Target-Based Environmental Trade Measures: A Proposal For the New WTO Committee on Trade and Environment

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On June 30, 1995, the United States lifted its controversial and unprecedented environmental trade sanctions against Taiwan.[1] The sanctions,[2] approximately twenty-five million dollars in import prohibitions against wildlife specimens and products from Taiwan,[3] had been imposed on August 2, 1994,[4] "in response to Taiwan's failure to undertake sufficient actions to stop illegal trade in internationally recognized endangered species."[5] The United States had threatened to use such environmental trade sanctions in the past but had never before actually implemented them.[6] The Clinton Administration finally lifted the sanctions after Taiwan

1. Press release from the White House, President Lifts Trade Sanctions Against Taiwan; Welcomes Major Steps taken to Protect Endangered Species (June 30, 1995) [hereinafter President Lifts Trade Sanctions] (on file with the *Stanford Environmental Law Journal*); *see also* Steven Greenhouse, *U.S. Lifting Trade Penalties on Taiwan*, N.Y. TIMES, July 1, 1995, § 1, at 4.

2. As much as possible, this Note will follow the helpfully clear distinctions among various environmental trade measures set out by Steve Charnovitz in *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L ENVTL. L. REV. 1 (1993) [hereinafter *Taxonomy*].

3. *See The Rhinoceros and Tiger Conservation Act of 1994: Hearings on H.R. 3987 Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marines and Fisheries*, 103d Cong., 1st Sess. 21-22 (1994) [*hereinafter The Rhinoceros and Tiger Conservation Act of 1994: Hearings*] (statement of Mollie Beattie, Director, U.S. Fish and Wildlife Service).

4. Imposition of Prohibitions Pursuant to Section 8(a)(4) of the Fishermen's Protective Act of 1967, as Amended, 59 Fed. Reg. 40,463 (1994) [hereinafter Imposition of Prohibitions].

5. Proposed Import Prohibitions on Wildlife Specimens and Products of Taiwan Pursuant to the Pelly Amendment, 59 Fed. Reg. 22,043, 22,044 (proposed Apr. 28, 1994).

6. *See* Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the*

took critical steps toward halting commercial trade in the rhinoceros and the tiger, whose parts are used in traditional medicines. These steps included amendments to Taiwan's Wildlife Conservation Law that establish a new Nature Conservation Police designed to crack down on wildlife crime[7] and increase punishment to a maximum of seven years in jail and a fine equaling $94,339 in U.S. dollars.[8]

Strong and varied reactions followed this first-ever implementation of the Pelly Amendment's environmental sanctions. *Time* magazine, on one hand, included the sanctions against Taiwan as one of the top five environmental successes of 1994.[9] In addition, Samuel LaBudde of the Earth Island Institute[10] called the sanctions "perhaps the most significant event for species protection to occur in 20 years."[11] And, World Wildlife Fund Director of International Wildlife Policy, Ginette Hemley, declared: "The experience with Taiwan shows trade sanctions to be an effective tool in helping curb the deadly commerce in endangered species."[12] Others, however, have harshly criticized the Clinton Administration's apparent failure to consider developing country interests, calling the "use of American economic might to impose our environmental values on Taiwan's culture . . . tantamount to "eco-imperialism.'"[13] These varied reactions speak to the complexity of the issues involved in the Taiwan sanctions, and illustrate the controversies surrounding the use of trade measures to pursue environmental objectives in general. Cultural differences between East and West, as well as between developed and developing countries, the impacts of species trade on biodiversity as a global phenomenon, and the use of sanctions where the restricted products are not identical to the endangered resources to be protected, complicated the Taiwan

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Pelly Amendment on Foreign Environmental Practices, 9 AM. U. J. INT'L L. & POL'Y 751, 751 (1994) [hereinafter *Analysis of the Pelly Amendment*].

7. President Lifts Trade Sanctions, *supra* note 1.

8. *Taiwan Passes Stringent Wildlife Law to Avert Trade Sanctions*, Agence France Presse, Oct. 27, 1994, *available in* LEXIS, News Library.

9. *The Best Environment of 1994*, TIME, Dec. 26, 1994, at 144.

10. A nonprofit environmental organization.

11. James Gerstenzang, *U.S. Will Impose Trade Sanctions Against Taiwan to Protect Wildlife*, L.A. TIMES, Apr. 12, 1994, at A7.

12. Press Release from the World Wildlife Fund, World Wildlife Fund Statement on U.S. Government Decision to Lift Pelly Amendment Sanctions Against Taiwan (June 30, 1995) (on file with the *Stanford Environmental Law Journal*).

13. James Sheehan, *Most Favored Fauna Treatment*, WASH. TIMES, May 31, 1994, at A12.

case and remain some of the most complex and pressing issues surrounding trade and the environment today.

Recently, the international trade community took a formal step toward grappling with the use of trade measures as a way to enforce environmental protection. At the close of the Uruguay Round of the Multilateral Trade Negotiations at Marrakech on April 15, 1994, the members of the General Agreement on Tariffs and Trade (GATT)[14] adopted a Decision on Trade and Environment.[15] This Decision includes an agreement to establish a Committee on Trade and Environment under the auspices of the new World Trade Organization (WTO), which will report to the first biennial meeting of the WTO Ministerial Conference in 1997.[16]

While the decision to establish a formal committee of the WTO is an important event, the Marrakech negotiations were not the first debate on trade measures and the environment.[17] The potential connections and conflicts between promoting free trade and protecting the environment have been widely debated since 1991, when a GATT panel report criticized a U.S. law that restricted imports of tuna caught in ways that threatened

14. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, 55 U.N.T.S. 187 [hereinafter GATT].

15. GATT: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 108 Stat. 4809, 33 I.L.M. 1125, 1267 [hereinafter Uruguay Round Decision on Trade and Environment].

16. *See id.* at 1268; *see also* Jennifer Schultz, *Current Development: The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423 (1995). The new trade and environment committee will consider, inter alia, "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements," as well as "the issue of exports of domestically prohibited goods." Uruguay Round Decision on Trade and Environment, *supra* note 15, at 1268-69. *See also* Sanford E. Gaines, *Foreward*, 13 STAN. ENVTL. L.J. vii (1994) (announcing the agreement and outlining the challenges facing the WTO).

17. The GATT had nominally established an informal committee to investigate environmental concerns in the 1970s, but this group lay dormant for 20 years before being reactivated in an overwhelmingly hostile atmosphere that effectively precluded any real progress toward resolving the conflicts of trade and the environment. *See* Douglas Jake Caldwell, *International Environmental Agreements and the GATT: An Analysis of the Potential Conflict and the Role of a GATT "Waiver" Resolution*, 18 MD. J. INT'L L. & TRADE 173, 193 (1994). "In October 1991, despite considerable consternation and misgivings among the contracting parties, the GATT Council requested the activation of the GATT Group on Environmental Measures and International Trade (EMIT). The GATT EMIT Group had originally been established in 1971 but had *never met* until November 1991." *Id.* (citations omitted).

dolphins.[18] Discussions on trade and environment since then have taken this, and a subsequent tuna-dolphin GATT panel decision,[19] as their point of departure. In 1992, the GATT used the tuna-dolphin case to argue for total abstinence from environmental trade measures,[20] while the European Union (E.U.) reacted by seeking to limit the acceptable range of environmental trade measures (ETMs) to those "pursuant to a multilateral environmental agreement" (MEA) such as the Montreal Protocol, the Basel Convention, or the Convention on International Trade in Endangered Species (CITES).[21] Recognizing the limitations of the European Union's focus on MEAs, the Clinton Administration suggested substantive categories where the use of environmental trade measures would be considered.[22] Finally, Yale Law School professor and former Bush Administration official Daniel C. Esty recently proposed a complex, multi-part test to replace GATT Article XX.[23]

However, none of these proposals adequately resolves the current controversy over what sort of ETMs the international trade rules should allow. Despite the large number of laws and directives worldwide currently authorizing ETMs, the analysis to date has generally suffered from a lack of precision in distinguishing among various types of ETMs. Furthermore, these proposals seem to disregard the different interests among the contracting parties to the GATT, especially with regard to developing countries.[24] To address these deficiencies, this Note advocates an approach that analyzes the appropriateness of environmental trade measures

18. GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594 [hereinafter Tuna I].

19. GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, May 20, 1994, 33 I.L.M. 839 [hereinafter Tuna II].

20. *See infra* text accompanying notes 180-192.

21. *See infra* text accompanying notes 193-206. The European Union also acknowledged, however, the importance of certain ETMs against countries not party to MEAs.

22. *See infra* text accompanying notes 207-212.

23. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994); *see also* Daniel P. Blank, Book Note, 14 STAN. ENVTL. L.J. 421 (1995) (reviewing Esty's book); *infra* text accompanying notes 213-226.

24. Although some recent proposals by non-governmental organizations have urged that addressing health and environmental concerns surrounding domestically prohibited goods (DPGs) should be a high priority for the WTO Committee on Trade and Environment, the attention paid to DPGs relative to other issues has remained slight. *See* JUSTIN WARD & JAMES CAMERON, NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL PRIORITIES FOR THE WORLD TRADING SYSTEM ii, 22 (1995).

based on the actual products or resources targeted by the trade restriction. This "target-based" approach hinges on the tangible subjects of the measures, rather than such nebulous concepts as the level of the agreement or the urgency of the environmental threat. As such, the target-based approach provides a more useful framework to guide the WTO and individual countries in deciding when ETMs should be implemented. In addition, the target-based framework is more responsive to the interests of developing countries. In articulating this approach, this Note draws lessons from the successful Taiwan Pelly sanctions as well as other recent events[25] that should be considered by the WTO Committee on Trade and Environment in its ongoing discussions regarding the appropriate use of ETMs.

Part I of this Note begins with a discussion of the circumstances surrounding the Pelly sanctions against Taiwan and a review of what the GATT currently allows regarding ETMs. Part II surveys the stances taken on the use of ETMs by both developed and developing countries in order to define a context for examining proposals on the subject. Part III uses the Taiwan case study to critique four major proposals that have been put forward regarding the GATT rules and ETMs. Part IV proposes the target-based approach as a more responsive discipline on the use of environmental trade measures outside the exclusive jurisdiction of the country applying the measure. Although the target-based approach would permit the use of some ETMs, it restricts their use to certain limited and well-defined circumstances. Currently, although many countries formally denounce the use of ETMs, these same countries continue to use them liberally in practice by clearly authorizing a strictly circumscribed use of ETMs. The target-based approach aims to establish a framework that is both more protective of the environment and less susceptible to protectionist restrictions. Finally, Part V summarizes the lessons learned for the WTO Committee on Trade and Environment.

25. *See, e.g.*, the unilateral prohibition by the European Union on imports of fur from animals captured using leg-hold traps, *infra* note 108 and accompanying text; the armed skirmish between Canada and the European Union over international fisheries resources, *infra* text accompanying notes 92-102; the conclusion of the NAFTA environmental side agreement, the North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]; and the calls by many developing countries for a ban on exports from industrialized countries of domestically prohibited goods, *infra* text accompanying notes 145-158.

I. PELLY SANCTIONS AGAINST TAIWAN

On April 11, 1994, the Clinton White House announced that Taiwan would be sanctioned "for its lack of progress in eliminating its illegal trade in tigers and rhinoceroses."[26] International experts had earlier predicted that these endangered populations would likely become extinct in the next two to five years if the trade in their body parts were not immediately eliminated.[27] To mitigate this grave threat to global biodiversity, the international community recommended strict measures against Taiwan, including import prohibitions.[28] However, in reaction to this unanimous recommendation, the United States alone has thus far responded with import prohibitions.

The sanctions against Taiwan provide an instructive case study on the use of ETMs for several reasons. First, they raise many of the most hotly debated issues regarding the use of trade restrictions to protect the environment. Second, the sanctions, followed by immediate action on the part of Taiwan, demonstrate that trade restrictions can be effective in achieving environmental goals.[29] Third, they indicate that limited ETMs can be successfully applied without undermining the overall trade system.

The domestic authority for the U.S. sanctions against Taiwan, found in the "Pelly" Amendment to the Fisherman's Protective Act

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26. President's Message to Congress on Rhinoceros and Tiger Trade by China and Taiwan (Apr. 11, 1994). The announcement explained:

> The population of the world's rhinoceroses had declined 90% within the last 23 years to present levels of 10,000 animals, and the tiger population has declined 95% within this century to present levels of 5,000. The primary threat to both species is the poaching that continues in their native ranges fueled by the market demand for medicinal products made from tiger and rhinoceros parts.

Id.

27. *See* 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].

28. *See Analysis of the Pelly Amendment, supra* note 6, at 769.

29. Certainly many in the Clinton Administration, environmental organizations, and even in Taiwan believe that the sanctions accomplished their purpose. *See* U.S. Fish & Wildlife Service Fact Sheet: U.S. Pelly Amendment and Taiwan (June 30, 1995) (on file with the *Stanford Environmental Law Journal*) (stating that a group of U.S. experts who visited Taiwan in March 1995 under the auspices of the American Institute in Taiwan found that, overall, the progress made by Taiwanese authorities "generally satisfie[d] the U.S. criteria."). *See also Challenges Facing Farm Sector in 1995*, Central News Agency, Jan. 2, 1995, *available in* LEXIS, News Library ("The American government has given high marks to Taiwan's adoption of amendments to the Wildlife Conservation Law, which were implemented on Nov. 1."); *supra* text accompanying notes 7-12.

of 1967,[30] reflects the fact that the loss of biodiversity in any country can have global impacts. The Pelly Amendment depends on international standards in two important ways. The Pelly Amendment requires the Secretaries of Commerce and the Interior to monitor the activities of foreign nationals and to notify the President upon finding that foreign nationals, "directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species . . . ."[31] Then, upon such certification, "the President may direct the Secretary of the Treasury to prohibit . . . the importation . . . of any products from the offending country for any duration . . . to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade."[32] Thus, the authority under Pelly to certify a country is conditioned upon whether the effectiveness of an international conservation program has been diminished by another country's nationals. The authority to subsequently impose import prohibitions against that country, following a certification, is limited by the bounds of the GATT. The following sections analyze the Taiwan sanctions by studying whether they are grounded in the source of international authority required by the Pelly Amendment.

A. *Diminishing the Effectiveness of International Conservation Programs*

First, as discussed above, Pelly sanctions may not be imposed under U.S. law unless the target country's nationals have diminished the effectiveness of an international conservation program. In the Taiwan case, the relevant international conservation program is under the Convention on International Trade in Endangered Species (CITES).[33] Prior to the Taiwan episode, sanctions under the Pelly Amendment for diminishing the effectiveness of CITES had only been threatened once, and no threat had ever re-

30. Pub. L. No. 95-376, 92 Stat. 714 (1978) (codified as amended at 22 U.S.C. § 1978 (1994)).

31. *Id.* § 1978(a)(2).

32. *Id.* § 1978(a)(4). The range of products authorized for trade sanctions by the Pelly Amendment was originally limited to fish and wildlife (and fish and wildlife products), but was expanded to include any or all products from the offending nation with the enactment of the High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102-582, Sec. 201(a)(1), § (a)(4), 106 Stat. 4900, 4904 (1992) (codified at 16 U.S.C. § 1801 (1994)) [hereinafter Driftnet Act].

33. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

sulted in actual import prohibitions by any country.[34] Still, CITES has played an active role in identifying countries that flout the rules of endangered species trade and encouraging the use of enforcement measures against such countries.

The provisions of CITES regulate the international trade in species that are either currently threatened with extinction or that may become endangered if their trade is not regulated.[35] Article XIII states that the CITES Secretariat will inform a party if that party is not effectively implementing one or more provisions of the Convention.[36] In reply, the party must "inform the Secretariat of any relevant facts insofar as its laws permit and . . . propose remedial action."[37] The Conference of the Parties then reviews the information provided by the party at the next meeting and "make[s] whatever recommendations it deems appropriate."[38]

In response to the grave risk of their extinction, CITES has prohibited international trade in rhinoceroses and tigers for nearly twenty years.[39] More recently, a 1987 CITES Standing Committee resolution urged parties to ban all domestic commerce in rhinoceros parts.[40] In addition, the resolution ordered the destruction of all government stocks of rhinoceros horns,[41] and recommended that parties "use all appropriate means, including economic, political and diplomatic, to exert pressure on countries continuing to allow trade in rhinoceros horn . . . ."[42] The Standing Committee repeated this recommendation in 1992.[43]

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34. *See Analysis of the Pelly Amendment, supra* note 6, at 772.

35. In accordance with appendices to CITES, which require that parties establish trade permit systems, certain animals and plants may not be traded or may be traded only in limited quantities. More than 100 nations have ratified CITES. *See* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-92-43, INTERNATIONAL ENVIRONMENT: INTERNATIONAL AGREEMENTS ARE NOT WELL MONITORED 16 (1992).

36. CITES, *supra* note 33, art. XIII.

37. *Id.*

38. *Id.; see also* U.S. INT'L TRADE COMM'N, PUB. NO. 2351, INTERNATIONAL AGREEMENTS TO PROTECT THE ENVIRONMENT AND WILDLIFE 5-30 (1991).

39. *See Rhinoceros and Tiger Conservation Act of 1994: Hearings on H.R. 3987 Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marines and Fisheries,* 103d Cong., 1st Sess. 41 (1994) (statement of Dorene Bolze, Director of Policy Analysis, Wildlife Conservation Society).

40. *See* Notice Regarding Convention on International Trade in Endangered Species, 57 Fed. Reg. 59,122, 59,123 (1992).

41. *See id.*

42. *See Analysis of the Pelly Amendment, supra* note 6, at 770 (quoting *Trade in Rhinoceros Products,* CITES RES. OF THE CONF. OF THE PARTIES 6.10 (1987)).

43. *See* Notice Regarding Convention on International Trade in Endangered Species, *supra* note 40, at 59,124. On November 12, 1992, the World Wildlife Fund and the Na-

Following a March 1993 request for information on the control of illegal trade in rhinoceros and tiger parts, the Standing Committee unanimously adopted a decision in September 1993 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 .... Parties should consider implementing stricter domestic measures up to and including prohibition [of] trade [in] wildlife species" against China and Taiwan.[44] Soon thereafter, Secretary of the Interior Bruce Babbitt certified to President Clinton under the Pelly Amendment that both China and Taiwan were diminishing the effectiveness of CITES by engaging in the trade of rhinoceros and tiger parts and products.[45] Babbitt's letter stated that "[a]lthough recent submissions by China and Taiwan show that some progress has been made in addressing the tiger and rhinoceros trade, the record still shows that they fall short of the international conservation standards of CITES."[46]

In response, President Clinton sent a letter to Congress stating that while import prohibitions would not be imposed immediately on either China or Taiwan, sanctions would be implemented if those countries did not make "measurable, verifiable, and substantial progress" in accordance with CITES by March 1994.[47] The

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tional Wildlife Federation submitted a petition to the Secretary of the Interior, requesting that China, South Korea, Taiwan, and Yemen be certified to the President under the terms of the Pelly Amendment because of their continuing involvement in the rhinoceros horn trade. *See id.* The petition outlined evidence that together these nations are responsible for creating the demand that has resulted in the death of over 60,000 rhinoceroses since 1944. *Id.*

44. *Analysis of the Pelly Amendment, supra* note 6, at 769.

45. Letter from Bruce Babbitt, Secretary of the Interior, to the President (Sept. 7, 1993) (on file with the *Stanford Environmental Law Journal*) (quoting *Rhinoceros and Tiger: Time for Decision*, CITES PRESS RELEASE, Sept. 9, 1993).

46. *Id.*

47. President's Message, *supra* note 27. In his message to Congress, President Clinton set out a list of actions that, if taken by China and Taiwan, "would demonstrate their commitment to the elimination of trade in rhinoceros and tiger parts and products." *Id.* These included:

> at a minimum, consolidation and control of stockpiles; formation of a permanent wildlife or conservation law enforcement unit with specialized training; development and implementation of a comprehensive law enforcement and education action plan; increased enforcement penalties; prompt termination of amnesty periods for illegal holding and commercialization; and establishment of regional law enforcement arrangements.

Id. At the same time, the President directed "the Department of the Interior, in coordination with the Department of State and the American Institute in Taiwan, to enter immediately into dialogue with China and Taiwan regarding specific U.S. offers of trade and law

Clinton Administration clearly intended the March 1994 deadline to coincide with the next meeting of the CITES Standing Committee, which would provide more information on the situation in China and Taiwan. At that meeting, the Committee dealt separately with China and Taiwan. It cited progress made by China, while indicating that stricter compliance was required.[48] However, on the status of Taiwan, the Committee was much more critical, expressing "concern that the actions agreed to by the authorities in Taiwan . . . towards meeting the minimum requirements have not yet been implemented."[49] A few weeks later, the United States announced the trade sanctions against Taiwan.

Given these findings by the CITES Standing Committee, the U.S. import prohibitions against Taiwan clearly met the first Pelly reference to international standards: nationals of Taiwan were diminishing the effectiveness of CITES. It is important to note, however, that despite this finding by CITES and Secretary Babbitt, neither the provisions of the Pelly Amendment nor CITES itself mandated that the United States impose trade sanctions. The only

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enforcement assistance." *Id.* On December 21, 1993, the Secretary of Interior sent letters to Chairman of the Council of Agriculture and the Minister of Economic Affairs in Taipei amplifying the actions recommended in President Clinton's report to Congress, as well as the CITES criteria. *See The Rhinoceros and Tiger Conservation Act of 1994: Hearings, supra* note 3. In January, February and March of 1994, U.S. delegations visited China and Taiwan. *Id.*

48. *See The Rhinoceros and Tiger Conservation Act of 1994: Hearings on H.R. 3987 Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. (1994) (background memorandum to Members of the Subcommittee on Environment and Natural Resources from Subcommittee Staff).

49. *See id.* While the Standing Committee provided international motivation for sanctions, pressure also grew on the domestic front. On March 18, the President received a letter from 39 members of Congress urging him to take action against both Taiwan and China. *See* Gerstenzang, *supra* note 11. Later that month, both the *Time* magazine cover story of the March 28 issue and the lead story on the same day for ABC television's "Day One" program featured the impact of illegal trade and poaching on the plight of the tiger. Eugene Linden, *Tigers on the Brink*, TIME, Mar. 28, 1994, at 44; *Day One* (ABC television broadcast, Mar. 28, 1994). A White House press release issued April 11, 1994, announced the decision to apply import prohibitions against Taiwan, but not China. *See* President's Message, *supra* note 26. After a public comment period, the President, on August 2, 1994, directed the Secretary of the Treasury to prohibit the import of "wildlife specimens and parts and products" from Taiwan. Imposition of Prohibitions, *supra* note 4. Although the trade measures affected less than 0.1% of Taiwan's exports to the United States, J. Jennings Moss, *Taiwan Back on Clinton's Trade List; Export of Tiger, Rhino Parts Curbed*, WASH. TIMES, July 1, 1995, at A6, Taiwan responded by taking major strides in combating the devastating commerce in endangered species within one year after the imposition of sanctions. President Lifts Trade Sanctions, *supra* note 1; *see also supra* text accompanying notes 7-8. In response to the progress made by Taiwan, the United States lifted its sanctions on June 30, 1995. President Lifts Trade Sanctions, *supra* note 1.

action mandated by the Pelly Amendment, following a certification by either the Secretary of Commerce or the Secretary of the Interior, is that the President report to Congress on what actions will be taken, if any.[50] Furthermore, while the CITES Standing Committee called for import prohibitions against Taiwan,[51] the treaty itself does not require any response to the recommendations of the Standing Committee. Nonetheless, the certification was authorized by the Pelly Amendment and specifically recommended by the relevant international body.

B. *To the Extent Sanctioned by the GATT*

While Pelly relies on CITES for guidance as to the appropriateness of international environmental trade sanctions, Pelly relies on the GATT in determining the range of international trade actions available. To be consistent with the terms of the Pelly Amendment, the Taiwan sanctions also had to be "GATT-legal."

In weighing what is GATT-legal, most trade analysts focus on the basic requirements found in Articles I and III, which oblige parties to treat imports from any GATT party no less favorably than other imports (the "most favored nation" requirement) and no less favorably, after border duties are paid, than domestically-produced "like products" (the "national treatment" requirement).[52] Taken on its face, the sweeping language of these requirements would seem to preclude the use of virtually all ETMs.

However, GATT Article XX enumerates several exceptions to these general requirements, provided that measures imposed do not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a dis-

50. 22 U.S.C. § 1978(b) (1994).

51. *See supra* text accompanying notes 40-43. CITES itself had already banned the trade in rhinoceros and tiger products, but the Pelly Amendment authorized an unlimited range of potential trade sanctions. Originally, Pelly only authorized import prohibitions on fish or wildlife products, but its authority was expanded in 1992 to include "any products from the offending country for any duration." *See* Driftnet Act, *supra* note 32. Despite having the authority to ban the imports of any or all products from Taiwan, the Clinton Administration limited the sanctions to certain wildlife products. President Lifts Trade Sanctions, *supra* note 1. With trade in rhinoceroses and tigers already banned, the target of the import prohibitions was limited to the products that were related to endangered species.

52. *See, e.g.*, ESTY, *supra* note 23, at 46. Steve Charnovitz has argued that GATT Article XI is also relevant, as it provides for a general elimination of quantitative restrictions on trade by forbidding prohibitions or restrictions other than certain duties and taxes. *Analysis of the Pelly Amendment*, *supra* note 6, at 776.

guised restriction on international trade."[53] These conditions notwithstanding, Article XX includes two sections that explicitly permit ETMs that are: "(b) necessary to protect human, animal or plant life or health" or "(g) relat[ed] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[54]

Although the GATT is generally understood to "provide broad leeway for countries to pursue *domestic* environmental regulation,"[55] a state's authority under Articles XX(b) and XX(g) to use trade measures to protect the environment outside its borders is much more limited. The language of those sections has been interpreted narrowly so that, for example, the "necessary" provision of XX(b) would allow environmental policies only if no "less GATT-inconsistent" or "less trade-restrictive" policy tool is available to achieve the established goal.[56] In addition, the measure must be proportionate to the need to protect human, animal, or plant life or health.[57] The requirement of Article XX(g) has been interpreted somewhat more leniently, to mean that an environmental policy in question should be "primarily aimed" at addressing a conservation goal,[58] and that the measure must be undertaken simultaneously with domestic restrictions on production and consumption.[59] GATT further provides that such measures may be taken only while conditions necessitating the restrictions prevail.[60]

These interpretations were established by GATT panel reports pursuant to challenges on the use of ETMs, especially the report of the first GATT panel to examine the U.S. ban of tuna imports under its dolphin protection legislation (Tuna I).[61] First, the panel

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53. GATT, *supra* note 14, art. XX.

54. *Id.* Parties to the GATT also remain free to implement trade restrictions that are not explicitly justified under Article XX. However, such unjustified measures are not authorized by the Pelly Amendment, and would also be open to challenge under the GATT's dispute resolution procedures. *See, e.g.*, Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 468 (1993) (arguing that the GATT exceptions could allow for some "creative illegality").

55. ESTY, *supra* note 23, at 102.

56. *Id.* at 48.

57. *See* McDonald, *supra* note 54, at 434-36.

58. *See* ESTY, *supra* note 23, at 49.

59. *See* McDonald, *supra* note 54, at 446-48.

60. *See id.* at 448-49.

61.. *Id.* Pursuant to the provisions of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1371(a)(2)(C) (1972) (amended 1973, 1981, 1984, 1986, 1988, 1990) (Supp. 1992), a federal district court judge in 1990 enjoined the importation of yellowfin tuna

found that extrajurisdictional measures were not "necessary" under Article XX(b).[62] In addition, the panel interpreted Article XX(g) to mean that "[a] country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction."[63] The effect of this cumulative jurisprudence regarding the use of ETMs under Article XX was to call into question any measure that appeared unilateral, extrajurisdictional, or based on process or production methods (PPMs).

The Pelly sanctions against Taiwan provide a good example of a trade measure intended to address an environmental concern beyond the exclusive jurisdiction of the country imposing the measure: while the loss of species anywhere may affect global biodiversity, neither the poaching of the populations nor the commerce of their parts was occurring in the United States. In addition, although there is a relationship between the products targeted for import prohibition and the environmental problem being addressed, that relationship is not direct in the same way that prohibiting the import of the tigers and rhinoceroses themselves would be. As a result, Pelly sanctions like those against Taiwan

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from Mexico based upon its ratio of dolphin deaths per net dropped. *See* Earth Island Inst. v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991). Following a challenge by Mexico, a GATT dispute resolution panel found that the U.S. ban violated Article III's national treatment requirement. Tuna I, *supra* note 18, ¶ 5.15. The reason that the GATT panel report gives for finding an Article III violation is that the trade measure was based on production methods rather than on the imported product itself. *Id.* The panel further found that the ban could not be justified under Article XX(b) or XX(g) since trade measures under those sections may not be applied "unilaterally" or "extrajurisdictionally." *Id.* ¶¶ 5.24-5.34. The panel was silent on whether any dolphins, endangered or not, could even be considered an exhaustible natural resource. *See id.*

62. *See supra* text accompanying notes 56-57; *see also Analysis of the Pelly Amendment*, *supra* note 6, at 781. Steve Charnovitz, Policy Director of the Washington, D.C. Competitiveness Council, suggests that, although one can infer that an extrajurisdictional trade restriction relates to the life or health of organisms outside the country imposing the measure, "it is unclear whether a trade measure aimed at maintaining global bio-diversity would be considered jurisdictional or extra-jurisdictional." *Analysis of the Pelly Amendment*, *supra* note 6, at 782.

63. Tuna I, *supra* note 18, ¶ 5.31. Janet McDonald, Assistant Professor of Law at Bond University, Queensland, Australia, complains that, although "Article XX(b) does not state that the humans, animals or plants must be located within the territory of the party imposing the measure, but the panel in Tuna-Dolphin placed this limitation on the exception." McDonald, *supra* note 54, at 430. McDonald believes that "the panel failed to account for the use of the disjunctive 'production or consumption' in the wording of the exception. These terms should suggest that . . . the resource need not be located or even processed within the party's jurisdiction so long as the resource is consumed in the domestic market." *Id.* at 442-43.

would arguably be inconsistent with GATT under its current jurisprudence.

While the GATT-legality of the Taiwan sanctions must be measured against the interpretations as well as the text of Article XX, it should be noted that a heated debate arose over the reasoning of this first tuna-dolphin decision, with trade and environment analysts labeling it as "specious,"[64] "illogical,"[65] "insidious,"[66] "unpersuasive and . . . wrong . . . ."[67] The panel's discussion of "extrajurisdictional" trade measures came under heaviest fire. Analysts such as Steve Charnovitz and Janet McDonald argued that, given the numerous extrajurisdictional trade measures used by many countries, the report will create, rather than minimize, conflicts between the GATT and other formal international environmental treaties. A more obvious and logical interpretation would be that the measures envisioned by Articles XX(b) and (g) were never meant to be anything but "extrajurisdictional."[68] In fact, Belina Anderson suggests that the panel's reluctance to allow extrajurisdictional ETMs is inconsistent with other exceptions in Article XX, as well. Anderson points out that Article XX(e), the exception for trade restrictions on the products of prison labor, "legitimizes trade measures based upon extraterritorial conditions and, like the MMPA [Marine Mammal Protection Act], production processes in particular."[69] These criticisms notwithstanding, although Tuna I was not adopted by the GATT Council, virtually every country except the United States supports it.[70]

The June 1994 report of the second tuna-dolphin panel (Tuna

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64. McDonald, *supra* note 54, at 433.

65. *Analysis of the Pelly Amendment*, *supra* note 6, at 782.

66. William J. Snape III & Naomi B. Lefkovitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process"?*, 27 CORNELL INT'L L.J. 777, 785 (1994).

67. Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, TEMP. L. REV. 751, 766 (1993).

68. *See* McDonald, *supra* note 54, at 432-33; *see also Analysis of the Pelly Amendment*, *supra* note 6, at 788. Belina Anderson, noting that "the express wording of these provisions does not suggest any territorial limitation" and the Tuna I panel "thus was not obliged to resort to a review of the legislative history," questions why "the panel turned to its drafting history from the 1947 United Nations Conference on Trade and Employment ('UNCTE') to determine the territorial scope of these exceptions." Anderson, *supra* note 67, at 768.

69. Anderson, *supra* note 67, at 770 (internal citation omitted).

70. *Analysis of the Pelly Amendment*, *supra* note 6, at 782. Mexico dropped the GATT action due to, it is widely believed, the sensitive politics of the ongoing negotiations of the North American Free Trade Agreement. *See* Timothy Noah & Bob Davis, *Tuna Boycott is Ruled Illegal By GATT Panel*, WALL ST. J., May 23, 1994, at A1. Nevertheless, an "intermediary" embargo remained against those countries that were importing tuna from countries under the primary MMPA tuna ban. Thus, the Netherland Antilles initiated a second tuna-

II) includes some significant distinctions from the first. The Tuna II panel explicitly acknowledged that "a policy to conserve dolphins was a policy to conserve an exhaustible natural resource," regardless of "whether at present their stocks were depleted."[71] More importantly, the panel stated that "it could see no valid reason for supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision."[72]

Unfortunately, even with the addition of the Tuna II report, it remains unclear whether import prohibitions like the ones against Taiwan would be "sanctioned" by the GATT. William Snape argues that "[a]lthough the Tuna/Dolphin II Panel was not as obstreperous or strident against the MMPA as its judicial predecessor, its reasoning and final decision were not much different."[73] Charnovitz, on the other hand, believes that since "the interpretation of GATT Article XX is in flux . . . a well-crafted Pelly action could perhaps fit under the Article XX(b) exception."[74]

GATT-legality proves moot in this particular instance, as Taiwan is not a party to the GATT. Thus, trade restrictions against Taiwan cannot be inconsistent with the GATT as a matter of international law.[75] Nonetheless, the Taiwan sanctions provide a useful case study for the WTO's Committee on Trade and Environment in its deliberations on the ways in which the trading rules can be made to accommodate environmental concerns.

First, the Taiwan case study shows that limited ETMs can be effective in compelling countries to change their environmental practices. It also demonstrates that ETMs can draw upon interna-

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dolphin dispute resolution action with the European Economic Community (EEC) against the United States. *See* Tuna II, *supra* note 19, ¶ 3.1.

71. Tuna II, *supra* note 19, ¶ 5.13.

72. *Id.* ¶ 5.20; *see also* Snape & Lefkovitz, *supra* note 66, at 787 ("in one of the few promising, albeit baby step, developments in international trade law, it also found for several reasons that XX(g) may apply to policies related to the conservation of exhaustible natural resources, even if those resources are outside a contracting party's territorial jurisdiction" (internal citation omitted)). The panel made a similar finding with regard to the "extraterritorial" application of Article XX(b). *See* Tuna II, *supra* note 19, ¶ 5.33.

73. Snape & Lefkovitz, *supra* note 66, at 785-86.

74. *Analysis of the Pelly Amendment*, *supra* note 6, at 806. "Unlike Article XX(g), Article XX(b) does not require a parallel domestic provision. Therefore, it may permit sanctions." *Id.* at 791.

75. *See* Daniel C.K. Chow, *Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Direct Participation in International Environmental Law Treaties*, 14 STAN. ENVTL. L.J. 256, 262 (1995).

tional law to lend a degree of international consensus to unilateral actions. Under current interpretations, the exceptions for ETMs listed in GATT's Article XX would not cover the Taiwan sanctions.[76] The very success of the Taiwan sanctions, however, indicates that there is a need to consider reforming the GATT rules in this area. The WTO Committee on Trade and Environment is currently considering revisions that might address these concerns, and Part III of this Note will critically examine some of the specific proposals that have been offered thus far. As background to that discussion, Part II analyzes the larger context of the diversity of countries" viewpoints, interests and concerns about ETMs.

II. MULTIPLE VIEWPOINTS

The U.S. imposition of import prohibitions against Taiwan for its commerce in medicinal products made from endangered species underscores the fact that trade and environment conflicts can raise difficult cross-cultural issues. Overall, the much-delayed conclusion of the Uruguay Round negotiations demonstrates the high level of contention among the contracting parties on various trade-related concerns.[77] Although not the single most contentious issue, environmental issues were a source of much discord among the negotiating countries, and will most likely remain so in the context of the WTO Committee on Trade and Environment. As discussed in this Part, viewpoints in this area differ substantially between the developed and developing countries. Unfortunately, the proposals addressing the use of ETMs that are analyzed in Part III largely ignore these important differences in viewpoint.

To be effective, any proposal dealing with trade and the environment must address the various lines of division among countries for two important reasons. The first is fairness. Global environmental problems affect everyone and all countries should have a voice in determining how they should be addressed. Proposals should recognize that countries have unequal abilities to mitigate environmental degradation and that countries have varying levels of historic culpability for that degradation. The industrialized countries, for example, are largely responsible for the current damage to the ozone layer, though all countries are susceptible to the resulting increase in skin cancer and cataracts.

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76. *See supra* text accompanying notes 53 & 75.

77. The Uruguay Round talks began in 1986, and were due to end in 1990, but a final agreement was not signed until April 1994. WARD & CAMERON, *supra* note 24, at 1.

The second reason to consider diverging viewpoints is practicality. The likelihood of reaching any agreement on changes to the GATT to protect the environment depends on sensitivity to such perspectives. The WTO Committee on Trade and Environment, which will report to the entire GATT council in 1997,[78] includes numerous developed and developing country parties and its first chairman was Ambassador Luiz Felipe Lampreia of Brazil.[79] Although, in the past, the parties with the largest economies could effectively dictate the outcome of trade deals, the Uruguay Round demonstrated that such a simplified model of power politics at the international level no longer holds. In recent years, with the advent of the "Group of 77 plus China" negotiating bloc, even the smaller developing countries have been better able to assert their interests. This Part briefly surveys some of the concerns of both the developed and developing countries with regard to the use of environmental trade measures.

A. *Developed Countries*

Developed countries as a whole have thus far set both the tone and the agenda for discussions on trade and the environment. However, substantially different viewpoints, even among developed countries, have hindered progress toward a consensus regarding how to use trade measures to protect the environment. After years of inactivity, the United States has recently emerged at the forefront of developed country efforts to integrate trade relations and environmental protection. The United States was the principle motivator behind the 1993 environmental side agreement to the North American Free Trade Agreement (NAFTA).[80] In addition, the United States used its economic and political leverage during the Uruguay Round negotiations to press for both substantive and procedural changes in the GATT, specifically to increase sensitivity, transparency and democratic decision making in environmental matters. [81] Finally, with the Taiwan sanctions, the United States

78. *Id.*

79. *Sub-Committee on Trade and Environment Begins Work Programme*, TRADE AND THE ENV'T, GATT Doc. TE 007 (July 26, 1994), at 1. Before the close of the Uruguay Round, developing countries had been extremely vocal in their opposition to the work of the GATT EMIT group. *See* Caldwell, *supra* note 17.

80. *See* NAAEC, *supra* note 25; *see also* Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87 (1994).

81. *See* Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27

demonstrated that it alone was prepared to follow through with trade sanctions to promote environmental protection.

However, the United States has not always supported protecting the environment with trade measures.[82] Until pressed by the courts in 1991, the Bush Administration remained reluctant to apply the trade restrictions in the Marine Mammal Protection Act (MMPA) to activities by foreign nationals outside the U.S. Exclusive Economic Zone (EEZ).[83] Nonetheless, the United States vigorously defended the MMPA before a GATT dispute settlement panel subsequently invoked by Mexico.[84] Despite an unfavorable reception by the panel, the United States made largely the same arguments three years later in the second tuna-dolphin dispute.[85]

Current U.S. policies promoting the linkage of trade and the environment grew directly out of these experiences in the GATT.[86] Numerous treaties to which the United States is party provide for

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CORNELL INT'L L.J. 459, 520-21 (1994) [hereinafter *Free Trade, Fair Trade*]; *see also* Peter Behr, *Trade, Environment Face Off: GATT Panel Plans to Address Conflicts Created by the Two*, WASH. POST, Mar. 23, 1994, at F1.

82. *See Free Trade, Fair Trade*, *supra* note 81, at 515 (describing the Reagan Administration's staunch opposition to the European Community's import restrictions on meat from livestock that had been given growth hormones).

83. It took a suit by the environmental group Earth Island Institute to prod the Bush Administration into action. *See* Earth Island Inst. v. Mosbacher, *supra* note 61. Environmental organizations brought suit and were granted a preliminary injunction enjoining importation of yellowfin tuna from Mexico. The injunction was then affirmed by the Ninth Circuit. *Id.* at 1453.

84. *See* Tuna I, *supra* note 18. The United States argued that the trade measures were consistent with the "national treatment" requirements of GATT's Article III(4) because they applied to both domestic consumption and imports alike. *See id.* ¶ 3.20. The United States also argued that, even if these measures were not consistent with Article III, they were covered by the exceptions in Article XX(b) because they were necessary to protect the life and health of dolphins, *see id.*, ¶ 3.33, and XX(g) because dolphins are an exhaustible natural resource, and the trade measures were imposed in conjunction with domestic restrictions. *See id.* ¶¶ 3.40-3.41. In addition, the United States argued for the necessity of the "intermediary embargo" of tuna from countries that do not prohibit their importation of tuna from countries under a primary embargo by the United States. *See id.* ¶ 3.7.

85. *See* Tuna II, *supra* note 19.

86. Clinton Administration negotiators were largely responsible for the agreement establishing the WTO's new Trade and Environment Committee. Nevertheless, as Steve Charnovitz points out, "a large amount of effort had to be expended for a fairly minor goal." *See Free Trade, Fair Trade*, *supra* note 81, at 522 (internal citation omitted). The rhetoric of the Clinton Administration, which indicated that its interest in maintaining competitiveness with Mexico was at least as strong as its interest in safeguarding the environment, may have made it more difficult for the United States to promote the Trade and Environment Committee. *See id.* at 522-23. "It is no wonder, therefore, that developing countries have been doubtful of the Clinton Administration's motives for more environmental work in the GATT." *Id.* at 523.

trade measures to protect the environment,[87] and many federal laws, like the MMPA, mandate the imposition of sanctions with no discretion to the Executive Branch. As a result, the United States has been forced to develop arguments supporting the use of ETMs that would provide some cover for its domestic legislative requirements.

Other developed countries, such as Canada, have been much less sanguine about strengthening the links between trade and the environment. This posture was particularly evident in Canada's half-hearted support for the NAFTA environmental side agreement.[88] Canada has also been especially critical of the use of trade measures as a tool to protect the environment. In 1982, for example, Canada challenged a ban by the United States on imports of Canadian tuna and tuna products in response to Canada's seizure of nineteen U.S. fishing vessels operating within Canada's 200-mile EEZ.[89] Then, in the first tuna-dolphin case in 1991, Canada submitted an "interested third party" brief arguing that the "MMPA embargo was inconsistent with United States obligations" under the GATT.[90] Similarly, in the second tuna-dolphin case, Canada supported the arguments of the European Community against the use of ETMs by the United States.[91]

Nevertheless, despite its opposition, Canada, like many other developed countries, has itself imposed strong unilateral measures, including trade restrictions,[92] to protect international fisheries resources. Although gunboat diplomacy is hardly in keeping with Canada's carefully cultivated image as "an international concilia-

87. *See* ESTY, *supra* note 23, at 275-81.

88. *See, e.g.*, Patton, *supra* note 80, at 94. In fact, Canada managed to exempt itself entirely from the environmental trade sanction enforcement provisions under the agreement. *See infra* note 249.

89. *See* ESTY, *supra* note 23, at 266 (summarizing Canada-U.S. Tuna GATT, BISD 29 Supp. 91 (1982)). The United States, with the first-ever invocation of Article XX(g) as a defense in a GATT dispute, claimed that the ban was related to conservation. *See Free Trade, Fair Trade, supra* note 81, at 516. The panel found for Canada based in part on the fact that the ban applied to all species of tuna, including those not in danger of depletion, and was not matched with commensurate domestic restrictions. *See* ESTY, *supra* note 23, at 266. As a precedent-setting case for the interpretation of Article XX, the decision diluted the potential for a stronger interpretation of the exemptions. *Id.* at 516.

90. Tuna I, *supra* note 18, ¶ 4.7.

91. *See* Tuna II, *supra* note 19, ¶ 4.17.

92. *E.g.*, in another fisheries dispute with the United States in 1988, Canada itself invoked Article XX(g) to defend an export ban on unprocessed herring and salmon, but the panel did not find for Canada. ESTY, *supra* note 23, at 267 (summarizing Canada-Herring and Salmon, GATT, BISD 35 Supp. 98 (1988)).

tor, a peace-loving state that has won respect around the world for its contribution to international order,"[93] and despite its reputation for "mild behavior and distaste for conflict,"[94] Canada "long has aggressively protected its coastal waters and unilaterally enlarged their boundaries from time to time."[95] Along these lines, on May 10, 1994, Canada announced that it "would begin policing the North Atlantic beyond its 200-mile limit, boarding and seizing offending vessels if necessary."[96] On March 9, 1995, in an unprecedented response to what Canadian officials claimed was "overfishing," Canadian patrol boats fired warning shots at a Spanish fishing vessel in international waters off the coast of Newfoundland.[97] Although the Spanish boats were not fishing in the Canadian EEZ, Canada claimed that they had exceeded a nonbinding international quota agreement under the Northwest Atlantic Fisheries Organization (NAFO).[98] Not surprisingly, the European Union condemned Canada's actions, calling the high seas dispute over fishing rights "an act of 'organized piracy.' "[99]

Overfishing of several stocks on Canada's continental shelf has become a steadily worsening problem, and Canadian officials responded to international criticism of their unilateral approach by labeling it a temporary measure in response to an emergency situation.[100] Given the serious declines in fish stocks worldwide, conflict

93. Barry Bartmann, *Pirates or Pathfinders?*, OTTAWA CITIZEN, Mar. 21, 1995, at A11.

94. Anne Swardson, *Canada's Fish Affair: Diplomacy or Piracy?*, WASH. POST, Mar. 29, 1995, at A25.

95. *Id.* (noting that Canada was one of the first countries to form a fishing zone 12 miles from its shores and to extend its territorial fishing rights to 200 miles).

96. Charles Trueheart, *Canada Vows to Police High Seas*, WASH. POST, May 11, 1994, at A30. Fisheries Minister Brian Tobin explained that "[i]f we do not protect these fragile stocks now, we—not we as a nation, but we as a planet—may lose them forever." *Id.* In a 1992 initiative to rebuild the stocks, Canada had imposed stringent restrictions on the activities of its own fishermen, leaving 33,000 fishermen and fish plant workers unemployed, three-quarters of them in Newfoundland. Clyde H. Farnsworth, *Canada Acts to Cut Fishing By Foreigners*, N.Y. TIMES, May 22, 1994, § 1, at 9.

97. Anne Swardson, *Canada Fires Warning Shots, Seizes Boat in International Waters*, WASH. POST, Mar. 10, 1995, at A25. The Canadians then boarded the Spanish vessel, arrested the captain, and towed the ship to a Canadian port. *See id.*

98. *See id.*

99. *Id.*

100. *See* Farnsworth, *supra* note 96, at 9. Tobin's office also suggested that the crackdown was "aimed at neither the United States nor Europe." *Id.* Instead, targets such as those ships from Panama, Honduras and Belize were designated as "pirate" vessels "without international registry or flying 'flags of convenience.' " *Id.* Two months later, however, Canadian authorities armed with M-16s seized two U.S. boats in international waters for "illegal" scallop fishing. David Rohde, *Worldwide Fish Depletion Sparks Gunboat Diplomacy Over Share of the Catch*, CHRISTIAN SCI. MONITOR, Aug. 24, 1994, at 7. The similarities be-

over access to fishing waters has become widespread.[101] These skirmishes highlight the importance of allowing countries to implement some type of limited, non-military measures. As a result, Canada's recent embrace of unilateral gunboat tactics to protect overburdened natural resources may signal a willingness to ease its opposition to certain uses of ETMs.[102]

The European Union, in contrast to Canada, has already made sweeping gestures toward incorporating environmental protection into its trade policy. Indeed, E.U. international environmental policies have been touted as "model,"[103] and even as "the fulcrum on

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tween the Canadian fisheries law and the U.S. trade and environment actions are notable. Like the MMPA, the Canadian fisheries law began as a genuine domestic conservation effort, but was then applied internationally due in part to employment and competitiveness concerns. Also, like the U.S. trade sanctions against Taiwan, the Canadian fisheries law is based on a non-binding international standard. In the Taiwan case, however, the relevant international organization explicitly called for the imposition of import prohibitions against the offending country. The NAFO, on the other hand, never made any such recommendation on the use of gunboats against Spain to enforce its quotas.

101. Nearly thirty separate conflicts flared in the year leading up to the Canadian incident. Bronwen Maddox, *Fleets Fight in Over-Fished Waters*, FIN. TIMES, Aug. 30, 1994, at 4. These conflicts resulted from the depletion of fish stocks, of which the U.N. Food and Agriculture Organization estimates at least seventy percent "are being harvested near or beyond any sustainable scale." *See Atlantic Fish: Battle Stations*, ECONOMIST, Mar. 18, 1995, at 46 [hereinafter *Atlantic Fish*]. In response to this problem, a draft agreement was considered at a meeting of the U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in August 1994. The agreement would allow governments to seize vessels fishing illegally, if not in international waters, at least within the 200-mile EEZs of coastal nations. *U.N. Mulls Tough Fishing Practice Rules*, UPI, Aug. 23, 1994, *available in* LEXIS, News Library, UPI File. However, Canada and the United States were the only countries who called for binding rules, with the European Union divided on the issue and most other fishing countries against. *Id.*

102. Until recently, Canada acknowledged no unilateral jurisdiction over foreign nationals fishing in the international waters beyond its 200 mile EEZ. In fact, the Canadian Fisheries Minister in 1993 stated that he could see "no point in sending Canadian gunboats against foreign trawlers fishing illegally in coastal waters." Alan Ferguson, *Use of gunboats ruled out in our war on overfishing*, TORONTO STAR, July 13, 1993, at A2, and another official dismissed concerns about overfishing by foreign trawlers, saying "[t]he idea that some pirate fleet is going to scoop them up is not a serious danger in my opinion." *Id.* However, while the recent conflict with the European Union was ultimately resolved by reallocating some of the NAFO fishing quotas, Prime Minister Chretien has stated that Canada would not repeal its law unilaterally authorizing checks on foreign vessels fishing in international waters and warned that it would "continue to defend its right to protect fish stocks from nations trawling near the continental shelf." *Canada, EU repair bruised relations after fish dispute*, Reuters, May 8, 1995, *available in* LEXIS, News Library, Reuters File.

103. Then-Director of the Center for International Environmental Law Philippe Sands wrote in 1991 that the approach of the European Community in addressing international environmental problems "can serve as a model for the rest of the international community." Philippe Sands, *European Community Environmental Law*, 100 YALE L.J. 2511, 2511 (1991). Sands further argues that the European Court has held that "the protection of the

which the trade and environment agenda emerges."[104] However, in practice, the European Union's attempts at reconciling trade and the environment have proved half-hearted. For example, in September 1989, the European Commission proposed that a Directive on liability for waste "be based on Article 100A, which is primarily concerned with removing barriers to trade, in spite of the Directive's clear environmental objectives."[105] So, although environmental protection was asserted as a justification for certain restrictions on trade, implementation was rigged to make the regulations ineffective in achieving the stated environmental goal.

The position of the European Union on the use of ETMs has similarly remained contradictory, with significant gaps between rhetoric and practice.[106] While the European Union outwardly condemns unilateralism, extrajurisdictionality, and trade measures based on process or production methods (PPMs), the European Union often uses such trade measures itself.[107]

The E.U. ban on the import of fur from animals caught with leg-hold traps, scheduled to go into effect in 1996, is a good example of its use of the trade measures it officially shuns.[108] Citing the difficulties in determining the method of capture of an animal by examining the fur, this ETM is designed to discourage the use of these traps by prohibiting the import of all furs from those species caught in this manner.[109] Thus, the E.U. regulation prohibits the

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environment was one of the Community's 'essential objectives' justifying certain limitations on the principle of the free movement of goods." *Id.* at 2513.

104. Konrad von Moltke, *A European Perspective on Trade and the Environment, in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 93, 93 (Durwood Zaelke et al. eds., 1993). *But see* U.S. Congress, Office of Technology Assessment, *Trade and Environment: Conflicts and Opportunities,* OTA-BP-ITE-94 20 (1994) (warning that the E.U. innovations may not be easily transferable).

105. Sands, *supra* note 103, at 2517.

106. *Free Trade, Fair Trade, supra* note 81, at 513 (arguing that "[t]he Commission's policy is characterized by hypocrisy").

107. For example, in 1993 the European Union brought the United States before a GATT dispute resolution panel in the Tuna II case, arguing that "Article XX(g) or (b) could not be invoked in this case to conserve natural resources or to protect the life or health of living things located outside the jurisdiction of the party taking the measure." Tuna II, *supra* note 19, ¶ 3.15. After Tuna II, the European Parliament "called for a two-year moratorium on GATT panel decisions on environmental issues." William H. Lash, III, *Environment and global trade,* SOCIETY, May 1994, at 52.

108. Council Regulation 3254/91 of Nov. 4, 1991 Prohibiting the Use of Leghold Traps in the Community and the Introduction into the Community of Pelts and Manufactured Goods of Certain Wild Animal Species Originating in Countries which Catch Them by Means of Leghold Traps or Trapping Methods Which Do Not Meet International Humane Trapping Standards, 1991 O.J. (L308) 1.

109. The European Union has provided two ways to avoid the ban. First, the country

imports of fur from countries outside the jurisdiction of the European Union based solely on the method of harvesting. As such, the regulation seems to embody the very concepts of unilateralism, extrajurisdictionality, and process-based trade measures, to which the European Community has so strongly objected in the context of the GATT.

Even more than the schism between E.U. theory and practice with regard to trade and the environment, perhaps the greatest obstacle preventing the European Union from taking a clear position on the use of ETMs is its principle of "subsidiarity"—the concept that decisions should be made at the lowest possible level of government. E.U. scholar Konrad von Moltke quotes the Single European Act to explain: as applied to the European Union, subsidiarity means that "[t]he Community shall take action relating to the environment to the extent to which the objectives [of the proposed action] . . . can be attained better at the Community level than at the level of the individual Member State."[110] The fact that any environmental issue can have an international dimension, and can thus trigger action at the Union level, however "makes a mockery of the principle of subsidiarity; it also flies in the face of a long tradition of environmental management that emphasizes the local over the regional and the regional over the global, even while remaining sensitive to the larger dimension of many localized issues."[111]

The European Union, like the United States, should be a natural supporter of the use of at least limited trade measures to protect the environment, as demonstrated by its own numerous trade and environment directives. In nearly all international environmental contexts, the countries of the European Union rhetorically stake out pro-environmental positions. Most European countries, however, are concerned about what they (perhaps hypocritically) see as the free-wheeling use of ETMs by the United States. Moreover, subsidiarity will likely keep E.U. positions conservative and, if

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of export may pass legislation prohibiting the use of leg-hold traps. *Id.* art. III, ¶ 1. Second, the country may require "humane" trapping methods based on an internationally-recognized standard. However, no such standard currently exists. *Id.*

110. von Moltke, *supra* note 104, at 106.

111. *Id.* The problems of subsidiarity can also be seen in the fractured response of the European Union and its member nations to the recent Canadian fish dispute. *See* Swardson, *supra* note 94, at A25; John Carvel et al., *Britain Splits EU Ranks on Halibut War*, GUARDIAN, Mar. 29, 1995, at 24.

history is any guide, less than coherent.[112] The key to obtaining E.U. cooperation in practice will likely lie in strong disciplines on the use of ETMs and reassurances that Pandora's box will not be opened wide.

Other developed countries, such as Norway and Japan, have already signaled support for the limited use of ETMs directed at the protection of endangered species. Ironically, both Norway and Japan have been the repeated objects of U.S. threats to use ETMs. Between 1986 and 1993 the United States certified Norway four times under the Pelly Amendment for its whaling activities.[113] Not surprisingly, given the constant threats from the United States over its whaling practices, Norway suggested in its "interested third party" submission to the first tuna-dolphin dispute resolution panel that the Marine Mammal Protection Act "might entail arbitrary and unjustifiable restrictions on international trade," and that "the exceptions in Article XX should be interpreted narrowly." [114] Notwithstanding this critical stance, Norway is currently among the countries that have most strongly "indicated a willingness to amend Article XX to apply to production processes or methods, so long as standards are set by international agreement."[115]

Like Norway, Japan would also seem an unlikely country to support a push for ETMs in the GATT. Japan has received numerous environmental trade threats from the United States under the Pelly Amendment for its harvesting of hawksbill and olive ridley sea turtles, as well as minke whales.[116] Japan, like Norway, submitted an

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112. Moreover, "although the North-South tension in the trade and environment debate is a sensitive issue, the Commission seems intent on aggravating it." *Free Trade, Fair Trade, supra* note 81, at 514.

113. *See Analysis of the Pelly Amendment, supra* note 6, at 765-68.

114. Tuna I, *supra* note 18, ¶ 4.21.

115. *See* Daniel C. Esty, *Unpacking the "Trade and Environment" Conflict*, 25 LAW & POL'Y INT'L BUS. 1259, 1267 n.24 [hereinafter *Unpacking the Conflict*] (citing the Nordic Group Submission to GATT EMIT Group (1992) (unpublished)); *see also* Carrie Dolmat-Connell, *After NAFTA: Can a New International Convention on Toxic Trade Be Far Behind?*, 12 B.U. INT'L L.J. 443, 454 (1994) ("the United States, Switzerland, and the Scandinavian countries wish to take a more forward-looking approach to trade and the environment").

116. In 1974, Japan was certified under Pelly for exceeding the International Whaling Commission quota for the 1973-74 season with respect to the minke whale. *See Analysis of the Pelly Amendment, supra* note 6, at 763. Although President Ford did not follow through on the sanction threat, Japan agreed to the IWC quota for the next year. *See id.* However, along with Norway, Japan later objected to the IWC's commercial whaling moratorium. *See* Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 227 (1986). In 1988, Japan was again certified for conducting "research" whaling in violation of an IWC resolution. *Analysis of the Pelly Amendment, supra* note 6, at 765. President Reagan denied fishing privileges to Japan in the exclusive economic zone, but imposed no

interested third party brief in Tuna I criticizing the U.S. law.[117] Moreover, Japan has traditionally focused predominantly on financial assistance rather than trade sanctions to achieve international environmental goals, especially with regard to forestry and fisheries issues.[118]

Japan, however, has also demonstrated a willingness to encourage the use of limited ETMs. In 1994, Japan successfully proposed the following resolution language to the International Convention for the Conservation of Atlantic Tunas (ICCAT): "To ensure the effectiveness of ICCAT bluefin tuna conservation program, the Commission supports Contracting Parties taking, consistent with their international obligations, non-discriminatory trade restrictive measures on bluefin tuna products, in any form," from Parties identified by the Commission to be "diminishing the effectiveness of the relevant conservation recommendations of the Commission . . . ."[119]

Thus, several key developing countries appear to be potentially supportive of at least limited use of ETMs.[120] Even those countries

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Pelly sanctions. *See id.* In 1991, the Secretaries of the Interior and Commerce both certified Japan for engaging in trade in hawksbill and olive ridley sea turtles but, after some progress by Japan, *see id.* at 767, President Bush did not impose sanctions. *Id. See also* McDonald, *supra* note 54, at 458-59.

117. Japan argued in its submission that the MMPA "was not justified under Article XX(b) and XX(g)." Tuna I, *supra* note 18, ¶ 4.18.

118. In 1986, for example, the Japanese Government "offered several million dollars to fund the International Tropical Timber Organization (ITTO), as well as free office space and support services, and, in addition, undertook to underwrite the costs of bi-annual Council meetings both in Yokohama and overseas." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, DEFORESTATION: AN OVERVIEW OF GLOBAL PROGRAMS AND AGREEMENTS 17 92-764 ENR (1992). In 1990, Japan became the biggest contributor to the ITTO, with a contribution of $27 million for projects, ten times more than the second largest. *See id.* at 22. Overall, Japan increased funding for international forestry projects from $86 million in 1988 to $117.2 million in 1990, compared with only $87.9 million by the United States in 1990. National Audubon Society, et al., Overview of International Forestry Funding: A Report of the Global Forestry Coordination and Cooperation Project 3 (May 1993) (unpublished report on file with the *Stanford Environmental Law Journal*).

119. Draft Resolution By International Convention for the Conservation of Atlantic Tunas (ICCAT) Concerning Action Plan to Ensure Effectiveness of Conservation Program for Atlantic Bluefin Tuna (Apr. 18, 1994) (unpublished submission by Japan, on file with the *Stanford Environmental Law Journal*). "At the 1994 ICCAT meeting, the countries of the Commission took an historic decision by agreeing to a procedure providing for the possibility of trade sanctions by member countries against non-members whose vessels fish in a manner which undermines the agreed ICCAT conservation measures." *Current Issues in International Fishery Conservation and Management: Hearing Before the Subcomm. on Fisheries, Wildlife, and Oceans* (1995), *available in* WESTLAW, File No. 26825 (testimony of David A. Colson, Deputy Assistant Secretary of State for Oceans).

120. Australia, as well, seems likely to support changes to GATT to promote environ-

that indignantly protest when an ETM is applied against them have frequently implemented ETMs themselves.

The type of ETM predominantly favored by the developed countries has been import restrictions to address global or transboundary environmental problems, including the depletion of extrajurisdictional living resources. As the next section illustrates, the developed country focus is in stark contrast to the focus of developing countries. Developing countries concentrate more on export restrictions to address local environmental problems like hazardous waste and toxic pesticides.

B. *Developing Countries*

Developing countries possess land areas of various sizes and are endowed with varying quantities of resources; some developing countries are party to the major environmental agreements, but many important players, such as China and Taiwan, are not even members of the GATT. As a result, generalized characterizations of the position of "developing countries" on any issue run the risk of being dangerously overbroad. Yet, while a single "developing world" stance may not exist, given the heterogeneity of the countries that make up this group, common characteristics unite them. In fact, many trade and environment analysts have noted developing countries' uniformly hostile reactions to the linkage of trade and environment issues across international borders.[121]

Most of the countries generally lumped together as "developing" share a common colonial history and currently face similar circumstances, especially when viewed in contrast to the industrialized world. Significantly, in the context of international agreements and cooperative efforts, developing countries tend to act in concert through the bloc of the Group of 77 (G-77) plus China. Thus, for analytical purposes regarding trade and the environment, this Note will treat the "developing countries" as having a

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mental protection. In its "interested third party" submissions to both tuna-dolphin panels, Australia emphasized that no GATT panel has "competence to resolve the conflicts between a contracting party's obligations under the General Agreement and its obligations under other instruments such as those in respect of the conservation of marine mammals." Tuna I, *supra* note 18, ¶ 4.1; *see also* Tuna II, *supra* note 19, ¶¶ 4.1-4.2. In addition, Australia recently signaled a strong interest in moving forward on the trade and environment issue when it criticized the old GATT environmental working group for "getting bogged down in theoretical discussions, rather than focusing on specific trade-related actions." Dolmat-Connell, *supra* note 115, at 454.

121. *See, e.g.*, Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 377 (1994).

unified position, even though substantial disagreement among these countries is certain to exist on specific issues.

1. *Structural concerns.*

Developing countries tend to be suspicious of the international trade system as a whole.[122] Many analysts from the Third World believe that trade relations between the North and South are "structurally biased against the interests of the South."[123] To support their position, these critics point to such events as the United Nations General Assembly's illusory 1974 promise, which was never implemented, of a New International Economic Order to benefit developing countries.[124] In addition, other trade concessions, such as the Generalized System of Preferences, have had only minimal utility or effectiveness and further substantiate their claims.[125]

This suspicion has carried over with particular force to the area of trade and the environment. Developing countries have voiced strong concerns over "green protectionism," viewing the predominantly unilateral environmental trade measures as lending an insidious advantage to domestic industries in the North. They have also decried "eco-imperialism," whereby industrialized countries are believed to use extrajurisdictional trade measures to undermine the sovereign right of developing countries to use their own resources.[126] Attempts to impose even minimal international environmental standards on the development process are frequently perceived by developing countries as a threat not only to their economic development, but also to their freedom of action.[127] Developing countries' history of colonization further heightens their

122. Scott Vaughan, *Trade and Environment: Some North-South Considerations*, 27 CORNELL INT'L L.J. 591, 593 (1994). Mr. Vaughan is the Coordinator of Environment and Trade, United Nations Environment Program, Geneva. *Id.*

123. Brown, *supra* note 121, at 360.

124. *See id.* at 362.

125. *See id.* at 363.

126. *See Free Trade, Fair Trade, supra* note 81, at 492 (citing as examples Gijs M. DeVries, *How to Banish Eco-Imperialism*, J. COM., Apr. 30, 1992, at 8A and Christopher Chivvis, *A Troublesome Attack on GATT*, J. COM., Mar. 1, 1994, at 8A). "Arthur Dunkel, as GATT Director General, expressed concern that nations were trying 'to impose domestic environmental or labour standards on other countries through trade measures . . . .'" *Id.* (internal citation omitted). Charnovitz debates this assertion and suggests that these concerns are "exaggerated." *Id.* "Actually, the real danger of eco-imperialism comes not from passive unilateral trade measures but from World Trade Organization (WTO) dispute settlement . . . [which] would permit the complaining country to levy trade sanctions . . . aimed solely at forcing the other country to change its law." *Id.* at 493.

127. Brown, *supra* note 121, at 377.

alarm over proposals to curb or control industrial development and the use of their abundant stock of natural resources.[128] Finally, developing countries have also criticized the fact that Principle 12 of the Rio Declaration on Environment and Development,[129] which acknowledges the particular concerns of developing countries on trade and environment issues, has been largely ignored by the industrialized countries.[130]

The loudest critics of green protectionism and eco-imperialism have been the larger, more advanced developing countries that are rich in resources and represent large markets. During a 1994 joint U.N. Environmental Programme (UNEP)—U.N. Commission on Trade and Development high-level session on trade and the environment, Indian Minister for the Environment and Forests Shri Kamal Nath argued that "[t]here is a social and environmental subsidy which industrialized nations receive from developing countries. This insidious subsidy renders all development in the North unsustainable by definition. It makes a mockery of free trade; and if we have to set things right, then the subsidy must be accounted for."[131] However, the source of criticism has not been limited to the largest developing countries. In a similar vein, Malaysia's Minister of the Environment, Rafidah Aziz, stated at the April 1994 conclusion of the GATT's Uruguay Round in Marrakech that "environmental issues are now clearly being used to promote protectionist motives, particularly to keep out imports from countries which have a better competitive edge and comparative advantage."[132]

Although Mexico has remained fairly quiet on trade and environment issues since it withdrew its tuna-dolphin complaint in the run-up to the NAFTA,[133] other developing countries have been quite vocal in criticizing the United States for its unilateral ETMs. Indonesia, for example, submitted an interested third party brief in Tuna I, arguing that the "MMPA had been used as a means to . . . shield United States producers from import competition by exploiting public sympathy for dolphins, which were in any event not

128. Anderson, *supra* note 67, at 775. "For less-developed nations, control over natural resources not only symbolizes political independence but is crucial to their continuing struggle for economic independence and growth." *Id.*

129. U.N. Conference on Environment and Development (UNCED), *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

130. *See, e.g.*, Vaughan, *supra* note 122, at 602 n. 40.

131. Vaughan, *supra* note 122, at 598 (internal citation omitted).

132. *Id.* at 593 (internal citation omitted).

133. *See supra* note 70.

a species listed as endangered under CITES."[134] Although not a party to the GATT, Taiwan has strongly protested the trade sanctions imposed by the United States to curb Taiwanese commerce in tiger and rhinoceros parts.[135] Other disgruntled developing country victims of U.S. environmental trade threats include, but are not limited to, Chile, Peru, South Korea, the Netherland Antilles, and China.[136]

Some developing countries have proposed increased levels of foreign assistance as a prerequisite to solving the problems of Third World environmental degradation.[137] Many states have argued that the developing countries serve as guardians of a large percentage of the remaining terrestrial environmental commons, and that developing country obligations should be contingent upon the industrial world's willingness to fulfill its financial responsibilities to the guardians.[138] In fact, Chapter 33 of the United Nations Conference on Environment and Development's (UNCED) Agenda 21 calls for massive infusions of foreign assistance into developing countries to facilitate environmental protection.[139] Nearly all other major international environmental agreements have included support for developing countries through some financial mechanism.[140] In addition, most industrialized countries provide some form of bilateral assistance to developing countries to protect the environment.[141] However, much of this aid has traditionally been "tied" and can only be spent to purchase exports

134. Tuna I, *supra* note 18, ¶ 4.15.

135. *See* Tom Kenworthy, *President Imposes Sanctions on Taiwan*, WASH. POST, Apr. 12, 1994, at C1.

136. *See Analysis of the Pelly Amendment*, *supra* note 6, at 768-72; *see also* Tuna II, *supra* note 19.

137. *See, e.g.*, Vaughan, *supra* note 122, at 594-95.

138. *See* Brown, *supra* note 121, at 379.

139. UNCED, Agenda 21, Annex II, U.N. Doc. A/CONF.151/26/Rev.1 (1992).

140. *See, e.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) (amended in London, June 29, 1990, 30 I.L.M. 537, and in Copenhagen, Nov. 25, 1993, 32 I.L.M. 874) [hereinafter Montreal Protocol] art. 10, as amended, 30 I.L.M. 537, 550 (establishing the Multilateral Fund); *see also* IAN A. BOWLES, CONSERVATION INTERNATIONAL, & GLENN T. PRICKETT, NATURAL RESOURCES DEFENSE COUNCIL, REFRAMING THE GREEN WINDOW: AN ANALYSIS OF THE GEF PILOT PHASE-APPROACH TO BIODIVERSITY AND GLOBAL WARMING AND RECOMMENDATIONS FOR THE OPERATIONAL PHASE (1994) (regarding the establishment of the Global Environmental Facility as the funding mechanism for certain multilateral environmental agreements). In addition, the environmental agreements concurrent to the NAFTA included two billion dollars for Mexico to help carry out the mandate of the newly-established Border Environment Cooperation Commission. *See* Vaughan, *supra* note 122, at 604.

141. *See infra* note 186.

from the granting state.[142]

Nevertheless, with the recent dwindling of foreign aid budgets—and recognition of the limitation of foreign assistance even at significant levels—both industrial and developing countries have begun to focus on "trade, not aid."[143] More sophisticated developing countries are acknowledging that the solution to their problems does not lie in uncertain and limited financial transfers from rich to poor countries. Financial assistance increases dependence on industrialized countries and in its traditional forms can seriously undermine sovereignty. Instead, many developing countries aim to bolster national production through increased trade concessions from developed countries.[144] As a result, developing countries have grown especially sensitive to potential restrictions on trade.

2. *Substantive concerns.*

Beyond the structural suspicions surrounding efforts to reconcile trade and the environment, several substantive issues currently trouble developing countries. Two substantive issues in particular dominate this debate: a concern over "domestically prohibited goods (DPGs)" and the status of natural resources that are traded as commodities.

The developing countries' concern with the trade in DPGs is that dangerous chemicals, wastes, contaminated products, and other items banned in the manufacturing country are being dumped in developing countries.[145] For example, Nigeria reported to the GATT in 1989 that one million kilograms of beef imported by a number of West African countries had been contaminated by the radioactive fallout from the Chernobyl explosion.[146] While DPGs such as expired pharmaceutical products, alcohol and tobacco, handguns, and unsafe toys are also a cause for concern among developing nations, hazardous wastes and pesticides—deemed too dangerous for use or disposal in the country of origin

142. *See* Brown, *supra* note 121, at 370.

143. *See id.* at 369-70.

144. Former U.S. Secretary of State George Schultz recently advocated this approach as well, explaining that development "can only be accomplished if the developed countries trade more with developing countries, even if this does result in some loss of jobs and loss of some industries in the former (rich) countries." *See id.* at 370.

145. *Id.* at 434.

146. *See id.* at 435. Some European nations had also attempted to export powdered milk and chicken products originating in the fallout area. *See id.*

but routinely transferred to developing country dumps and markets—have become the most controversial.[147]

The GATT took notice of DPG problems starting in the early 1980s when a Ministerial Declaration recommended that contracting parties "notify the GATT of any goods produced and exported by them, but banned for domestic use."[148] However, attempts by a group of developing countries to get DPG concerns on the agenda for the Uruguay Round in 1986 failed, and instead the topic was relegated fruitlessly to the GATT's regular work program.[149]

Work on the DPG issue progressed in other fora, where debate focused on a prophylactic procedure known as "prior informed consent" (PIC). The PIC procedure requires affirmative, voluntary permission of a recipient country to authorize exports prohibited in the country of origin. This affirmative consent is intended to demonstrate the recipient country's awareness and acceptance of the potential dangers associated with the export. Several international agreements have already implemented the PIC procedure.[150]

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147. Dolmat-Connell, *supra* note 115, at 443-44. "The sale of pesticides in Africa, for example, increased 180 percent between 1980 and 1985." *Id.*

148. McDonald, *supra* note 54, at 461.

149. *See* Dolmat-Connell, *supra* note 115, at 454.

150. For example, the London Guidelines for the Exchange of Information on Chemicals in International Trade established a PIC requirement for exporting states having banned or severely restricted a chemical domestically. *See* Schultz, *supra* note 16, at 434. In addition, the U.N. Food and Agriculture Organization adopted amendments to its Code of Conduct on the Distribution and Use of Pesticides that incorporate provisions for PIC in the use of certain chemicals. *See* Dolmat-Connell, *supra* note 115, at 450-51. ("[D]eveloping countries had pushed for inclusion of the P.I.C. process in the original Code of Conduct but their efforts were blocked by pressure from industrialized nations."). As a result of increasing international concern that developing countries were being used as a depository for the hazardous waste of industrialized countries, *see* McDonald, *supra* note 54, at 453, the Basel Convention on Trade in Hazardous Waste was negotiated in 1989. Basel Convention on Trade in Hazardous Wastes, Mar. 22, 1989, 28 I.L.M. 649 (1989) [*hereinafter* Basel Convention]. Under the Basel Convention, "trade in hazardous waste is permitted only between parties, and is subject to a number of conditions," *see* McDonald, *supra* note 54, at 453, including a requirement for prior informed consent. *See* Basel Convention, *supra*, art. 6, ¶ 4. Moreover, a party is permitted to export hazardous waste only if domestically it "does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes . . . in an environmentally sound and efficient manner." *Id.*, art. 4, ¶ 9(a). Finally, to bolster the PIC, the Basel Convention requires each party to take appropriate measures to prevent the exports of waste to "Parties, particularly developing countries, which have prohibited by their legislation all imports, or if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner. . . ." *Id.*, art. 4, ¶ 2(e).

While the PIC procedure was designed to protect recipient countries, particularly developing countries, from harmful imports by requiring affirmative consent, the PIC itself has posed several problems for developing countries. Often, developing countries lack the technical capability necessary to assess the risk of importing certain goods and to make informed and responsible public health decisions.[151] In addition, developing countries can find it difficult to refuse the hard currency that flows from increased agricultural productivity and exports as well as from the sale of hazardous waste disposal services.[152] These difficulties with the PIC ultimately led to calls for an outright ban on DPG exports to developing countries. As early as 1987, "the Organization of African Unity passed a resolution stating that dumping wastes illegally into Africa was 'a crime against Africa and African People.'"[153] Five years later, at a conference chaired by UNEP Executive Director Mustafa K. Tolba, delegates from fifty-three countries met to address the problems of "toxic trade." Tolba argued that "developing nations must, through transfer of resources and environmentally sound technologies, be 'given the chance to leap-frog the dirty technologies that caused so many of the problems in the first place.'"[154] The participants reviewed a set of recommendations concerning international trade in potentially harmful chemicals that "proposed, for the first time ever, that a convention be adopted that actually *prohibits* the export of products that are 'unacceptable for domestic purposes in the exporting country.'"[155] The ban would have freed developing countries from the burden of refusing to import goods that are environmentally harmful but economically beneficial. In the end, however, the participating countries failed to adopt the recommendations.

One argument against adopting a ban to bolster the PIC procedure has been that it would run afoul of the GATT rules on trade and the environment.[156] For example, if a waste-exporting nation under the Basel Convention permits exports of a hazardous sub-

151. *See* Dolmat-Connell, *supra* note 115, at 445 (internal citation omitted).

152. *See* McDonald, *supra* note 54, at 460 (internal citation omitted).

153. U.S. Int'l Trade Comm'n, International Agreements to Protect the Environment and Wildlife: Report to the Comm. on Finance, U.S. Senate, on Investigation No. 332-287 Under Section 332 of the Tariff Act of 1930, Pub. 2351 at 5-69 (Jan. 1991).

154. *See* Dolmat-Connell, *supra* note 115, at 459 (internal citation omitted).

155. *Id.* at 460.

156. *See* Anderson, *supra* note 67, at 770-71. "[A] unilateral [trade] export restriction would be deemed illegal if challenged under the GATT, as were the MMPA import measures, because of its grounding in extraterritorial concerns." *Id.*

stance to some nations but not to others, it will have breached the GATT Article I most-favored-nation obligation by granting more favorable treatment to one state than to another. "Moreover, a selective ban of this sort may be criticized both for violating the importing nation's sovereign right to determine which products it wishes to import and for being paternalistic, especially where the importing country does not share the environmental and economic priorities of the exporter." [157]

The DPG issue thus creates a paradoxical situation for developing countries, which usually advocate strongly for GATT protections against green protectionism and eco-imperialism. With respect to DPGs, developing countries are demanding just the opposite: that the North make value judgments about the South's capabilities to handle the prohibited goods and hinder their access to trade. Developing countries—as well as some developed country supporters[158]—push for these restrictions despite the fact that

157. McDonald, *supra* note 54, at 461 (internal citation omitted). In addition, under the reasoning of the tuna-dolphin panel report, the terms of the Basel Convention "could not be exempted under Article XX(b)'s health and safety exception because the prohibition on export would not have been to protect the health of individuals in the exporting party...." *Id.* at 454. Basel's prohibition on trade with nonparties would thus also violate MFN, and perhaps could only be harmonized with the requirement if the waste trade were construed, not as a product, but as a service for disposal. *See id.* at 454-55. This is a poor fit, however, where the waste is actually useful, e.g., where it can be recycled or some usable substance can be extracted from it. *Id.* at 455.

158. Some supporters of a ban on the export of pesticides that have been prohibited domestically claim that "the unrestricted export of these chemicals may in turn threaten public health in the exporting nation itself." Dolmat-Connell, *supra* note 115, at 446. Through the reimportation of fruits and vegetables produced with the banned pesticide, the export of the chemicals may threaten, not just the well-being of the importing country, but of the exporting country as well. This effect is called the "circle of poison," and has been cited as a justification for the use of trade restrictions. *See* Senator John F. Kerry, *Trade and the Environment: Charting a New Course*, 27 CORNELL INT'L L.J. 447, 456 (1994). The protection of the exporting country's domestic health and environment is a justification for a DPG export ban that on its face would be more consistent with GATT's Article XX(b) health and safety exception.

However, this approach has several problems. First, as a practical matter, one country's ban on the export of a pesticide would not necessarily prevent its reimportation on fresh produce. Developing countries could simply find another source for the desired pesticide. Thus, pesticide-laden produce could still be imported into countries with pesticide export bans in place. Imposition of sanitary and phytosanitary import controls, not export bans, would be a preferable way to address problems with the importation of food contaminated by harmful pesticides. Furthermore, due to differences in climate and geography, a pesticide that is inappropriate for use in the manufacturing country in the North may be perfectly appropriate for use in the South. For example, pressing epidemiological problems in developing countries, such as malaria, may outweigh even a statistically significant increase in the risk of cancer. Finally, developing countries are concerned with the effects of DPGs on their own health and environment rather than the consequences for

such prohibitions deny them the opportunity to use their comparative advantage, undermine their sovereignty and represent an extrajurisdictional ETM. In effect, on the DPG issue, the South is calling for, rather than decrying, the use of ETMs.

Another substantive area of concern for developing countries is the status of natural resources that are traded as commodities. The fish trade, for example, is an especially important issue in both Africa and Asia, where fish accounts for between one fifth and one third of the animal-derived protein in people's diets, compared with only seven percent in Western diets.[159] In addition, one hundred million of the world's poorest people depend on fisheries for jobs.[160] If the fisheries in the Third World die out, "there will be no Newfoundland 'fisherman's dole' for them."[161]

"As the great North Atlantic fisheries disappear, fishermen [have] cast their nets in more-distant waters, off the coast of Africa and in the Indian Ocean, their large sophisticated fleets easily displacing the smaller boats of less industrialized nations."[162] The best and largest ships from large national fleets of countries such as Spain and Japan are moving into the high seas and, sometimes illegally, into the territorial waters of developing countries. "Half the fish caught off the coast of western Africa are taken by foreign fleets and sold in international markets at prices too high for locals to pay."[163] Stocks of fish that straddle two or more countries' jurisdictions are also a problem, not only between the United States and Canada, but also, for example, among Angola, Namibia, and South Africa.[164] The combination of encroaching foreign fleets and straddling stocks has led to an explosion in the number of fishing disputes in the coastal waters of developing countries. Disputes have recently erupted in coastal waters off Ecuador, Patagonia, Senegal, and Indonesia, as well as in the Caribbean, Bay of Bengal and the Straits of Malacca.[165]

Although some of these clashes have involved modern trawler

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developed countries. The "circle of poison" thus makes little sense by itself as a justification for trade measures to protect the environment, and is only tenuously related to the complaints of the developing countries about DPGs.

159. *See* Maddox, *supra* note 101, at 4 (citing U.N. figures); *see also* Polly Ghazi, et al., *Focus: The Rape of the Oceans*, OBSERVER, Apr. 2, 1995, at 23.

160. Ghazi, *supra* note 159, at 23.

161. *Id.*

162. Deborah Cramer, *Troubled Waters*, ATLANTIC MONTHLY, June 1995, at 22, 24.

163. *Id.* at 24.

164. *See Atlantic Fish*, *supra* note 101, at 48.

165. Maddox, *supra* note 101, at 4.

fleets accused of piracy, in most cases the plunder has been at the invitation of developing countries. Developing nations own ninety percent of the coastal waters that lie within the 200-mile fisheries exclusion zones.[166] Nevertheless, many governments have endangered their traditional fisheries by signing lucrative deals with industrialized nations to write off debt or boost fledgling economies. "Senegal, for example, has agreed to allow massive exploitation of its waters by European 'fleets.'"[167] In Asia, as well, "small fishing communities may claim their traditional grounds [but] are being invaded by industrial fleets, often owned by foreigners who pay fees for access to the country's waters."[168] The rewards for developing country governments have been rich: developing countries now make ten billion dollars annually from fish exports, more than revenues from coffee, tea, or rubber.[169]

An analogy may be made between the fisheries on one hand, and the waste and pesticides trade on the other. In both cases, despite a general suspicion of ETMs and eco-imperialistic affronts to their sovereignty, developing countries are calling for self-restraint on the part of industrialized countries to protect resources outside their own jurisdictions. Aside from cases of piracy, developing countries are choosing to enter into contractual arrangements to import goods and exploit their own natural resources. However, the same countries that stalwartly defend their sovereign rights to dispose of their resources as they choose simultaneously decry the immoral advantage taken by developed countries in these arrangements.

3. *Proposals.*

Although the imbalanced power politics of the GATT clearly favor the trading strength of the industrialized world, reforms to promote environmental protection ultimately cannot succeed without the agreement of the G-77 and China. As a result, the concerns of the developing countries discussed above must be

166. Ghazi, *supra* note 159, at 23.

167. *Id.*

168. *Atlantic Fish*, *supra* note 101, at 48.

169. Ghazi, *supra* note 159, at 23. The situation with the timber trade is similar. In 1987, ninety-six percent of Japan's massive tropical hardwood imports came from three Southeast Asian areas—the Malaysian states of Sarawak and Sabah, and Papua New Guinea. *See* Robert M. Hardaway, et al., *Tropical Forest Conservation Legislation and Policy: A Global Perspective*, 15 WHITTIER L. REV. 919, 944 (1994).

reflected in any proposal to make trade rules more sensitive to environmental issues.

Because developing countries remain deeply wary of the international trade system as a whole, efforts to "green" the trade rules cannot occur in isolation. The North must also commit to providing "tangible assistance to the South through additional financing, technology transfer, increased commitments to overseas development assistance, and other initiatives to promote sustainable development."[170] In addition, developing countries would likely expect some efforts in the following areas: to address the potentially discriminatory effects of eco-labeling,[171] to improve the Generalized System of Preferences to develop creative and fair arrangements for trade-related intellectual property provisions and to encourage environmental protection indirectly through increased investment in developing countries.[172]

With respect to ETMs in particular, developing countries have sought to cabin any potential changes in trade rules within the overall policy context of UNCED. [173] Principle 12 of the Rio Declaration of Environment and Development adopted at UNCED specifically addresses the issue of trade and the environment[174] and arguably provides a relatively progressive starting point for discussions on the use of trade measures to protect the environment.

The first clause of Principle 12 provides that "[t]rade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade."[175] This simply restates the facially unobjectionable introduction to GATT Article XX.[176] It goes on to state that "[u]nilateral actions to deal with environmental challenges should be avoided."[177] However, Principle 12 does not suggest that unilat-

170. Vaughan, *supra* note 122, at 591.

171. Austria's tropical timber labeling and tax scheme, for example, which was initiated as a way of preserving tropical rainforests, demonstrates the potential for adversely affecting the environmental goals it seeks to prevent. By reducing market demand for tropical timber, a tax scheme such as Austria's could result in lower prices elsewhere and, consequently, lead exporting countries to increase the amount of timber they cut in order to make up lost revenue. *See* ESTY, *supra* note 23, at 189.

172. *See* Schultz, *supra* note 16, at 435-37; *see also* Brown, *supra* note 121, at 20.

173. *See* Vaughan, *supra* note 122, at 602.

174. Rio Declaration, *supra* note 129.

175. *Id.* at 289.

176. *See supra* text accompanying note 52.

177. *Id.* The United States took the precaution of filing an interpretive statement with regard to that principle, emphasizing that "in certain situations, trade measures may provide an effective and appropriate means of addressing environmental concerns . . .

eral measures may never be used, merely that they should be avoided. In other words, while unilateral measures should not be a default response, the language of Principle 12 seems to allow that there are some situations in which they may be appropriate. Principle 12 concludes that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus."[178] Similarly, Principle 12 does not require a binding agreement, only a level of international consensus. Moreover, the qualifying clause "as far as possible" alludes to the difficulties of achieving perfect consensus. Critically examined, Principle 12 yields ample room for some limited use of ETMs. Developing countries have, with good reason, accused the industrialized world of backing away from its promises at UNCED. Principle 12 is a good place to begin a serious discussion of ETMs and should be embraced, rather than rejected, by developed countries.

III. PROPOSALS FOR WHAT THE GATT RULES SHOULD ALLOW

Since the release of the first tuna-dolphin report, numerous recommendations have addressed the question of when, if ever, trade measures should be used to protect the environment outside the exclusive jurisdiction of the country imposing the measures. Particularly significant among these have been the 1992 recommendations by the GATT Secretariat and by the European Commission and 1994 proposals by the Clinton Administration and by Daniel C. Esty in his book, *Greening the GATT*.[179] This Part reviews the elements of each proposal, emphasizing how each has built on previous efforts to address this question. However, each of these paradigms has one or more serious problems, including a disregard for the motivations behind the current use of ETMs, a lack of clarity on when ETMs would be permitted, and overall disregard for the concerns of the non-Western and developing countries. These recommendations and others like them comprise the starting point for deliberations in the WTO Committee on Trade and Environment. This Part critiques each proposal, using the Taiwan sanctions as an analytical case study.

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subject to certain disciplines." *U.S. Environment Initiatives and UNCED: U.S. Statements for the Record on the UNCED Agreements*, U.S. DEPARTMENT OF STATE DISPATCH SUPPLEMENT, July 1992, 3:4, at 25.

178. Rio Declaration, *supra* note 129.

179. *See* ESTY, *supra* note 23.

A. *GATT Secretariat: Why Environmental Trade Measures at All?*

In reaction to the debate surrounding the first tuna-dolphin decision, the GATT Secretariat included a special section on trade and the environment in its 1992 annual report.[180] This twenty-eight-page insert provides the GATT Secretariat's perspective on the major issues relating to trade and the environment and questions whether trade measures need ever be used to protect the environment.

In its report, the GATT Secretariat acknowledges the importance of safeguarding the environment, but argues that contracting parties should abstain from ever using any ETMs in favor of "negotiating a multilateral solution or, failing that, requesting a waiver" from the GATT rules.[181] In other words, the Secretariat asserts that ETMs should never be used without specific, formal dispensation from the GATT parties. The Secretariat justifies its advocacy of a general moratorium on ETMs by explaining that "GATT rules could never block the adoption of environmental policies which have broad support in the world community."[182]

Under this paradigm, ETMs of the kind that the United States imposed on Taiwan clearly would not have been permitted.[183] Applying the Secretariat's interpretation, the United States should have continued to work through multilateral diplomatic channels instead of using trade restrictions. Alternatively, if it appeared that no further progress could be made diplomatically, the United States should have obtained a waiver of the GATT rules in order to impose the specific trade sanctions. However, despite the broad-

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180. 1 GENERAL AGREEMENT ON TARIFFS AND TRADE, INTERNATIONAL TRADE 90-91 21 (1992).

181. *Id.* at 22. The Secretariat writes that "[i]f most of GATT's contracting parties agree to participate in a particular multilateral environmental agreement, the consistency of its trade provisions with GATT is not likely to be a problem since there would be enough votes to secure a waiver, if necessary." *Id* at 26. While the waiver approach has the advantage of not requiring further negotiations on the GATT rules, there is some question about whether the kind of open-ended waivers that would be necessary to cover the environmental trade measures associated even with multilateral agreements are tenable. *See, e.g.*, JOHN H. JACKSON, THE GREENING OF WORLD TRADE: SUPPORTING PAPERS 106 (1991).

182. INTERNATIONAL TRADE 90-91, *supra* note 180. The GATT Secretariat goes on to explain that: "This is because in most instances the support of two-thirds of GATT's membership—currently 69 out of 103 countries—is sufficient to amend the rules or grant a waiver." *Id.*

183. As discussed above, *supra* text accompanying note 75, Taiwan is not currently a contracting party to the GATT, so technically Taiwan has no rights under that treaty. However, the circumstances surrounding the imposition of the sanctions by the United States are used here to illustrate the Secretariat's position.

based support for the trade sanction recommendation by the CITES Standing Committee, such a waiver would not likely have been granted. The "interested third party" briefs submitted to the tuna-dolphin panels[184] show that most contracting parties fear that explicitly authorizing any type of ETM would risk a slide down the slippery slope of green protectionism.

The GATT Secretariat's proposal is clear enough, but it disregards the motivations behind the use of ETMs. The core of the GATT Secretariat's position is that "unilateral restrictions on trade would never be the most efficient instrument for dealing with an environmental problem."[185] To be sure, trade measures are not the only tools available to protect the environment; the range of options for addressing environmental concerns is both broad and varied.[186] Particularly with regard to transboundary or global issues, the "multilateral solution"[187] of diplomacy and international cooperation advocated by the GATT Secretariat is universally heralded as the most effective means of global environmental protection. However, not every transboundary or global environmental concern is currently addressed by a formal international treaty.[188]

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184. *See supra* notes 90-91, 107, 114, 134 and accompanying text.

185. INTERNATIONAL TRADE 90-91, *supra* note 180, at 21.

186. ETMs fall in the middle of this range of options to confront environmental problems. At one end of the spectrum, countries continue to turn to military force to resolve global environmental problems. *See, e.g.*, Swardson, *supra* note 97. Alternatively, "carrots" such as bilateral technical and financial assistance, or multilateral environmental assistance through institutions such as the World Bank and the Global Environmental Facility, can be used as well. Indeed, limited funding mechanisms are routinely included in MEAs both as an incentive for developing countries to join the treaty and to facilitate their compliance with its obligations, although recent commentary indicates that these arrangements may not be GATT-consistent. *See* Scott N. Carlson, *The Montreal Protocol's Environmental Subsidies and GATT: A Needed Reconciliation*, 29 TEX. INT'L L. J. 211 (1994). Others suggest that they may in some cases do more harm than good. *See, e.g.*, BOWLES & PRICKETT, supra note 140, at 3-4. Providing environmental assistance may also seem like rewarding the offender and may not be as effective as direct action. For example, while the United States offered technical assistance to Taiwan to help eliminate its trade in endangered species, it ultimately took trade measures to gain Taiwan's full cooperation and achieve the desired results. *See supra* notes 2-8, 26 and accompanying text.

187. INTERNATIONAL TRADE 90-91, *supra* note 180, at 22.

188. Unlike non-binding international standards, binding multilateral environmental agreements (MEAs) are extremely difficult to negotiate: they typically require years of work and often result in little more than the lowest common denominator. Even the existence of a formal MEA does not ensure that the key countries will become signatories, or that each signatory will unfailingly comply with its provisions. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 35, at 45 (concluding that while the widespread lack of complete reporting does not necessarily equate to less than full compliance, the level of compliance is difficult to judge because of incomplete reporting).

Underlying the GATT Secretariat's approach is the conventional wisdom that ETMs are "ineffective." A significant body of analysis, however, suggests the opposite. At least one article has suggested that the success rate of U.S. actions under the Pelly Amendment is "impressive."[189] The continued use of ETMs by individual countries as well as regional trade organizations such as the European Union further supports this claim.[190] In addition, it has been suggested that "unilateralism may be a precondition for multilateralism;"[191] many important health and environmental treaties were preceded and spurred on by unilateral trade measures in areas such as whaling, hazardous waste, and driftnet fishing.[192] Clearly, ETMs—including unilateral measures—work in some situations. Exhortations that they do not, such as those made by the GATT Secretariat, miss the point and will inevitably fail to solve the problem of effectively limiting their use.

B. *European Union: Pursuant to a Multilateral Environmental Agreement*

Acknowledging the importance of international agreements that authorize the use of trade measures, the Commission of the European Communities proposed to the GATT Group on Environmental Measures and International Trade in 1992 that it condition the use of trade measures upon the existence of a pertinent "multilateral environmental agreement (MEA)."[193] Like the GATT Secretariat, the European Community argued that "a country should not unilaterally restrict imports on the basis of environmental damage . . . ."[194] However, the E.C. Paper explicitly recognizes the legitimate functions of trade measures in the context of MEAs and suggests that, unlike "unilateral" trade measures to protect the environment, the existence of an MEA serves to ensure that the true

189. *Analysis of the Pelly Amendment*, *supra* note 6, at 773. Note, however, that the U.S. actions under Pelly prior to the Taiwan case had been limited to the threat of sanctions.

190. *See infra* text accompanying notes 193-205.

191. *Free Trade, Fair Trade*, *supra* note 81, at 493.

192. *See id.* at 493-95. "In reviewing the history of environmental cooperation, there clearly has been a fruitful interplay between unilateral and multilateral action." *Id.* at 498.

193. Directorate-General for External Relations, European Commission, The GATT and the trade provisions of Multilateral Environmental Agreements (Nov. 13, 1992) [hereinafter EC Paper] (unpublished submission from the European Community to the GATT Group on Environmental Measures and International Trade, on file with the *Stanford Environmental Law Journal*). For another argument in support of a treaty-based approach to environmental reform of the GATT *see* McDonald, *supra* note 54, at 474.

194. *Id.* at 2.

purpose of trade measures is environmental protection.[195]

Building on this argument, the European Community proposed a "collective interpretation of Article XX" to "dispel current uncertainty and set clear criteria on the use of trade measures under MEAs."[196] The purpose of this collective interpretation would be to set out "the conditions under which a trade measure, taken pursuant to an MEA and applicable to a GATT member non-party of the MEA, can derogate from the positive obligations imposed by other GATT provisions."[197]

Specifically, the European Community proposed to create an exemption under Article XX "when the environmental agreement is genuinely multilateral in nature" based on three criteria: 1) that the negotiation of the agreement is under the auspices of the United Nations Environment Program (UNEP) and open for participation by all GATT members; 2) that accession to the agreement is open to any GATT members on equitable terms; and 3) that regional problems need only be dealt with at the regional level, but regional agreements would not justify use of trade measures against those outside the region.[198]

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195. *See id.* at 4.

> On the basis of an examination of existing MEAs—and, in particular, CITES, Basel, and the Montreal Protocol—it appears that in all cases the rationale for trade measures has been to ensure the effective implementation of commitments to protect the environment. Trade measures vis-à-vis non parties have been used to avoid circumvention of the measures applied by the parties, to ensure that all imports or exports are subject to the same environmental standards that apply to the parties or to address legitimate concerns about the impact that uncontrolled production or consumption by non parties would have on the effectiveness of the controls agreed by the parties. This is quite different from the argument based on the need to force countries to sign an agreement or to punish 'free-rider' behavior. If such rationale for trade measures was to be accepted, the scope for applying trade measures under an MEA would be practically limitless. At the same time, it is important to note that the Rio Declaration on Environment and Development—and, in particular, Principles 2 and 7—underlines the duty of countries to cooperate for the solution of global or transboundary environmental problem [sic].

Id.

196. *See id.* at 3.

197. *Id.* at 5. The power of the GATT contracting parties to interpret the provisions of the treaty "definitively," so that the interpretation would be binding as a matter of treaty law on all parties to the agreement, including those that oppose the interpretation, can arguably be read into the broad language of Article XXV. *See* JACKSON, *supra* note 181, at 107.

198. E.C. Paper, *supra* note 193, at 8. Before the Uruguay Round, a case might have been made that, under the provisions of the Vienna Convention on treaties, the trade provisions of MEAs would supersede the GATT restrictions on the use of ETMs, since the MEAs were generally subsequent to and more specific than the GATT. *See* Vienna Conven-

The European Community claimed that it intended this approach to dispel uncertainty and set clear criteria; in fact, its approach does neither. The problems are predominantly definitional: what is an "agreement"? What is "multilateral"? What is "pursuant to"? There are other questions as well: how many countries must sign a treaty before it is considered a multilateral agreement? Must the agreement be legally binding, or would non-binding declarations such as the U.N. Driftnet Agreement[199] be sufficient? Is multilateralism the exclusive basis for determining whether the ETM is "ensur[ing] the effective implementation of commitments to protect the environment,"[200] or is it merely one of several? What about activity outside the jurisdiction that causes injury inside the jurisdiction? Must there be multilateral agreement on the standards used to identify environmental problems and the value of using trade measures to solve those problems? For example, the Framework Convention on Climate Change (FCCC)[201] has a large number of signatories, including the United States, but includes only vague obligations and makes no mention of trade measures. Could a party to the FCCC justify a ban on imports of steel from the United States because its steel production causes significant emissions of greenhouse gases?[202]

Moreover, the distinction between multilateral and unilateral can be difficult to pin down. "Although some commentators might view trade measures imposed pursuant to any treaty as non-unilateral, whenever such measures are imposed on a non-party, that country is likely to view the measure as unilateral."[203] In addition, all ETMs are ultimately imposed by individual sovereign nations. To this extent, whether pursuant to an international agreement or not, they are all essentially "unilateral."[204] The E.C. Paper seems to

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tion on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331, 8 I.L.M. 679 (1969). Nevertheless, with the completion of the Uruguay Round, now subsequent to most MEAs, this line of argumentation is no longer potentially viable.

199. *See supra* note 32.

200. *Id.* at 4.

201. United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (1992).

202. Many MEAs, though, do include specific noncompliance provisions. For example, the Montreal Protocol includes both reporting requirements and procedures for technical assistance to facilitate compliance with the treaty obligations. *See* Montreal Protocol, *supra* note 140, arts. 7, 8 & 10. In addition, to effectuate the purpose of the treaty and to motivate countries to participate, the Montreal Protocol prohibits trade in ozone-depleting substances with non-parties. *Id.* at art. 4.

203. *Free Trade, Fair Trade, supra* note 81, at 497.

204. Notwithstanding Steve Charnovitz's hypothetical example of a environmental

propose that unilateral trade measures may be used as long as they have enough of a connection to an international agreement of some type. Yet how much is enough, and what kind of agreement is sufficient?

Because the E.C.'s approach presents so many unanswered questions, it is unclear whether the Taiwan sanctions would be permitted. The sanctions were not legally binding obligations under CITES, although CITES is a formal MEA negotiated under UNEP and open for participation by all GATT members on equitable terms. Nevertheless, they were imposed pursuant to the politically authoritative recommendations of the CITES Standing Committee. The E.C. Paper makes explicit reference to CITES as one of the existing MEAs where "the rationale for trade measures has been to ensure the effective implementation of commitments to protect the environment."[205] Yet none of the E.U. countries followed the CITES recommendation.[206] The Taiwan case shows how difficult it would be to implement the E.U.'s MEA proposal in practice.

C. *Clinton Administration Policy: Categories for Consideration*

Two months before President Clinton announced the trade sanctions against Taiwan, Undersecretary of State for Global Affairs Timothy Wirth testified before the Senate Subcommittee on Foreign Commerce and Tourism, identifying four situations in which the Clinton Administration believes "the consideration of trade measures may be appropriate."[207] These situations occur when the environmental effect of an activity is partially within U.S. jurisdiction, when a plant or animal species is endangered or threatened, when the effectiveness of an international environmental or conservation agreement is being diminished, or when trade measures are "required by an international environment treaty to which the United States is a party . . . ."[208]

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trade measure that would be multilateral—a United Nations trade sanction against a country like Iraq for eco-terrorism. *See Taxonomy, supra* note 2, at 3.

205. EC Paper, *supra* note 193, at 4.

206. Moreover, despite the European Union's avowed focus on MEAs, a 1994 report released by the non-profit Environmental Investigation Agency suggested that the European Union has failed to enforce CITES at either the Union or national level. *See Imminent Extinction of Tigers, Rhinos Predicted in Environmental Group Report*, DAILY REP. FOR EXECUTIVES (BNA), Nov. 3, 1994, § A, at 211. This gap between proposal and practice remains an endemic problem with the European Union. *See supra* text accompanying notes 193-206.

207. *Administration Unveils New Policy on Sanctions for Environmental Harm*, 11 INT'L TRADE REP. (BNA) No. 6, 221 (Feb. 9, 1994) [hereinafter *Administration Unveils*].

208. *Id.*

In its treatment of MEAs, the Clinton Administration's policy is much more limited than the E.C. approach. While the language of the E.C.'s collective interpretation (if not the actions of the member states) seems to cover all trade measures "pursuant to" any binding UNEP agreement with open-ended participation, the Clinton policy gives explicit recognition only to trade measures *required by* an international treaty that is *legally binding*. Under that part of the Clinton policy, then, the Taiwan sanctions would not have been permitted because the import prohibitions were merely recommended by CITES; imposing the sanctions was not a *legal obligation* under the treaty. However, the consideration of trade measures such as the sanctions imposed on Taiwan is permitted under two of the other three parts of the Clinton policy in that tigers and rhinoceroses are endangered and the effectiveness of an international conservation agreement was being diminished, as evidenced by the CITES Standing Committee's call for import prohibitions against Taiwan.[209]

As a national policy, the Clinton Administration's categorical approach deliberately leaves open the question of whether the ETMs would actually be implemented. In his testimony, Undersecretary Wirth explained that "[w]hether the implementation of trade measures is appropriate will depend on other factors."[210] Although such flexibility no doubt aids the Clinton Administration's decision making, it has done little to identify publicly the other implementation factors to which Wirth alludes.[211] Along these lines, former Bush Administration official Daniel C. Esty describes the Clinton policy as "notable" but "not very illuminating" since it "indicates only when consideration of environmental trade

209. *See supra* text accompanying notes 40-43. It is worth noting that, unlike the Taiwan sanctions, the MMPA—which set off the entire ETM debate—does not seem to fit into any of the four categories of the Clinton Administration policy. The dolphins, while migratory around the Eastern Tropical Pacific, are not even partially within the U.S. EEZ; the dolphins in question are not endangered or threatened enough to be listed by CITES; and no other international agreement on dolphin conservation has yet been negotiated.

210. *Administration Unveils*, *supra* note 207, at 221.

211. *See Free Trade, Fair Trade*, *supra* note 81, at 520.

> The other troublesome point about these principles is that they fail to make use of many important analytical distinctions in the trade and environment debate. For example, there is no distinction between standards and sanctions, even though countries presumably should have GATT greater [sic] rights to do the former. There is also no distinction as to the degree of intrusiveness of the environmental measure. Finally, there is no distinction between environmental activities in the global commons and such activities in a foreign country.

Id.

measures may be appropriate, not when such measures should or will be used."[212] Despite these criticisms, the Clinton policy is significant because it recognizes the deficiencies of the GATT and E.C. approaches and raises the issues of transboundary concerns, the global impact of the loss of species, and the important role of even non-binding international standards.

D. *Daniel C. Esty: Greening The GATT*

A more complex proposal on the use of ETMs is presented in Daniel C. Esty's 1994 book, *Greening the GATT: Trade, Environment, and the Future.*[213] In it, Esty suggests replacing the GATT Article XX analysis with an intricate three-prong test to weigh competing trade and environment claims. [214] The three prongs of Esty's test are "intent and effect," "legitimacy," and "appropriateness."[215] A trade measure that meets the requirements of each prong would be permissible.

The two major problems with Esty's proposal are a lack of clarity and unresponsiveness to the concerns of developing countries. The purpose of Esty's first prong, "intent and effect," is clear enough—to "unmask hidden trade barriers and to identify environmental policies that disproportionately burden foreign interests . . . ."[216] This simply reframes the "disguised restriction on international trade" prohibition in Article XX. Nevertheless, Esty does not specify how this "unmasking" would be accomplished.

The requirements of the second and third prongs, "legitimacy" and "appropriateness," while explained in greater detail than the first, are in places vague or self-contradictory. The result is a labyrinthine test that circles back on itself without giving clear guidance. For example, in his "legitimacy" prong, Esty suggests that environmental threats that transgress national boundaries or affect the global commons, including "significant threat[s] to the integrity or sustainability of an important species or ecosystem,"[217] should generally count as justification for trade measures, even without an explicit international agreement.[218] However, Esty qualifies the presumption of legitimacy for such environmental

212. ESTY, *supra* note 23, at 127.
213. *Id.; see also* Blank, *supra* note 23.
214. Esty, *supra* note 23, at 115.
215. *Id.* at 116-30.
216. *Id.* at 116.
217. *Id.* at 124.
218. *Id.* at 235.

claims with the requirement that there in fact be an established international obligation.[219] The confusing result is that the purported alternative to action in the absence of a controlling international agreement itself seems to require the presence of such an agreement.

Finally, Esty's third prong, "appropriateness," is the justification of the disruption to trade, which would be determined by "whether the trade remedy chosen to support the policy is appropriate."[220] Here, Esty astutely recognizes that the differences among possible trade remedies are vast. For example, a country might ban the import of whale meat out of concern for declining whale populations, or it might ban the imports of cars to address the same problem. Accordingly, Esty suggests that a trade measure's severity "should vary with the significance and locus of the environmental harm."[221] Although such a general exhortation would be difficult to apply as a practical matter, Esty helpfully appends a matrix illustrating appropriate trade measures based on the locus and significance of environmental harm. Unfortunately, given the subjective nature of the matrix's categories, it is difficult in practice to predict how specific trade measures might be classified.[222] To further confuse the situation, Esty qualifies his matrix with an inscrutable footnote asserting that, matrix notwithstanding, "[u]nilateral actions should be taken only under extraordinary circumstances."[223] What circumstances rank as extraordinary are nowhere explained.

Equally problematically, Esty neglects the viewpoints of developing countries, despite having nominally devoted a chapter to

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219. *Id.* The recommendation by the CITES Standing Committee of sanctions against Taiwan would seem to meet the requirement that "the international trading system should presume the legitimacy of any environmental standards or policy established by international convention." *Id.* at 117. In fact, Esty goes on to say that:

> [t]he inability to obtain broad support for trade penalties for violations of the endangered species provisions of the CITES agreement, for instance, highlights the need for multilateral unilateralism. The decision of the United States to impose trade sanctions on Taiwan for failing to control illegal trafficking in rhinoceros horns and the body parts of endangered tigers offers an example of this category of trade actions.

220. *Id.* at 236.

221. *Id.*

222. It is unclear, for example, whether Esty's matrix would place the "significance" of Taiwan's role in the extinction of the rhinoceros and the tiger in the category of "rapid, major, certain, irreversible harms (serious)," which warrant "sanctions," or in the categories of "less rapid, major, certain, or reversible harms (moderate)" or "least certain, slower, reversible, or narrower harms (limited)," which justify only "bans" or "labeling" respectively. *See id.* at 283.

223. *Id.*

North-South issues. [224] For example, although bans on the export of harmful products (e.g., hazardous waste or pesticides) or potentially endangered resources (e.g., animal fur or timber) are both common and controversial, especially in their impacts on the developing world, Esty pays little attention to the use of export bans as an environmental trade measure.[225] Moreover, despite suspicions among the developing countries that environmental efforts are intended to deprive them of their sovereign right to control their natural resources, Esty proposes that the voting structure of a new international organization to supervise the harmonization of trade and the environment should not be one country-one vote since such a structure would not "reflect the realities of power on the international scene," and so that "objections by small nations will not hold up progress."[226]

Although Esty's proposal is more complex than the current Article XX test, it does not provide an adequate replacement. His proposal does not provide the clarity or breadth of viewpoint needed to effectively address problems of interpretation and implementation. While Esty's proposal clearly develops the Clinton Administration's criteria for considering ETMs, it does not shed much more light on the actual use of such measures.

IV. A TARGET-BASED APPROACH

This section suggests a different approach for the WTO Committee on Trade and Environment to take in developing its recommendations on the use of trade measures to protect the environment and the issue of domestically prohibited goods. Many countries now recognize that some trade measures in limited circumstances can be an effective tool for protecting the environment. Nevertheless, most countries also agree on the need for clear guidelines on the use of such ETMs. The nature of these disciplines remains the issue of greatest contention.

The target-based approach is a new proposal to guide and circumscribe the use of ETMs. If the contracting parties to the GATT could agree on such an approach, individual countries would be able to use it as a guide in their decision making as to when and if to use ETMs. The target-based approach does not necessitate any

224. *See* Blank, *supra* note 23, at 422.
225. *See* ESTY, *supra* note 23, at 255.
226. *Id.* at 95.

amendments to the relevant text of the GATT.[227] Instead, it would replace the current interpretation of Article XX(b) and (g), developed in part by the panel reports of the tuna-dolphin and other cases, with a new collective interpretation.[228]

The target-based approach determines the appropriateness of an ETM based on the specific resource or product subject to the trade restriction (the "target" of the ETM), rather than the jurisdiction of the environmental problem or the extent of international consensus about the problem, or such vague concepts as "urgency," "severity," or "effectiveness." The approach recognizes that the locus of a problem and the extent of international will to solve it are important in deciding whether to use any international environmental protection measure. Nevertheless, because the approach focuses on an easily-ascertainable fact, the target of the trade measure, analyzing the appropriateness of a given ETM proceeds from a concrete starting point, instead of cycling through endless arguments about the degree of consensus, urgency or severity that warrants the use of an ETM.

The target-based approach is offered in the spirit of Principle 12 of the Rio Declaration[229] and is intended to equitably address the concerns of developing, as well as developed, countries. As such, the targets of the ETMs covered by this approach include living resources to be conserved, environmentally harmful products and resources or products whose manner of harvesting or production raises objections. By endorsing a new collective interpretation of Article XX based on the targets of ETMs, the WTO Committee on Trade and Environment can address the range of concerns raised in Part II of this Note, and overcome the problems associated with the proposals examined in Part III.

The target-based approach hinges on a few key distinctions. First, the approach applies primarily to environmental concerns that are extrajurisdictional to the country imposing the measure.[230]

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227. *See supra* text accompanying notes 53-54.

228. *See* Jackson, *supra* note 181.

229. *See supra* text accompanying notes 176-179.

230. For an explication of the difference between "extrajurisdictional," a term coined by the GATT panel in Tuna I, and the more common term "extraterritorial," see Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL AFF. 203, 208 (1992). Charnovitz suggests that jurisdictionality should be rejected as a GATT principle since it "is unhelpful in dealing with natural resources not located in any country's jurisdiction (for example, the ozone layer) or with resources that migrate (for example, birds)." *Id.* at 210.

The approach does not squarely address the protection of the domestic environment of the country imposing the trade restrictions, although import restrictions on environmentally harmful products and export restrictions on living resources to be conserved address this issue tangentially. The approach does not cover trade restrictions that countries use to protect the environment within their exclusive jurisdictions because other GATT provisions already address such measures in detail.[231] Instead, the approach permits some use of trade measures to protect the transboundary environment or resources of the country imposing the measure,[232] the global commons[233] and, in some limited circumstances, the environment or resources within the exclusive jurisdiction of a country other than the one imposing the restrictions.[234]

Second, the approach recognizes both binding international agreements and prevailing but non-binding standards that address the protection of a resource or the manufacturing of a product. Prevailing standards[235] provide political rather than necessarily legal authority, and might include non-binding resolutions, declarations, and guidelines from international organizations like the CITES Secretariat and the International Standards Organization. Given that the standards referred to in the target-based approach need not be specified in a binding treaty, the approach differs from the E.C. proposal with its MEA focus. Moreover, because the approach is not generally articulated in relation to binding multilateral agreements, the issue of whether the country affected by an ETM is a "party" to any agreement in most cases is not relevant.[236] Where the ETMs are permitted under the approach, they apply

231. Uruguay Round agreements on SPS and TBT impose disciplines on national health and environmental measures with trade effects. They are not considered here because they apply only to environmental protection within the exclusive jurisdiction of the country imposing the measure. *See* Agreement on the Application of Sanitary and Phytosanitary Measures, GATT Doc. MTN/FA II-A1A-4, and Agreement on Technical Barriers to Trade, GATT Doc. II-A1A-6, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (Dec. 15, 1993), 33 I.L.M. 9 (1994); *see also Free Trade, Fair Trade, supra* note 81, at 479-80.

232. E.g., migratory birds, straddling fish stocks, or cross-border pollution.

233. E.g., ozone depletion, loss of biodiversity, or pollution of the high seas or Antarctica.

234. E.g., due to shipments of hazardous wastes or pesticides.

235. A standard might be prevailing, even if it is not legally binding. A standard also need not be unanimous to be considered prevailing. Prevailing standards are usually, but not always, international.

236. The only case where it is relevant is the exception to the overall prohibition on unrelated ETMs. *See infra* text accompanying notes 245-249.

equally to parties and nonparties to any pertinent standard or MEA.

Third, parts of the approach refer to species that are "endangered or threatened." These designations are used both by international treaties, such as CITES,[237] and by national legislation, such as the U.S. Endangered Species Act,[238] and are generally intended to refer to those species that are at risk of extinction. The approach does not address ethical treatment and animal rights issues involving species that are not endangered or threatened.[239] Along similar lines, the approach uses the phrase "reasonable scientific basis" to mean "objective," as distinct from a preference or value judgment.[240] Finally, the approach refers to "diminishing the effectiveness" of a prevailing standard. This language is drawn from the text of the Pelly Amendment,[241] as well as the recent proposal by Japan in the context of the ICCAT.[242] The reference, while perhaps cryptic on its face, reflects a concept that has gained some level of international recognition.

A major problem with the current interpretations of Article XX, as well as the recent proposals for changing it, is the lack of clarity about when ETMs are allowed. The target-based approach assumes that trade measures are not appropriate in most circumstances. The approach recommends, however, that in those cir-

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237. CITES, *supra* note 33.

238. 16 U.S.C. § § 1531-1544 (1988).

239. These issues are, of course, important. However, the target-based approach seeks to limit the use of ETMs to situations in which most countries would agree that they are appropriate. *See infra* text accompanying notes 246-255. Other tools, such as diplomatic pressure and technical assistance, remain available to address ethical treatment and animal rights concerns.

240. Steve Charnovitz is critical of the suggestion that environmental trade measures should be based on science rather than on values: "A desire to save a cetacean species from extinction is based on a value judgment that the species should be saved. Science does not supply values, and therefore it cannot tell us what species to save." *Free Trade, Fair Trade, supra* note 81, at 488. However, the target-based approach does not intend to substitute science for values in dictating the desired level of environmental protection. Instead, the approach requires a "reasonable scientific basis" to ensure the reliability of evidence claiming that a species is endangered or the effectiveness of a standard is being diminished. While it must be conceded that such a requirement lacks a certain level of precision, the U.S. Supreme Court recently outlined some general observations as to what elements it believes would define "scientific" evidence: whether it can (and has been) tested, whether the theory or technique has been subjected to peer review and publication, the known or potential rate of error, and whether it has been "generally accepted" by the scientific community. *See* Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786, 2796-98 (1993); *see also infra* text accompanying note 277.

241. *See supra* text accompanying notes 30-32.

242. *See supra* text accompanying note 119.

cumstances where they are appropriate, their permissibility should be clearly discernible. The discipline imposed by the target-based approach follows a sliding scale: where the target of the ETM most directly relates to its purpose, the requirements for justifying the ETM are least strict, and, as the target becomes less directly related to the environmental purpose, the burden of justifying the trade restriction increases.

The target-based approach categorizes ETMs according to the relationship between the target and the environmental concern. The target of the ETM is considered either directly related, indirectly related, or unrelated to the environmental problem that the measure is intended to address. Within these three categories, the approach further distinguishes between measures aimed at conserving living resources and measures aimed at controlling environmentally harmful products. In the following sections, each category—unrelated, directly related, and indirectly related—is considered in turn. Each section discusses the target-based approach as it applies to both living resources and environmentally harmful products. The discussion begins with the clearest cases, focusing first on unrelated and then on directly related ETMs. The larger, more complex category of indirectly related measures is addressed in the last section. [243]

A. *Unrelated Trade Restrictions*

UNLESS IMPOSED UNDER THE EXPLICIT AUTHORITY OF A BINDING INTERNATIONAL AGREEMENT AS AGAINST A PARTY TO THAT AGREEMENT, ENVIRONMENTAL TRADE RESTRICTIONS ARE NOT PERMITTED WHERE THE TARGET IS NEITHER DIRECTLY NOR INDIRECTLY RELATED:

a) TO THE LIVING RESOURCE TO BE CONSERVED, OR

b) TO THE ENVIRONMENTALLY HARMFUL PRODUCT.

As discussed above, it is important to recognize that the target-based approach is not designed to permit a wide range of ETMs. At one end of the spectrum are ETMs on targets "unrelated" to the environmental goal. Because such measures, generally understood to be sanctions,[244] are most vulnerable to manipulation in response

243. This Note purposefully simplifies or selectively emphasizes certain laws and directives described in the following sections in order to better illustrate the different categories.

244. *See* Steve Charnovitz, *Environmentalism Confronts GATT Rules*, 27 J. WORLD TRADE 37, 39 & 43 (1993) [hereinafter *Confronts*].

to protectionist motives, they are not permitted under the target-based approach. As a result, a large class of potential ETMs is presumptively ruled out under the target-based approach.

The only exception to this blanket prohibition of unrelated ETMs are those measures imposed by parties acting under the explicit authority of a binding international agreement. An illustration of this exception is the environmental side agreement to the NAFTA, the North American Agreement on Environmental Cooperation (NAAEC),[245] which authorizes "the limited use of trade sanctions to encourage Party enforcement of national environmental law . . . ."[246] Under this side agreement, the parties explicitly negotiated how and when such unrelated sanctions could be applied.[247]

At least one writer believes that "[b]y including a trade sanction option as a means of last resort to punish the most flagrant and persistent cases of party non-enforcement, NAFTA's environmental council maintains its focus on the rewards of the consultative process."[248] Nonetheless, the sanctions authorized by the side agreement encompass imports that are not even "broadly" related to the environmental harm. Such unrelated ETMs would not normally be countenanced by the target-based approach, but environmental trade sanctions under the NAAEC as against parties would be permitted.[249] This exception allows unrelated ETMs among countries that are party to legally-binding agreements that permit them,

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245. NAAEC, *supra* note 25.

246. *See* Patton, *supra* note 80, at 87.

247. Sanctions may be imposed under the NAAEC only after several steps have been taken to resolve the dispute. *See* NAAEC, *supra* note 25; *see also* Patton, *supra* note 80, at 88. For example, an arbitral panel has the power to impose a "monetary enforcement assessment" against an offending party. NAAEC, *supra* note 25, arts. 1, 34(4)(b). If the United States or Mexico is the offending party and refuses to pay the assessment after 180 days, the treaty empowers the complaining party to suspend trade benefits for an amount no greater than the assessment. *See id.* art. 36(1). Upon suspension of benefits, the complaining party may raise tariff rates against certain products from the complained against party. At this point the potential sanctions might still arguably be "broadly related" to the environmental harm. In fact, the agreement suggests that, at least initially, the complaining party should seek to impose sanctions on the industry or economic sector that benefited from the non-enforcement of the offending party's environmental law. *See id.* Annex 36(B)(1)-(2). "If such a sanction would not be 'practicable or effective,'" however, "the complaining Party may suspend trade benefits for other industries or economic sectors." Patton, *supra* note 80 at 107 (citing NAAEC, *supra* note 25, at Annex 36B(2)(b)).

248. Patton, *supra* note 80, at 89.

249. Such sanctions, however, are not permitted against Canada. NAAEC, *supra* note 25.

while prohibiting them against countries not party to such agreements.

B. *Directly Related Trade Restrictions*

At the other end of the spectrum are environmental trade measures with targets in the "directly related" category, including import and export restrictions on living resources and environmentally harmful products. Because the targets of the trade measures in this category are themselves the subjects of the environmental goals to be achieved, the risk that the measure represents disguised protectionism is substantially lower than that for the unrelated ETMs. As a result, the target-based approach would generally permit such directly related ETMs, subject to certain requirements.

1. *Living resource to be conserved.*

RESTRICTIONS ON THE IMPORT OR EXPORT OF A LIVING RESOURCE TO BE CONSERVED ARE PERMITTED PROVIDED THAT THE COUNTRY IMPOSING THE MEASURE HAS A REASONABLE SCIENTIFIC BASIS FOR CONSIDERING THAT:

a) THE TARGETED RESOURCE IS ENDANGERED OR THREATENED, OR THAT THE CONTINUED IMPORT OR EXPORT WOULD CAUSE IT TO BECOME ENDANGERED OR THREATENED; OR

b) THE TARGETED RESOURCE IS NOT PRESENTLY AT RISK OF BECOMING ENDANGERED OR THREATENED, BUT CONTINUED IMPORT OR EXPORT OF THE TARGETED RESOURCE WOULD DIMINISH THE EFFECTIVENESS OF A PREVAILING CONSERVATION STANDARD COVERING THAT RESOURCE.

Legitimate environmental purposes for trade restrictions targeting a living resource might include the protection of species that are either endangered or threatened with endangerment or the protection of species covered by an international conservation standard. Unlike the MEA focus of the E.C. Paper, the standard referred to in the target-based approach need not be specified in a formal or binding international treaty or be universally accepted. Rather, the standard must simply cover the species that is the target of the trade measure.

A reasonable scientific basis for considering that the targeted resource is endangered includes, for example, listing on a CITES

Appendix. In this way, the alternative requirements of (a) and (b) could overlap. In either case, it is the country imposing the measure that is determining whether the resource is endangered or whether its continued trade would diminish the effectiveness of a scientifically-based standard. However, the country imposing the measure must be able to articulate a reasonable basis for that determination.

The Endangered Species Act (ESA)[250] is a good illustration of a resource-targeted trade restriction. The ESA serves as the U.S. implementing legislation for CITES[251] and prohibits the importation into the United States of species that are listed under the Act as endangered.[252] By restricting imports of endangered species, the ESA aims to mitigate the commercial pressures that threaten them with extinction. The import restrictions of the ESA could fit under either of the requirements of this subcategory: the listing of species as endangered or threatened has a reasonable scientific basis and also implements the prevailing international conservation standard for endangered species. [253]

Like import restrictions, export restrictions can also be imposed directly on the subject of the environmental goal. These measures aim to protect certain living resources in the territory of the country imposing the measure. The 1978 Eagle Protection Act, for example, prohibits the purchase, sale, import, or export of bald or golden eagles.[254] The export restrictions of this statute would meet the requirements of the target-based approach since bald and golden eagles are endangered species. On the other hand, the Forest Resources and Shortage Relief Act of 1990 provides an example of an export measure that would not meet the target-based criteria. The Act restricts the export of timber from public lands in

250. *Supra* note 238.

251. *Id.* § 1537.

252. *Id.* § 1538.

253. Another example of an import restriction affecting the living resource to be conserved is the 1992 Austrian tropical timber labeling and tax scheme. *See supra* note 171. Still other examples include the African Elephant Conservation Act of 1988, Pub. L. No. 100-478, § 2001, 102 Stat. 2306, 2315 (1988) (codified as amended at 16 U.S.C. § § 4201-4245 (1994)), the Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773 (1994), and the Atlantic Tunas Convention, 16 U.S.C. § 971 (1994).

254. 16 U.S.C. § 668(a) (1978); *see also* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Towards a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 333 (1990). Similarly, under the 1988 Migratory Bird Treaty Act, no one may hunt, take, capture, kill, possess, sell, offer to sell, ship, import, or export any migratory bird. 16 U.S.C. § 703 (1988).

the western continental United States in order to increase the timber supply to domestic mills.[255] The timber export restrictions would not qualify under this subcategory because the trees are not endangered and the export restriction does not reflect any international conservation standard.

2. *Environmentally harmful products.*

RESTRICTIONS ON THE IMPORT OR EXPORT OF AN ENVIRONMENTALLY HARMFUL PRODUCT ARE PERMITTED PROVIDED THAT THE COUNTRY IMPOSING THE MEASURE HAS A REASONABLE SCIENTIFIC BASIS FOR CONSIDERING THAT CONTINUED IMPORT OR EXPORT OF THE PRODUCT:

a) WOULD CAUSE ENVIRONMENTAL HARM TO THE GLOBAL COMMONS OR WITHIN THE TRANSBOUNDARY JURISDICTION OF THE COUNTRY IMPOSING THE MEASURE; OR

b) WOULD DIMINISH THE EFFECTIVENESS OF A PREVAILING ENVIRONMENTAL STANDARD COVERING THE TARGETED PRODUCT.

Just as trade measures can protect living resources by directly targeting and restricting trade in those resources, trade measures aimed at mitigating pollution can directly target the environmentally harmful product. The trade provisions of the Montreal Protocol on Substances that Deplete the Ozone Layer[256] provide good examples of trade restrictions allowed under this subcategory to protect the global commons. The Montreal Protocol controls the production and trade of chlorofluorocarbons (CFCs) and other substances that deplete the stratospheric ozone layer that shields the globe from cancer-causing ultra-violet radiation.[257] Where the

255. 16 U.S.C. § 620(c) (1994); *see also Case Summaries,* 24 ENVTL. L. 1229, 1286 (1994). Similarly, the Export Administration Act, 50 U.S.C. App. § 2406 (1988), restricts exports of commodities, such as red cedar, that may be in short supply. *See* Bradley K. Steinbrecher, Comment, *The Impact of the Clinton Administration's Export Promotion Plan on U.S. Exports of Computers and High-Technology Equipment,* 15 U. PA. J. INT'L BUS. L. 675, 681 (1995).

256. Montreal Protocol, *supra* note 140.

257. *Id.* at art. 4. The trade restrictions, which apply in different ways both among parties to the Protocol and between parties and non-parties, serve a dual purpose: to reduce domestic consumption of ozone-depleting substances (ODSs) and to ensure that nonparties "derive no economic advantage from their failure to comply with the Protocol." McDonald, *supra* note 54, at 451. The trade restrictions among parties are based on gradually reduced levels of permitted consumption (defined as production plus imports minus exports). Montreal Protocol, *supra* note 140, art. 1, ¶ 6. A party that has reached its permissible limit for the control period may not import more ODSs, even from other parties

environmental harm of the import or export is transboundary or global, the only requirement is a reasonable scientific basis for concern.[258] However, where the environmental harm is not to the global commons or within the transboundary jurisdiction of the country imposing the measure (i.e. when it is completely within the territory of another country, such as with exports of hazardous waste), the country imposing the ETM must meet prevailing international standards.

In this way, this subcategory of directly-related, target-based measures is intended to address the two-tiered dilemma for developing countries regarding domestically prohibited goods (DPGs) discussed in Part II. This dilemma is that, on one hand, developing countries want to deflect "eco-imperialism" aimed at limiting the imports of their products and resources with the alleged goal of protecting the environment within the developing country's own exclusive jurisdiction. On the other hand, developing countries are in favor of restrictions on export-dumping of potentially harmful products such as pesticides and hazardous waste.

The requirements of this subcategory are intended to resolve this dilemma by protecting developing countries from industrialized countries' efforts to impose particular environmental values in the absence of any international standard. At the same time, they would allow industrialized countries to take responsibility for their hazardous exports. For example, a country may wish to limit the export of hazardous waste, pesticides, or other goods that have an adverse impact on the environment of a particular importing coun-

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to the Protocol, unless the party re-exports within the same control period to reduce its net consumption level to the permissible point. Such a circumstance seems sensible when it is recalled that a party might produce one type of ODS for export while importing another. *See id.* at art. 2. Between parties and non-parties no trade is permitted, unless the non-party is otherwise complying with the terms of the Protocol. *Id.* at art. 4, ¶ 8. McDonald argues that the Montreal Protocol "sections restricting trade in controlled substances clearly discriminate against nonparties," and thus breach GATT's MFN requirement. McDonald, *supra* note 54, at 451. However, the fact that non-party compliers are treated as parties for the purposes of the trade restrictions suggests that they actually might not violate MFN with regard to non-parties.

258. It could be argued that the increased incidence of skin cancer and cataracts that results from ozone depletion includes a harm directly to the territory of the country imposing the measure. However, even if the atmospheric chemistry of ozone depletion were such that a given country that manufactured CFCs were not itself susceptible to the effects of the depleted ozone layer, its interest in the ozone as a global commons phenomenon would be a sufficient justification under this subcategory.

try.[259] Alternatively, a country may decide on its own initiative to control the export of some DPGs with regard to all potential recipients. President Carter's 1981 Executive Order provides an example of the latter action in that it sets federal policy on "the export of hazardous substances banned or significantly restricted in the U.S."[260] Both types of action would be allowed under the subcategory of directly related, target-based measures, provided that such actions are taken pursuant to a prevailing international standard for the product in question.

C. *Indirectly Related Trade Restrictions*

The "indirectly related" category encompasses two distinct ways in which a target can be related to the environmental goal without being directly related. The first type of indirect relationship stems from the manner in which the resource is harvested or good is produced. Here, the environmental harm comes from the harvesting or production process, not from the resource or good itself. This type of measure is commonly referred to as a process or production method (PPM). The second indirect relationship connects "broadly related" resources or goods controlled by a common standard. As a result, there are four "indirectly related" sub-categories: (1) import restrictions on living resources based on the manner of harvesting, (2) import restrictions on environmentally harmful goods based on the manner of production, (3) import and export restrictions on resources or goods "broadly related" to the living resource to be conserved, and (4) import and export restrictions on resources or goods "broadly related" to the environmentally harmful product to be controlled.[261] Given that the targets of the trade measures in this category are in some way distinct from the environmental goal to be achieved, there is a greater risk (both real and perceived) that the measures have protectionist purposes than in the "directly related" category. As a result, the requirements for imposing such measures are commensurably greater.

259. *See supra* text accompanying note 145. The PIC provisions of the Basel Convention and the London Guidelines provide international standards for such restrictions.

260. Exec. Order No. 12,264, 46 Fed. Reg. 7806 (1981) (*revoked by* Exec. Order No. 12,290, 46 Fed. Reg. 12,943 (1981)).

261. Export restrictions are generally not placed on living resources based on the manner of harvesting or on environmentally harmful goods based on the manner of production. Since the aim in situations such as these would be to protect a country's domestic environment, export restrictions seem an extremely unlikely tool.

Nevertheless, unlike most measures in the "unrelated" category, a number of "indirectly related" measures would still be permitted.

1. *Living resource based on the manner of harvesting.*

RESTRICTIONS ON THE IMPORT OF A LIVING RESOURCE BASED ON THE MANNER OF HARVESTING ARE ONLY PERMITTED IF THE COUNTRY IMPOSING THE MEASURE HAS A REASONABLE SCIENTIFIC BASIS BOTH FOR CONSIDERING THAT:

a) THE MANNER OF HARVESTING THE TARGETED RESOURCE, ALTHOUGH NOT NECESSARILY THREATENED OR ENDANGERED, ADVERSELY AFFECTS EITHER (i) AN ENDANGERED OR THREATENED SPECIES, OR (ii) THE ENVIRONMENT OF THE GLOBAL COMMONS OR WITHIN THE TRANSBOUNDARY JURISDICTION OF THE COUNTRY IMPOSING THE MEASURE; AND THAT

b) THE IMPORT OF THE TARGETED RESOURCE WOULD DIMINISH THE EFFECTIVENESS OF A PREVAILING CONSERVATION STANDARD COVERING THE HARVESTING OF THAT RESOURCE.

Import restrictions sometimes target a living resource based on the manner in which it is harvested. While the imported resource itself might not be the subject of the trade measure's environmental goal, something about the way in which it was harvested threatens the living resource to be conserved or causes some other environmental harm. Because the target of the import prohibition of a living resource based upon its manner of harvesting is thus only indirectly related to the environmental goal, the risks of disguised protectionism under this type of measure are greater than for imposition of a "directly related" measure on living resources to be conserved.

As a result, this subcategory of the target-based approach requires both a reasonable scientific basis regarding the precarious or shared nature of the resource to be conserved and a prevailing international standard regarding the targeted resource for a country to impose an import restriction on a living resource based upon the manner in which it is harvested. Under part (a), if the environmental harm is neither part of the global commons nor migratory, transboundary, straddling or otherwise shared—in other words, if it is wholly within the jurisdiction of another country—then the resource to be conserved would have to be an endangered or

threatened species to justify such an indirectly related import restriction. Moreover, the international standard would need to do more than simply identify the resource to be conserved: it must also relate to the harvesting of the resource targeted by the trade measure.

Three examples illustrate how these requirements could be applied. The E.U. leg-hold trap directive discussed in Part II, which bans the imports of fur from animals caught using leg-hold traps,[262] provides one good illustration of this subcategory. In that directive, the import prohibition aims, not at preventing certain fur-bearing animals from being killed, but at preventing them from being killed in an "inhumane" way. The banned fur is from animals caught in leg-hold traps. However, the fur from such animals is indistinguishable from the fur from animals killed in other ways. The concern is not that the animal died, but how it died. For that reason, the import restriction is related to the environmental goal, but only indirectly. However, since the targets themselves are not necessarily endangered and their harvesting does not affect either the global commons or the European Union's transboundary jurisdiction, the leg-hold traps directive does not meet the requirements of part (a). Moreover, since no standard is yet in place addressing the use of leg-hold traps, the directive also fails under part (b).

Another example is the U.S. tuna-dolphin law. The Marine Mammal Protection Act prohibits the import of tuna because its manner of harvesting threatens dolphins.[263] The living resource conserved is the dolphins, but the target of import restriction is tuna. The dolphins themselves were not chosen as the target since, unlike tuna, they are not commonly traded. The target is thus attenuated from the environmental goal. It is related, however, because it is the tuna harvesting, fueled by the tuna trade, that creates the threat to the dolphins. As described above, under the indirectly related test for harvesting a living resource, if the resource is wholly within the jurisdiction of another country, then the resource to be conserved would have to be an endangered species to justify such an import restriction. In addition, the international standard would need to relate to the harvesting of the resource targeted by the trade measure. Although an international standard

262. *See supra* note 108 and accompanying text.
263. *See supra* note 61.

addresses dolphin mortality in tuna fishing, [264] the U.S. tuna-dolphin law would be inconsistent with the requirements to the extent that the dolphins in question are neither endangered nor migratory in the transboundary jurisdiction of the United States.

However, a third example, the U.S. Sea Turtle Conservation Act,[265] could potentially meet the requirements. Like the tuna-dolphin law, section 609 of the Act provides that shrimp harvested using technology harmful to certain sea turtles may not be imported into the United States.[266] Unlike most species of dolphins, however, the relevant sea turtles are listed in CITES Appendix I as endangered. If the use by shrimpers of the mandated "turtle excluder devices" were addressed by an international standard, then the prohibition on imports of shrimp that were harvested without the devices would be consistent with the requirements of the indirectly related category of the target-based approach.

2. *Environmentally harmful product based on the manner of production.*

RESTRICTIONS ON THE IMPORT OF AN ENVIRONMENTALLY HARMFUL PRODUCT BASED ON THE MANNER OF PRODUCTION ARE ONLY PERMITTED IF THE COUNTRY IMPOSING THE MEASURE HAS A REASONABLE SCIENTIFIC BASIS FOR CONSIDERING THAT:

a) THE MANNER OF PRODUCTION ADVERSELY AFFECTS EITHER (i) AN ENDANGERED OR THREATENED SPECIES, OR (ii) THE ENVIRONMENT OF THE GLOBAL COMMONS OR THE TRANSBOUNDARY JURISDICTION OF THE COUNTRY IMPOSING THE MEASURE; AND THAT

b) THE IMPORTATION OF THE TARGETED PRODUCT

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264. *Confronts, supra* note 244, at 40.

In June 1992, an international agreement on dolphin conservation was reached under the auspices of the Inter-American Tropical Tuna Commission. The agreement sets an annual dolphin mortality limit for the eastern Pacific Ocean and then apportions that limit to qualified fishing vessels. The annual limit goes down each year through 1999, at which time it must not exceed 5,000 dolphin deaths.

Id.

265. 16 U.S.C. § 1537 (1995); *see also* McDonald, *supra* note 54, at 449-50.

266. *See* 16 U.S.C. § 1537 b(1); *see also* BUREAU OF OCEANS, ENV'T & INT'L SCI. AFF., U.S. DEP'T OF STATE, REVISED GUIDELINES FOR DETERMINING COMPARABILITY OF FOREIGN PROGRAMS FOR THE PROTECTION OF TURTLES IN SHRIMP TRAWL FISHING OPERATIONS, PUBLIC NOTICE No. 1763, 8-6023 (1993) ("unless there is a certification to Congress by May 1, 1991, and annually thereafter, that the harvesting nation has a regulatory program and an incidental take rate comparable to that of the United States").

WOULD DIMINISH THE EFFECTIVENESS OF A PREVAILING ENVIRONMENTAL STANDARD COVERING THE MANUFACTURE OF THAT PRODUCT.

Like the previous subcategory, restrictions on the import of an environmentally harmful product based on its manner of production have requirements both with regard to the environmental effect and the manner of production of the targeted product.

A trade restriction contemplated by the Montreal Protocol distinct from the ban on bulk chemical shipments considered above[267] provides a good illustration of a measure that would be allowed under this subcategory. Article 4 of the Protocol authorizes the Parties to prohibit the trade, not just of bulk shipments of ozone-depleting substances, but also of products manufactured with, but no longer containing, those substances.[268] Electronic circuit boards, for example, might be cleaned with a CFC-based solvent before export. The CFCs evaporate during the cleaning process and migrate to the stratosphere. The resulting damage to the ozone layer causes increased incidence of skin cancer and cataracts worldwide, not just in the country using the CFC solvents. For this reason, products manufactured with CFCs can have the same adverse impact on the global environment as actual bulk shipments of products containing CFCs.

Although the parties to the Montreal Protocol have not yet used the treaty authority to implement a prohibition on the trade of products manufactured with ozone-depleting substances, such a trade measure meets the requirements of the target-based approach because of its impact on the global commons and its basis on an international standard covering the manner of production.

3. "Broadly related" to the living resource to be conserved.

RESTRICTIONS ON THE IMPORT OR EXPORT OF A SECONDARY LIVING RESOURCE OR PRODUCT COVERED BY THE SAME PREVAILING CONSERVATION STANDARD AS THE PRIMARY LIVING RESOURCE TO BE CONSERVED ARE ONLY PERMITTED IF:

a) THE COUNTRY AFFECTED BY THE IMPORT OR EXPORT RESTRICTION IS AFFIRMATIVELY FOUND BY THE REL-

267. *See supra* notes 256-257 and accompanying text.

268. *See* Montreal Protocol, *supra* note 140, as amended, art. 4.

EVANT INTERNATIONAL BODY, IF ANY, TO BE DIMINISHING THE EFFECTIVENESS OF THAT STANDARD; AND

b) THE COUNTRY IMPOSING THE RESTRICTION HAS A REASONABLE SCIENTIFIC BASIS FOR CONSIDERING THAT THE PRIMARY LIVING RESOURCE TO BE CONSERVED IS ENDANGERED OR THREATENED; AND

c) THE TRADE IN THE PRIMARY LIVING RESOURCE TO BE CONSERVED ITSELF IS ALREADY PROHIBITED.

The "broadly related" category encompasses ETMs only tenuously connected to the environmental benefit to be achieved. The threat of protectionism is mitigated, however, because three strict conditions limit the applicability of this rule to environmental rogues and regulated products likely to be environmentally harmful even if not prohibited.

Most of the prevailing international conservation standards cover multiple species and often completely ban trade in some species while partially banning trade in others. The rationale behind trade restrictions "broadly related" to the living resource to be conserved is that, if a country flouts the standard for one species, it cannot be trusted to "play by the rules" for other species. Under CITES, for example, no trade is permitted in numerous species listed in Appendix I, while some limited trade is permitted for species listed in Appendices II and III.[269] In the situation where trade in the primary living resource to be conserved is already prohibited, additional trade restrictions on that species would clearly have no impact. However, trade restrictions could instead be applied to secondary products or resources that are covered by the same international treaty but may still be traded.

The U.S. sanctions against Taiwan aptly illustrate a measure that would be allowed under this subcategory. Rhinoceroses and tigers, the primary living resources to be conserved, are listed in CITES Appendix I. The CITES Standing Committee, the relevant international body, found Taiwan to be undermining the effectiveness of the convention and recommended import prohibitions as a potential remedy. Although the authority of the Pelly Amendment was expanded in 1992 to restrict any and all imports, the United States limited the import prohibitions to wildlife products also covered by CITES.[270] Banning the import of such unrelated products

269. CITES, *supra* note 33, at apps. I, II and III.

270. Technically, the import prohibition covered " 'wildlife specimens and parts and products' of Taiwan," including " 'fish or wildlife' or products of 'fish or wildlife' as de-

as consumer electronics no doubt would have been even more effective in getting the attention of the authorities in Taipei. It also would have intensified international cries of economic protectionism against the United States. By limiting the target of the import prohibitions to secondary products and resources also covered by CITES, however, the sanctions against Taiwan mitigate the risk of disguised protectionism.

4. "Broadly related" to the environmentally harmful product.

RESTRICTIONS ON THE IMPORT OR EXPORT OF A LIVING RESOURCE OR PRODUCT COVERED BY THE SAME PREVAILING ENVIRONMENTAL STANDARD AS THE ENVIRONMENTALLY HARMFUL PRODUCT ARE ONLY PERMITTED IF:

a) THE COUNTRY AFFECTED BY THE IMPORT OR EXPORT RESTRICTION IS AFFIRMATIVELY FOUND BY THE RELEVANT INTERNATIONAL BODY, IF ANY, TO BE DIMINISHING THE EFFECTIVENESS OF THAT STANDARD; AND

b) THE COUNTRY IMPOSING THE RESTRICTION HAS A REASONABLE SCIENTIFIC BASIS FOR CONSIDERING THAT THE ENVIRONMENTALLY HARMFUL PRODUCT AFFECTS EITHER THE GLOBAL COMMONS OR THE TRANSBOUNDARY ENVIRONMENT OF THE COUNTRY IMPOSING THE IMPORT OR EXPORT RESTRICTION; AND

c) THE TRADE IN THE ENVIRONMENTALLY HARMFUL PRODUCT ITSELF IS ALREADY PROHIBITED.

Yet another example from the Montreal Protocol illustrates this subcategory. As discussed above, that treaty controls the production and trade of several ozone-depleting substances. If the trade restrictions were different for various controlled substances (so that, for example, limited trade in methyl bromide were permitted while all trade in CFCs was prohibited), it is conceivable that a country might want to restrict the methyl bromide trade of a country caught flouting the controls on CFCs.

Such an import prohibition on methyl bromide would be permitted under this subcategory of the target-based approach, for example, if the Parties to the Protocol found a country to be illegally producing CFCs after the final phase-out date since the environ-

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fined in the 'Lacey Act' (16 U.S.C. 3371)," but not covering either "plants, alive or dead, and their products or shellfish and fishery products imported for human or animal consumption." 59 Fed. Reg. 22,043, 22,045 (1994). Nonetheless, the basic effect of the Act's coverage is to target CITES-controlled species from Appendices II and III.

mental harm of increased ozone depletion is global and the trade in the CFCs themselves would already have been banned.

D. *Limitations of the Target-based Approach*

The ability to identify and place an offending nation's products or processes neatly into one of the above categories is crucial for the target-based approach. However, the decision to categorize trade restrictions on certain resources or products as "directly related," "indirectly related," or "unrelated" will naturally be subject to debate. For example, the U.S. Wild Bird Conservation Act of 1992 (WBCA)[271] has enjoyed much support from the environmental community because of the Act's sophisticated and circumscribed use of ETMs.[272] However, while leading trade and environment analysts agree that the WBCA establishes an effective trade restriction without a protectionist intent,[273] they differ on how to characterize its effects.[274]

Similarly, the High Seas Driftnet Fisheries Enforcement Act[275]—which imposes mandatory import prohibitions on fish, fish products, and sport fishing equipment from any nation whose na-

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271. Pub. L. No. 102-440, 106 Stat. 2224 (codified at 16 U.S.C. § 4901 (1992)).

272. William Snape, Counsel to Defenders of Wildlife and Adjunct Professor at the University of Baltimore, believes that this "exemplary piece of legislation" is an excellent case study of the "use of PPM trade measures to regulate unsustainable trade in wild birds" because, "[a]t its core, the Act aims to distinguish birds based on their method of production by promoting the use of captive-bred, not wild-caught, birds or birds that were sustainably harvested rather than taken under an unregulated and unsustainable regime." Snape & Lefkovitz, *supra* note 66, at 811 (footnote omitted).

273. *See id.* at 812 ("the Act operates primarily to promote captive breeding and the sustainable management of wild bird populations in countries of export and does not seek to end the trade of birds *per se* or in a protectionist manner"); *Confronts*, *supra* note 244, at 43 (suggesting that the WBCA is "paradigmatic in violating so many key GATT principles without even a brush of protectionism").

274. Unlike Snape, Steve Charnovitz has argued in the context of the GATT's "like products" requirement that "[a] country might allow importation of an endangered species only if it is captive-bred, but a potential exporter might say that the 'likeness' should not depend on how the species is harvested." *Free Trade, Fair Trade*, *supra* note 81, at 477. Rather than focusing on the arguably PPM-like aspects of the WBCA, Charnovitz notes that, of the ten species of exotic birds regulated by the Act, "[e]ight of these are Appendix II birds for which commercial trade is not currently banned under CITES. Two species have since been moved to CITES Appendix I." *Confronts*, *supra* note 244, at 42 n.35 (citing 57 Fed. Reg. 57,510). In this way, the trade measure of the WBCA might be better classified as "broadly related to the living resource to be conserved." A third alternative is that the trade measures might simply be viewed as targeting the living resource to be conserved, since all ten species covered by the WBCA were "named in a recent CITES report as being threatened by continued trade." *Id.* at 42

275. *See supra* note 32.

tionals or vessels violate the U.N. driftnet moratorium[276]—authorizes multiple trade restrictions, which could be categorized as indirect restrictions broadly related or based on the manner of harvesting, as direct prohibitions on the import of the living resource to be conserved, or as unrelated sanctions. While a piece of legislation may thus be broad enough to authorize a range of ETMs that might span more than one target category, the target-based approach can still be used to analyze, on a case-by-case basis, whatever measures are actually implemented. In addition, implementation of the target-based approach can focus attention on the specific subjects of a particular trade restriction, rather than broad characterizations of legislative authority as a whole.

Another limitation of the target-based approach is its incorporation of such phrases as "prevailing" standards and "reasonable scientific basis." An ideal collective interpretation would articulate an appropriately responsive and flexible discipline without utilizing such potentially controversial references. Along these lines, determining whether a standard is prevailing might necessarily entail some comparison among existing standards, if there are more than one. Any such comparison will inevitably lead to some level of disagreement.

Nevertheless, the target-based approach strives to put forward workable definitions of these elements in order to mitigate the risk of controversy. For example, since the approach's reference to "a reasonable scientific basis" is not a requirement for certainty, or even preponderance, it should preclude the "dueling science" effect of challenging one scientific theory with another. While the approach suggests looking, inter alia, to whether the scientific basis is generally accepted,[277] the predominant focus is on the foundation of the scientific basis itself. In any event, the target-based approach, while obviously less than ideal, is substantially clearer than previous proposals with other, typically binary, categories like "extraordinary" or "not extraordinary," and "pursuant" or "not pursuant."

V. A PROPOSAL FOR THE WTO COMMITTEE ON TRADE AND ENVIRONMENT

The Committee on Trade and Environment is scheduled to re-

276. *See Confronts, supra* note 244, at 41.
277. *See supra* note 240.

port to the first biennial meeting of the WTO Ministerial Conference in 1997.[278] Among the issues the Committee will initially address are (1) "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;" and (2) "the issue of exports of domestically prohibited goods."[279] These two issues—the first raised primarily by developed countries and the second by developing countries—could split the Committee between the divergent interests of the two groups. This Note, however, has suggested that the two areas of interest can and, to a certain degree, must be addressed concurrently. By applying the target-based approach, the Committee can acknowledge and begin to address the legitimate concerns of developing countries regarding domestically prohibited goods (DPGs) by framing the issue within the context of the use of trade measures to protect the environment "extrajurisdictionally" and, to some extent, "unilaterally."

The target-based approach also recognizes other important aspects of the trade and environment debate left unresolved by the other proposals analyzed in Part III of this Note. Difficult issues raised by the Taiwan case that eluded earlier proposals—including non-binding international standards, party status, extrajurisdictional impacts, unilateral actions, and restrictions on targets other than the primary resource to be conserved—are fully addressed by the target-based approach.

In the Taiwan case, import prohibitions were recommended by the CITES Standing Committee for what it called Taiwan's inadequate efforts "to sufficiently control illegal trade in rhinoceros horn and tiger parts . . . ."[280] Although the rhinoceros and tiger, endangered species whose trade is already banned by CITES, are not indigenous to Taiwan, countries like Taiwan have fueled the destruction with their demand for medicinal products made from those animals. Taiwan is not, however, a party to CITES. Moreover, CITES cannot require that parties follow the Standing Committee's recommendations to implement import prohibitions. Nevertheless, the United States, acting alone in response to the CITES recommendations, used ETMs in conjunction with the Pelly

278. *See Uruguay Round Decision on Trade and Environment*; *supra* note 15, at 1268; *see also* WARD & CAMERON, *supra* note 24.

279. Uruguay Round Decision on Trade and Environment, *supra* note 15, at 1268-69.

280. *Analysis of the Pelly Amendment*, *supra* note 6, at 769.

Amendment (which authorized trade sanctions on any and all products from the offending country) to prohibit the imports of targeted wildlife products from Taiwan:

This complex situation defies more simplistic proposals, such as the "pursuant to an MEA" approach proposed by the European Community in 1992, for environmental reform of the GATT. Even more intricate proposals, like the multi-part analysis suggested by Daniel C. Esty in *Greening the GATT,* cannot easily discern whether the U.S. import prohibition would or would not be "sanctioned by the General Agreement on Tariffs and Trade," as required by both domestic law[281] and international agreement.

By focusing on the objects of the trade measures against Taiwan, however, the target-based approach facilitates a clear determination of whether the sanctions were appropriate. The United States banned the import of resources covered by the same prevailing conservation standard as the primary living resource to be conserved. Because CITES affirmatively found Taiwan to be diminishing the effectiveness of the standard, because the rhinoceros and tiger are endangered, and because their trade is already prohibited, the import prohibitions by the United States, even if acting alone to protect global biodiversity, would be justified under the target-based approach.

In this way, a collective interpretation based on the target-based approach provides a better analytical tool for determining when an environmental trade measure may be used. It provides a clear discipline on when ETMs would be allowed, it recognizes the motivations behind the use of ETMs, and it is responsive to the concerns of developing countries. This integrated but flexible approach addresses the DPG concerns of the developing countries through the same procedures through which it addresses the global and transboundary environmental concerns of the developed countries. It accounts for both import and export restrictions as they apply both to pollution and to resource conservation. On a practical level, the target-based approach recognizes the critical roles that science and international cooperation play in environmental protection efforts, as well as the legitimate interests of individual countries in protecting the global commons, including the world's biological diversity. The approach provides a simple framework as well as flexibility in

281. Pelly Amendment, 22 U.S.C. § 1978(a)(4) (1994).

its critically-important recognition that a scientific basis is never absolute and international consensus is never universal.

This is not to say that every law or directive authorizing trade measures will fit easily into one of the directly-related, indirectly-related, or unrelated categories. Nor will disputes among scientists or between developed and developing countries quickly cease. Determining the threshold of "prevailing" international standards will, consequently, often be controversial.

More fundamentally, the target-based approach alone will not solve the problem of how to reconcile the distinct goals of free trade and environmental protection. Public goods (or public "bads") have always posed difficult problems for economic systems based on free trade. This is especially true in the case of an international trade system, where no single government can monitor and allocate costs. The global environment provides economists and politicians with the quintessential "public goods problem." The ultimate goal of a fair and efficient economic system should be to raise the costs of environmental offenders' abusive practices without raising protectionist walls that penalize other nations' unrelated competitive efforts. No arrangement for the use of ETMs, a small piece in this larger picture, can by itself resolve this underlying tension.

However, countries will no doubt continue to use trade measures to achieve environmental goals, and experience has shown that they have an important role to play in that regard. By using lessons gleaned from the Taiwan sanctions and other real-world illustrations, and acknowledging in a clearly-delineated framework the complexity of ETM issues in the context of the disparate concerns of developing and developed countries, the target-based approach provides a useful starting point for the work of the WTO Committee on Trade and Environment.