THE GATT: TUNA, DOLPHINS, DIAPERS, AND YOU[1]

by Allison Areias

The new linkage between trade and the environment is a controversial subject. The controversy touches on areas as diverse as tuna fishing to diaper choice. In the middle stands the General Agreement Tariffs and Trade (GATT)[2], which governs trade between 105 nations and currently dominates the trade arena. The GATT's rules increasingly conflict with new "green" trade measures directed toward protecting the environment. However, some claim these "green" measures may be disguised economic protectionism or even harmful to the environment in the long run. Developing countries in particular claim they create technical barriers to trade. Currently, GATT officials themselves are attempting to address the conflict between free trade and environmental protection. Trade purists, however, see this linkage between trade and the environment as the beginning of the end--the introduction of subjective goals that will ultimately tear the GATT apart. Subjective environmental goals may lead to subjective social or foreign policy goals, such as fighting apartheid or governments which restrict freedom of speech.[3] Economic distortion and trade retaliation would follow. The end result: a classic slippery slope, at the bottom of which the GATT would find itself mired in protectionist legislation.[4] However, in the words of one trade official[5]: "There are trade purists who say that the linkage of trade and other areas is dangerous, but the political reality is that it's going to happen."[6]

This article discusses the GATT[7] mechanism itself and how it has reacted to the use of environmental trade measures, using the tuna embargo in the Marine Mammal Protection Act[8] as an example. Future problems are highlighted, such as eco-packaging and labelling, and how these problems may impact developing countries. Finally, this article presents GATT-consistent solutions to problems that will continue to effect international trade for years to come.

I. WHAT IS THE GATT?

A. The origins of the GATT

The seed of the GATT was planted in 1944, when the former Allies held the Bretton Woods negotiations in order to establish the World Bank and the International Monetary Fund. Bretton Woods left trade to the direction of the United Nations, which drafted the Havana Charter of the International Trade Organization (ITO). Under a parallel negotiation process, the main trading nations organized a simple set of rules aimed at reducing tariffs. Flexibility and consensus were paramount, as skittish nations refused to be forced into more formal commitments. These rules became the General Agreement on Tariffs and Trade. When the U.S. refused to ratify the Havana Charter, the ITO as an institution was defunct. The General Agreement stepped in to fill the vacuum and the new trading regime took hold. From the original 23 founding members, or "contracting parties," the GATT has grown to include 105 countries. Together these countries account for 90% of world trade in goods.[9]

Originally, the GATT was meant to be a set of trading rules, not an international organization. However, the increasing complexity in trading relations dictated the introduction of institutional measures. By the 1960s, the GATT included a Secretariat, a governing "Council," and an ever-increasing number of committees to manage the burgeoning network of trading relationships.

B. The GATT structural framework

In relation to its importance in the global allocation of resources, the GATT

remains largely misunderstood. The GATT is a contract between 105 nations. A Secretariat services the General Agreement,[10] whose goals are to ensure a stable commercial environment and reduce unfair or discriminatory trade barriers between nations. The GATT rules currently dominate international trade and heavily influence domestic policy-making.

The GATT members, or "contracting parties,"[11] may terminate their participation in the trading "contract" at any time after 60 days' notice, with or without cause. Two principles provide the foundation on which most of the rules are based: Most Favored Nation (MFN) and National Treatment.

The MFN principle, embodied in Article I of the GATT, underlies most of the GATT functions. Article I states that all contracting parties shall be granted "Most Favored Nation" status with respect to customs duties on any other kind of trade measure. Any trade advantage granted by one contracting party to any product originating in or destined for any other contracting party will be immediately given to the like product originating in or destined for other contracting parties. For example, after all trade negotiations are concluded, either bilaterally or at the end of a GATT-sponsored "round," the concessions that the United States granted to Portugal on textiles must be given to all other contracting parties who produce a like product. Understandably, problems often arise concerning the definition of a "like" product.

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The other fundamental principle, Article III: National Treatment, regulates national treatment on internal taxation and regulation. Once a product passes the external tariff hurdle, it must be treated the same as a "like" domestic product. Internal taxes cannot be more than the taxes charged on domestic products. Again, definitions differ on "like" products.

For the most part, the GATT rules allow nations to craft their trade policy to suit their own needs. The GATT rules do not interfere with the use of embargoes or trade measures for security reasons.[12] Article XX even provides an exception as vague as measures "necessary to protect public morals."

C. The GATT as a forum for negotiations

The original contracting parties established a framework for scheduled trade negotiations to continue the goal of liberalization of world trade. Unwilling to commit to a rigid system, the countries set out a schedule of trading "rounds" which were to occur "from time to time."[13] Major rounds include the Dillon Round in 1960, which focused on Euro-unity and the establishment of customs unions and free-trade areas; the Kennedy Round from 1964-1967, which introduced an advanced anti-dumping code and increased developing countries' influence; and the Tokyo Round from 1973-1979, which for the first time included non-contracting parties and began GATT's involvement in areas not directly connected with trade.[14] The current Uruguay Round, ongoing since September 1986, will attempt to bring the agricultural and service sectors within the GATT orbit. However, the intense controversy surrounding the inclusion of agriculture continues to deadlock the negotiations. Furthermore, the new Clinton administration may also disrupt the round. President-elect Clinton and Vice-President-elect Gore, who is noted for protectionist rhetoric, may be unwilling to accept a Republican-crafted regime. Putting a new, Democratic twist on the round could delay the round past the negotiating deadline.

D. The GATT as a forum for arbitration

In addition to constructing a forum for international negotiation, the contracting parties also established a dispute settlement mechanism to solve the inevitable trade conflicts. When a dispute arises, any one of the affected contracting parties may request an arbitration by a panel of mutually-acceptable trade experts. These experts review arguments from both parties and rule on whether the disputed trade measure is consistent with the GATT's rules. This panel has no enforcement power. It can only make recommendations to the GATT Council composed of all contracting parties. The GATT Council must unanimously adopt the decision in order for it to serve as precedent in later panel arbitrations. If a trade measure is found to violate the GATT, the injured nation may use trade sanctions, usually in the form of countervailing duties, against the offending nation.

Only an injured contracting party has standing to bring a dispute before a panel. The GATT Secretariat cannot unilaterally seek out and invalidate discriminatory trade measures. For example, Voluntary Export Restraints (VERs) are illegal under the GATT. However, many contracting parties use them.[15] "Injured" nations (those who restrict their exports) do not complain because the decrease in supply leads to increased demand and increased price. This increase in price, the "quota rent," accrues directly to the injured nation. Neither the injured nor the importing nation wants to break the agreement and the issue is consequently never brought to a panel for resolution.

E. The limitations of the GATT

The GATT is not a formal international organization like the International Labor Organization, under the aegis of the United Nations. For many years, nations insisted on the General Agreement remaining just that, an agreement.[16] In fact, nations themselves interpreted the rules without the benefit of the current Secretariat or its Legal Department. Today, the GATT functions as a de-facto organization through its Secretariat but remains technically only a contract between nations.

However, the GATT is also limited as a contract. No international court may bind a nation against its will. No GATT-police can force compliance or the payment of damages for breach of contract. The contracting parties are free to leave, create alternative agreements, or refuse to follow certain rules, although they risk the consequences of countervailing duties. Furthermore, the GATT does not interfere with domestic economic policy unless that policy dictates discriminatory behavior against other contracting parties, as in the Tuna embargo. Until now, the GATT has only established defensive or compensatory remedies for countries negatively impacted by domestic policies.[17] Dr. Frieder Roessler, the GATT's general counsel, considers the trading rules as a way to "resolve conflicts of interest within, not between nations." Thus, the GATT should be regarded as part of a country's "domestic constitutional framework for trade policy-making, not of the international law of coexistence or cooperation."[18] According to Dr. Roessler, national governments should follow the GATT guidelines[19] in order to maximize the benefits created by a stable international trading order. These governments should not rely on the GATT to provide that stable international order. In essence, the GATT provides the road map to international trade, but it is up to the contracting parties to build the roads and do the driving.

F. The GATT and developing countries

Developing countries pose a delicate problem for the GATT. True trade liberalization benefits those industries that are comparatively most efficient.[20] Industries in developing countries are often not as efficient or competitive as those of developed countries. During the 1960s, developing nations became increasingly vocal about these problems through the United

Nations Conference on Trade and Development (UNCTAD). In the mid-1960s, UNCTAD and the developing countries succeeded in obtaining a special amendment, Part IV,[21] to the General Agreement, which commits contracting parties give special consideration to developing countries' needs. This commitment does not obligate the contracting parties but "recommends" they work to further sustainable development. Section 1(a) recalls that the basic objectives of the GATT include "raising the standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties." Section 1(f) notes "that the contracting parties may enable less-developed contracting parties to use special measures to promote their trade and development."[22]

In pursuit of rapid economic development,[23] developing countries increasingly suffer devastating environmental effects. In response, the United Nations Environment Program established the Brundtland Commission in 1987 to explore this interaction between economic growth, trade and environmental protection. The Brundtland Commission defined the goals of "sustainable development"[24] as methods that discourage the use of nonrenewable resources and activities that adversely impact the future quality of life." The GATT may increasingly be called upon in the future to facilitate this "discouraging" of the use of nonrenewable resources, while at the same time having to honor its commitment to allow developing countries more freedom to pursue economic growth.

II. GATT INTERFERENCE WITH DOMESTIC LEGISLATION: THE "TUNA CASE"[25]

A. The tuna embargo and the dolphin-friendly label

In the 1980s, environmental groups forced the U.S. to comply with the tuna embargo provision of the 1972 Marine Mammal Protection Act (MMPA).[26] The Act prohibited the import of tuna from foreign fishing fleets which kill more than the number of dolphins killed by the U.S. fleet. The Act especially targeted tuna harvested in the Eastern Tropical Pacific (ETP)[27], where many coastal spotted dolphins (Stenella attenuata) and Eastern spinner dolphins (Stenella longirostris) are caught.[28]

The authorized "dolphin-kill" ceilings allowed up to 20,500 dolphins to be killed a year by the U.S. tuna fishing fleet. Foreign fleets had a higher allowed kill; up to 1.25 times the U.S. fleet's average incidental kill during the same period. These respective ceilings, however, were calculated retroactively at the end of the season. The foreign fleets could never know during the season if they were exceeding their limits and thus excluding themselves from the U.S. market. Furthermore, Mexico was disproportionally affected by an embargo focused on the ETP. Mexico currently fields the largest number of fishing vessels in the ETP. Far from the "Old Man and the Sea" scenario, Mexican fishermen utilize sophisticated commercial fishing technology and directly compete with American fishermen for the U.S. market. In fact, the panel found that the U.S. only had four boats in the ETP, two of which were rumored to be research vessels.[29]

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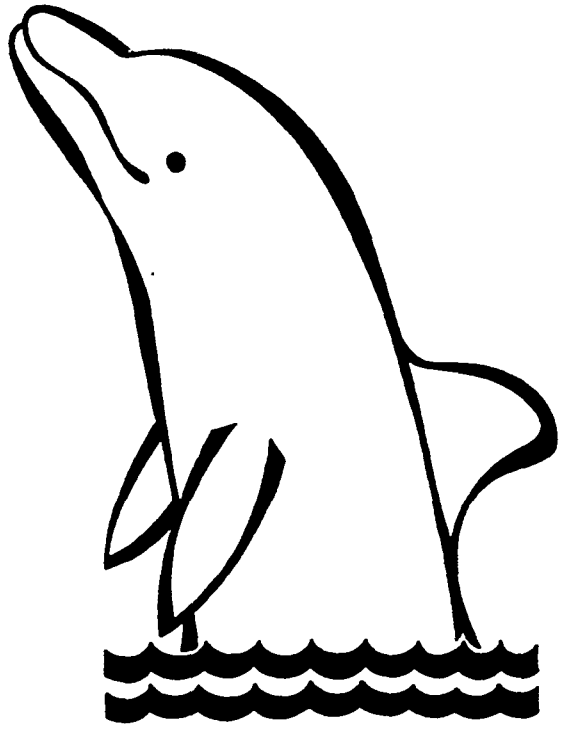
In order to further promote dolphin safety, the U.S. also enacted the Dolphin Protection Consumer Information Act (DPCIA).[30] The DPCIA allows the "Dolphin-Safe" label to be used on tuna products marketed within the U.S. or exported from the U.S., which were caught with dolphin-safe methods. Tuna products can still be sold freely, with or without the "Dolphin-Safe"

label. The label, however, may not be used if the tuna was harvested either with a purse-seine net in the ETP in a fashion which does not meet criteria for dolphin safety, or if the tuna was caught on the high seas with a drift net.[31] In response to both the tuna embargo and the labelling provision, Mexico requested a GATT dispute panel review. The panel decision may be the most popularly known and perhaps bitterly debated environmental provision to be adjudicated by a GATT panel. The decision illustrates how the linkage between trade and the environment can go awry--economic protectionism hidden in environmental protection laws.

B. The "Tuna Case" Panel Decision

Article XX, §§ (b) and (g) allow certain exceptions to GATT rules when trade measures are necessary to protect human, animal or plant life or health or conserve exhaustible natural resources.[32] The U.S. argued that Article XX of the GATT justified the tuna embargo. The panel rejected this argument and found that the MMPA provision amounted to a quantitative restriction, or quota, which is illegal under the GATT. The GATT requires that the U.S. must treat Mexican tuna no less favorably than U.S. tuna.[33] The freedom of the U.S. fishermen in only having to abide by a prospective absolute ceiling was more favorable than the retroactive and varying ceiling that the Mexicans had to meet. In addition, the GATT rules do not allow such standards to be imposed outside of a nation's jurisdiction, although contracting parties are still free to set environmental standards within their own territory. The panel also found that the U.S. could properly regulate a product under the GATT, but not a production method. Since mandating harvesting methods essentially regulates production, the U.S. could not ban the import of a product based solely on the way it was made. For example, a country could ban poor quality tuna, but could not ban acceptable tuna which was caught with a controversial drift net. Only the essential product, the tuna, may be regulated, and not the method with which it was caught. Finally, the panel concluded that alternative means were available, such as bilateral cooperative efforts or an international treaty.



Unlike the tuna embargo provision, the Dolphin Protection Consumer Information Act passed panel scrutiny. The panel allowed the voluntary label provision since "like" domestic products also had to meet the standards. Since the DPCIA sets labelling standards for consumer free choice, the legislation did not restrict the sale of tuna per se. Labelling requirements do not discriminate against any one country but against any fishermen who harvest in the ETP or import into the U.S. market.

Since the panel report, Mexico has not asked the GATT Council to adopt the decision. Many attribute this to U.S. pressure during the North American Free Trade Area (NAFTA) negotiations. Without official adoption, affected countries may not use retaliatory or countervailing duties against the U.S., and the tuna panel decision cannot serve as an official precedent.

C. Dolphins v. The GATT: a mistaken perception

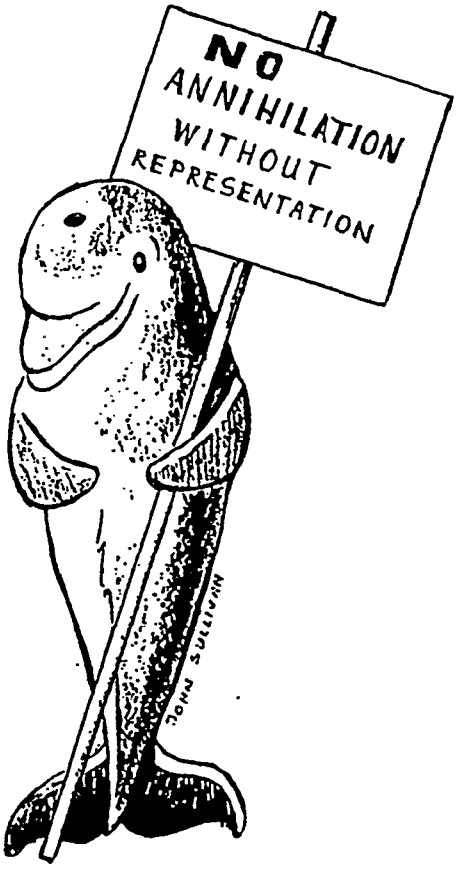
The tuna case illustrates how the Geneva-based GATT Secretariat is often mistaken as the main actor in the "environment v. free trade" war. During the tuna panel arbitration, a hot-air balloon, pleading "GATT, Save the Dolphins," was tied to one of Geneva's central bridges. Earth Island Institute's Fall 1992 newsletter features a grim, winter-time photograph of the imposing GATT building, with the caption: "GATT Threatens 'Dolphin-Safe' Law: One of many American laws challenged by the GATT is the one that prevents sale or import of tuna caught in a manner that also kills thousands of dolphins..."[34]

The message inaccurately portrays the Secretariat as actively prosecuting or "challenging" environmental provisions. David Phillips, of Earth Island, testified before the Subcommittee on Health and the Environment of the House Energy and Commerce Committee:

> "It is our belief that the GATT Panel ruling on the tuna/dolphin issue constitutes an unwarranted intervention into domestic laws and U.S. obligations under numerous treaties. Unless GATT is reformed quickly, we foresee that Congressional efforts to stop the use of open ocean drift nets, prevent trade in endangered species, preserve the rain forests, and protect the atmosphere will be severely compromised and under constant GATT attack."[35]

Statements like Mr. Phillips' underscore the perception that the GATT Secretariat itself attacks environmental provisions, rather than the injured contracting parties, such as Mexico in the tuna case.

Part of the environmental community does believe that the General Agreement itself can be reformed to allow environmental provisions within the framework of international trade. Other environmental groups, such as Greenpeace, believe the "interests of the environment are directly opposite to the free trade dictates of the GATT."[36] Greenpeace rejects the GATT's ability to overrule the legislation passed by sovereign national parliaments and sees no place for the GATT in environmental protection.[37] A recent GATT study extolled the virtues of free trade, claiming that higher per capita incomes would create the "freedom and incentive to devote a growing proportion of national expenditure to the environment."[38] Greenpeace called this claim a "travesty." Groups like Greenpeace are also wary of using the GATT's rules to protect the environment and making the Secretariat responsible for enforcing this protection. Given the GATT's historical preference for free trade over the environment, it would be rather like the fox minding the chicken coop.



John Sullivan From "ECONEWS"

D. Beyond the Tuna Case

Since the 1991 tuna case, environmental groups have continued to monitor the "dolphin-

safe" label[39] and press for dolphin-protective legislation. Their efforts bore fruit recently when President Bush signed the International Dolphin Conservation Act of 1992 (IDCA).[40] The IDCA provides for a zero U.S. dolphin kill by 1994[41] and authorizes Congress to enter into an international agreement to further protect dolphin life. The IDCA's provisions have a good chance of passing a GATT panel review. Since American fishermen will catch NO dolphin, there will be no variable and prospective ceiling with which foreign fishermen must comply. Therefore, foreign tuna may be embargoed because it will not be treated less favorably than American tuna. The international agreement authorized in the IDCA also represents the type of "alternative means" that the tuna panel referred to in its decision. The problem still remains, however, of American enforcement of standards of production outside of U.S. jurisdiction and the continued attempt to reach production methods. It will be up to Mexico or another affected nation to bring the IDCA before a GATT panel for ultimate resolution.

III. FUTURE PROBLEMS: PACKAGING AND LABELLING

Recognizing the growing conflict over environmental issues, the GATT recently resurrected its dormant Working Group on Trade and the Environment. In recent Working Group meetings, contracting parties grappled with one of the tuna case issues: eco-packaging and labelling.

One of the obstacles in resolving packaging and labelling problems is that countries view certain environmental values differently. Americans like dolphins, while other countries consider them nuisances and bad luck.[42] Simple preferences differ too. For example, without explanation, the Germans may want cardboard containers while the French want glass. Developing countries find many environmental values and standards to be arbitrary and subjective. They claim arbitrary packaging and labelling standards become technical barriers to trade. Restrictive requirements may favor domestic producers or producers with the capital to convert to more environmentally favorable methods. As mentioned earlier, many developing nations value economic growth over more esoteric goals, such as saving dolphins or scenic vistas.

A. Packaging

Packaging requirements may differ between countries. This difference has resulted in litigation, outside of the GATT, which further demonstrates the conflict between trade and the environment. Commission of the European Communities v. Kingdom of Denmark[43] provides an excellent example of this conflict. Denmark required that certain beverages be sold only in "returnable containers." Returnable containers, however, were defined as those for which existed an approved system for collection and refilling. Beverage importers, whose containers did not have an approved collection system, claimed that the regulation created an import barrier. These importers would either have to create a system of collection or change to existing "returnable containers." The European Commission argued that the measure could only be justified if the restrictive effects on trade were "not disproportionate to the intended objective of protecting the environment."[44] The European Court accepted this idea of proportionality and upheld some parts of the regulation. In supporting its decision, the Court stated that measures to protect the environment "should choose the means which least restricts the free movement of

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goods."[45] This may prove to be more difficult than the European Court had foreseen.

Packaging requirements impact trade in a variety of ways. For example, a country with a limited paper industry and forest products may find it impossible to adapt to requirements mandating cardboard containers or wooden crates.[46] Furthermore, many products, especially those from developing countries, travel long distances in hot weather on poor transport facilities. For these countries, only sturdier packaging allows their products to arrive in a marketable condition.

Packaging requirements can span the product's entire life-cycle: primary fiber production, processing, production, distribution, wrapping, and sale. This "cradle-to-grave" approach involves significant capital expenditures for factory and packaging modification. Some measures may prescribe percentage requirements of recycled material included in the packaging of the product. Recycled material is often unavailable, more expensive, or requires costly factory adaptations.[47] Many countries rely on their lower production costs to give their products a competitive edge in foreign markets. This forces them to raise prices to compensate for the costs of environmentally-friendly packaging, which may ultimately result in their products being left on the shelves.

Developing countries are particularly vulnerable to extensive packaging requirements. Theoretically, developed nations could force developing nations out of the market through prohibitively restrictive packaging requirements. Developed country producers could then capture the entire market and use the profits to create higher-quality products or simply raise the price to the consumer who has lost the cheaper alternative. Developing countries are largely powerless to change this problem, as a power bias exists for large countries with strong trade deficits and large markets. When countries import more than they export, they can force compliance through their monopsony power, i.e. the power of the largest buyer. Producers either change to fit the new regulations or lose access to the market.

In the long run, however, packaging requirements which become technical barriers to trade may have adverse global environmental and social effects. In order to retain their market share, developing countries may simply reduce wages or costly safety measures. As export industries suffer, governments would fall back on primary resource exploitation to fulfill balance of payments commitments. Unemployed workers may also put pressure on primary resources to simply sustain themselves on a day-to-day basis.

B. Labelling

Arbitrary labelling, like packaging, can throw up potential trade barriers. Eco-labelling can have a significant effect on consumer purchasing. Labels increasingly appeal to environmentally-aware consumers, who may choose a product on the basis of its advertised safety for the environment. Such products now range from photo-degradable diapers (which get buried in landfills and never exposed to light) to environmentally-friendly industrial cleaners.

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The now ubiquitous "Dolphin-friendly" label was the first to test the GATT's flexibility in allowing environmental provisions which may impact trade. As explained above the dolphin-friendly label survived review because producers could voluntarily label their tuna if it was harvested in compliance with dolphin-friendly methods. Thus, the "dolphin-friendly" label is optional and involves consumer choice. The incentive to cheat, however, can be overwhelming. Prices for dolphin-friendly labeled tuna may be as much as 25 cents higher per

can.

As eco-labelling becomes widespread, many consumers use the labels as a "standard" or green light to buy. In an informal survey,[48] many consumers in Davis, California, said they would only buy dolphin-friendly labelled tuna, and would pay more for it. Some were willing to pay even up to a dollar more. Label design itself also affected their choice. One common label, stamped directly into the metal on the top of the can, features a very likable dolphin head and torso. Around the can, eye-catching lettering claims the tuna is "Dolphin-Friendly" and "Packed in the U.S.A." Where the tuna is packed, however, is not important. Rather, it is where the tuna is caught that is important. This labelling can lead consumers to believe that tuna packed in the U.S.A. is dolphin-friendlier. By misleading the consumer, this distributor could charge even more per can, on the mistaken assumption that this product is safer for the environment. Developing country producers may not be able to afford this fancier labelling. Thus, in buying a seemingly "safer" product, the consumer may unwittingly add to the problem of labelling as a technical barrier to trade.

Many label requirements today also go unenforced. The majority of tuna brands now carry a dolphin-friendly label. Many consumers, however, do not question a label's validity or the enforcement standards behind it. Buyers for a local Davis, California grocery store simply accepted the dolphin-friendly guarantee and even the store's wholesalers could only produce documentation concerning the legitimacy of a few labels.[49] While monitoring efforts of organizations like the Earth Island Institute[50] increasingly validate "dolphin-safe" labels, many possibilities for abuse still exist.

IV. SOLUTIONS THROUGH THE GATT

A. The GATT Code on Standards

The original contracting parties foresaw that different standards may create barriers to trade, especially in light of the ambiguities in Article XX.[51] During the Tokyo round, they negotiated a Code on Standards[52] in order to facilitate trade in the face of differing national regulations, standards, and testing and certification systems. The Code, unlike Article XX, expressly addresses environmental concerns. The Code is qualified, however, by a requirement that environmental regulations be "necessary" to environmental protection. Some commentators feel the "necessity" requirement should be amended to allow that the measure only be "related to" environmental protection.[53] This less-stringent standard would permit nations to adequately protect their environments without acting outside the GATT's rules of international trade.

Although the Code legitimatizes environmental policies, it does not offer concrete guidelines. Its usefulness is also hampered by the exclusion of standards on processing and production methods (PPMs). Many GATT-inconsistent environmental provisions try to reach precisely these PPMs, as the U.S. did in the tuna embargo. Nations may still request a panel arbitration, however, to protest discriminatory trade measures based on PPMs instead of characteristics of the product itself. [54]

B. Harmonizing environmental standards

Many point to harmonization of environmental standards as a necessary precursor to the fair implementation of environmental provisions.[55] Contracting parties, however, differ widely in their willingness, and ability, to "harmonize." Developed countries face consumer and political pressure to enforce high environmental standards. But in order to continue the GATT tradition of consensus, global standards may have to be acceptable to all contracting parties. Thus, the standards may be those of the lowest common denominator, i.e. a very poor contracting party,

with inadequate environmental protection.

Conversely, many developing countries resist standards imposed by developed countries, who have already polluted or destroyed much of their own environment or that of their colonies. Developing countries often accept pollution in exchange for economic growth. Furthermore, they may be simply unable to meet higher standards which depend on sophisticated technology. Eventually, if harmonization is unattainable, domestic producers may demand higher tariffs on imported goods coming from countries with less-stringent environmental regulations.[56] These tariffs are justified on the theory that, since the environment absorbs the negative costs of production (pollution, deforestation, water contamination), the product does not adequately reflect the true market value.

Proof problems also obstruct the harmonization of environmental standards. One difficult problem is allocating the burden of proof. One view is to require the import-banning country to prove the actual, quantifiable harm to the environment. The other view is to force the producing country to bear the burden and prove that no possibility for harm exists. The Federal Drug Administration currently operates in a similar fashion, requiring pharmaceutical companies to conclusively prove their new drugs are not harmful. Contracting parties must also decide if the countries will decide this between themselves or if a GATT panel will act as an arbitrator.

Developing countries also demand proof that international standards are based on scientific evidence.[57] However, as seen above, standards represent different political, social and environmental perceptions. Developed countries tend to resist strict scientific proof as a prerequisite to legislation. How can American affinity for dolphins be quantified? Or, for example, how can the U.S. demonstrate that irradiated food is dangerous? No overwhelming evidence exists on the effects of eating irradiated food, but the legislature responded to consumer concerns and banned irradiation in certain cases. The restrictive legislation would have been impossible if it had to be based on irrefutable scientific evidence.[58]

C. GATT reform through amendments

The most direct solution to resolve these conflicts between the GATT and domestic environmental policy is to amend the GATT itself. One GATT scholar recommends amending the GATT to allow contracting parties to use "environmental" trade measures.[59] Articles I and III (MFN and National Treatment), which serve to minimize discrimination against "like" products, should allow differentiation between the environmental impacts of "like" products. Article II, limiting tariff rates, could permit higher charges on imports that were produced in environmentally-unfriendly ways. Article X, requiring publication of all laws and regulations related to exports and imports, could include environmental regulations and the scientific information on which they are based. This "transparency" device would allow countries to adjust their production methods before-the-fact, instead of facing high tariffs at the border or being refused access to the market altogether. Rules on subsidies[60] could be amended to allow the levying of countervailing duties against products that are sold at less than what they "cost" to the environment. Conversely, subsidies enacted for environmental protection could not be opposed. The countervailing duty would be the cost equivalent of the savings to the exporting country due to its low environmental standards. Consequently, countries would lose the economic benefit they gained from overexploiting their environment.

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Perhaps the most radical proposal would allow Article XX to apply extra-territorially.[61]

Nations could then enforce their environmental standards outside of their own jurisdictions. Protecting the "global commons" is justified under the theory that each nation's ecology depends on the health of the planet as a whole. Increasing proof of ozone depletion and universal marine pollution may lend support to this proposal, which currently faces strong national sovereignty arguments.

V. CONCLUSION

As the global woodlot dwindles, the conflict between trade and the environment will continue. To resolve this conflict, we must understand the impact of introducing subjective goals, such as environmental protection, into the trade arena. Punishing environmental offenders through their pocketbooks may seem an easy and effective way to protect the environment but it may also jeopardize the soundness of the General Agreement and its trading regime. Resentful contracting parties may withdraw from the GATT, thereby reducing its stabilizing force over a portion of international trade. Those countries who choose to withdraw will then be out "freewheeling" on their own. Whether they become self-sufficient or enter into regional agreements, international interdependency will decrease. These nations may feel less need to abide by international law standards. The burning of the Kuwaiti oil fields was a devastating reminder of the environmental damage that is caused by nations acting outside of international law.

This linkage will have important consequences, both for the environment and environmentalism. Environmentalism should never be allowed to disguise economic protectionism. True environmental goals would be discredited and ironically, the ultimate winner may be a domestic corporate polluter. Moreover, provisions such as arbitrary packaging and labelling requirements can ultimately degrade the environment. The well-intentioned, but uninformed choice of an "environmentally-friendly" label may support an industry who has simply jumped on the environmental bandwagon but provides no real corresponding benefit to the environment. We may be helping to eliminate developing country producers and destabilize their already fragile economies.

If environmentalism does cross international borders, then we must achieve international solutions. Only trade measures based on a truly global view will protect our common future and common earth.

NOTES

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2. Much of the material for this article is drawn from the International Trade course in Geneva, through Widener University's International Law Institute. For the most comprehensive single source of information on the General Agreement on Tariffs and Trade, please see John H. Jackson et al., Legal Problems of International Economic Relations, 1986.

3. Dr. Frieder Roessler, GATT General Counsel, Professor of the International Trade course. Supra note 2.

4. GATT Study Says Reducing Protectionism in Agriculture Means Better Environment, Feb. 19, 1992, International Trade Reporter.

5. Michael Smith, former Deputy U.S. Trade Representative who chaired a U.S. Environmental Protection Agency committee on trade and the environment.

6. GATT: Trading Nations Reconvene Environment Committee, BNA International Environment Daily, Oct. 16, 1991.

7. The GATT text used for this article is "The Text of the General Agreement on Tariffs and Trade", reprinted in July 1986, and available from the GATT Secretariat in Geneva.

8. 16 U.S.C. 1401.

9. The GATT, Ce Qu'Il Est, Ce Qu'Il Fait, available from the GATT Secretariat, pp. 1-3.

10. In current GATT literature, the term GATT is often used interchangeably to mean both the General Agreement and the Secretariat which services the Agreement. For clarity, I have tried to use GATT only in reference to the General Agreement and its rules. I apologize for any confusion.

11. Nations acting together in their rule-making capacity are designated in the General Agreement as CONTRACTING PARTIES, or the Council of contracting parties. When nations act in their own sovereign capacity, although as members of the GATT, they are contracting parties. Jackson, pp. 311-313.

12. Article XXI

"Nothing in this Agreement shall be construed

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

13. GATT Article XXVIII bis, Tariff Negotiations, §1, at 48-49.

14. The Tokyo Round established the Tokyo Round Codes On Technical Barriers to Trade, Government Procurement, Customs Valuation, Civil Aircraft, Anti-Dumping Practices, Subsidies and Countervailing Measures, and Import Licensing. The Sectoral agreements included bovine meat, dairy products, trade in civil aircraft. (The text of the Tokyo Round Agreements, reprinted in Geneva, August, 1986 and available from the GATT Secretariat.)

15. A VER is a secret agreement between governments for a competitive country to limit its exports in order to protect an importing country's industry. A 1985 report demonstrated the impact of the VER between the United States and Japan. In 1984, Japan "voluntarily" exported fewer cars into the American market and the resulting decrease in supply raised the price. Consumers paid $1,300 more, on average, than they would have without the VER. The benefit of the VER to the American work force was relatively small, increasing US employment by no more than 22,000 over the period April 1981 to the end of 1982. Cost and Benefits of Protection, The OECD Observer, No. 134, May 1985.

16. International Trade Course, supra, note 2.

17. Dr. Frieder Roessler, The Scope, Limits, and Functions of the GATT Legal System, at 6. Document available from Dr. Roessler.

18. Dr. Frieder Roessler, The Constitutional Function of the Multilateral Trade Order, at 1. Document available only from Dr. Roessler.

19. The GATT's rules govern the use (or non-use) of tariffs, subsidies, quotas, and Voluntary Export Restraints(VERs) to regulate trade. The choice of trade measures can mean money flows into the national treasury at the border or stays in the country of origin. Different measures place different burdens on exporters and can result in great distortions in international markets. Tariffs are the preferred trade measure, since they result in the least distortion and generate income for the importing country. VER's, the most trade-distorting, are illegal under the GATT but remain widely used. Dr. Frieder Roessler, supra note 17, pp. 1-16.

20. Jackson, pp. 11-17.

21. GATT Docs. L/2281 of 26 Oct. 1964, and L/2297 of 17 Nov. 1964.

22. GATT Part IV, Articles XXXVI to XXXVIII.

23. Malaysia has the Vision 20/20 program, which aspires to attain First World development status by the year 2020. Governmental policy claims the environment will be addressed only after economic goals are reached. Environmentalism is also a hazardous proposition. The 1988 Amendment to the Secrets Act provides for a mandatory, minimum 1 year jail sentence for attempting to discover a state "secret." Anything, however, can be labelled as secret. Therefore, environmentalists face jail terms if they pursue such project information as factory emissions or water quality. (Lecture by Malaysian environmentalist, March 15, 1992, University of Oregon Environmental Law Conference.)

24. Brundtland Commission, The World Commission on Environment and Development, Our Common Future (1987) at pp. 43-46.

25. United States - Restrictions on Imports of Tuna, Report of the Panel, GATT document DS21/R, 3 September 1991.

26. Earth Island Institute v Mosbacher

27. The area of the Pacific Ocean at 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude and bordered by the coasts of North, Central, and South America.

28. In the ETP, Yellow-fin tuna often swim under schools of dolphin. Fishermen use the dolphins to locate the tuna and encircle both schools with a purse-seine net. The bottom of the net is then drawn together, making a sack, which is hauled onto the boat. The dolphins are either suffocated or crushed in the process.

29. International Trade Course, supra nt.2

30. Section 901, Public Law 101-627, 104 Stat. 4465-67, enacted 28 November 1990, codified in part at 16 U.S.C. 1685.

31. Drift nets are usually long nets, made of fine, monofilament nylon mesh which creates 2-inch diameter openings. The net is almost invisible underwater and can extend 30-45 feet deep and 50 miles in length. Its use has been likened to "strip-mining" the oceans. (Anna Sequoia, 67 Ways to Save the Animals, 1987, at 68) Due to their great length and drag, the nets often break away. As they catch everything in their path, they create food chains, where trapped fish attract larger fish, which attract seals, which attract sharks or other predators. All the animals become trapped, their weight drags the net to the ocean floor, where the mammals drown. After the animals decompose, the drift net rises off the bottom and starts fishing again, repeating the cycle indefinitely. (Conversation with Paul Wong, Interpretive Specialist, U.S. Fish and Wildlife Service, San Francisco Bay National Wildlife Refuge)

32. GATT Article XX, sections (b) and (g) are often used to justify environmental provisions. The sections allow that, subject to the general prohibition of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, the General Agreement will not prevent trade measures that:

b) "are necessary to protect human, animal or plant life or health (sanitary/phyto-sanitary regulations)...

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

33. GATT Article III:4 "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use...."

34. GATT and Dolphins, Dolphin Alert, (Earth Island Institute Newsletter) Fall 1992, at 4.

35. David Phillips, Statement on the Implications of the GATT Panel Ruling On Dolphin Protection and the Environment, September 27, 1991, at 2. Available directly from Earth Island Institute.

36. GATT Reports on Trade Treaty Impact; Greenpeace Terms Study a "Travesty", Daily Report for Executives, Feb. 12, 1992

37. Randall Palmer, GATT Report Says Free Trade Benefits Environment, Reuters Money Report, Feb. 11, 1992.

38. "International Trade 1990-91", GATT document, quoted in "Gatt Reports on Trade Treaty Impact; Greenpeace Terms Study a 'Travesty'.", Daily Report for Executives, Fed. 12, 1992, at A-21.

39. Earth Island Institute's Dolphin Project has been an effective watchdog over the validity of the "Dolphin-safe" label. The group's monitoring program places independent monitors on-site at tuna canneries, on board fishing and carrier vessels, and at unloading docks. Monitors now work in Thailand and the Philippines, two major tuna producers, and will soon expand into other countries where tuna is purchased, processed and stored. Does the "Dolphin-Safe Label Really Mean What It Says? Dolphin Alert (Earth Island Institute Save the Dolphins Project Newsletter) Fall 1992, at 3.

40. Signed October 9, 1992.

41. Due to the work of environmental groups, many of the major tuna suppliers now use dolphin-friendly methods. These suppliers include: Starkist (H.J. Heinz), Chicken of the Sea (Mantrust of Indonesia), Bumble Bee (Unicord of Thailand), Deep Sea Tongol (caught in deep water, below where dolphins are usually found)(imported by Humble Whole Foods), Ocean Light (Imported by Humble Whole Foods), and Captain's Choice (Safeway brand). Kraft Foods has also promised to buy fish products only from dolphin-safe suppliers. Dolphin Alert, Id. at 5.

42. On the island of Negros Oriental, the Philippines, dolphin sold in the open air markets are often referred to as "wok-woks" or witches.

43. Case 302/86 Eur. Court Rep. 4607 (Judgment of Sept. 20, 1988)

44. Id. at 4610.

45. Id. at 4629.

46. The Malaysian delegate to the GATT Working Party on Trade and The Environment, during the July meetings, noted a German law banning the use of all material that is not recyclable, reusable, or may be incinerated for energy recovery. The legislation includes all transportation, transit, outer and secondary packaging. Under this rigid formula, the wooden crates that hold 60% of all developing country exports of food and fruits were considered illegal. Developing countries are now forced to change their packaging in order to access the German market.

47. Swedish delegation at July Meetings of GATT Working Party on Trade and the Environment.

48. The author spoke with over 40 people in the Davis Food Coop, a local grocery store which caters to environmentalists.

49. One Coop wholesalers, Mountain People, had no documentation other than that for the Deep Sea brand, which listed the Earth Island Institute as the contact. Earth Island certifies that this tuna is dolphin-friendly, according to Earth Island's own rigorous standards.

50. See supra, note 39.

51. See supra, note 32.

52. Officially named the Agreement on Technical Barriers to Trade.

53. Eliza Patterson, GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects, Vol. 26 Journal of World Trade No. 3, June 1992, at 108.

54. Id. at 108, in footnote 33.

55. GATT Meeting of the Working Party on Trade and the Environment, July 1992.

56. Kyle E. McSlarrow, International Trade and the Environment: Building a Framework for Conflict Resolution, 21 ELR 10589, News and Analysis, Dialogues Section. Oct. 1991

57. Marwa J. Kisiri, International Trade and the Environment- An Additional Non-Tariff Barrier to the Developing Countries' Trade?, Vol. 15 Journal of World Competition, No. 3, March 1992, at 88.

58. Conversation with Janet Chakarian, Economic Affairs Officer, Technical Barriers to Trade Division, GATT Secretariat in Geneva.

59. Patterson, supra note 53. Please see entire article.

60. Subsidies are prohibited under the GATT Articles VI and XVI and the Subsidies Code. The rules generally prohibit subsidies on the export of industrial products but allow export subsidies on the agricultural products and on domestic industries, provided the subsidies do not create harmful trade effects.

61. Patterson, pp. 106-107.

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