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Using Trade to Enforce International Environmental Law: Implications for United States Law

MARY ELLEN O'CONNELL*

The United States has enviable domestic environmental protection laws. However, good domestic environmental protection raises two concerns: effectiveness and competitiveness. Regarding effectiveness, environmentalists well understand that effective environmental protection cannot stop at one state's borders. Controlling air and water pollution, ozone destruction, and threats to wildlife in the United States will not eliminate those problems as long as other states continue destructive practices. Regarding competitiveness, United States environmental protection laws can pose a competitive disadvantage when businesses in other states do not face the same regulations.

In response to these two problems of environmental protection—effectiveness and competitiveness—members of Congress introduced over thirty bills in 1990 to amend U.S. trade laws. The bills were designed to either press other states to adopt environmental protection standards similar to the United States' own or to at least minimize the competitive disadvantage for U.S. business inherent in U.S. regulations. The bills took one of two approaches: either they aimed at restricting access to U.S. markets for those states failing to honor international environmental commitments, or they levied duties on imports from states failing to protect the environment.

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2. For references to numerous writers who take this view, see Mary Ellen O'Connell, Enforcing the New International Law of the Environment, 35 GER. Y.B. INT'L L. 293 (1992).
5. Id. at 251.

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Most of these bills faded from the scene, but several statutes in the environmental area already include such measures. The Marine Mammal Protection Act (MMPA) was adopted in 1972 and amended in 1987, 1988, and 1992. The MMPA prohibits the killing of marine mammals except in a few circumstances, including those incidental to commercial harvesting of fish. However, the number of dolphins that may be killed incidental to commercial fishing must be limited. U.S. fishermen have been limited to killing 20,000 dolphins annually. The Act also tries to ensure the effectiveness of the protection measures and limit the potential for creating competitive disadvantage for U.S. fishermen by forbidding the import into the United States of fish caught by fishermen from countries that do not protect marine mammals. Following a lawsuit to enforce the MMPA, the United States imposed an embargo on imports of tuna caught by Mexican fishermen. Mexico argued that the embargo violated the General Agreement on Tariffs and Trade (GATT) and took the United States to a GATT dispute resolution panel in Geneva to press this view. The panel agreed with Mexico and the United States withdrew the embargo.

The GATT panel could have reached the opposite decision within the parameters of the GATT if environmental protection had been a priority. But it is clear that the panel was more concerned about protecting the integrity of the international trading rules from unilateral actions. This concern—whether the United States or others can lawfully take unilateral action to protect the environment—is the topic of this paper. Congress has amended the Marine Mammal Protection Act to meet the criticisms of the GATT panel. Yet the Act continues to require unilateral action in some

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6. See infra note 45.
12. The General Agreement on Tariffs and Trade regulates trading relations among over 100 member countries. For the basic agreements see, 55 U.N.T.S. 187 (1947). For further discussion of GATT regulations see infra, footnotes 57-62 and accompanying text.
14. The panel decision is reprinted at 30 I.L.M. 1594; see also N.Y. TIMES, Mar. 20, 1992, at B10.
cases and is probably, therefore, still inconsistent with the GATT. Other U.S. statutes also contain provisions for unilateral action. The Pelly Amendment, for example, may require the embargo of products from Japan and Norway if those States resume commercial whaling, as they have recently threatened to do.\textsuperscript{16}

Unilateral actions are lawful under public international law. Under the customary international law doctrine of countermeasures, states may take otherwise unlawful action in response to prior unlawful action as long as the response is necessary and proportional. Thus, the United States may continue to take action against environmental breaches through trade measures that violate the GATT when it can show that it is responding to an unlawful action and the measure is necessary and proportional.

The international enforcement system has few mechanisms beyond unilateral action for enforcement. It is understandable, therefore, that the system permits unilateral action despite the criticisms of such measures voiced by the GATT panel and other critics. Their presence in U.S. statutes past and future is consistent with international environmental laws.

The use of unilateral countermeasures does have negative aspects. They are self-judging and thus open to abuse and they are far more available to wealthy countries than to poor ones. These criticisms deserve serious consideration and should underscore for governments that international law imposes important limitations on the use of countermeasures. Nevertheless, the point of this article is to underscore that countermeasures are the only means of enforcing most international environmental laws.

The article will begin with an explanation and assessment of the use of countermeasures to enforce international environmental protection. It will then argue that the MMPA authorizes a lawful countermeasure, despite the GATT decision. The article will further argue that countermeasures, even with their acknowledged deficiencies, are nevertheless lawful and can play a role in international environmental protection and in meeting concerns of effectiveness and competitiveness.

\textsuperscript{16} Andrew Pollack, \textit{A First Step to Create a Sanctuary for Whales}, \textsc{Int'l Herald Trib.}, May 15-16, 1993, at 2.
I. COUNTERMEASURES

When the United States imposed an embargo on the import of Mexican tuna in order to induce Mexico to stop using fishing techniques destructive of the environment, it was imposing a countermeasure on Mexico. Countermeasures, viewed strictly, are the only means of enforcing most international environmental law. International law does have some courts and arbitral tribunals, but courts adjudicate, they do not enforce. If a state does not comply with a court order, countermeasures must be used to enforce it. Trade sanctions are the most available form of countermeasures and trade thus plays a central role in environmental enforcement. To better understand this role, it is helpful first to contrast countermeasures with related categories of state action, in particular dispute settlement, compliance techniques, and implementation techniques, before discussing countermeasures per se.

A. Categories of State Action

According to Black's Law Dictionary, "to enforce" means to "compel obedience."17 Thus "dispute resolution" techniques are not technically enforcement techniques, despite the frequent use of the term "enforcement" when discussing dispute resolution.18 In dispute resolution, parties employ some means of resolving a dispute regarding what legal obligation is owed. The common forms of dispute resolution in international relations are adjudication, negotiation, mediation, and conciliation.19 While international law does not have a domestic-type compulsory court system, the International Court of Justice does have some compulsory jurisdiction and all states may bring disputes if the parties to the dispute agree to do so.20

18. Writers often mention that the Vienna Convention on Protection of the Ozone Layer and the Montreal Protocol thereto, see infra, note 26, have no enforcement mechanisms. They really mean they have no binding dispute resolution provisions. See also, e.g., Charles DiLeva, Trends in International Environmental Law: A Field With Increasing Influence, 21 ENV'TL L. REP. 10076 (1991). ("Despite widely supported goals, international environmental agreements lack enforcement mechanisms—a factor that many observers consider a major weakness of international law.")
19. For a further description of these terms, see LOUIS HENKIN ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 573-75 (2nd ed. 1989).
States have also created other types of dispute resolution bodies such as the Iran-United States Claims Tribunal and the dispute resolution panels of the General Agreement on Tariffs and Trade.\textsuperscript{21} Mexico brought its dispute with the United States over tuna harvesting to a GATT dispute resolution panel to obtain an authoritative, third-party clarification of whether the United States could lawfully impose an embargo on Mexican tuna exports consistent with the GATT. Hungary and Slovokia have agreed to go to the International Court of Justice to determine whether Slovokia has the right under international law to build a dam across the Danube.\textsuperscript{22} But in any of these cases, the party that receives support for its position may still need to enforce the decision if the other party fails to comply voluntarily.

Dispute resolution techniques can play a useful role in inducing governments to comply with obligations in cases where they otherwise would not. For example, in the well-known Air Services Arbitration, France refused to allow certain aircraft to land in Paris under the terms of a U.S.-French air services agreement until a dispute resolution tribunal ruled that France's interpretation of the agreement was wrong.\textsuperscript{23} On the other hand, international law contains many examples where states have refused to comply with decisions. In the Nicaragua Case, the United States refused to comply with orders of the International Court of Justice.\textsuperscript{24} Even with the use of enforcement techniques, Nicaragua could have done little to get the orders enforced.\textsuperscript{25}

Despite the Nicaragua case and some other cases which demonstrate the limits of dispute resolution, it is still unfortunate that so many recent multilateral environmental treaties do not have binding dispute resolution provisions.\textsuperscript{26} Good dispute resolution measures can obviate the need for enforcement in some cases, although the point here is that they are not the same.

\textsuperscript{21} For a recent review of international courts, see INTERNATIONAL COURTS FOR THE 21ST CENTURY (Janis ed., 1992).
\textsuperscript{24} See Mary Ellen O'Connell, Enforcing Monetary Judgments of the International Court of Justice, 30 VA. J. INT'L L. 891, 927 (1990).
\textsuperscript{25} Id.
Another term often confused with dispute resolution is "compliance." States are under an obligation to comply with their international duties. Many techniques exist to encourage or assist states in complying, but these are not enforcement techniques. Compliance techniques are used at the stage prior to a determination that a breach of obligation has occurred. Roger Fisher has recommended in his book Improving Compliance with International Law that the obligations of international law be formed with a view to achieving compliance so as to never reach the enforcement problem. Indeed, international law as a consent-based system does tend to create rules with which states are pre-disposed to comply. Other compliance techniques include monitoring, reporting systems, and contingency funds.

The new Framework Convention on Climate Change contains many compliance techniques but no binding dispute resolution provisions. For example, parties must report on steps taken to implement the Convention. The Convention establishes a "Subsidiary Body for Implementation" to help the parties review the reports. Reporting and review are methods which have been used in the human rights field and were found to have some impact on state behavior.

"Implementation" is another term often confused with enforcement. Implementation refers to the further steps states must take as required by a convention. Thus if a state is supposed to limit the production of ozone-depleting chemicals but does not adopt the necessary domestic legislation to accomplish this, it has failed to implement the Montreal Protocol and has failed to comply by not implementing. The Convention has a means to assist states in complying through its implementation fund.

27. "Compliance as a concept denotes an act of yielding or acceding to some wish or demand. That is, through compliance, one consents to act in conformity or in accordance with some specific desire, request, condition, or direction. Compliance by a state with international law is generally demonstrated by that government's willingness to accept as binding constraints various rules, regulations, and principles that are intended to direct the conduct of states in their international dealings with one another." Christopher Joyner, Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq, 32 VA. J. INT'L L. 1 (1991).
31. Id. art. 12(1)(b).
32. Id. art. 10.
The European Community provides examples of the distinctions among implementation, compliance, and enforcement. It is said that the European Community has an "implementation deficit."\(^\text{33}\) States often fail to adopt domestic laws to put into effect Community directives. When they fail to adopt these laws, they fail to implement. When they fail to implement, they fail to comply with the Treaty of Rome. The Community can take states to the European Court of Justice to get an authoritative ruling on a failure to implement, but at present the Court has almost no capacity to enforce its decisions. With the adoption of the Maastricht treaty, the Court is given the ability to impose fines on states that fail to comply with obligations. Depending on how the fines may be collected, the Court may gain enforcement capacity.

In the Mexico-U.S. case, Mexico failed to implement techniques to protect dolphins. It thereby failed to comply with a customary international law obligation to prevent damage to the marine environment. This failure gave rise to the right of the United States to take enforcement action.\(^\text{34}\)

**B. Enforcement Action**

International law, lacking a police force, embraces two other means of forcefully enforcing international law obligations: through domestic legal institutions with the use of armed force, or by using countermeasures.

Employing domestic legal institutions to enforce international law is clearly the most efficient means of enforcement. The greatest quantity of international law is probably enforced through domestic courts. On the other hand, this can only lead to enforcement against the government of the state where enforcement is sought or against any individuals who must comply with an international obligation. It is rare for domestic courts to enforce an international legal obligation against a foreign state. In the United States the courts have in recent years narrowed the opportunities for such enforcement.\(^\text{35}\)

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\(^{33}\) Comment of Ernst Klatte, European Community DG XI (Information and Communication) May 18, 1993.

\(^{34}\) See infra part II.

\(^{35}\) The Sabbatino Case is probably the best known example of parties trying to use U.S. courts to enforce international law. In that case plaintiffs argued that the Supreme Court should find Cuba in violation of international law. The Court found that the Act of State Doctrine applied to the question and would not rule. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 3989 (1964). For a thorough
But individuals and environmental groups can, for example, bring a suit against the U.S. government for failing to administer an international treaty incorporated into U.S. law. For example, the Vienna Convention on the Protection of the Ozone Layer is implemented in domestic law and citizens may sue the government for failing to comply. Should the government fail to obey a court order to comply, the courts may levy fines or, it is even accepted that the army may come to the assistance of the courts. More significantly for international environmental law, the United States will enforce the Vienna Convention against those of its own citizens who might violate the Convention’s obligations, as incorporated in U.S. law. It is because of cases like these that we say the greatest quantity of international law is enforced through domestic institutions.

While the use of domestic institutions is the most common means of enforcing international law, the use of force is the least common means. In some rare cases, states or the U.N. may use force to enforce international obligations. Basically, states may use force in self-defense. According to the International Court of Justice this means states may use force when responding to an armed attack. Even if faced with an imminent, fatal threat due to a breach of an environmental obligation by a state, the victim state would not be allowed to use force.

The U.N. may use force in response to a threat to, or breach of, international peace. This means it probably has a broader right to use force than individual states. If an imminent melt-down of a nuclear reactor or a similar event were about to occur, presumably the U.N. could send

discussion of the capacity of U.S. courts to hear cases against foreign sovereigns under international or U.S. domestic law, see BORN & WESTIN, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS (1992).

In the case of individuals, they will most often be subject to international law when incorporated in U.S. law. For example, persons subject to U.S. jurisdiction, whether U.S. citizens or not, must comply with the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085. This is incorporated in U.S. law in the Endangered Species Act, 16 U.S.C. §§ 1531-43 (Supp. 1991). See, e.g., Man Hing Ivory and Imports, Inc. v. Deukmejian, 702 F.2d 760 (9th Cir. 1982). For a further discussion of this subject, see CHRISTOPH SCHREUER, INTERNATIONAL LAW IN DOMESTIC COURTS (1980).


40. See U.N. CHARTER, art. 39.
"blue helmets" to prevent loss of life, especially where the Security Council believed the victim state might respond with force following such a disaster.\textsuperscript{41} The U.N. has never taken forceful action in the environmental area and the likelihood of its doing so seems slim. It has plenty of difficulty at the present moment responding to unlawful use of force and massive human rights abuse.

The only other method of enforcement on the international plane is the use of countermeasures. Countermeasures are actions taken in response to a prior unfriendly or unlawful action.\textsuperscript{42} Unfriendly, though lawful actions, such as withdrawing diplomats, are also known as retorsions. States may always take unfriendly actions. They may take unlawful actions only when the prior action was unlawful. Unlawful countermeasures are also known as reprisals. They must be necessary and proportional. By necessary, we mean that the responding state must at least first request that the acting state comply with its obligations before imposing countermeasures. The meaning of proportional is not as well understood.\textsuperscript{43} The Tuna case, however, provides a good example. In that instance, the United States wanted Mexico to reform its tuna fishing techniques, per Mexico's obligation under customary international law. The United States cut off imports of tuna pending these reforms. The United States' action might have been out of proportion if it had embargoed all trade with Mexico as we did in the Hostages case and in the Gulf War.

The United States is the chief user of countermeasures. Their use against China in response to its human rights record continues to be discussed.\textsuperscript{44} Congress has added provisions in various statutes to use both retorsions and reprisals to respond to abuses of human rights and breaches of international environmental law.\textsuperscript{45} The executive branch regularly

\textsuperscript{41} Compare the rationale for imposing an embargo on Rhodesia. The Council ordered the embargo to respond to the threat of force by Rhodesia's neighbors following the unilateral declaration of independence.

\textsuperscript{42} See Henkin et al., supra note 19, at 541-42.

\textsuperscript{43} See O'Connell, supra note 24, at 927.

\textsuperscript{44} Michael Richardson, \textit{Value Clash Looms for U.S. and Asia}, \textit{Int'l Herald Trib.}, May 3, 1993, at 1.

employs retorsions and reprisals to respond to treaty breaches, unlawful uses of force and human rights abuses.

The United States' employment of countermeasures is understandable since they are the only available tool for lawfully applying coercion peacefully under international law. But the very fact that it is the United States which uses them so frequently points out one of the disadvantages of countermeasures—they will be far more available to wealthy countries than to poor ones. States holding assets to freeze or valuable markets to close can do both as countermeasures. Poor states will often have few resources available for leverage. Even when resources are available, these states may need to be able to withstand counter-countermeasures to effectively use the countermeasure. Thus some see countermeasures as fundamentally unfair and therefore question their acceptability in a legal system.

Another central drawback of countermeasures is that they are self-judging. Lacking a compulsory judicial system, it will be a rare case where a state will have an objective third-party decision finding a wrong and authorizing the wronged state to use countermeasures. Most often the state choosing to take such measures will take them based only on its own assessment. In some cases, the international community may respond negatively to the imposition of measures, making it clear that the court of world opinion disagrees with the state's assessment. Such a negative response can play the role of an objective third-party assessment. In other cases, however, it must be accepted that international opinion will be ignored and the wronged state may have little recourse. Several of these issues surrounding countermeasures arose in the tuna dispute.

II. EMBARGOING TUNA AS A COUNTERMEASURE

The following description of the process of catching yellowfin tuna in the Eastern Pacific clearly reveals why Congress began its investigation into the protection of dolphins.

In the eastern tropical Pacific Ocean (ETP) schools of yellowfin tuna typically forage for food beneath herds of dolphin. Biologists do not fully understand why the two species travel together.

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Both American and foreign commercial tuna fishermen exploit this phenomenon. Fishing vessels chase the visible dolphin herds in hopes of locating schools of yellowfin that may be below. When the boats catch up with the dolphin herd, purse seine nets are used to catch the tuna in a process known as "setting on dolphin." Purse seine are house-sized nets with weights and floats that become sack-like, open bottom traps. The dolphin are herded into the upper part of the nets, while the lower part lands to confine the tuna following below. The bottom of the net is then pulled closed, like purse strings, trapping both the tuna and the air breathing dolphin.

Setting on dolphin is not a peaceful procedure. The terrified and exhausted dolphin are driven into the center of the nets by explosives and high-speed chase boats. Many dolphin drown immediately as they are crowded into increasingly tight space, unable to reach the surface to breathe. Others are battered against the speed boats or the main ship and suffer serious injuries. The result is often a bloody and horrifyingly confused struggle in which the dolphin are mutilated, their beaks and flippers broken or ripped from their bodies as they become entangled in the nets or are crushed to death against the ship's power block. The bewildered dolphin try to escape. . . . Ironically, after creating this gruesome scene, in many instances the fishermen find that there are no tuna below the herd.46

Before countries began taking protective measures, as many as 300,000 dolphins a year were being killed this way in the process of catching only five percent of all tuna consumed.47 In the 1960s, U.S. public pressure to stop the slaughter of dolphins was very strong. Scientific evidence showed that some subspecies had declined by as much as eighty percent following the introduction of purse seining in the 1960s.48 In response, Congress adopted the Marine Mammal Protection Act in 1972.49 The general

47. Id. at 122. Ross, supra note 9, at 346.
48. Coulston, supra note 46, at 103.
obligation of the Act is to forbid the taking and importation of marine mammals.\textsuperscript{50} But under pressure from the economically-troubled U.S. tuna fishing fleet, an exception was made for dolphins. The fleet could apply for an exemption and has for many years been allowed to kill more than 20,000 dolphins in the course of catching yellowfin tuna. To make sure the Act did not simply shift the slaughter of dolphins from U.S. to foreign fishermen, the Act also required that foreign fishermen refrain from killing dolphins. They could kill more dolphins per year but not significantly more. The result of doing so would be a ban on importation of tuna from such countries. In 1984 and 1988 the provisions regarding foreign countries were strengthened by Congress when it became clear the Executive branch was not enforcing the Act.\textsuperscript{51} The amendments strengthened the evidentiary requirement of foreign importers to show that tuna was not caught with purse seine nets, that the country had a program regarding fishing regulation in place, and that it would cooperate in scientific research programs. Further, the United States would not import tuna processed in countries that bought tuna caught without regard for dolphins.\textsuperscript{52}

Environmentalists were generally disappointed with these provisions. They had lobbied for a complete ban on the killing of dolphins. They argued that other methods besides "setting on dolphin" are available for harvesting tuna and that killing such large numbers of dolphins for such a small percentage of the tuna harvest made little environmental sense.\textsuperscript{53} Nevertheless, the small Association of American Tunaboats kept the Congress from adopting a complete ban. That Association has shrunk from more than ninety members in the 1960s to fewer than forty in the 1990s. While it is disputed that environmental regulation caused this decline, the fact must have impressed Congress enough for it to grant concessions to the industry. The MMPA permits some dolphins to be killed by Americans and requires that foreign fishermen make some effort to reduce the kill rate.

A number of countries have come close to having tuna exports embargoed. However, in all cases the countries were able to meet the U.S. requirements, except Panama, which had imports embargoed in 1990 and Mexico, which had imports embargoed in 1991 as a result of a lawsuit to

\textsuperscript{51} McDorman, supra note 45, at 492.
\textsuperscript{52} Id. at 493.
\textsuperscript{53} See Coulston, supra note 46, at 122.
compel the executive branch to enforce the MMPA against it. Mexico, unhappy with the embargo, took the United States to a GATT dispute resolution panel in Geneva.

The GATT panel found that the MMPA embargo provisions violate GATT Article XI’s prohibition of quantitative restrictions. Nevertheless, the GATT has exceptions to Article XI and other obligations in Article XX. Article XX(b) allows exceptions for the protection of life and health of wildlife and XX(g) allows exceptions for the conservation of exhaustible resources. Astonishingly, the GATT panel found these provisions did not apply and for basically an erroneous reason. Despite the fact that the articles have no geographic limit, the panel said that they only apply to measures applicable within the domestic jurisdiction of the state. If the United States wishes to protect wildlife outside its borders, the panel suggested that it negotiate a treaty to do so.

This finding shows little understanding of international law. States are bound by customary international law, not just treaties. Significant evidence now exists that states have an obligation to take scientifically supported steps to protect the environment beyond national boundaries. This obligation rests on Mexico, Panama, and others that do not take steps to protect wildlife on the high seas—science has demonstrated that “setting on dolphin” with purse seine nets is highly damaging and that other methods are available. The United States has the right, if not the duty, under general international law to enforce this obligation against all violators. It has this right because areas beyond national jurisdiction have no protectors except the collective states. Moreover, the environment is not so easily divisible as the panel seems to suggest. In addition, failing to protect wildlife in the high seas can result in injuries to the U.S. domestic environment. It is not known whether the United States made this argument to the panel, though it probably would not have persuaded a panel focused on protecting trade first.

The panel also found that the tie to the U.S. incidental kill rate made the obligation unpredictable and, therefore, they concluded the Act was not

57. O’Connell, supra note 2, at 332.
58. Id. at 328.
aimed primarily at conservation. This finding is equally questionable. The panel did not find that the measure was in any sense intended to protect the U.S. fishing industry. What other purpose beyond conservation could it then have? Indeed, the Association of American Tunaboats has argued for twenty years that the Act hurts, rather than helps, the U.S. fishing industry. Moreover, the Act is supported by scientific evidence. It is true that the formula for finding an allowable foreign kill rate could make the rate unpredictable, but since the rate has been 20,000 for many years, the rate could be argued to be stable. As it is higher than the U.S. rate, the burden is less than on domestic fishermen. Eliminating the provision for foreign fishers would only shift the killing from Americans to others.

Congress amended the Act on this point in 1992 to require that foreign fishers show a decline in the dolphin kill rate based on the foreign fishers' own past experience. Congress also directed the executive branch to negotiate agreements with other governments to place a moratorium on the killing of dolphins. It is not clear from the language of the Act whether the United States will still impose embargoes on tuna imports from those states that have not negotiated a moratorium agreement. The point of the amendments seems to be to bring the United States into compliance with the panel's decision.

While the MMPA may have been saved from violating the GATT, a number of articles have appeared lately applying the GATT panel's decision to the Montreal Protocol on the Ozone Layer, the Convention on the International Trade in Endangered Species, and the Basel Convention on Transboundary Movement of Hazardous Waste. All three conventions may be inconsistent with the panel's decision. They remain to date, however, unchallenged before the GATT.

Reforming the GATT to protect these conventions and to raise the value of environmental protection generally in the GATT is currently a major goal.


60. See Coulston, supra note 46, at 103.


of environmentalists. The panel’s decision in the Tuna case shows a value preference for free trade over environmental protection. If the panel had valued the environment, it need not have read in geographical limits into Article XX. Then the U.S. action would have been categorized as a retorsion—a lawful action taken in response to a prior unlawful action.

As it was, the panel found the action unlawful, so in its view the embargo was a reprisal-type countermeasure. Even as amended, the MMPA probably remains in this category. But, as such and even without GATT reform, it was still lawful for the United States to take the action as long as it was proportional and necessary. Because the U.S. embargo was only of tuna products taken in a process that unnecessarily killed dolphins, it appears to be eminently proportional. It was taken only after years of negotiation and attempts to make Mexico limit its use of purse seine nets.

Even though a good case exists that the measures the United States took were proportional and necessary, because the GATT has its own dispute resolution provisions, it might be argued that it is a “self-contained regime” that excludes the use of unilateral measures inconsistent with its provisions. The International Court of Justice introduced the term “self-contained regime” in the Hostages Case to respond to Iran’s arguments that it had permitted the kidnapping of diplomatic hostages in violation of the

64. Besides the GATT panel decision and the total absence of discussion of the environment in GATT negotiations, Director General Dunkel further underscored the GATT’s position on the environment when he said:

Production and consumption activities in other countries can also be a source of domestic environmental concern. Pollution may be spilling over borders and harming either the regional environment (acid rain) or the global commons (ozone depletion). Or land development projects may be threatening the extinction of an animal or plant species, and uncontrolled fishing may be depleting fish stock on the high seas. It is not unreasonable that the government of a country concerned by such practices would seek to see them changed—and that it would find it difficult to accept that this would not be possible. . . . In principle it is not possible under GATT’s rules to make access to one’s own market dependent on the domestic environmental policies or practices of the exporting country.


Many are concerned about priorities at the GATT. Ralph Nader is a particularly vocal critic of the GATT. Nancy Dunne, A Consuming Interest in Trade, FIN. TIMES, May 18, 1993, at 4; FIN. TIMES, supra note 63.

65. See McDorman, supra note 45.
diplomatic immunity regimes as, in essence, a countermeasure for other crimes the United States had committed against Iran. The Court pointed out that diplomatic treaties had their own remedies—diplomats may be declared persona non grata and expelled. No room exists for kidnapping them as remedies for other wrongs.67

The GATT is probably not such a self-contained regime that permits no use of remedies outside those of the GATT itself. The diplomatic regime has a unique need to be self-contained. Actions against human beings should not be used as countermeasures.68 In addition, we have the example of the Air Services case, where a treaty regime had a dispute settlement mechanism, but nonetheless, the dispute resolution panel found that unilateral measures could be carried out.69 Moreover, the practice of states after forty-seven years of experience under the GATT rebuts the argument that the GATT is a self-contained regime. States have imposed embargoes and other trade sanctions to enforce all manner of international legal obligations from the prohibition on the use of force to the protection of human rights.70 The GATT contains no special reason why trade sanctions can be used in so many cases but not to enforce environmental protection.

In addition to the self-contained regime argument, some have also argued that because dolphins are not protected by treaty, Mexico violated no international law and therefore the United States had no right to take a countermeasure. The GATT panel itself suggested that the United States could only defend its action by showing an international treaty that protected dolphins. Perhaps the United States did not make clear at the GATT that

67. ZOLLER, supra note 66, at 90-91.
68. See O'Connell, supra note 24.
69. Air Services Agreement Case, supra note 23 and accompanying text.
70. According to Carter, “although some GATT experts are uncomfortable about the frequent use of these types of controls [against terrorism or human rights violations], it seems unlikely that there will be any significant challenge to these controls in GATT in the near future.” BARRY CARTER, INTERNATIONAL ECONOMIC SANCTIONS 96-97 (1988). One of the most recent example of the use of trade controls for human rights is the action in Haiti. In 1992 the United States and the Organization of American States ordered a trade embargo against Haiti, which is a member of the GATT. WASHINGTON POST, June 4, 1992 at A24. European countries did not participate in the embargo, saying it would be illegal for them to do so until ordered to by the Security Council. The Council ordered all U.N. members to participate in the embargo in June of 1993. MIAMI HERALD, June 17, 1993 at A1. (The GATT itself has no exception for Security Council orders. But the U.N. Charter in Article 103 makes clear that the Charter, and impliedly actions taken under the Charter, take precedence over other treaties.)
it could take such measures to enforce customary environmental law and that now customary environmental law requires the taking of steps to prevent damage to the environment.71 This may seem like a vague standard, and that is one of its weaknesses, but the actions required to be taken must be consistent with scientific evidence. Some environmentalists now argue that international law now embraces a doctrine called the precautionary principle, which requires states to take action not only based on scientific evidence, but also on evidence that is not scientific. The basis on which states must act under this doctrine is truly uncertain.72 By comparison, any state may point to sound scientific evidence as the basis for pressing another state to reform. Probably the best approach to enforcing these principles is to hold negotiations beforehand to discuss precisely what is required for prevention and how such steps can be carried out.73 Such negotiations are in any case required before countermeasures may be implemented. The United States and Mexico have carried out such negotiations. When Mexico made no move to stop its destructive practices the United States was entitled to take countermeasures.

Article 12 of the recent Rio Declaration on the Environment states, "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."74 This requirement is not binding per se since the Declaration is not binding. But even if it were, the United States acted consistently with it. The article says countermeasures should be "avoided." The regime of counter-measures itself contains a parallel limitation. Countermeasures may only be used when necessary. As argued above, necessity is proven when good faith negotiation has proven fruitless. At that point countermeasures need no longer be "avoided."75

71. O'Connell, supra note 2.
72. For a statement finding the precautionary principle to be incorporated in customary international law, see Philippe Sands, The "Greening" of International Law: Emerging Principles and Rules, 1 IND. J. GLOBAL LEGAL STUD. 293. See also DAVID FREESTONE, THE PRECAUTIONARY PRINCIPLES IN INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 21 (R. Churchill & D. Freestone eds., 1991). This article provides only slim evidence of the existence of such a principle.
73. See O'Connell, supra note 2.
75. It could be argued that the GATT dispute resolution panel made an objective, third-party decision that the MMPA is not concerned with environmental protection and therefore countermeasures to enforce the MMPA are unlawful. See supra note 59 and accompanying text. Generally it would be a desideratum to have objective third-party decisions on the legality of countermeasures so that states
For some this may seem like a far too anarchic system that gives too much leeway to states like the United States to enforce what they wish and then to call it law. To some extent, this is an accurate account of the international system. Professors of trade law, in particular, have reacted strongly to the right of states to take unilateral measures inconsistent with GATT substantive rules. They are plainly concerned that 114 member states acting unilaterally will undermine the trading regime. Yet, the GATT itself serves a restraining function. In order to prove the countermeasure aims at protecting environmental obligations, those same environmental obligations must be imposed on the state’s own citizens, in a nondiscriminatory fashion. States are unlikely to do so frivolously. Nor have the complaining trade lawyers explained why, when trade has been used for forty years to enforce international law obligations inconsistent with the GATT, the fear of the GATT’s disintegration is only raised now. If the Germans embargoed products from Bulgaria to induce it to close down a nuclear reactor on the verge of melt-down, even professors of trade law would probably not cite the GATT against them. But the principles under which Germany would be permitted to do that are the same as the ones that permitted the United States to embargo Mexican-processed fish. We see here a clash of values between keeping dolphins off the endangered species list and protecting Mexico’s comparative advantage in fishing.

To some it may be that dolphins constitute the “wrong” case, while nuclear reactors are the “right” case for using countermeasures. International law, however, does not currently limit the use of remedies to only some categories of wrongs and not others. Countermeasures are limited by the doctrines of necessity and proportionality. Even with these restraints, it is admitted that countermeasures are problematic. But it is also admitted that they remain the only means of enforcing international environmental law on the international plane. The United States has the legal right to include them in existing and future legislation.

do not judge the legality for themselves. On the other hand, this panel had only the law of the GATT under consideration and not wider international law; thus, its decision has little bearing on the right of the U.S. to take a countermeasure in this case.
III. CONCLUSION

The discussion over how best to protect the international environment will be with us for some time to come. New treaty and customary rules are being developed quickly. But the means of enforcing them remain few and inadequate. Indeed, it was argued here that countermeasures are the only lawful means of enforcing international environmental law. The United States is the chief user of countermeasures and has adopted their use in a number of statutes designed to ensure that efforts to protect the international environment are effective, without damaging U.S. competitiveness. A dispute resolution panel of the GATT found, however, that their use in the Tuna case was inconsistent with the GATT. It may be that the GATT will be reformed to allow for greater environmental protection. In the meantime, however, violating the GATT for environmental protection, within the parameters of the rules governing countermeasures, is lawful under international law.