turtle Appellate*, *supra* note 20, ¶¶ 166-70; Berger, *supra* note 144, at 365; Shaffer, *supra* note 145, at 511-12; Grosko, *supra* note 145, at 832-33; Nancy L. Perkins, *Introductory Note: World Trade Organization: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 38 I.L.M. 118, 119 (1999).

<sup>169</sup> See *Shrimp-Turtle Appellate*, *supra* note 20, ¶¶ 173, 175; Berger, *supra* note 144; Shaffer, *supra* note 145, at 512; Grosko, *supra* note 145, at 833-34.

<sup>170</sup> See Shaffer, *supra* note 145, at 511-12.

<sup>171</sup> See *id.* at 512.

The Shrimp-Turtle decision represents an “important step forward in elucidating the parameters and proper application of GATT Article XX” by clarifying the relationship of Article XX’s chapeau to the article’s exceptions.<sup>172</sup> The Appellate Body held that Article XX exceptions could not be used to justify a restriction on trade if “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.”<sup>173</sup> In order to avoid a discrimination charge under Article XX, importing countries must consider the different circumstances and conditions of the exporting countries that may require different treatment. The Appellate Body distinguished two kinds of requirements in the Article XX chapeau: substantive and procedural. The “unjustifiable discrimination” language was interpreted as a substantive requirement. The United States’ overbroad implementation of Section 609 constituted unjustifiable discrimination. The term “arbitrary discrimination” was interpreted as establishing a procedural requirement. The U.S. implementation of Section 609 was found to be arbitrary under Article XX’s chapeau, because it lacked basic fairness and breached the chapeau’s procedural requirement of due process.<sup>174</sup> This was contrary to the spirit of Article X:3, which establishes standards of procedural fairness.<sup>175</sup>

Reactions to the Shrimp-Turtle decision were mixed. Even though the United States lost its appeal, it responded positively. The U.S. Trade Representative to the WTO expressed pleasure with the Appellate Body’s finding that Section 609 was not inconsistent with the GATT.<sup>176</sup> The United States has been working on revamping the regulations to implement Section 609 in line with the Shrimp-Turtle decision.<sup>177</sup> In

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<sup>172</sup> See Perkins, *supra* note 168, at 118.

<sup>173</sup> See *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 180.

<sup>174</sup> See *id.* ¶¶ 180, 182. See Berger, *supra* note 144, at 366; Shaffer, *supra* note 145, at 512; Ahn, *supra* note 143, at 850-51. The Shrimp-Turtle dispute marks the first time that the GATT Article X:3 due process requirement has been evoked in a trade and environment opinion or report. Grosko, *supra* note 145, at 834-35.

<sup>175</sup> *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 180. See Berger, *supra* note 144, at 366; Shafer, *supra* note 145, at 512.

<sup>176</sup> Perkins, *supra* note 168, at 120 (citing Statement of Ambassador Rita Derrick Hayes, Permanent U.S. Trade Representative to the World Trade Organization to the WTO Dispute Settlement Body (Nov. 25, 1998)). See also Berger, *supra* note 144, at 371.

<sup>177</sup> U.S. Import Prohibition of Certain Shrimp and Shrimp Products: Status Report by the United States, Jan. 17, 2000, WT/DS58/15/Add.4, available at World Trade Organization: Documents Online, <http://docsonline.wto.org/> (last visited Feb. 2,

contrast, Thailand, although a winner in the dispute, has expressed serious concern over the Appellate Body's apparent deference to the political concerns underlying the United States' environmental protection claims.<sup>178</sup> Environmental non-government organizations ("NGOs") reacted with dismay. The World Wide Fund for Nature<sup>179</sup> alleged that the case once again showed the WTO's strong bias toward free trade at any cost.<sup>180</sup> Earth Island Institute, the NGO whose lawsuit compelled the United States to apply Section 609 to all countries, derided the decision as a "death blow for sea turtles."<sup>181</sup>

Although the Shrimp-Turtle decision may be a temporary defeat for the world's sea turtles, it is in some ways a small victory for the environmental movement on the trade front. By finding that the Article XX(g) exception relates to the conservation of natural resources covered in Section 609, the Appellate Body recognized the potential legitimacy of unilateral measures protecting the environment.<sup>182</sup> Some commentators believe that this may ultimately prompt the developing countries that challenged the U.S. law in the first place to upgrade their environmental regulations.<sup>183</sup>

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2001). In its most recent status report, the United States indicated that it "has implemented the recommendations and rulings of the DSB during the reasonable period of time. Our implementation steps have both responded to the issues raised by the Appellate Body report, and—with the cooperation of the countries in the Indian Ocean region—have advanced efforts to conserve endangered sea turtles." *Id.*

<sup>178</sup> See Perkins, *supra* note 168, at 120 (citing *Environment: WTO Formally Adopts Shrimp-Turtle Ruling As Thailand Fears Victory May Be Pyrrhic*, 15 INT'L TRADE REP. 1884 (BNA) (Nov. 11, 1998)).

<sup>179</sup> Previously known as the World Wildlife Fund.

<sup>180</sup> See Perkins, *supra* note 168, at 120 (citing World Wildlife Fund, Press Release, Statement in Response to the WTO Shrimp-Turtle Ruling (Oct. 12, 1998)).

<sup>181</sup> Shafer, *supra* note 145, at 513 (citing *WTO rejects U.S. ban on shrimp nets that harm sea turtles*, CNN (Oct. 12, 1998), at <http://www.cnn.com/US/9810/12/world.trade.ruling>).

<sup>182</sup> See *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 133 (finding that a WTO Member may rely on Article XX(g) to justify trade-restrictive measures aimed at protecting environmental resources in the "global commons" so long as there is at least some jurisdictional relationship between those resources and that WTO member); *also* Perkins, *supra* note 168, at 119.

<sup>183</sup> *Shrimp-Turtle Appellate*, *supra* note 20, ¶ 186. "[A]lthough the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the

## VI. PELLY SANCTIONS AFTER SHRIMP-TURTLE

Section 609's certification system reflects CITES' certification system. To be GATT consistent, Pelly Amendment sanctions would need to overcome the same due process and fairness concerns that led the WTO Appellate Body to finding that the implementation of Section 609 was inconsistent with the GATT. Any implementation of economic sanctions, pursuant to the Pelly Amendment must be careful to avoid the appearance of unilateralism, inflexibility, and unequal application to similarly situated nations.

A Pelly sanction similar to the one imposed upon Taiwan in 1994 should not be subject to attack for being unilateral. Unlike Section 609, the Pelly Amendment sanctions levied against Taiwan were pursuant to a widely accepted multilateral environmental treaty. The portrayal of the U.S. sanctions against Taiwan as being a multilateral action, however, is somewhat misleading. CITES-condoned sanctions are perhaps more accurately characterized as "multilateral unilateralism."<sup>184</sup> CITES, which has no policing body, depends upon its member nations to enforce the treaty. The Standing Committee of CITES authorizes the implementation of trade measures on recalcitrant nations but cannot require member nations to take action. When the United States implemented sanctions against Taiwan, it did so in the "spirit of international consensus," but it acted alone.<sup>185</sup>

A Pelly sanction similar to the one imposed upon Taiwan in 1994 should also be less subject to the criticism of being inflexible. The Appellate Body for the Shrimp-Turtle decision criticized Section 609 of the ESA for imposing inflexible, comprehensive, regulatory programs on foreign nations. In contrast, the United States implemented the 1994 trade sanctions on Taiwan in response to "Taiwan's singular failure, within the international community, to prevent activity that was illegal under Taiwanese and international law."<sup>186</sup>

Although the certification process under the Pelly Amendment does contain potential due process problems, Pelly certification is less

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requirements of the chapeau of Article XX." *Id.* See also Grosko, *supra* note 145, at 841; Perkins, *supra* note 168, at 118; Shafer, *supra* note 145, at 514.

<sup>184</sup> Amy E. Vulpio, *From the Forests of Asia to the Pharmacies of New York City: Searching for a Safe Haven for Rhinos and Tigers*, 11 GEO. INT'L ENVTL. L. REV. 463, 480 (1999) (citing Daniel Esty, *Unpacking the "Trade and Environment" Conflict*, 25 LAW & POL'Y INT'L BUS. 1259, 1275-76 (1994)).

<sup>185</sup> *Id.*

<sup>186</sup> See Berger, *supra* note 144, at 400.

vulnerable to due process challenges than is Section 609 or the ESA. Unlike Section 609 of the ESA, which requires all countries that conduct commercial shrimp operations to be certified annually to avoid sanctions,<sup>187</sup> the Pelly certification process is initiated only against problem nations.<sup>188</sup> The Pelly Amendment's less complicated certification procedures are more consistent with maintaining procedural safeguards and the United States should be able to develop the necessary guidelines to make the Pelly sanctions more impervious to GATT due process attacks.

A more serious issue that needs to be addressed is the Appellate Body's concern for fairness in implementing environmental actions affecting trade. Although the United States must ensure that sanctions are applied equally to all countries, it may single out a particular country, such as Korea, who engages in the trade of bear parts, under two conditions: (1) it can show that the country's trade in bear parts is especially egregious and (2) that other nonconforming countries have been making reasonable efforts to comply with CITES by fighting the endangered trade in bear parts within their jurisdictions. An example of alleged unequal treatment by the United States is illustrated by Taiwan's complaints of U.S.-imposed Pelly sanctions. Taiwan alleged that the U.S. sanctions were unfair, because they were imposed unequally on China, Korea, and other major contributors to the endangered species trade.<sup>189</sup>

One possible point of contention between bear-trading nations and the United States is that many U.S. states still allow trade in black bear parts. The legal trade of non-threatened North American bears complicates efforts to protect endangered Asiatic species.<sup>190</sup> Thus, a Pelly sanction imposed to protect bear parts would have to be carefully implemented to pass the arbitrary and unfair discrimination tests of GATT Article XX. The likelihood that a WTO panel would perceive U.S. sanctions as fair would be increased if the United States were to uniformly ban the trade of bear parts in all states.

The greatest challenge that a Pelly sanction would have to overcome would be an attack on the intended scope of the embargo's impact. Pelly sanctions need not be limited to wildlife products. The President has discretion to widen the scope of trade sanctions as far as

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<sup>187</sup> Conservation of Sea Turtles § 609(a).

<sup>188</sup> 22 U.S.C. § 1978(a) (2000).

<sup>189</sup> Susan Yu, *ROC Protests Impending Sanctions by US Over Wildlife*, FREE CHINA J., Apr. 9, 1994, at 2, available at 1994 WL 11284600.

<sup>190</sup> *Wildlife Protection and Conservation: Hearing on S. 263 Before the Senate Comm. on Environment and Public Works*, CONG. TESTIMONY, July 7, 1998 (statement of Ginette Hemely, Vice President for Species Conservation World Wildlife Fund), available at 1998 WL 12762031.

necessary to affect the offending nation.<sup>191</sup> The President may suspend any or all trade relations with a certified country, tailoring the sanctions to have “maximum impact” on the targeted country.<sup>192</sup> As the court in the *Florsheim* case understood, widening the scope of the embargo against Taiwan to include all wildlife products was reasonable to effectively pressure Taiwan into taking steps to curtail the trade in rhinoceros and tiger parts by Taiwanese citizens.<sup>193</sup>

In contrast, the Appellate Body in the *Shrimp-Turtle* case held that for an embargo to conform to the GATT, it must bear a “close and genuine relationship” to the environmental harm it seeks to address.<sup>194</sup> A sanctioning country runs into problems when it bans products unrelated to the stated conservation objectives. Direct and narrowly tailored sanctions, however, may be ineffective in influencing other countries’ policy choices. The broader the sanctions, the more likely it is that they will lead to the sanctioned countries making the desired changes to their trade policies.

The 1994 U.S. embargo against Taiwanese wildlife products arguably met the *Shrimp-Turtle* “relationship to conservation objectives” test. The CITES provides an umbrella under which a broader embargo could reasonably be effectuated. Because the CITES is extensive enough to protect thousands of plant and animal species, placing an embargo on all wildlife products could be construed as reasonably related to eliminating the tiger and rhinoceros trade.<sup>195</sup> Embargos on products other than wildlife would be more difficult to defend against a GATT challenge. The farther apart the relationship between the sanctioned product and the protected wildlife, the greater the risk of the WTO finding the sanctions to be overly broad and therefore inconsistent with the GATT.

For example, a Pelly sanction imposed on Korea to protect bears could ban all Korean wildlife products, which would be analogous to the 1994 embargo imposed on Taiwan. It also could be significantly broadened to include traditional medicines and cosmetics, whether or not

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<sup>191</sup> 22 U.S.C. § 1978(a)(4).

<sup>192</sup> § 1978(a)(4).

<sup>193</sup> See *supra* notes 94-98 and accompanying text.

<sup>194</sup> *Shrimp-Turtle Appellate*, *supra* note 20, ¶¶ 135-142.

<sup>195</sup> Berger, *supra* note 144, at 403. “When a sanctioned nation fails to meet clear international conservation standards, sanctions against a range of wildlife products may be necessary and appropriate, if there is no more direct trade links to the species threatened.” *Id.* (citing to Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and the Environment*, 15 STAN. ENVTL. L. J. 61, 123 (1996)).

the ingredients are derived from wild animal and plant species. For such an embargo to pass the Article XX(g) test, the United States would need to argue that bears are an exhaustible natural resource and that the ban is necessary to promote their conservation.

## VII. CONCLUSION

Unless South Korea and Taiwan take significant steps in controlling the illegal trafficking of bear products by its nationals, the United States should invoke the Pelly amendment and impose an embargo on all wildlife products, traditional medicine, and cosmetics exported from these countries. The threat of such a sanction, along with bilateral negotiations and technical assistance from the United States, may make the actual imposition of sanctions unnecessary. Were Korea to challenge the U.S. embargo within the WTO DSS, such an embargo, if carefully implemented, should be able to withstand GATT scrutiny.

The recent WTO Shrimp-Turtle decision demonstrates that a Pelly sanction imposed on Korea would, if carefully implemented, withstand a challenge brought before the WTO DSS. To avoid potential GATT violations, the United States would need to implement sanctions in a manner that is flexible, multilateral, not overly broad, and procedurally fair. Before imposing sanctions, the United States should first make every effort to gain the offending country's cooperation through dialog and offer technical and legal expertise. Also, the United States should first endeavor to obtain authorization from the CITES Standing Committee and encourage other nations to take similar steps, especially Southeast Asian nations whose bear populations have been decimated by the Korean and Taiwanese markets. By building international consensus, the United States can strengthen its position before the WTO.<sup>196</sup>

A major consideration for the United States will be determining the appropriate scope of such a challenge. The WTO has provided little guidance on how to determine when the scope of environmental measures effecting trade are so broad as to violate the GATT Article XX chapeau requirements. Finding the balance between sanctions so narrowly applied as to have almost no deterrent value on the one hand, or so overly broad as to risk offending the GATT on the other, will be somewhat hit and miss until future WTO panel and Appellate Body decisions clarify the *Shrimp-Turtle* test for over-breadth.

Paul C. Lin-Easton<sup>197</sup>

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<sup>196</sup> Berger, *supra* note at 144, at 411.

<sup>197</sup> Class of 2001, William S. Richardson School of Law, University of Hawaii at Manoa.