Conflicts Between the Convention on International Trade in Endangered Species and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade

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INTRODUCTION

Conflicts between environmental conservation and the pursuit of free trade have recently gained increasing attention. Perhaps the best demonstration of the tension between the goals of environmental conservation and free trade in recent years was the debate surrounding the North American Free Trade Agreement (NAFTA). By successfully convincing the Canadian, Mexican and U.S. governments to attach an environmental side agreement to NAFTA, environmentalists established that their concerns will no longer take a back seat in determining how to construct free trade rules.

In recent decades, countries have at times subrogated the principles of free trade to the promotion of environmental conservation by entering into bilateral and multilateral environmental accords which use trade measures to promote compliance. One such multilateral treaty is the Convention on International Trade in Endangered Species (CITES).[1] Its provisions require the use of trade restrictions in certain instances to protect endangered species.[2]

Despite the increased international attention to environmental conservation, the General Agreement on Tariffs and Trade (GATT)[3] trade regime continues to limit the use of trade restrictions to promote conservation goals. Although there are GATT provisions which permit countries to use restrictive trade measures to promote health, safety, and conservation, the

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1. 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].

2. *Id.* arts. V, VIII.

3. The General Agreement on Tariffs & Trade, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (*entered into force* Jan. 12, 1948) [hereinafter GATT].

interpretation given to these exceptions seems to indicate that some CITES-type trade sanctions would not be permissible under the GATT.

This note will examine recent sanctions, condoned by CITES, which were imposed on China and Taiwan in connection with their trade in rhinoceros horn and tiger parts. Part I will examine CITES and its enforcement mechanisms. Consideration will be given to CITES authority to recommend imposing punitive trade restrictions on non-complying members and the legal effect of such recommendations. The note will analyze these questions in light of the recent CITES recommendation which requested that its members consider imposing trade sanctions on China and Taiwan for their trade in rhinoceros horn and tiger parts. Part II will address the Pelly Amendment, domestic legislation permitting the imposition of trade sanctions against a nation which, among other things, fails to comply with CITES. The article will discuss the U.S. decision to impose sanctions against Taiwan, and not China, under the Pelly Amendment. Part III will examine GATT Panel decisions which considered whether an exception to the GATT provisions was permissible when health or environmental protection was the justification for trade restrictions. Part IV will explore conflicts between the GATT and CITES, as well as the GATT and the Pelly Amendment, in the context of China's and Taiwan's trade in rhino horn and tiger bone. Specifically, consideration will be given to whether the U.S. trade sanctions imposed upon Taiwan would be permissible under the GATT if Taiwan had been a member of the GATT and had challenged the trade sanctions.

The note concludes that recent GATT Panel cases interpret the environmental exceptions in the GATT too narrowly. This narrow interpretation provides a disincentive for countries to pressure a nation to comply with the provisions of an international environmental treaty. GATT Panels should therefore expand the interpretation of the exceptions to allow a country to use trade measures to promote environmental conservation outside its borders in certain circumstances: when there is strong international consensus that trade restrictions are appropriate; when such measures do not unfairly discriminate against another country's goods or services; and when the measures are not aimed at gaining an unfair trade advantage. The author will argue that an expanded interpretation of the exceptions to the GATT's conservation provisions would prevent many potential conflicts between environmental conservation and free trade and would avoid the need for further environmental amendments to the GATT. In addition, a broader interpretation would recognize that countries have entered into numerous environmental agreements affecting free trade objectives precisely because they want environmental conservation sometimes to be given priority over free trade.

PART I: THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES

A. CITES SCOPE

Trade in wildlife is estimated to be the world's third largest illegal trade, worth five to ten billion dollars a year.[4] As a result of the pressing need to control trade in endangered species, several countries ratified the Convention on International Trade in Endangered Species (CITES) in 1975.[5] To date, a total of 122 countries have become signatories to CITES.[6] The central purpose of CITES is to protect threatened and endangered species from exploitation caused by international trade.[7]

CITES divides endangered species into three categories.[8] Appendix I lists "all species threatened with extinction which are or may be affected by trade."[9] Appendix I species are provided the most protective treatment, and their trade is generally banned.[10] Exports of Appendix I species require a permit; this permit is only issued upon a scientific finding by the state of export "that such export will not be detrimental to the survival of that species."[11] Imports are similarly limited by a permit requirement.[12] Further, re-export can only occur if the re-exporting state verifies that the specimen was imported in accordance with CITES.[13] These requirements essentially shut down trade in Appendix I species.[14]

Appendix II lists endangered species that are not sufficiently endangered to warrant inclusion in Appendix I.[15] They are in sufficient danger, however, to warrant control of trade.[16] While the export and re-export provisions of Appendix II are similar to Appendix I, the limitations on import of these species are less rigorous.[17]

Appendix III lists species that are internally regulated by a nation.[18] A

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4. Julian Baum & Carl Goldstein, *Asia's Untamed Business*, FAR E. ECON. REV., Aug. 19, 1993, at 22, 23. Drugs and arms are the first and second largest illegal trades, respectively. *Id.*
5. David S. Favre, *Tension Points Within the Language of the CITES Treaty*, 5 B.U. INT'L L.J. 247, 248 n.2 (1987). CITES came into force when the tenth country ratified it, in 1975. *Id.*
6. *Clinton May Give Wildlife Trade Sanctions Rule Monday*, Reuters, Mar. 31, 1994, *available in* LEXIS.
7. CITES, *supra* note 1, at 244-45.
8. *Id.* art. II.
9. *Id.* art. II(1).
10. *Id.*
11. *Id.* art. III(2)(a).
12. *Id.* art. III(3)(a).
13. *Id.* art. III(4)(a).
14. Michael J. Glennon, *Has International Law Failed the Elephant?* 84 A.J.I.L. 1, 11 (1990).
15. CITES, *supra* note 1, art. II(2).
16. *Id.*
17. Glennon, *supra* note 14, at 11.
18. CITES, *supra* note 1, art. II(3).

member nation may add a species to Appendix III which is endangered within its country, but not necessarily recognized as endangered by the international community.[19] Trade in Appendix III species is permitted with an export license showing that the species was legally obtained or imported.[20]

B. CITES ENFORCEMENT PROVISIONS

Article VIII of CITES requires members to take certain enforcement measures, including penalizing trade with a nation which fails to comply with a CITES provision for exporting an endangered species.[21] Article VIII(1) states:

> The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:
> (a) to penalize trade in, or possession of, such specimens, or both; and
> (b) to provide for the confiscation or return to the State of export of such specimens.[22]

Article VIII(1)(a) does not specify what penalties should be imposed.[23] Because specific enforcement measures are left up to the individual nations, inconsistent sentences and light fines are frequently imposed.[24]

In addition, Article VIII requires members to maintain records of trade in Appendix-listed species and to submit annual reports to the Secretariat, detailing the trade in such species.[25] Reports, if submitted at all, are often late and are general in content.[26]

CITES attempts to force compliance with the above provisions primarily through two methods.[27] First, the CITES Secretariat monitors compliance.[28] The Secretariat is required to bring compliance or enforcement problems to a non-conforming nation's attention and may present reports on a nation's enforcement problems at the biennial Conference of the Parties.[29] Second, at the Conference of the Parties, member nations lobby

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19. *Id.*
20. *Id.* art. V.
21. *Id.* art. VIII.
22. *Id.*
23. *Id.*
24. Kevin D. Hill, *The Convention on International Trade in Endangered Species: Fifteen Years Later*, 13 LOY. L.A. INT'L & COMP. L.J. 231, 240 (1990).
25. CITES, *supra* note 1, art. VIII(6), (7).
26. Simon Lyster, *The Convention on Trade in Endangered Species,* in INTERNATIONAL WILDLIFE LAW 237, 269 (Cambridge Publications Ltd., 1985).
27. Hill, *supra* note 24, at 273.
28. *Id.*
29. *Id.*

one another to improve their compliance records.[30] In addition, Conferences, under Article XI(3)(e), may "where appropriate, make recommendations for improving the effectiveness of the. . . Convention."[31]

Indeed Conferences, through their Standing Committees, have recommended a prohibition of all trade in CITES species with a member nation.[32] For example, in 1985, the Standing Committee passed a resolution prohibiting all CITES trade with Bolivia, but allowed parties to determine whether actually to take such action.[33] In 1986, the CITES Secretariat requested that parties refrain from CITES trade with Macau.[34] In 1992, the CITES Secretariat suggested that members not accept any CITES documents issued by Italy or with Italy as the country of destination. This recommendation, however, was later withdrawn.[35] And in 1993, the Standing Committee recommended that its members consider imposing import restrictions on wildlife from Taiwan and China.

The legal effect of such CITES recommendations is unclear. The fact that recommendations are so labeled indicates that they are not legally binding. Partly because Article XI(3)(e) does not bind parties to CITES recommendations, CITES has received continuous criticism that its enforcement mechanisms are insufficient to force compliance with the terms of the Convention.[36]

C. CITES PROVISIONS WHICH IMPACT DOMESTIC AND INTERNATIONAL LAW

Article XIV(1) contains two provisions which impact how a country uses trade measures to promote CITES-related goals. First, Article XIV(1)

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30. *Id.*

31. CITES, *supra* note 1, art. XI(3)(e).

32. Hill, *supra* note 24, at 273-74. Standing Committees are permanent advisory committees. The Committee has a nine-person rotating membership; the members represent different geographical regions. The Committee performs necessary functions during the period between the biennial meetings. Lyster, *supra* note 26, at 274-75.

33. Hill, *supra* note 24, at 274.

34. Eric McFadden, *Asian Compliance with CITES: Problems and Prospects*, 5 B.U. INT'L L.J. 311, 324 (1987).

35. *Int'l Convention Says Protection of Flora, Fauna Lacking in Italy,* INT'L ENV'T DAILY (BNA), Aug. 4, 1992.

36. CITES, *supra* note 1, art. XII (no enforcement powers given to CITES Secretariat). The CITES Secretariat has been criticized for its inability to move quickly, and its inability in the face of consuming nations' markets to overcome producing nations' attempts to protect endangered wildlife. *See* Hill, *supra* note 24, at 275-6; *see also* Karl Jonathan Liwo, *The Continuing Significance of The Convention on International Trade in Endangered Species of Wild Fauna and Flora During the 1990s*, 15 SUFFOLK TRANSNAT'L L.J. 122, 137-147 (1991) (criticizing CITES text for its lack of guidance in trading with non-parties, its many exemptions, its indefinite standards for categorizing species in CITES' appendices, and its inability to deal with unrecognizable parts or derivatives of protected species).

states that the Convention shall not affect the rights of Parties to adopt:

> (a) stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and II, or the complete prohibition thereof; or
> (b) domestic measures restricting or prohibiting trade, taking possession, or transport of species not included in Appendices I, II, or III.[37]

As Article XIV(1)(b) indicates, CITES allows trade measures to be taken which affect trade in any wildlife. In fact, on a number of occasions, CITES members have adopted measures which go beyond the Convention's provisions, although they were not compelled to take such measures.[38] Another important provision of Article XIV states:

> [the] Convention shall in no way affect the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a union or regional trade agreement establishing or maintaining a common external customs control. . . .[39]

This provision appears to limit the power of a CITES member to take trade measures. Article XIV could be interpreted to subordinate CITES obligations to other international agreements involving trade agreements, such as the GATT. This provision is important in determining the outcome of a conflict between CITES and the GATT and will be discussed in Part IV.

D. THE TRADE IN RHINOS AND TIGERS AND CITES RESPONSE

CITES has focused for a number of years upon the trade in rhinoceros and tiger parts, in light of the threatened extinction of these animals. All rhinoceros and tiger species are currently listed under Appendix I.[40] The sections below give a brief overview of the trade in these animals.

1. Current Populations of Rhinos and Tigers

There are estimated to be only 5,000-6,000 tigers remaining worldwide.[41] The greatest number of tigers is located in India, but small populations also exist in Southeast Asia, China, and Siberia.[42] Currently, there are estimated

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37. CITES, *supra* note 1, art. XIV(1).
38. WILLIAM WIJNSTEKERS, CITES SECRETARIAT, THE EVOLUTION OF CITES 166 (3d ed. 1992).
39. CITES, *supra* note 1, art. XIV(3).
40. Hill, *supra* note 24, at 238.
41. *Saving the Tiger in the Farmyards of the Night*, ECONOMIST, Mar. 14, 1992, at 101, 101 [hereinafter *Saving the Tiger*]. In India, where conservation efforts have been strongly supported, there are estimated to be approximately 4,000 Bengal tigers. *Id.*
42. *China Purrs*, ECONOMIST, June 5, 1993, at 36, 36. Due to the dwindling numbers of tigers in

to be fewer than fifty Amoy tigers in their native area south of the Yangtze River in southern China and fewer than fifty Siberian tigers in northeast China.[43] There are no tigers in the wild in Taiwan. Like tigers, the worldwide population of rhinoceros is very small, estimated to be less than 11,000.[44] Rhinos are spread throughout India, Southeast Asia, and Africa, but no single habitat has more than 2,000 rhinos, the number believed necessary to sustain a population.[45] There are no wild rhinos in either Taiwan or China.

2. Value of Rhinos and Tigers

Many Chinese believe that tiger bone and rhinoceros horn have medicinal value. Tiger bone is said to be effective in treating ulcers and burns,[46] rheumatism, heart ailments, liver disorders,[47] and for alleviating fever and fortifying the bones.[48] Some Chinese believe tiger whiskers are useful for treating toothaches,[49] and some believe the tiger penis is an aphrodisiac.[50] In addition to using tigers for their medicinal value, the tiger skin is valuable for display.[51]

The rhinoceros is also highly valued. It is viewed as the "four-footed pharmacopeia" in Chinese medicine.[52] This may be due in part to a Chinese myth that rhinos can copulate for longer than an hour.[53] Although Chinese use most parts of the rhino, the most popular item is the rhinoceros horn, believed to reduce fever, settle fright, resolve toxins, and increase sexual drive.[54] In addition, rhino toenail is used to reduce fever, blood is used as a tonic, and the hide is believed to cure skin ailments.[55]

Due to China's and Taiwan's recent prosperity, many more Chinese are now better able to pay the high prices exotic animals command. This increased demand has expanded the trade in tiger bone and rhino horn.[56] Tiger bone prices have risen to between $50 to $140 per pound, depending

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China, China and Taiwan have turned to India for their tigers. In April, 1993, China and India agreed to cooperate on anti-poaching measures. The Chinese have also asked the International Union for Conservation of Nature (IUCN) to help draft legislation prohibiting trade in tigers. *Id.*

43. *Saving the Tiger, supra* note 41, at 101.
44. Nancy Nash, *The Horn's Dilemma*, FAR E. ECON. REV., Aug. 19, 1993, at 27, 27.
45. *Id.*
46. *China Purrs, supra* note 42, at 36.
47. Jayanta Sarkar, *Tigers at Bay,* FAR E. ECON. REV., Apr. 29, 1993, at 31, 31.
48. Baum & Goldstein, *supra* note 4, at 23.
49. *Id.*
50. *Id.*
51. *Id.*
52. Nash, *supra* note 44, at 27.
53. *Id.*
54. Baum & Goldstein, *supra* note 4, at 23.
55. *Id.*
56. *Tiger Economics*, FAR E. ECON. REV., Aug. 19, 1993, at 5, 5.

on size.[57] Rhino horns also command high prices. African rhino horns weighing 1.5 kilograms sell for $5,000 in Asian pharmacies. Asian rhino horns are valued at up to ten times that amount.[58]

3. Taiwan's Trade in Rhino and Tiger

Taiwan has been dubbed "Asia's largest market for rhino horns."[59] Although Taiwan reports that few pharmacies carry medicines with tiger bone and rhino horn, conservation groups contend that rhino horn is widely available in pharmacies, and that Taiwanese traders have stockpiled five to ten tons of rhino horn.[60] Taiwanese officials respond that where "rhino horn" or "tiger bone" is listed as an ingredient in a medicine, tiger and rhino parts are not actual ingredients; rather, goat horn is frequently substituted.[61]

Taiwan's unique status in the international arena affects its ability to become a CITES member. Taiwan's existence is owed to the Kuomintang's takeover of the island in 1950, after its members fled China. Taiwan is not officially recognized as a nation by most countries, including the United States. Because Taiwan is not a member of the United Nations, it is unable to become a formal signatory to CITES, which is a U.N. Convention. Nonetheless, Taiwan has stated that it will adhere to the provisions of CITES.[62] In addition to its verbal commitment to CITES, Taiwan has several domestic conservation laws aimed at protecting endangered species.

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57. Sarkar, *supra* note 47, at 31.

58. Nash, *supra* note 44, at 27. Traffic International, a group which monitors contraband trade in cooperation with the U.N., reported that the price of rhino horn powder has decreased by almost 50% in recent years. Shada Islam & Julian Baum, *Bone Idle*, FAR E. ECON. REV., Sept. 30, 1993, at 28, 28. The presumption is that the decrease in price is due to an increase in killings of the rhinoceros. *Id.*

59. Jack C.C. Li, *Taiwan: Endangered Species — Total Effort to Halt Sales and Trafficking*, BUS. TAIWAN, Reuters Textline, July 12, 1993, *available in* LEXIS. Much of Taiwan's trade in endangered species occurs by boat from Fujian Province, on China's eastern coast, to Taiwan. Baum & Goldstein, *supra* note 4, at 23. Additionally, shipment occurs by truck and ship from Guangzhou to Hong Kong; from Hong Kong, the animal parts are smuggled to Taiwan. *Id.* Diplomatic passport-holders have used their diplomatic immunity in Asia, particularly in Hong Kong and Taiwan, to trade in rare animals. Jessica Carter, *Diplomatic Links in Illegal Wildlife Trade*, S. CHINA MORNING POST, Oct. 3, 1993, at 5. Customs officials in Hong Kong are not permitted to search diplomatic passport carriers unless they receive a tip and get special permission. Usually, a consular representative must be present. *Id.*

60. Carl Goldstein, *Cuisine and Cure*, FAR E. ECON. REV., Aug. 19, 1993, at 26, 26; *see also* Islam & Baum, *supra* note 58, at 28; *see also Taiwan Denies It Allows Rhino Horn Imports*, Reuters, Nov. 16, 1992, *available in* LEXIS.

61. *Taiwan: CITES Gets Dose of Reality on Rhino Horn Allegations*, CHINA ECON. NEWS SERVICE, Reuters Textline, Dec. 2, 1993, *available in* LEXIS.

62. Interview with Wang Minglai, Senior Specialist for Agriculture, Economic Division, Coordination Council for North American Affairs Office in the United States, Washington, D.C. (Apr. 12, 1994).

One such law is the 1985 Wildlife Protection and Preservation Law, which bans the import of rhino horn.[63] In 1986, Taiwan prohibited the use of rhino horn in medicines,[64] and in 1989, it passed a conservation law banning trade in rare wildlife, enforced by fines of up to $400 and a one-year prison sentence.[65]

4. China's Trade in Rhino and Tiger

China's size and focus upon economic development present many obstacles to conservation of endangered species and prevention of their trade. For example, China has had difficulty controlling poachers of its native tigers. As a result, there are estimated to be fewer than one hundred tigers throughout all of China. In addition to poaching, tiger populations have been devastated by the destruction of habitat.[66]

Halting foreign trade in rare wildlife has also presented major enforcement problems. Although Guangdong province, bordering Hong Kong to the South, reportedly tightened up its regulations against illegal trade in July 1993, some reports indicate that the regulations are only for show; black marketeers brag that they need only one week to get virtually any kind of animal.[67] A branch of the People's Liberation Army which is responsible for controlling smuggling,[68] as well as overseeing border guards, reportedly participate in the trade.[69] Corruption is not endemic to the Guangdong border alone. Trade in illegal species facilitated by such officials has also been reported in Yunnan Province, which borders Burma and Vietnam,[70] and in eastern Fujian Province, where boats frequently depart to Taiwan.[71]

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63. Goldstein, *supra* note 60, at 27.

64. *Taiwan: Official Calls for Joint Action, Not Sanctions, on Horns,* CHINA ECON. NEWS SERVICE, Reuters, June 12, 1993, *available in* LEXIS.

65. *Id.* Taiwanese officials have stated that 2,000 police officers are assigned to enforce its conservation laws. *Id.* They also claim that from June, 1989, when Taiwan's wildlife regulations took effect, to December, 1992, approximately 200 to 300 persons were charged and fined under the law. Li, *supra* note 59. Taiwan also recently attempted to improve its image by donating $100,000 to the World Wildlife Fund, to assist the organization's projects in Africa. *Id.*

66. At the Breeding Centre of Felid, in Heilongjiang Province, Siberian tigers were bred in a commercial venture to maintain the tigers' numbers and to compete with illegal poachers. New legislation, which China passed because of international pressure, outlaws the use of tiger parts in China. Because the breeding center lost its commercial value on the domestic and international market, the banks investing in the project terminated funding. Thus, the sixty-nine living tigers as of last year faced the prospect of starvation. Peter Woolrich, *Captive Tigers Face Uncertain Future,* S. CHINA MORNING POST, Aug. 1, 1993, at 1.

67. Goldstein, *supra* note 60, at 26.

68. *Id.* at 27.

69. *Id.*

70. Karin Malmstrom, *Blame the Outsider,* FAR E. ECON. REV., Aug. 19, 1993, at 26, 26.

71. *Saving the Tiger, supra* note 41, at 101. In March, 1993, the French government arrested two ethnic Chinese in France for possession of 24 tiger penises. *Id.; see also* Islam & Baum, *supra* note 58, at 28. In August, 1993, police in New Delhi found more than a quarter ton of tiger bones when

China joined CITES in 1981 without reservation,[72] and formally banned the import of rhino horns in that year.[73] Recent legislation passed in response to international pressure forbids trade of tiger parts.[74] Production of traditional Chinese medicines which use rhinoceros horn or tiger bone was also banned in 1993.[75] The Ministry of Forestry prohibits all advertisements and other forms of publicity for products containing rhino horns or tiger bone.[76] In addition, China has encouraged nations in the region to enter into an international convention to control trade in endangered species.[77]

5. CITES Response to China's and Taiwan's Trade

In 1993, the serious predicament of tigers and rhinos, and China's and Taiwan's illegal trade in tiger and rhino parts, led the CITES Standing Committee to consider a complete ban on exports of all wildlife products from Taiwan and China.[78] The Standing Committee approved a resolution calling upon the 122 CITES signatories "to consider introducing stricter measures, up to and including trade sanctions in world wildlife products" against Taiwan and China.[79] The Standing Committee's suggestions included restrictions on the import and export of a broad range of products, including orchids, certain timber species, reptile skins, coal, furs and widely-traded birds and animals.[80] The Committee specifically cited both countries' lack of enforcement of domestic laws prohibiting trade in tiger bone and rhino horn as one reason for the recommendation.[81] A final decision on these recommendations was postponed until March 1994.[82]

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they raided the stockpiles of illegal animal traders. The World Wildlife Fund said that the bones were headed for China and were worth more than $650,000. *Id.*

72. China acceded to CITES on January 8, 1981. 20 I.L.M. 1018 (1981).

73. *China Rejects U.S. Allegations on Rhino Trade*, Reuters, Sept. 11, 1993, *available in* LEXIS.

74. The legislation provides: "The import and export of rhinoceros horn and tiger bone. . .are strictly prohibited. No institution or individual shall be allowed to transport, carry or mail rhinoceros horn and tiger bone into or out of China." Circular of the State Council of the People's Republic of China on the Prohibition of Trade in Rhinoceros Horn and Tiger Bone, May 29, 1993 [hereinafter Circular of the State Council].

75. *Circular Bans Use of Rhinoceros Horn and Tiger Bone in Medicine*, XINHUA GEN. OVERSEAS NEWS SERVICE, Sept. 22, 1993, *available in* LEXIS.

76. *China Further Clamps Down on Rhinoceros Horn, Tiger Bone Trade*, XINHUA GEN. OVERSEAS NEWS SERVICE, Nov. 4, 1993, *available in* LEXIS.

77. *China Bans Rhino, Tiger in Medicine Despite Heavy Losses*, XINHUA GEN. OVERSEAS NEWS SERVICE, Jan. 10, 1994, *available in* LEXIS.

78. *Babbitt Takes Step Toward Trade Sanctions Against China, Taiwan for CITES Violations*, INT'L TRADE REP. (BNA) No. 36, at 1494 (Sept. 15, 1993) [hereinafter *Babbitt Takes Step*].

79. CITES, Decisions of the Standing Committee on Trade in Rhinoceros Horn and Tiger Specimens, Brussels, Belgium (Sept. 6-8, 1994).

80. *Id.*

81. *Id.*

82. *Taiwan: Rhino Lovers Say Taiwan Continues to Face Sanctions*, CHINA ECON. NEWS SERVICE, Reuter Textline, Jan. 28, 1994, *available in* LEXIS.

On March 25, 1994, the CITES Standing Committee passed another resolution on Taiwan's and China's trade in tiger and rhino parts.[83] The Standing Committee praised China, stating that it "notes with satisfaction the progress demonstrated by China in meeting the stated minimum requirements but notes well that further actions are still needed. . . ."[84] However, the Committee expressed "concern that the actions agreed by the authorities in Taiwan and China towards meeting the minimum requirements have not yet been implemented. . . ."[85] The Committee did not withdraw its September recommendation urging nations to consider prohibiting trade in wildlife specimens with Taiwan and China.

As noted above, a CITES resolution is not binding on members because its terms do not require nations to accept and implement Standing Committee recommendations. Furthermore, a CITES recommendation, such as one requesting parties to consider broad import bans, would have even less authority than one recommending a ban on only CITES Appendix-listed species. This diminished authority results from the fact that Appendix-listed species are within the purview of CITES, while broader import restraints are not. Therefore, a CITES member that completely ignores the recommendations to consider imposing import restrictions would not violate CITES. Indeed, all CITES members, with the exception of the United States, chose not to impose sanctions against Taiwan or China despite the CITES recommendations.[86] The United States, however, found that the recommendations merited consideration. Largely as a result of the CITES recommendations, President Clinton imposed import sanctions against Taiwan under the Pelly Amendment.[87]

PART II: THE PELLY AMENDMENT

The Pelly Amendment states that the Secretary of the Interior or the Secretary of Commerce may certify that a nation has been found to engage in activity which diminishes the effectiveness of an "international program for endangered or threatened species."[88] Within sixty days of the date of certification, the President is required to notify Congress of any action

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83. CITES, Decisions of the Standing Committee on Trade in Rhinoceros Horn and Tiger Specimens, Geneva, Switzerland (Mar. 21-25, 1994).

84. *Id.*

85. *Id.*

86. The United States ratified and implemented CITES in 1988 as part of the Endangered Species Act (ESA). 16 U.S.C. §§ 1531-44 (1988). The ESA explicitly prohibits the trade of any species in violation of CITES. *Id.* § 1538.

87. Fishermen's Protective Act of 1967, § 8 (as amended in 1971), (codified as amended at 22 U.S.C. § 1978 (1994)) [hereinafter the Pelly Amendment].

88. *Id.*

taken pursuant to the certification. If the President decides not to impose sanctions, he is required to inform Congress of the reasons for his decision.[89] If the President determines that sanctions are required, he may impose them "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade."[90]

CITES is an example of an "international program for endangered or threatened species." "International program" is defined by the statutes to include "any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to protect endangered species."[91] Therefore, import sanctions are appropriate under the Pelly Amendment when a member of CITES fails to comply with its provisions.

Originally, the Pelly Amendment only addressed the depletion of Atlantic salmon.[92] But in 1989, Congress broadened the Pelly Amendment to allow the imposition of trade sanctions on nations trading or taking *any* threatened or endangered species, not simply fish.[93] In 1992, the Pelly Amendment was further amended to permit the President to impose import sanctions on any product exported from a certified nation, not limited solely to fish and wildlife products.[94]

A. LEGISLATIVE CONCERN OVER INCONSISTENCY WITH THE GATT

Congress was aware of potential conflict between the Pelly Amendment and the GATT rules prohibiting certain import restrictions.[95] Congress therefore required that the President's actions be "sanctioned by the General Agreement on Tariffs and Trade."[96] However, the Committee on

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89. *Id.* Although there have been challenges in the past to the amount of discretion the Secretary of the Interior or the Secretary of Commerce holds in determining certification, there has not been a challenge to the President's discretion under the Pelly Amendment. *See* Am. Cetacean Soc'y v. Baldrige, 604 F. Supp. 1398 (D.D.C. 1985), *aff'd,* 768 F.2d 426, *rev'd sub nom.* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) (holding that the Secretary of Commerce was not required to certify Japan under the Packwood-Magnuson or Pelly Amendments, when Japan had agreed to cease commercial whaling by 1988 in return for a short-term preservation of a limited number of whales).

90. 22 U.S.C. § 1978 (1994). Subsection (a)(4) of the statute substituted the words "any products" for "fish products. . .or wildlife products." *Id.* § 1978(a)(4).

91. *Id.* at § 1978(h).

92. H.R. REP. NO. 468, 92d Cong., 2d Sess., at 2409-11 (1971).

93. "When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President." § 1978.

94. *Id.* at § 1978(a)(4).

95. H.R. REP. NO. 468, at 2413.

96. § 1978(a)(4).

Merchant Marine and Fisheries determined that Article XX of GATT, allowing trade measures to protect human, animal, or plant life or to conserve a natural resource, did not limit the ability of the President to impose import sanctions.[97] Moreover, the Committee determined that import sanctions would not have to be limited only to the import of the endangered fish species, but instead could be imposed upon any fish product; such a narrow interpretation should not be given to GATT Article XX's conservation provision.[98]

Congress further rejected the concern that the Pelly Amendment was inconsistent with the GATT by extending the range of permissible trade sanctions in the 1993 Amendment to the Pelly Amendment. As a result, the President now has discretion to impose import sanctions on any product, not limited solely to flora and fauna, of an exporting nation violating the Pelly Amendment.[99]

Whether Pelly Amendment sanctions are consistent with the GATT was not a consideration in the U.S. decision to sanction Taiwan because Taiwan is not a member of the GATT. Therefore, the Pelly Amendment allowed the United States to respond to Taiwan's trade in rhino and tiger parts without concern that import sanctions would be found impermissible under the GATT.

B. U.S. RESPONSE TO TAIWAN AND CHINA'S WILDLIFE TRADE

The United States determined that import sanctions were appropriate against Taiwan and not China. Had Taiwan been a member of the GATT, the rationale behind the U.S. decision to impose sanctions would be an important factor in determining whether the action was permissible under the GATT; therefore that rationale is considered here.

After the CITES meeting in September 1993, U.S. Secretary of the Interior Bruce Babbitt certified China and Taiwan under the Pelly Amendment.[100] Babbitt sent a letter to the Office of the U.S. Trade Representative, stating that Taiwan and China had taken "initial steps" to curb the

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97. H.R. REP. NO. 468, at 2414.

98. *Id.*

99. Congress is not the only branch concerned with inconsistencies between the GATT and domestic environmental legislation. Eileen Claussen, the new National Security Council Environmental Officer, says a major issue for the Administration in the environment-trade area is whether it should proceed on a unilateral or multilateral basis. A senior official who participates in the Administration's environment-trade interagency group convened by Claussen said that the Administration is "considering whether the United States should set guidelines and evaluate violations on a case-by-case basis, develop a checklist of criteria for evaluating violations, or set standards of behavior which, if violated, would trigger automatic sanctions." *See generally Clean Trade*, NAT'L. J. GOV'T EXECUTIVE, Jan. 1994.

100. *Babbitt Takes Step, supra* note 78, at 1494.

trade and requesting the postponement of trade sanctions "pending further progress."[101]

In November 1993, the President set up an interagency task force to review Taiwan's and China's trade. In addition, the Administration laid out criteria, substantially following the CITES Standing Committee's criteria, for assessing whether Taiwan and China had made progress in controlling their trade.[102] The President stated, "Actions by Taiwan and China that would demonstrate their commitment to the elimination of trade in rhinoceros and tiger parts and products could include, at a minimum, consolidation and control of stockpiles."[103] Benchmark actions included:

(1) Formation of a permanent wildlife or conservation law enforcement unit with specialized training.
(2) Development and implementation of a comprehensive law enforcement and education action plan, and increased enforcement penalties.
(3) Prompt termination of amnesty periods for illegally holding or commercializing rhino horn or tiger parts.[104]

The Clinton Administration sent a committee to China and Taiwan in early March 1994, to investigate both nations' progress.[105] As a result of this investigation and the March CITES recommendation, the Administration on April 11, 1994, announced the imposition of import sanctions on Taiwan.[106] This was the first time a President had used the Pelly Amendment to impose trade sanctions.[107]

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101. *Id.*

102. *Clinton Threatens to Impose Sanctions on China, Taiwan for Tiger, Rhino Trade*, INT'L TRADE DAILY (BNA) (Nov. 10, 1993), *available in* LEXIS.

103. *Id.*

104. *Id.*

105. Telephone Interview with Dr. Susan Lieberman, Acting Chief of Fish and Wildlife Services Operations Branch, Department of the Interior (Apr. 14, 1994) [hereinafter Interview with Lieberman].

106. *Id.; see also* Letter from President William J. Clinton to Speaker of the House of Representatives Thomas S. Foley (Apr. 11, 1994) (on file with author) [hereinafter Clinton Letter]. The Administration waited for the final recommendation by the Standing Committee of CITES before announcing its decision. However, it indicated that while its decision might be influenced by the CITES recommendation, it would not depend on the Committee's recommendations.

107. *See* Thomas L. Friedman, *Taiwan's Wildlife Trade Draws Call for Sanctions*, N.Y. TIMES, Apr. 7, 1994, at A6. The Secretaries of Commerce and the Interior have, to date, certified nations under the Pelly Amendment on thirty-one occasions, but previously, sanctions were never imposed. The first certification occurred in 1974, after Japan and the Soviet Union exceeded the International Whaling Commission's (IWC) quota for the 1973 mink whale season. James Michael Zimmerman, *Baldrige/Murazumi Agreement: The Supreme Court Gives Credence to an Aberration in American Cetacean Society III*, 14 B.C. ENVTL. AFF. L. REV. 257, 270 (1987). This has resulted in Congressional criticism of the Pelly Amendment as a "paper tiger". Erin K. Flory, *Recent Development: Construing the Pelly and Packwood-Magnuson Amendments: The D.C. Circuit Court Harpoons Executive Discretion —American Cetacean Society v. Baldridge*, 61 WASH. L. REV. 631, 635 n.24 (1986). Consequently,

The Administration, however, did not sanction China. In a letter to House Speaker Thomas Foley, the President noted the CITES Standing Committee's favorable language towards China, as well as specific actions China had taken, including consolidation of stockpiles, broadcast announcements, and public burnings of rhino and tiger products, all of which were taken to educate the nation on its new wildlife laws.[108]

The Administration stated that Taiwan had not consolidated its stockpiles, noting that constitutional provisions would not permit Taiwan to do so.[109] Taiwan admittedly had made an effort to identify and register stock on a voluntary basis, but this effort had resulted in locating only one-third of the stocks.[110] Furthermore, Taiwan's enforcement actions were limited, due to constitutional issues surrounding the use of undercover agents.[111] Finally, and most important to the Administration's determination, Taiwan had not enacted adequate amendments to its Wildlife Conservation Law.[112] The Administration thus determined that it would "follow the recommendation of the CITES Standing Committee and direct that imports of wildlife specimens and products from Taiwan be prohibited. . . ."[113] The President acknowledged that the Pelly Amendment granted him authority to impose a broader range of sanctions, but decided they were not appropriate at that time.[114]

However, there is speculation that the Administration sanctioned Taiwan, and not China, for reasons other than conservation goals. A decision on whether to renew China's Most-Favored Nation (MFN) trade status was due less than two months after the decision on the Pelly Amendment was required. Therefore, the Clinton Administration may have wanted to avoid opening up a new dispute with Beijing on the eve of the MFN decision, when U.S.-China relations were particularly delicate.[115] Another factor

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Congress passed legislation which attempts to require imposition of trade sanctions by the President. For example, the Packwood-Magnuson Amendment requires the President to impose import sanctions when the Secretary of the Interior or the Secretary of Commerce certifies a nation under the Pelly Amendment, for violations of the Whaling Convention. *Id.* This may actually reduce the effectiveness of the Pelly Amendment by decreasing the likelihood that a Secretary will certify a nation. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 474 U.S. 787 (1986). Most recently, Congress passed the Rhinoceros and Tiger Conservation Act, a two-part bill modelled after the African Elephant Act of 1988. H.R. 3987, 103d Cong., 2d Sess. (1994). The bill was signed by President Clinton in October, 1994. Rhinoceros and Tiger Conservation Act of 1994, Pub. L. No. 103-391.

108. Clinton Letter, *supra* note 106, at 2.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 3.

113. *Id.*

114. *Id.*

115. Friedman, *supra* note 107, at A6.

calling into question the merit of the decision was the Administration's apparent awareness that the Pelly Amendment had become a "paper tiger" and would lose force if sanctions were merely threatened, and not imposed.[116] Therefore, the *time* may have been right to impose sanctions under the Pelly Amendment, even if not for the right *reason.* Finally, it is possible that China was not sanctioned because it was politically simpler to sanction Taiwan, a smaller and weaker country than China.[117]

However, there are several factors which indicate that China had genuinely been more successful than Taiwan in regulating its trade in wildlife. First, since China is a much larger country than Taiwan, it would have more difficulty limiting the trade across its vast territory. Therefore, more time should be given to China to comply.[118] In addition, China's authoritarian regime was able to implement reforms more quickly than the Taiwanese government. Beijing forced the quick passage of conservation laws[119] and stepped up undercover operations, actions which were not particularly difficult given the existing extensive apparatus to pursue undercover investigations. Taiwan, on the other hand, has been unable to pass conservation legislation without lengthy debate. Furthermore, as President Clinton acknowledged in his letter to Speaker Foley, Taiwan could not increase enforcement actions without raising constitutional questions.[120] Thus, China may truly have progressed further than Taiwan towards eliminating its trade in tiger bone and rhino horn. Taiwan, it appears, ultimately suffered sanctions because its democratic regime could not reform quickly, whereas the Chinese were rewarded for their efficiency in reforming through authoritarian means: a somewhat bizarre result.

PART III: THE GATT

A. THE GATT/WTO DISPUTE SETTLEMENT PROVISIONS

The Uruguay Round negotiations of the GATT were concluded in December 1993.[121] The negotiators established several new agreements, including the World Trade Organization Agreement(WTO); the GATT is

116. Interview with Administration official, Washington, D.C. (anonymity requested).

117. Jim Mann, *U.S. Delays Trade Sanctions on China*, L.A. TIMES, May 1, 1994, at A1. When one U.S. environmental official was asked to explain the reason for sanctioning Taiwan and not China, that official responded, "1.08 billion people," referring to China's population; Taiwan has a population of only 20 million. *Id.*

118. Interview with Lieberman, *supra* note 105.

119. Circular of the State Council, *supra* note 74.

120. Clinton Letter, *supra* note 106, at 2.

121. Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT,* 88 A.J.I.L. 477, 477 (July 1994).

one of several agreements which will be administered under the WTO.[122]

New agreements negotiated under the Uruguay Round will likely have an impact upon the GATT provisions discussed later in this article, particularly the new agreements concerning technical barriers to trade and sanitary and phytosanitary measures.[123] But, because these two agreements are unlikely to have an effect upon conflicts between the GATT and CITES, they are beyond the scope of this article.

Another Uruguay Round agreement which would have a direct impact upon a dispute involving the GATT and CITES is the dispute settlement agreement.[124] Article XXIII of the "old" GATT established a dispute settlement mechanism under which complaints were generally resolved between the parties before the dispute reached a decision-making body, called a GATT Panel. When the three-member GATT Panel did decide an issue, the holdings were not adopted unless unanimously approved.[125] Thus, the losing party could unilaterally block adoption of a Panel decision.[126] Under the new Understanding on Dispute Settlement, a WTO agreement, Panel decisions will become automatically effective after sixty days if not unanimously *rejected.* Parties will thus have a greater incentive to settle their disputes prior to what is effectively binding arbitration.

The impact of the new WTO dispute settlement system on environmental and trade disputes, therefore, is important. GATT Panels, as the only international dispute mechanism to address environmental and trade conflicts, will singularly resolve disputes between countries that arise when one country restricts trade in order to further an environmental objective. In the past, GATT Panels, with their fundamental free trade bias, have often rejected the use of trade restrictions to promote environmental goals. Under the new WTO, it is almost certain that the use of trade measures to further environmental objectives will often continue to be found impermissible. But unlike the old GATT dispute settlement mechanism, a country which imposes trade measures to promote environmental objectives will be unable to block the adoption of an unfavorable decision.

B. DESCRIPTION OF GATT ARTICLES I, III, AND XI

There are three main principles underlying the GATT: the Most-Favored

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122. *Id.* at 478; *see also* Agreement Establishing the Multilateral Trade Organization, MTN/FA II, Dec. 15, 1993 [hereinafter MTO Agreement].

123. *See generally* MTO Agreement, *supra* note 122, at Annexes 1A, 4, 6. The provisions in these agreements may make it more difficult for a country to seek an Article XX health and safety exception. *Id.*

124. MTO Agreement, *supra* note 122, at Annex 2.

125. Lowenfeld, *supra* note 121, at 479.

126. *Id.*

Nation principle, the National Treatment principle, and the restriction against quotas.[127] The Most-Favored Nation principle, set forth in Article I, requires a nation to extend to any Contracting Party's products treatment as favorable as that accorded any other Contracting Party's goods.[128] For example, a GATT member may not place a tariff of 5% on Contracting Party A's widget, where it places a tariff of only 2% on Contracting Party B's widget.

Article III, the National Treatment provision, requires a nation to treat imports no less favorably than like products of national origin.[129] For example, if Home Nation requires its domestic auto manufacturers to install only driver-side airbags, it cannot require imported autos from Neighbor GATT Nation to carry dual airbags.

Article XI, which places a restriction on import quotas, will invariably be cited in any GATT dispute where import sanctions have been imposed. Under Article XI, application of a quota, as either an export or import restriction, on another Contracting Party is a *prima facie* violation of the GATT.[130] Article XI:1 reads in part:

> No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Contracting Party on the importation of any product of the territory of any other Contracting Party.[131]

When a country imposes import prohibitions on a product, it is technically a "zero-quota," and therefore a *prima facie* GATT violation.

C. ARTICLE XX EXCEPTIONS

GATT Article XX provides specific exceptions to GATT provisions, including Article XI. The burden of proof is on the country asserting the Article XX exception to justify the trade measure taken.[132] There are primarily two exceptions which relate to environmental conservation:

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127. GATT, *supra* note 3, arts. I, III, XI.

128. *Id.* art. I.

129. *Id.* art. III.

130. *Id.* arts. XI, XXIII. The original purpose of these provisions was to move all trade barriers towards tariffs, which would facilitate negotiations on the liberalization of trade. JOHN JACKSON, WORLD TRADE AND THE LAW OF GATT, at 305-08 (1969).

131. GATT, *supra* note 3, art. XI.

132. Robert Repetto, *Trade and Environmental Policies: Achieving Complementarities and Avoiding Conflicts,* WORLD RESOURCES INST. 1, 7 (1993).

Article XX (b) and (g). These exceptions, together with the preamble, state:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[133]

1. The Preamble to Article XX

To date, no GATT Panel has found a country's use of a trade measure to have breached the provision prohibiting "unjustifiable discrimination".[134] Panels have also been unwilling to find "disguised restrictions" where an action is clearly taken as a trade measure.[135] For example, in the U.S.-Canada Tuna case, a Panel reasoned that the U.S. restriction on tuna from Canada was not disguised because the United States *publicly announced* that it was taking a trade measure against Canada.[136]

2. Extraterritorial Application of Article XX

One serious obstacle to many environmental actions under Article XX is the "rule" against extraterritorial application of an environmental measure. Article XX has generally been interpreted as affording protection only within a nation's borders;[137] most trade experts concur with this interpretation.[138]

In the well-known Tuna-Dolphin I decision, the United States imposed import restrictions on tuna from Mexico that was harvested in violation of the U.S. Marine Mammal Protection Act (MMPA).[139] The MMPA requires the United States to ban importation of commercial fish or fish products

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133. GATT, *supra* note 3, art. XX.

134. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 47 (1991).

135. *Id.* at 48.

136. *Id.; but see* John Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?* 49 WASH. & LEE L. REV. 1227, 1240 (1992) (concluding that the preamble has been interpreted by GATT Panels as providing a "softened measure of national treatment and MFN obligations").

137. Jackson, *supra* note 136, at 1240-41.

138. Charnovitz, *supra* note 134, at 52.

139. United States — Restrictions on Imports of Tuna, GATT Panel Report No. DS21/R, (Sept. 3, 1991) *reprinted in* 30 I.L.M. 1594, 1618-20 (1991) [hereinafter Tuna-Dolphin I].

caught with commercial fishing technology that results in the incidental killing or serious injury of ocean mammals in excess of U.S. standards.[140] The GATT Panel rejected the U.S. application of its domestic conservation law outside its national jurisdiction. However, it did indicate that extraterritorial conservation efforts might be permissible where all other options were exhausted.[141] But since the United States had not attempted to negotiate "international cooperative agreements," it had not exhausted its options. Therefore the Panel did not make a decision on whether the Article XX(b) and (g) exceptions applied extraterritorially.[142]

In Tuna-Dolphin II, the United States placed import restrictions on "intermediary" countries, not because they were themselves involved in the incidental killing of tuna, but because they were importing tuna from countries such as Mexico.[143] The Panel appeared to adopt, in part, the opinion that Article XX(b) and (g) exceptions could be applied outside a nation's jurisdiction.[144] The Panel agreed with the extraterritorial application of Article XX(g) for the following reason:

> The nature and precise scope of the *policy area*. . .is not spelled out or specifically conditioned by the text of the Article [XX(g)], in particular with respect to the location of the natural resource to be conserved.[145]

The Panel relied on two previous GATT Panel decisions which found the extraterritorial application of Article XX(g) permissible with regard to *migratory* birds and fish. The Panel stated that one Panel had "made no distinction between fish caught within or outside the territorial jurisdiction of the Contracting Party that had invoked this provision."[146] The Tuna-Dolphin II Panel similarly concluded that Article XX(b) could be applied outside the territorial jurisdiction of a party.

The Panel, however, severely limited extraterritorial application of an environmental measure by concluding that "measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred," were not permissible within the Article XX(b) and (g) exceptions.[147]

It is difficult to conceive of examples where a nation would take a trade

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140. *Id.* at 1618-20.

141. *Id.*

142. *Id.*

143. United States — Restrictions on Imports of Tuna, GATT Doc. DS29/R, para. 5.5 (1994) [hereinafter Tuna-Dolphin II].

144. *Id.* at para. 5.14-5.19.

145. *Id.* at para. 5.15.

146. *Id.* (*citing* Report of the Panels in Canada — Measures Affecting the Exports of Unprocessed Herring and Salmon, *adopted* Mar. 22, 1988, BISD 35S/98; United States — Prohibition of Imports of Tuna and Tuna Products from Canada, *adopted* Feb. 22, 1982, BISD 29S/91).

147. *Id.* at para. 5.27.

measure to further environmental goals where the trade measure is not directed at influencing a nation to change its environmental policies. Therefore, although the Tuna-Dolphin II Panel stated that Article XX(b) and (g) could be applied extraterritorially, it so limited the terms by which extraterritorial application of trade measures are permissible that the principle of extraterritoriality becomes almost meaningless.

An important question not decided by the Panel is whether a country can use a trade measure to encourage another country to comply with its stated policy or obligations under an environmental treaty. In Tuna-Dolphin II, the Panel stated that a country could not use a trade measure to *change* another country's policy, but did not address the use of a trade measure to enforce an internationally recognized rule.

3. Article XX(b)

Article XX (b) states that a trade measure must be: "necessary to protect human, animal, or plant life or health."[148] The most contentious issue surrounding Article XX (b) is how to interpret the word "necessary". The often-followed interpretation of "necessary" was set out in a challenge to the United States' enforcement of its patent laws.[149] Although the Panel in the Section 337 Patent dispute was construing subsection (d) of Article XX, the interpretation given to "necessary" in that case has been adopted in Article XX(b) cases. The Panel determined:

> [A] Contracting Party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. . . .[W]here a measure consistent with other GATT provisions is not reasonably available, a Contracting Party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[150]

Thus, a trade measure is "necessary" only when there is no alternative measure available, and that trade measure must be the trade measure least inconsistent with the GATT.[151]

In the Thai Cigarette dispute the Panel adopted the least restrictive alternative interpretation of "necessary". In that case, Contracting Parties challenged the Thai government's imposition of an absolute ban on

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148. GATT, *supra* note 3, art. XX.

149. Report of the Panel on United States — Section 337 of the Tariff Act of 1930, *adopted* Nov. 7, 1989, BISD 36S/345, para. 5.26.

150. *Id.*

151. Jackson, *supra* note 136, at 1240.

imported cigarettes.[152] The Thai government claimed a ban on imported cigarettes was necessary to the health of its citizens. The GATT Panel flatly rejected the Thai government's assertion that Article XX(b) applied. Citing the Section 337 Patent Panel decision, the Panel found that the Thai government could realize its goal of eliminating smoking through other means "reasonably available to Thailand to control the quality and quantity of cigarettes smoked. . . ."[153]

In Tuna-Dolphin I, a GATT Panel determined that the U.S. restriction on imports of yellowfish tuna from Mexico could not be justified under Article XX(b). The Panel said:

> [E]ven if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, [U.S. action under the MMPA] would not meet the requirement of necessity set out in that provision. The United States has not demonstrated. . .that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives. . .in particular through the negotiation of international cooperative agreements. . . .[154]

Finally, the Tuna-Dolphin II Panel further limited the "reasonable alternative" interpretation of "necessary" when it stated that the term "necessary" meant that "no alternative existed."[155] Without explaining what alternatives could have been used, the Panel concluded:

> [M]easures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health.[156]

4. Article XX(g)

Subject to the qualifications in the Article XX preamble, Article XX(g) states that a Contracting Party may take measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

In the Canadian Herring and Salmon dispute, Canada claimed that its prohibition on exports of herring and of pink and sockeye salmon was necessary to protect the depleted stocks of these species.[157] The United States countered that the restrictions were to maintain Canadian jobs and

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152. Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc. DS10/R, *adopted* Nov. 7, 1990, BISD 37S/200, *reprinted in* 30 I.L.M. 1122 (1991).

153. *Id.* at 1137, para. 74.

154. *Id.*

155. Tuna-Dolphin II, *supra* note 143, para. 5.35.

156. *Id.* at para. 5.39.

157. Report of the Panels in Canada — Measures Affecting Exports of Unprocessed Herring and Salmon, *supra* note 146.

protect Canadian processors.[158] The GATT Panel interpreted Article XX(g)'s language, "relating to the conservation of exhaustible natural resources," as requiring the trade measure to be "primarily aimed at" conservation.[159] Thus, it is possible that any trade sanction imposed only as a punitive measure would not be permitted under the reasoning of this case. This is so because the goal would be to force compliance with an international treaty or domestic law, rather than to protect a species.[160]

In Tuna-Dolphin II, the Panel adopted the "primarily aimed at" standard set out in the Canada Herring and Salmon dispute. The Panel reasoned that the U.S. embargo on tuna from individual nations could not by itself further U.S. conservation objectives.[161] Instead, U.S. conservation efforts could only be achieved if exporting countries changed their policies.[162] Although the Panel recognized that policy changes must occur to conserve dolphins, the Panel determined that the United States could not enforce its domestic legislation extraterritorially. Without explaining why the extrajurisdictional use of a trade measure could not be primarily aimed at conservation, the Panel concluded:

> [M]easures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource.[163]

Thus, the Panel conclusion, like the one made regarding Article XX(b), greatly limits a country's ability to take an Article XX(g) exception to promote conservation outside its borders.

These GATT Panel decisions are also relevant to conflicts between CITES and the GATT and between the Pelly Amendment and the GATT.

PART IV: CONFLICTS BETWEEN THE GATT AND CITES AND THE GATT AND THE PELLY AMENDMENT

A. CHINA'S AND TAIWAN'S STATUS REGARDING CITES AND THE GATT

Before discussing conflicts between CITES and the GATT and between the Pelly Amendment and the GATT, it should be noted that these conflicts are discussed in the context of the recent U.S. action to sanction Taiwan only hypothetically. Neither Taiwan nor China are WTO Contracting Parties, and Taiwan is not an official signatory to CITES. Because China

158. *Id.*
159. *Id.*
160. Charnovitz, *supra* note 134, at 50.
161. Tuna-Dolphin II, *supra* note 143, at para. 5.23.
162. *Id.* at para. 5.24.
163. *Id.* at para. 5.27.

and Taiwan are not Contracting Parties, the United States can freely impose sanctions without threat of a GATT Panel review of U.S. action.

Nevertheless, it is useful to examine the potential conflicts between the GATT and the recent import sanctions for several reasons. First, China and Taiwan will likely accede to the WTO in the near future.[164] Their wildlife trade, whether in rhino horn and tiger bone or other species, will continue to be a concern long after they accede to the WTO. Second, trade sanctions had never been imposed under the Pelly Amendment until the recent sanctioning of Taiwan. Therefore, the conflict between Pelly and the GATT is less remote than previously contemplated, when the Pelly Amendment had not been invoked. Finally, Taiwan holds a unique position in the international arena. It is not a member of the United Nations and therefore cannot become a party to conventions such as CITES. While Taiwan has agreed to uphold the provisions of CITES, the fact that it is not a signatory may lead a GATT Panel to view CITES as not controlling.

B. CITES AND THE GATT

1. Actions Taken in Accordance with CITES Treaty Language

It has been suggested that CITES and other multilateral environmental agreements justify trade measures when international trade is employed to thwart environmental goals; this is the case with trade in endangered species.[165] Indeed, in its almost twenty years of existence, no GATT Contracting Party has challenged an action taken under CITES, and such a direct challenge to CITES is unlikely.[166] CITES has not only nearly universal membership but also genuine acceptance; therefore it is improbable that Contracting Parties would allow a challenge to action taken in accordance

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164. China was a founding member of GATT but withdrew after the Communists took over, in 1949. China urgently seeks readmission to the GATT and has threatened GATT nations that if it is not allowed to rejoin GATT by the 1995 deadline for approving the Uruguay Round agreements, then the trade liberalization measures it has proposed will not come into effect. *General Developments: GATT,* INT'L TRADE REP. (BNA) No. 50, 2138 (Dec. 22, 1993); *see also General Developments: Legislative Calendar,* INT'L TRADE REP. (BNA) No. 4, 148 (Jan. 27, 1994). China has insisted that its accession to GATT precede Taiwan's; it views Taiwan as part of China, and therefore not deserving of GATT membership before it becomes a member itself. However, some influential political leaders disagree. *General Developments: Pacific Rim,* INT'L TRADE REP. (BNA) No. 13, 550 (Mar. 31, 1994). Taiwan's biggest challenges from the United States and Western Europe to joining the GATT will stem from failure to protect intellectual property rights, high tariffs on agricultural products, barriers to financial services markets, complicated government procurement procedures, and administrative barriers in some markets. *Id.*

165. Richard A. Johnson, Commentary, *Trade Sanctions and Environmental Objectives in the NAFTA,* 5 GEO. INT'L ENVTL. L. REV. 577, 584 (1993).

166. Janet McDonald, *Trade and the Environment: Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order,* 23 ENVTL. L. 397, 455 (1992).

with CITES to reach a GATT Panel.[167] As CITES becomes entrenched over time, it is even less likely that a direct challenge to CITES would be brought under the GATT.[168]

Moreover, CITES allows its members to trade with non-parties under the conditions of CITES Article X.[169] When a CITES party does ban trade in an endangered species, it generally bans trade with *all* countries, as well as within its borders.[170] Therefore, there is no outstanding issue raised under the National Treatment or Most-Favored Nation principles. [171]

Despite the unlikelihood of a *challenge* to CITES under the GATT, the following examples present situations where the two treaties could be considered to be in *conflict.*

Example 1: A CITES party refuses to import a species listed under the CITES Appendices from a non-party, but permits import from a CITES party. Under CITES, this is not only proper, but encouraged.[172] Under the GATT, however, if all three nations were GATT Contracting Parties, the restricting nation's actions would constitute a violation of the MFN principle. The restricting country has treated the wildlife "products" from the CITES member's country in a manner more favorable than that accorded a non-CITES member's wildlife. In addition, the trade measure represents a violation of Article XI, the restriction on import quotas.

Example 2: A CITES party allows trade in a domestic species to occur according to a permit authorized by CITES, but forbids imports of the same species within its borders from a non-CITES party. This would violate GATT's National Treatment provision because the CITES party has accorded its domestic good more favorable treatment than that accorded to a non-party's product. Again, this is a violation of Article XI because it places a quota on the non-CITES nation.

However, the CITES party's actions in these two examples would not be found to violate GATT provisions if an Article XX exception could be found. The CITES party would raise GATT Article XX(b) and (g) defenses.

Thus far, no GATT Panel has had occasion to address a direct conflict between action specified under an international environmental treaty requiring members to use trade measures to further its goal. As noted above, such a challenge is unlikely. However, were such a challenge brought prior to the implementation of the new WTO, it seems probable that CITES would

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167. *Id.* at 457.

168. *See generally id.* at 456-58.

169. CITES, *supra* note 1, art. X.

170. McDonald, *supra* note 166, at 455.

171. Hypothetically, a challenge could still be brought under Article XI, the quota prohibition. *Id.*

172. CITES, *supra* note 1, art. VIII.

control under the Vienna Convention on the Law of Treaties.[173] This Convention advises that when interpreting a treaty, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions should be considered."[174] Therefore, CITES would appear to control where there is a conflict between CITES and the GATT, as CITES is the later treaty in time. Since the GATT has so many members that are also CITES parties, CITES is controlling on most GATT nations where a conflict arises between the treaties. However, the implementation of the new WTO will presumably reverse which treaty controls. The WTO is actually a new agreement, and the GATT provisions under the WTO are considered to be part of the new treaty.

Nevertheless, whether a GATT Panel would even look to the Law of Treaties is unclear, particularly in light of Tuna Dolphin II. The GATT Panel in that decision refused to look at outside treaties, including CITES and the Law of Treaties, stating that they were not applicable to the case.

Finally, the language of CITES is ambiguous with regard to determining which treaty controls where there is a conflict between agreements. CITES Article XIV(2) states that the Convention in no way affects members' obligations under other international agreements.[175] As mentioned earlier, this could be interpreted to subrogate CITES to other agreements. If so construed, the problem of interpreting Article XX would remain the central issue in resolving disputes between CITES and the GATT.

2. Actions Taken in Accordance with CITES Resolutions

Although action in accordance with actual CITES provisions is unlikely to raise a GATT challenge, an issue more likely to raise a dispute is whether trade measures taken in response to a CITES resolution are permissible under the GATT. CITES recommendations, such as those regarding China's and Taiwan's rhino and tiger trade, are not binding on parties. Therefore, there is reason to suggest that a challenge brought under the GATT, pursuant to actions taken under a CITES *resolution,* would receive less deference than would a challenge brought against action taken directly in accordance with the language of CITES. Actions pursuant to a CITES resolution are discussed below in the context of the Pelly Amendment.

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173. The Vienna Convention on the Law of Treaties, *opened for signature* May 28, 1969, 1155 U.N.T.S. 331, art. 30 [hereinafter Vienna Convention]. *See* Winfried Lang, *International Environmental Agreements and the GATT*, 3-4 WIRTSCHAFTSPOLITISCHE BLATTER 364, 369.

174. Vienna Convention, *supra* note 173, art. 30.

175. CITES, *supra* note 1, art. XIV(2).

C. THE PELLY AMENDMENT AND THE GATT

1. Actions Taken in Accordance with Recommendations from a CITES Standing Committee

In Tuna-Dolphin I, the United States did not take action in response to a CITES recommendation or any other international treaty, but rather acted unilaterally. In fact, the species of dolphins at issue in Tuna-Dolphin is not a CITES Appendix-listed species. The present situation, where the United States placed import sanctions on Taiwan, is somewhat different. First, tigers and rhinos are endangered species. In addition, the CITES Standing Committee recommended that signatories consider imposing trade sanctions upon China and Taiwan. In other words, there was a violation of an international treaty, as well as international consensus to that effect.

Tuna-Dolphin I did not rule out the possibility of taking action via "international agreements." However, it is unclear whether a recommendation from a CITES Standing Committee would be sufficient for a Panel to find that unilateral trade sanctions are permissible under Article XX in such circumstances, because such recommendations are non-binding. Although Tuna-Dolphin I at least addressed the issue of international consensus, this issue was completely ignored in Tuna-Dolphin II. The Panel refused to permit any trade measure used primarily to force a nation to change its policies. Certainly, it would appear that a trade *sanction* imposed on products other than the one sought to be conserved would not be permissible under Tuna-Dolphin II's interpretation of Article XX(g). The purpose would almost certainly be to force the offending nation to change its policy. The entire purpose of a punitive trade measure is to change a country's practice in some manner. A GATT Panel could get around the Tuna-Dolphin decision, however, by interpreting the trade sanctions as measures primarily aimed at forcing an offending nation to *comply* with previously stated obligations under CITES, rather than to force a *change* in policy. As previously noted, GATT Panels have not had the opportunity to address the use of a trade measure to promote environmental conservation when taken subject to strong international consensus. It seems plausible that a GATT Panel would show more deference to action taken under domestic law pursuant to a recommendation by an international environmental treaty's secretariat. Such a recommendation would not appear to be made in a discriminatory manner or for a disguised purpose. When a GATT member takes action under an international agreement, there is less opportunity for arbitrary and discriminatory action to gain an unfair trade advantage.[176] There are, however, several issues raised by the current tiger

176. *See* Charnovitz, *supra* note 134, at 54 ("[A]side from these avenues [waivers and the Vienna

and rhino trade which indicate that it is unlikely that a GATT Panel would find a unilateral trade sanction taken in accordance with international consensus to be permissible.

First, although members of CITES are bound by the terms of the agreement, they are not bound by a CITES recommendation. A challenger to a trade sanction would argue that a CITES Standing Committee does not have authority to make a binding recommendation under CITES. Therefore, because CITES cannot make a binding recommendation, any trade measure taken pursuant to such a recommendation deserves no deference, but instead should be evaluated independently from the agreement.[177]

Second, Standing Committees' recommendations can be vague. Therefore, even if international consensus is present, a country may dispute the interpretation given to the recommendation by the country imposing sanctions. For example, Taiwan might argue that the first CITES recommendation (the September decision) only requested parties to consider imposing sanctions. If CITES had wanted its members actually to impose sanctions it would have stated this in a subsequent resolution. Taiwan might also argue that the U.S. sanctions were discriminatory because the second CITES decision (the March decision) regarding Taiwan and China treated China more favorably than Taiwan. The decision did not retract its earlier recommendation for countries to consider imposing trade sanctions on Taiwan *and* China. Taiwan would argue, moreover, that the real reason the United States imposed sanctions on Taiwan and not China was that the United States did not have the political will to sanction China. Therefore, the argument continues, the United States unfairly discriminated between Taiwan and China when the two nations' trade in rhino and tiger parts was identical.

Third, CITES authority to make recommendations to limit trade is even more precarious when the recommendation involves punitive sanctions not directly aimed at preserving endangered species. In the recommendations on China's and Taiwan's trade, the Standing Committee requested that countries consider imposing import restrictions on "wildlife." A Panel would have to give broad interpretation to Article XX exceptions to allow import restrictions on products other than endangered species or products not directly related to conservation of endangered species. Specifically, the

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Convention], the[r]e does not seem to be any other basis for asserting that environmental trade restrictions pursuant to an international agreement have greater GATT blessing than restrictions conceived and carried out unilaterally").

177. CITES, *supra* note 1, art. XII. This article does not specifically state that the Secretariat should call on members to take punitive measures. However, it instructs that the Secretariat may "perform any other function as may be entrusted to it by the Parties." *Id.* art. XII. However, this does not indicate that the signatories agreed that the Secretariat should have the power to require that members impose sanctions.

GATT Panel would consider whether, under Article XX(b), such import sanctions were "necessary" to protect endangered species. Even in Tuna-Dolphin I, although the United States took actions against products related to dolphin conservation, the actions were viewed as unnecessary because they were not the least trade-restrictive.[178] Similarly, a Panel might consider the restrictions to be punitive and not "primarily aimed at" conservation under Article XX(g). Because import sanctions are punitive and therefore arguably not aimed directly at conservation, it is questionable whether they would be found to be consistent with the GATT.

How a GATT Panel would balance these issues against an international resolution calling for consideration of trade restrictions is unclear.

2. Actions Taken Beyond Those Recommended by a CITES Standing Committee

Assuming that actions taken in accordance with a CITES resolution would not be found to violate the GATT, how would a GATT Panel respond to import restrictions taken pursuant to a CITES resolution which imposed more severe penalties than those recommended by CITES? For example, under the Pelly Amendment, the President has discretion to impose import sanctions upon *any* product from a country found to violate the Pelly Amendment.

It is unlikely that CITES would ever recommend import sanctions beyond fish and wildlife products, as only fish and wildlife are within the purview of CITES. And yet, such limited sanctions will not deter a nation that exports an insignificant amount of fish and wildlife products. The United States and other nations in such circumstances may desire to impose broader sanctions outside those recommended by CITES in order to bring serious pressure on the offending nation.

However, U.S. action under the Pelly Amendment which does not receive international approval or which extends sanctions beyond those recommended by the CITES Standing Committee will almost certainly suffer the same fate as the action condemned in the Tuna-Dolphin I decision. While in Tuna-Dolphin I, the GATT Panel decided it was not necessary to make a decision on the Pelly Amendment because sanctions had not actually been imposed under the Amendment,[179] the Panel indicated that it would likely find trade measures invoked under the Pelly Amendment to be a violation of GATT Article XI.[180] Furthermore, in Tuna-Dolphin II, the Panel was

178. Tuna-Dolphin I, *supra* note 139, at 1618-20.
179. *Id.* at 1618.
180. *Id.*

concerned that import restrictions were placed on *any* tuna, whether or not harvested in a manner that could harm dolphins.[181]

Such a narrow interpretation of the GATT appears to conflict with the language of Article XIV of CITES, which states that the provisions of the Convention shall not affect the right of Parties to adopt "stricter domestic measures regarding the conditions for trade. . . ."[182] Article XIV seems to indicate that tougher measures than those specified in CITES may be appropriate. However, the imposition of wide-ranging trade sanctions does increase the opportunity for a country to gain an unfair trade advantage. This suggests there is need for GATT Panel review in such a case, particularly to determine whether there is a disguised restriction or whether the action taken is discriminatory. And yet, if GATT Panels continue to narrowly interpret Article XX exceptions, international agreements and recommendations that were not intended to be so limited by the GATT will be less effective.

CONCLUSION

China and Taiwan have unquestionably been in violation of the CITES agreement for some years. CITES attention and corresponding U.S. pressure have resulted in some favorable actions by the Chinese and Taiwanese. While the CITES Standing Committee's condemnation of the endangered species trade in Taiwan and China caused those countries public embarrassment and resulted in enhancement and enforcement of their domestic conservation laws, the greater impetus for China and Taiwan's improvements has been the threat of trade sanctions. Taiwan and China will likely accede to the WTO in the near future. In a scenario where the nations are WTO members and the United States imposes import sanctions under the Pelly Amendment, they could potentially bring a challenge to U.S. action before a WTO Panel. Previous GATT cases involving U.S. enforcement of its domestic environmental legislation have been decided against U.S. unilateral action. However, in the present case, U.S. action was taken in accordance with a recommendation by the CITES Standing Committee. A potential GATT challenge to the Pelly Amendment raises concerns about the ability of the United States to apply its domestic conservation laws extraterritorially.

It has been suggested that multilateral environmental agreements such as CITES provide justification for trade measures where international trade is the means by which environmental goals are damaged.[183] However, because

181. Tuna-Dolphin II, *supra* note 143, at para. 5.23.
182. CITES, *supra* note 1, art. XIV.
183. Johnson, *supra* note 165, at 584.

CITES has not been challenged under the GATT, it is uncertain whether certain CITES measures would be found permissible. The Tuna-Dolphin I decision indicates, however, that some deference may be shown to multilateral agreements. While an amendment to GATT Article XX is probably not necessary to resolve environmental and trade conflicts, the uncertainty suggests that the current GATT is ill-equipped to consider the plethora of conflicts which can arise in the environmental and trade context.

The uncertainties surrounding a GATT Panel response to the use of trade measures to protect endangered species suggest the current interpretation of GATT Article XX is unsatisfactory. Regardless of whether future environmental an trade conflicts are resolved by an amendment to Article XX, a new interpretation of that provision, or a completely new waiver provision, it is clear that many countries have placed some conservation principles above the pursuit of free trade.[184] Therefore, conflicts between the principles of free trade and environmental conservation should, under some circumstances, be resolved in favor of conservation, particularly where there is international consensus to that effect and there is little indication that the trade measure is imposed to gain an unfair trade advantage. This would give proper recognition to the conservation goals of those countries that have entered into environmental agreements which impose trade restrictions upon nations that fail to comply with the environmental accord.

184. *See* Repetto, *supra* note 132, at 9-10 (suggesting a new interpretation of GATT); *see also* JACKSON, *supra* note 130, at 43-48 (discussing new interpretations, waivers and amendments); *see generally* Daniel C. Esty, *GATTing the Greens,* 72 FOREIGN AFF. 32 (1993).