

10-1993

Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT

Betsy Baker

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Environmental Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Betsy Baker, Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT, 26 *Vanderbilt Law Review* 437 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol26/iss3/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

VANDERBILT JOURNAL OF TRANSNATIONAL LAW

VOLUME 26

OCTOBER 1993

NUMBER 3

Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT

*Betsy Baker**

ABSTRACT

In this Article, Dean Baker examines the compatibility of multilateral environmental agreements with the provisions of the General Agreement on Tariffs and Trade (GATT). The author discusses the key provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste, the Montreal Protocol on Substances that Deplete the Ozone Layer, the United Nations Framework Convention on Climate Change, and the GATT. The author then reviews the conflict between unilateral environmental protection and open and free trade under the GATT. The author concludes the collective interests represented by international environmental agreements, and the agreements themselves, should provide a refutable presumption of validity and GATT compatibility to the extent they are relied upon to justify a state's seemingly unilateral actions to protect the environment.

* Associate Dean, University of Minnesota Law School. The author thanks the Alexander von Humboldt Bundeskanzler Scholars Program and the Institute for International Law, Kiel, Germany, for their support, and Daniel A. Farber, Robert E. Hudec, Tobias Stoll, and Rüdiger Wolfrum for their comments.

TABLE OF CONTENTS

I.	INTRODUCTION	439
II.	TRADE PROVISIONS IN MULTILATERAL TREATIES CONCERNING HAZARDOUS WASTE, OZONE DEPLE- TION, AND CLIMATE CHANGE.....	442
	A. <i>The Basel Convention on the Control of Trans- boundary Movements of Hazardous Wastes and Their Disposal</i>	443
	B. <i>The Montreal Protocol on Substances that De- plete the Ozone Layer</i>	444
	C. <i>United Nations Framework Convention on Cli- mate Change</i>	445
	D. <i>Environmental Agreements as Lex Posterior</i> ...	446
III.	BASIC GATT PRINCIPLES	447
	A. <i>Elimination of Trade Barriers</i>	448
	1. Article XI(2) Permissible Quantitative Re- strictions	448
	2. Article XX General Exceptions	449
	B. <i>Nondiscrimination</i>	449
	1. States in which the Same Conditions Prevail	450
	2. Arbitrary and Unsuitable Discrimination ..	451
	3. Application of Measures	452
	4. No Disguised Restrictions on Trade	452
IV.	GATT DISPUTE SETTLEMENT PANEL REPORTS RE- LATING TO THE ENVIRONMENT OR TO INTERNA- TIONAL AGREEMENTS	453
	A. <i>United States Restrictions on Imports of Tuna</i> .	455
	1. International Cooperative Arrangements ...	456
	2. Article XX(g)	459
	B. <i>Canadian Measures Affecting Exports of Un- processed Herring and Salmon (1988)</i>	460
	C. <i>The 1989 Canada-United States Free Trade Agreement Panel Report on Canada's Landing Requirement for Pacific Coast Salmon and Her- ring</i>	461
	D. <i>Thailand's Restrictions on Importation of and Internal Taxes on Cigarettes</i>	463
	E. <i>United States Prohibition of Imports of Tuna and Tuna Products from Canada</i>	464

V. GATT COMPATIBILITY: THE BASEL CONVENTION AND MONTREAL PROTOCOL	465
VI. CONCLUSION	467

I. INTRODUCTION

Surprisingly, there is a neglected topic in the current debate as to whether the General Agreement on Tariffs and Trade¹ (GATT) helps or hinders environmental protection.² It is the role of multilateral environmental treaties, specifically those addressed to global environmental problems, to justify trade measures against charges of protectionism and GATT incompatibility.³ A better understanding of this role will help to resolve the supposed conflict between the GATT's goal of open, nonprotectionist international trade and environmental treaties that attempt to restrict or ban the trade of environmentally harmful products.

1. The General Agreement on Tariffs and Trade, Oct. 30, 1947, *reprinted in* INTERNATIONAL ORGANIZATION AND INTEGRATION (Louis B. Sohn ed., 1986), 650 ff [hereinafter GATT].

2. A sampling of articles outlining the debate includes: John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992); Thomas J. Schoenbaum, *Agora: Trade and Environment, Free International Trade and Protection of the Environment: Irreconcilable Conflict?* 86 AM. J. INT'L L. 700 (1992); Geoffrey W. Levin, *The Environment and Trade—A Multilateral Imperative*, 1 MINN. J. GLOBAL TRADE 231 (1992); David Palmeter, *Environment and Trade, Who Will Be Heard? What Law is Relevant?*, 26 J. WORLD TRADE 34 (1992); Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37-55 (1991) ("Many environmental organizations . . . believe that the GATT views ecosystem protection as a nettlesome non-tariff barrier instead of an overriding goal.") Or, as the GATT Secretariat perceives its detractors' views: "Others argue that the unrestricted trade can be harmful to the environment, especially when a country's environmental policies are weak or non-existent." Report on "Trade and the Environment," GATT Doc. 1529, Feb. 3, 1992, at 2 [hereinafter GATT Report].

3. Ted L. McDorman in *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 507 (1991), certainly raises the topic and acknowledges that certain import embargoes may contain "a conservation-environmental value that is part of an international regime." In concluding that such trade measures are largely GATT-incompatible, however, his discussion focuses primarily on United States legislation relevant to the question, while this paper examines certain international environmental agreements in more detail. James Cameron & Jonathan Robinson, *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility With the GATT*, 2 Y.B. INT'L ENVTL. L. 3 (1991), provides a useful summary of such provisions and analyzes their GATT compatibility, but deals less with the role of the agreements in justifying applied trade measures.

A 1992 Report⁴ of the GATT Secretariat addressed the growing, if not erroneous, perception that the free trade principles embodied in the GATT contradict environmental protection goals. The intent of its message was clear: to show that the GATT champions liberal world trade; that liberal world trade helps the environment; and, therefore, that GATT defends the environment.⁵ The Report identified trade barriers, especially unilateral measures, as inefficient "greening" tools that can subject environmental causes to "being exploited by [trade] protectionists."⁶ The Report argued further that multilateral cooperation is preferable to unilateral actions,⁷ and that any multilateral environmental agreement aspiring to GATT compatibility cannot discriminate between parties and nonparties.⁸

Are protectionist trade measures such as import bans by individual countries acceptable under the GATT if they are based on a multilateral agreement to protect the environment? A complete answer to this question is important because multilateral agreements, some with trade restrictions or prohibitions, are becoming firmly established as the primary

4. GATT Report, *supra* note 2.

5. The GATT Report's accompanying press release begins: "Increased world trade leads to higher per capita incomes, and with that the freedom and incentive to devote a growing proportion of national expenditure to the environment." *Id.*, press release at 1. The Report identifies supporting economic arguments made in other contexts, including: Michael Rauscher, *Foreign Trade and the Environment*, in ENVIRONMENTAL SCARCITY, at 17 (Horst Seibert ed., 1991) ("Does international trade contribute to the deterioration of environmental quality? In economic theory, the link has traditionally been weak."); Ernst-Ulrich Petersmann, in *Trade Policy, Environmental Policy and the GATT*, Aussenwirtschaft, 46 JAHRGANG 197-221 (1991) (Heft II, Zurich), argues that liberal trade does not per se harm the environment. THE GREENING OF WORLD TRADE ISSUES (Kym Anderson & Richard Blackhurst eds., 1992), often cited in the GATT Report, contains a variety of economic analyses of the relationship between trade and the environment.

6. GATT Report, *supra* note 2, at 5.

7. *Id.* at 3.

8. The restrictions on trade with nonparties contained in the Montreal Protocol on Substances that Deplete the Ozone Layer illustrate the perceived conflict of GATT goals with environmental protection. Montreal Protocol, Sept. 16, 1987, S. Treaty Doc. No. 10, 100th Cong., 1st Sess. (1987), reprinted in 26 I.L.M. 1550 (1987), amended and adjusted S. Treaty Doc. No. 4, 102d Cong., 1st Sess. (1991), reprinted in 30 I.L.M. 539 (1991) (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]. The GATT Report criticized the Montreal Protocol, considered to be among the most successful models for dealing with global environmental problems: "[T]he parties to the Montreal Protocol . . . could have structured the Protocol . . . without the necessity of including provisions for special restrictions on trade with non-parties." GATT Report, *supra* note 2, at 12.

means for dealing with global environmental problems such as ozone depletion and climate change. Although the existence of multilateral agreements has not yet played a decisive role in any GATT Panel Report, their significance bears analysis.⁹

Trade-related provisions in three multilateral environmental agreements (dealing, respectively, with hazardous waste, ozone depletion, and climate change) are briefly examined in Part II of this Article, which also describes how these recent treaties affect the earlier-concluded GATT. Part III then outlines basic GATT principles, paying particular attention to how Article XX of the GATT can be applied to environmental protection. Part IV reviews the role of international agreements generally in the settlement of trade disputes through the GATT Panel Report process and in one case arising under the Canada-United States Free Trade Agreement. Part V measures the multilateral environmental agreements against these GATT Panel results.

This Article concludes by addressing the questions of whether and how states carrying out trade obligations under multilateral environmental agreements can simultaneously comply with the GATT. This inquiry needs to be distinguished from the closely related (and more frequently discussed)¹⁰ issue of how the GATT regards efforts by individual states

9. Principle 12 of the Rio Declaration on Environment and Development acknowledges the essential relationship between open economic systems, trade policy measures, and international consensus, without referring specifically to international environmental agreements:

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes *should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade*. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

The Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Rio de Janeiro, Principle 12, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter Rio Declaration] (emphasis added).

10. See, e.g., Armin von Bogdandy, *Internationaler Handel und nationaler Umweltschutz: Eine Abgrenzung im Lichte des GATT*, 3 Eu. Z.W. 243 (1992); Charnovitz, *supra* note 2, at 52-53. See also Jan Klabbers, *Jurisprudence in International Trade Law, Article XX of GATT*, 26 J. WORLD TRADE 63, 64 (1992), an article which "is basically concerned with one single question: how has Article XX been interpreted by the various GATT panels?"; Petersmann, *supra* note 5; C. Ford Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers*, 11 Nw. J. INT'L L. & BUS. 47 (1990).

to enforce domestic environmental standards against other members of the world community.¹¹ Both inquiries are essential to coordinating global environmental protection with the equally important and integrally related goals of economic growth and open world trade.¹²

II. TRADE PROVISIONS IN MULTILATERAL TREATIES CONCERNING HAZARDOUS WASTE, OZONE DEPLETION, AND CLIMATE CHANGE

Trade restrictions have long been used to protect domestic environmental interests¹³ and have appeared in recent years in international environmental agreements.¹⁴ Two of the three international environmental treaties discussed in this section—the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal¹⁵ and the Montreal Protocol on Substances that Deplete the Ozone Layer¹⁶—contain trade provisions representing the range of trade measures available to date in the realm of multilateral agreements to protect the environment. The third treaty, the United Nations Framework Convention on Climate Change,¹⁷ attempts to draft GATT compatibility

11. This issue was highlighted by the 1991 GATT Panel Report criticizing the United States embargo of Mexican tuna fish. United States—Restrictions on Imports of Tuna, Report of the GATT Panel, Aug. 16, 1991, *reprinted in* 30 I.L.M. 1594 (1991) [hereinafter Mexican Tuna Panel Report].

12. For an analysis of trade protectionism that is provocative, albeit not directly related to environmental questions, see V. Curzon Price, *Treating Protection as a Pollution Problem or How to Prevent GATT's Retreat from Multilateralism*, in *A NEW GATT FOR THE NINETIES AND EUROPE '92* (T. Oppermann & J. Molsberger eds., 1991).

13. Charnovitz, *supra* note 2, at 39; Cameron & Robinson, *supra* note 3, at 7. The increasing overlap between domestic and international environmental policy is highlighted by one author's observation that in the United States in one recent congressional period alone, the 101st Congress (1989), at least 33 environmental bills were introduced "that would restrict international trade or affect international trade policy," although few were actually enacted. Levin, *supra* note 2, at 232.

14. The GATT Report identifies 127 multilateral environmental agreements between 1933 and 1990, of which 17 contain some form of trade provision. The GATT Group on Environmental Measures and International Trade is studying these trade provisions as they relate to GATT obligations. GATT Report, *supra* note 2, at 10.

15. Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 28 I.L.M. 649 (entered into force May 5, 1992) [hereinafter Basel Convention].

16. Montreal Protocol, *supra* note 8. See Montreal Protocol Parties: Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 537.

17. *Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change*, U.N. Framework on Climate Change, 5th Sess., second

into its basic assumptions. Whether any of these agreements are in fact GATT compatible will be discussed in Part V; their trade provisions are outlined here simply for reference.

A. *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*¹⁸

The objectives of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, as stated in its Preamble, include the protection, "by strict control, of human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes." Parties have at least two obligations related to trade. Article 4.1(a) acknowledges a party's right to prohibit the import of hazardous wastes, requiring it to notify other parties of any such decision. The Preamble also recognizes this right: "[A]ny State has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory." Article 4.5 provides that a "[p]arty shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party." The Convention provides no further details or requirements regarding the import and export bans; each state party decides how it will structure, implement, and enforce them.

International trade provisions are only one part of the Basel Convention's larger scheme to control the transboundary movement of hazardous wastes. States must also act to reduce the domestic production of wastes. Both types of actions are required to meet the goals of the Convention. Each party must ensure that "the generation of hazardous wastes and other wastes within it is reduced to a minimum"¹⁹ and that "the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes."²⁰

part, at 1, U.N. Doc. A/AC 237/18 (part II) (1992), revised by U.N. Doc. A/AC 237/18 (part II) Add. 1/Corr. 1 (1992).

18. Overviews of the Basel Convention can be found in Mary Gade, *Hazardous Substances and Waste*, 1 Y.B. INT'L ENVL. L. 155 (1990); Katharina Kummer, *The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention*, 41 INT'L & COMP. L.Q. 530 (1992).

19. Basel Convention, *supra* note 15, art. 4.2(a).

20. *Id.* art. 4.2(d).

B. *The Montreal Protocol on Substances that Deplete the Ozone Layer*

The Montreal Protocol²¹ attempts to reduce the level of ozone-depleting substances ("controlled substances")²² in the earth's atmosphere. The Preamble states that the parties to the Protocol are "[d]etermined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination." The Protocol employs a system of consumption and production limitations for parties to the Protocol²³ as well as measures limiting trade in controlled substances with nonparties.²⁴

The trade measures in question include Article 4.1, which provides that "each Party shall ban the import of controlled substances . . . from any State not party to this Protocol." Different substances are banned under different timetables. Under Article 4.2, effective January 1, 1993, parties must ban the export of controlled substances to nonparties. In the future, the import from nonparties of products containing controlled substances must be banned,²⁵ and, if feasible, products from nonparties produced with, but not containing, controlled substances might be subject to an import ban.²⁶ Parties already are obligated to discourage the export to nonparties of technology for producing and using controlled substances.²⁷

Significantly, under Article 4.8, nonparties that can prove compliance with the Protocol receive the same trade treatment as parties in compliance. Thus, the Protocol does not distinguish between parties and nonparties, but between, on the one hand, states that meet certain standards

21. The Montreal Protocol has generated substantial literature. For a small sample, see, e.g., RICHARD E. BENEDICK, *OZONE DIPLOMACY* (1991); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 274-77 (1992); John W. Kindt & Samuel P. Menefee, *The Vexing Problem of Ozone Depletion in International Environmental Law and Policy*, 24 TEX. INT'L L. J. 261 (1989); Dale S. Byrk, Note, *The Montreal Protocol and Recent Developments to Protect the Ozone Layer*, 15 HARV. ENVTL. L. REV. 275 (1991); Annette M. Capretta, Note, *The Future's So Bright, I Gotta Wear Shades: Future Impacts of the Montreal Protocol on Substances that Deplete the Ozone Layer*, 29 VA. J. INT'L L. 211 (1988).

22. Controlled substances, defined in Article 1.4 of the Protocol, include fifteen forms of chlorofluorocarbons (CFCs), three forms of halons, carbon tetrachloride, and methyl chloroform. Montreal Protocol, *supra* note 8.

23. *Id.* arts. 2-3.

24. *Id.* art. 4.

25. *Id.* art. 4.3.

26. *Id.* art. 4.4.

27. *Id.* art. 4.5.

set by the Protocol, regardless of their party status, and, on the other hand, nonparty states that do not meet those standards.

C. *United Nations Framework Convention on Climate Change*

The Climate Change Convention, integrally connected with the 1992 United Nations Rio Conference on Environment and Development, consciously attempts to weave together the Conference's central themes of development and environment, to which trade is necessarily connected.²⁸ Because it is designed as a framework for subsequent and more specific protocols and legal instruments, the Convention requires no specific trade measures of its parties. Nevertheless, a brief consideration of certain provisions is still useful, in part because they lay the groundwork for future efforts to draft GATT compatibility into measures to combat climate change.

Article 3.5 of the Climate Change Convention is taken verbatim from GATT Article XX but omits one phrase.²⁹ GATT Article XX prohibits measures that "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Article 3.5 does not contain the limiting language "where the same conditions prevail."³⁰

28. Rio Declaration, *supra* note 9. Paragraphs 8 & 10 of the Conventions's Preamble, for example, almost mirror Principles 2 & 11 of the Rio Declaration. *See infra* note 29 and accompanying text.

29. U.N. Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter Climate Convention]. Article 3.5 reads: "Measures taken to combat climate change, including unilateral ones, *should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.*" (emphasis added). This language also appears in Principle 12 of the Rio Declaration. *See* Rio Declaration, *supra* note 9.

30. GATT-specific references proposed at the drafting stage were not, however, included in the final draft. Such proposed language that was not included in the Convention appears in the proposed Article 2.6: "States shall promote an open and balanced multilateral trading system. Except on the basis of a decision by the Conference of the Parties which should be consistent with the GATT, no country or group of countries shall introduce barriers to trade on the basis of claims related to climate change." Climate Change Convention, Part I, UN/Doc. A/AC.237/18 (1992) (proposed). Proposed Article 2.7 read: "Measures taken to combat climate change should not introduce trade distortions inconsistent with the GATT or hinder the promotion of an open and multilateral trading system." *Id.* The only influence of this proposed language in the final draft is found in Article 3.5 of the Climate Convention which, in addition to the GATT-parallel language cited in the text accompanying this footnote, provides that "The Parties should cooperate to promote a supportive and open international economic system." Climate Convention, *supra* note 29.

The Convention also contains general indications that the states have an interest in economically effective solutions to the greenhouse gas problem.³¹ It recognizes the importance of "social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter,"³² as well as the need for cost-effective policies and measures "to ensure global benefits at the lowest possible cost."³³ To the extent GATT principles can be convincingly presented as supporting these goals, the policymakers who will implement the Climate Convention will have bases for integrating GATT-compatible concepts into future protocols and other documents. Integration of GATT principles into this process is important since these documents will likely serve as the testing ground and model for multilateral legal solutions to global environmental problems well into the future.

D. *Environmental Agreements as Lex Posterior*

The Basel Convention, the Montreal Protocol and, when it comes into force, the United Nations Climate Change Convention are all "successive treaties" to the GATT under Article 30 of the Vienna Convention on the Law of Treaties.³⁴ As *lex posterior*, these agreements have priority over the GATT to the extent their provisions are GATT-incompatible when all states involved are parties to both the GATT and the later agreements; thus, among such parties the GATT-inconsistent provisions

31. The European Energy Charter, executed at the Hague on December 17, 1991, goes much further in indicating its intent to be GATT-compatible. One objective is "development of trade in energy consistent with major relevant multilateral agreements such as GATT [and] its related instruments." European Energy Charter, 13 ENERGY L.J. 1, 17 (1992) (Title 1.1). Further, parties ensure that "non-discriminatory access to local and international markets for disposal of [Energy Materials and Products] can be . . . provided through the operation of market forces and through elimination of barriers to trade." *Id.* (Title 3.5); see also Rudolf Lukes, *Die Europäische Energiecharta*, 13 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 401 (1992).

32. Climate Convention, *supra* note 29, pmb1.

33. *Id.* art. 3.3.

34. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT]. The GATT entered into force on Jan. 12, 1948, the Montreal Protocol on Jan. 1, 1989, and the Basel Convention on May 5, 1992; the Climate Change Convention is not yet in force. Technically, because the VCLT came into force after the GATT, it does not apply per se to the GATT, but the relevant rules regarding successive treaties apply it as customary law. Schoenbaum, *supra* note 2, at 719 n.108. See also Gwen Beacham, *International Trade and the Environment: Implications of the General Agreement on Tariffs and Trade for the Future of Environmental Protection Efforts*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 655, 688-670 (1992).

basically constitute exceptions to the GATT.³⁵ These exceptions, as between these parties, however, are largely irrelevant to the Basel Convention or the Montreal Protocol. Their trade measures are either to be applied only against nonparties³⁶ or, in principle, pursuant to rules to which other parties have already agreed.³⁷ Further, because the GATT already has a carefully structured system for allowing exceptions to GATT requirements, in theory it should not be necessary to rely on exception by *lex posterior*. Whenever possible, use of the GATT exception mechanisms is preferable. The GATT requires trade measures arising from the treaties to be either GATT-compatible or justified to the extent they are not.

Only when GATT contracting parties are not party to the agreement in question does GATT compatibility of obligations arising under trade provisions in environmental treaties become an issue. Under the Vienna Convention on the Law of Treaties, a GATT contracting party that is not a party to the relevant treaty can assert its GATT rights against any treaty provision it believes to be GATT inconsistent.³⁸

III. BASIC GATT PRINCIPLES

The basic GATT principles of eliminating trade barriers and promoting nondiscrimination between its contracting parties lie behind the criticism of certain multilateral environmental treaties. The GATT Secretariat criticized the Montreal Protocol, the Basel Convention, and the

35. The VCLT, *supra* note 34, provides in part: "4. When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3 [*i.e.*, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty]; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations." VCLT, *supra* note 34.

Schoenbaum, *supra* note 2, at 719, provides a detailed analysis under the VCLT regarding how obligations under a treaty that comes into force subsequent to the GATT might affect GATT obligations. When two GATT contracting parties are also parties to the subsequent treaty, incompatible later provisions are "exceptions to the GATT," and when only one of the two GATT contracting parties is party to such later treaty, "GATT obligations remain." McDorman, *supra* note 3, at 508, also discusses the "exception" status of later international agreements. Cameron & Robinson, *supra* note 3, at 16, deal with determining priority between the GATT and international environmental agreements.

36. Basel Convention, *supra* note 15, art. 4.5; Montreal Protocol, *supra* note 8, arts. 4.1., 4.2, 4.5.

37. *See, e.g.*, Basel Convention, *supra* note 15, art. 4.1.

38. VCLT, *supra* note 34, art. 4(b).

Convention on International Trade in Endangered Species of Wild Fauna and Flora³⁹ for specifying "a difference in the trade measures affecting parties and nonparties."⁴⁰ This criticism is somewhat premature since the trade provisions, standing alone, cannot be challenged under the GATT; they must first be applied by an individual state. It is also not clear that this anticipated difference between parties and nonparties in fact constitutes either an illegal trade barrier or discrimination when understood in light of the relevant GATT principles and exceptions.

A. *Elimination of Trade Barriers*

A basic purpose of the GATT is to eliminate illegal trade barriers between its contracting parties. GATT Article XI(1) prohibits contracting parties from applying trade "prohibitions or restrictions other than duties, taxes or similar charges" on products imported to or exported from other contracting parties. However, trade restrictions otherwise prohibited by Article XI may be allowed under Article XI(2) or under the Article XX general exceptions to the GATT.

1. Article XI(2) Permissible Quantitative Restrictions

GATT Article XI generally disallows quantitative restrictions on exports and imports. Exceptions are permitted, *inter alia*, for temporary prohibitions or restrictions "applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party."⁴¹ At first glance, this provision appears to offer the potential protection of the export bans to nonparties contained in the Basel Convention and the Montreal Protocol. On closer examination, however, little overlap of interests exists. First, the long-term measures contem-

39. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES]. Schoenbaum considers CITES to be GATT-incompatible to the extent a CITES party applies trade measures to protect natural resources outside its jurisdiction. Schoenbaum, *supra* note 2, at 720.

40. GATT Report, *supra* note 2, at 11.

41. GATT, *supra* note 1, art. XI(2)(a). Although Article XI(2) contains three grounds for exceptions, only XI(2)(a) has potentially relevant application to the environmental measures considered in this Article. Article XI(2)(b) relates exclusively to classification, grading, or marketing of commodities. Article XI(2)(c) deals only with *restrictions* and therefore is not relevant to the measures in the Basel Convention and the Montreal Protocol, which are prohibitions rather than restrictions. Further, the application of Article XI(2)(c) is itself sharply restricted. See Schoenbaum, *supra* note 2, at n. 46.

plated under both treaties are not likely to qualify as temporary. Second, neither treaty deals with "products essential to the exporting party." It is hard to argue that hazardous waste is either essential to or in critical shortage in those countries banning its export under the Basel Convention, unless the waste product results from production of another good that itself is essential to the country. The Montreal Protocol export ban of CFCs and other controlled substances is no more likely to be excepted under GATT XI(2)(b) as involving an essential product. The ban is certainly being applied to prevent a critical shortage of an item, ozone, that is essential to the CFC exporting country. But whether ozone is a "product" is debatable since it is not produced by human beings. The GATT system is probably not yet ready to recognize that a healthy ozone layer could itself be considered a product, in effect reinvigorated to a healthier state by human efforts to reverse earlier anthropomorphic harm to the same good.

2. Article XX General Exceptions

Exceptions to GATT rules, including the prohibition against trade barriers, are also possible under Article XX for trade measures that have purposes such as protecting public health, conserving exhaustible natural resources, and acquiring products in short supply. These exceptions are subject to several conditions, many of which relate to the basic GATT principle of nondiscrimination.

B. *Nondiscrimination*

Nondiscrimination is a central element of the GATT system⁴² and is embodied in the provision of "most-favoured-nation" status⁴³ and "national treatment"⁴⁴ for all contracting parties. For the purposes of ana-

42. JOHN H. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 400 (1977).

43. GATT Article I provides in part:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . *any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.* (emphasis added).

GATT, *supra* note 1, at 651.

44. GATT Article III's "national treatment" requires that the treatment of imported products be "no less favourable 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."

lyzing trade measures arising from environmental treaties, the GATT's most pertinent nondiscrimination provisions are contained in Article XX. At least two Article XX exceptions offer potential support of environmental protection measures.⁴⁵

As will be seen in Part IV, several GATT Panel Reports have discussed what kinds of measures can qualify as exceptions under these two headings. Whether the measure in question has a purpose that fits under either of these two subsections is the first question to be answered in determining whether it qualifies for an Article XX exception. Then, the requirements of the "preamble" to Article XX may be considered. The preamble to Article XX excepts only measures that "are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or a disguised restriction on international trade" (emphasis added).

1. States in Which the Same Conditions Prevail

The first step in determining if a measure is unacceptably arbitrary or discriminatory is to consider whether "the same conditions prevail" in the states concerned. Presumably, if different conditions prevail in two states, the states may be treated differently. In the case of trade measures arising under an environmental treaty, a highly relevant comparison of conditions is whether both states are party to the treaty in question, or are at least applying its standards.⁴⁶ A state which applies the standards of an international environmental agreement creates different conditions

45. Article XX allows measures: "necessary to protect human, animal or plant life or health" [Article XX(b)]; or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption," [Article XX(g)]. Apparently, drafters considered applying Article XX(g) expressly to measures made effective in conjunction with international agreements. In fact, "the original reference to 'international agreements' in Article XX(g) was dropped in the Geneva draft." Charnovitz, *supra* note 2, at 44. Had it remained, obligations under environmental treaties would have provided further grounds for exceptions to the GATT, but its removal does not preclude application of Article XX to measures arising from international agreements if they meet all other Article XX requirements.

46. Petersmann, *supra* note 5, at 217, has asked whether the "where same conditions prevail" language should be read to "imply that trade restrictions (such as those in the 1987 Montreal Protocol discriminating against countries with lower environmental standards) might be justifiable under GATT Article XX?." On the other hand, as to the "differences in social conditions, economic and political interests between industrialized and developing countries prevent[ing] the establishment of rules uniformly applicable to all of them," see Ignaz Seidl-Hohenveldern, *The Third World and the Protection of the Environment*, in ESTUDIOS DE DERECHO INTERNACIONAL, HOMENAJE AL PROFESSOR MIAJA DE LA MUELA-I 351-53 (1979).

for protection of the environment than one which does not. In comparing conditions, presumably other factors such as population, level of development, and available natural resources would also be considered.⁴⁷

2. Arbitrary and Unjustifiable Discrimination

If the same conditions are found to prevail in two states, the trade measure itself must be examined. If the measure discriminates on justifiable and nonarbitrary bases (and serves a purpose specified in Article XX) then it is closer to being compatible with the GATT. Domestic measures enacted to carry out environmental treaty obligations can withstand charges of "arbitrary or unjustifiable discrimination." Far from being arbitrary, environmental treaties typically contain statements of purpose. These purposes may even relate directly to the trade measures that the treaty employs. For example, the Basel Convention Preamble refers specifically to a state's right to ban the entry of foreign hazardous waste. A domestic trade measure that explicitly or implicitly incorporates the purposes of the treaty on which it is based strengthens its own nonarbitrary character.

As to whether a measure is justifiable under Article XX, the broad international consensus behind the treaties is a strong justification for the trade measures that they engender. The treaties embody the well-considered, negotiated compromises of their signatories on how best to address the environmental problem in question. The depth of scientific, diplomatic, legal, and other talent and resources behind a multilateral agreement such as the Basel Convention or the Montreal Protocol gives added justification to trade measures arising from them.⁴⁸ The fact that the agreements and, in principle, the trade measures are subject to review for effectiveness⁴⁹ is further evidence that they are justifiable and nonarbitrary.

47. Whether the same conditions prevail in different states has evidently never posed enough of an issue to have been discussed in a GATT Panel Report. Charnovitz, *supra* note 2, at 47.

48. For a description of the myriad players and processes involved in negotiating an international environmental protection treaty, see, e.g., Benedick, *supra* note 21; Kummer, *supra* note 18, at 533.

49. Basel Convention, *supra* note 15, art. 15.5; Montreal Protocol, *supra* note 8, art. 11.4(a); and Climate Convention, *supra* note 29, art. 7.2(e). These agreements all require the parties to consult periodically as to the effectiveness of their respective agreements.

3. Application of Measures

Determining how a trade measure is applied is the last step in concluding whether it is permissibly discriminatory. Recall that Article XX requires that "such measures *are not applied in a manner* which would constitute a means of arbitrary or unjustifiable discrimination" (emphasis added). The Basel Convention is criticized as discriminatory on its face simply because it makes a distinction between parties and nonparties.⁵⁰ Article 4.5 provides that a "[p]arty shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party." In fact, these distinctions should be more correctly evaluated for their effect as applied, rather than automatically judged as GATT-incompatible on the surface.⁵¹ It is conceivable that the application of a trade measure under Article 4.5 could be far more discriminatory than the content of the measure itself.⁵²

4. No Disguised Restrictions on Trade

A final Preamble condition for measures allowed under Article XX, although not directly related to nondiscrimination, is that these measures cannot be "a disguised restriction on international trade." The limited remarks from GATT panels on this requirement have treated the provision quite literally. Basically, if the enacting state announces the existence of a measure, it is treated as not disguised.⁵³ Given the GATT concern that environmental measures may be exploited by trade protec-

50. GATT Report, *supra* note 2, at 11-12.

51. See Klabbers, *supra* note 10, at 93: "[I]t [is] the *application* of measures rather than the measures themselves which [need] to be examined" (emphasis added). Klabbers identifies the source of this distinction as the Panel Report in *United States—Imports of Certain Automotive Spring Assemblies*, BISD 30S/107, report adopted on May 26, 1983. *Id.*

52. Assume, for example, that States X, Y, and Z are all parties to GATT, but that only X is party to the Basel Convention. Pursuant to the Convention, X enacts an import ban of waste oils from all nonparties. If X enforces the ban against Y but not against Z, *i.e.*, allows imports from Z but not from Y, it discriminates in the application of the same trade ban. This violates not only Article XX but the Basel Convention itself, in that the Convention prohibits parties from importing controlled wastes from nonparties. A party can (indeed, under art. 4.5, must) ban imports from nonparties regardless of whether it invokes its "right" under Article 4.1(a) "to prohibit the import of hazardous wastes." Basel Convention, *supra* note 15, arts. 4.1 & 4.5. Article 4.1 makes no distinction between parties and nonparties; it simply requires a party to notify other parties that it has decided to exercise that right.

53. The disguised restriction limit is "leniently interpreted as transparency" in Panel Reports. Charnovitz, *supra* note 2, at 48.

tionists, relevant tests are needed to reveal disguised restrictions.⁵⁴ A determination of the "genuine conservation reasons" behind a measure may help to distinguish disguised trade restrictions from measures that should really be excepted under Article XX.⁵⁵

IV. GATT DISPUTE SETTLEMENT PANEL REPORTS RELATING TO THE ENVIRONMENT OR TO INTERNATIONAL AGREEMENTS

The trade provisions contained in the Montreal Protocol and the Basel Convention have not yet been challenged in a GATT dispute settlement procedure, perhaps because these agreements only recently have entered into force (1989 and 1992 respectively). This procedure is used when one or more contracting parties decide to test whether their GATT benefits are being "nullified or impaired"⁵⁶ by the acts of another contracting party. When consultation, as mandated by Article XXII, with the alleged offender does not resolve the disagreement, the contracting parties may establish a panel to consider the complaint, under rules developed pursuant to Article XXIII(2).

The following Part of this Article examines the Mexican Tuna Panel Report in detail and summarizes relevant points from other GATT Panel Reports⁵⁷ and a Canada-United States Free Trade Agreement

54. Schoenbaum, *supra* note 2, at 716, draws on a Court of Justice of the European Community Case, Case 302/86, *Commission v. Denmark*, 1988 E.C.R. 4607, to suggest that trade measures which are not proportional to their purposes may be disguised trade restrictions. The court upheld a Danish ban on nonreturnable containers, but found quotas on nonapproved containers to be disproportional to the law's purpose. *Id.*

55. See *infra* part IV.C., for a more complete discussion of the dispute settlement process which gave rise to the "genuine conservation reasons" language under the Canada-United States Free Trade Agreement.

56. GATT, *supra* note 1, art. XXIII. For a history of the GATT dispute settlement procedure, see generally ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 52 (2d ed. 1990).

57. Mexican Tuna Panel Report, *supra* note 11. The others are: Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes Panel, GATT Doc. DS10/R (Nov. 7, 1990), GATT, BISD 37th Supp. 200 [hereinafter Thai Cigarette Panel Report]; Canada-Measures Affecting Exports of Unprocessed Herring and Salmon Panel, GATT Doc. L/6268 (Mar. 22, 1988) [hereinafter GATT Herring/Salmon Panel Report], BISD 35th Supp. 98; and United States-Prohibition of Tuna and Tuna Products from Canada, GATT Doc. L/5198 (Feb. 22, 1982), BISD 29th Supp. 91 [hereinafter Canadian Tuna Panel Report]. A fifth GATT Panel Report perceived by many as relevant to the environment—the United States Taxes on Petroleum and Certain Imported Substances Report, GATT Doc. L/6175 (June 17, 1987) BISD 34th Supp. 136—makes no specific references to international agreements and, accordingly, is not discussed in this paper.

Panel Report,⁵⁸ which relate, at least in part, to environmental issues. These Reports often are discussed in the context of investigating when a domestic measure to protect the environment can be excepted from the GATT. They are examined here, however, to address a more specific inquiry, namely: what role multilateral treaties addressed to global environmental problems should play in generally justifying trade measures carried out pursuant to those treaties.⁵⁹

A preliminary answer is that such agreements can "GATT-justify" the trade measures to which they give rise because the measures cannot be classified properly with typical unilateral measures.⁶⁰ The GATT, to be consistent with its professed interest in multilateral solutions to environmental problems,⁶¹ must allow the strength of the international consensus behind the respective agreements⁶² to speak for GATT compatibility of their ensuing trade measures, provided that the measures otherwise meet GATT requirements. At this point, the trade measures allowed or required by the treaties can only be implemented through individual states. This does not mean, however, that they are purely domestic measures. On the other hand, a state should not be able to hide behind the shield of a treaty to justify any trade measure. Otherwise, such a measure would be a disguised restriction.

58. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report of the Panel, Oct. 16, 1989, panel established under Ch. 18 of the Free Trade Agreement between Canada and the United States [hereinafter FTA Landing Requirement Report]. This Report relied on provisions of the FTA that parallel the GATT, having arisen following the GATT Herring/Salmon Panel Report, *supra* note 57.

59. This Article discusses only those panel reports that have an environmental component; other reports may exist that speak to how the GATT views the relationship between international agreements and domestic measures based on those agreements.

60. ELISABETH ZOLLER, *ENFORCING INTERNATIONAL LAW THROUGH US LEGISLATION* (1985), however, is concerned with their unilateral nature. *Id.* at 87. Charnovitz, *supra* note 2, distinguishes between "environmental trade restrictions pursuant to an international agreement . . . [and] restrictions conceived and carried out unilaterally," although he concludes that the former enjoy no "greater GATT blessing." Charnovitz, *supra* note 2, at 54. He believes the only bases for asserting special status for the former would be by the Contracting Parties granting a waiver under GATT Article XXV or recognizing the precedence of a widely accepted environmental treaty. *Id.*

61. See GATT Report, *supra* note 2, at 3.

62. See *supra* text preceding note 50.

A. *United States Restrictions on Imports of Tuna*⁶³

The Mexican Tuna Panel Report resulted from a proceeding requested by Mexico following a 1990 United States embargo of Mexican yellowfin tuna under the United States Marine Mammal Protection Act (the MMPA).⁶⁴ The United States claimed to be acting to protect dolphins harmed by the fishing methods employed by Mexican commercial fishing boats in harvesting yellowfin tuna.⁶⁵ The MMPA requires a ban on the importation of fish or products from fish caught with "commercial fishing technology" that results in the incidental killing or serious injury to ocean mammals in excess of United States standards.⁶⁶ The MMPA specifically bans the import of yellowfin tuna unless the harvesting government shows that its standards compare to United States standards.⁶⁷

The Panel Report concluded, *inter alia*, that this United States application of the MMPA and the relevant statutory provisions of the MMPA themselves violated the GATT Article XI(1) prohibition on trade restrictions. The provisions and their application also could not be excepted under Article XX(b) or XX(g).⁶⁸

The United States had argued that the embargoes were necessary under Article XX(b) to protect dolphins outside United States jurisdiction because no alternative means of dolphin protection were reasonably available. Mexico, on the other hand, pointed out that alternative, GATT-consistent means were available, "namely international co-operation between the countries concerned."⁶⁹ The Panel concluded that, prior to imposing the embargo, the United States had not exhausted other options to protect the dolphins, especially "the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas."⁷⁰

63. Mexican Tuna Panel Report, *supra* note 11.

64. Codified in part at 16 U.S.C. § 1361 (1988).

65. Mexican Tuna Panel Report, *supra* note 11, para. 3.33.

66. 16 U.S.C. § 101 (a)(2).

67. 16 U.S.C. § 101(a)(2)(b).

68. The Report, which was submitted to the Parties on August 16, 1991, is not likely to be voted on by the GATT Council. Mexico and the United States have since settled with a compromise agreement on June 15, 1992. Schoenbaum, *supra* note 2, n. 13. See David J. Ross, *Making GATT Dolphin-Safe: Trade and the Environment*, 2 DUKE J. COMP. & INT'L L. 345, 365 (1992) (for earlier indications that Mexico had decided not to pursue acceptance of the Report).

69. Mexican Tuna Panel Report, *supra* note 11, para. 5.24.

70. *Id.* para. 5.28.

1. International Cooperative Arrangements

Perhaps feeling constrained from commenting on a situation that was not before it (*i.e.*, since no international dolphin agreement existed), the Panel passed up an opportunity to state specifically that such an international cooperative arrangement in fact would provide the kind of justification necessary for a measure to be excepted under Article XX(b). The Panel commented only on the invalidity of the domestic law as a basis for the ban⁷¹ and failed to discuss satisfactorily whether there existed an international justification for the measures. This failure is significant since both the United States and Mexico referenced treaties in the attempt to legitimate their respective positions. The United States unsuccessfully referred to the CITES in an attempt to show that treaties can require parties "to prohibit the importation of products in order to protect endangered species found only outside its jurisdiction."⁷² But, as Mexico pointed out, the dolphins in question were not listed by the CITES as endangered.⁷³

At this point the Panel should have clarified what the result would have been had the dolphins in fact been so endangered. It should have led to acceptance of the trade ban as an internationally supported measure. A measure enacted specifically pursuant to an obligation in a multilateral agreement to protect a species or resource should be considered to represent more than a mere domestic interest, even though the measure is enacted—as it must be—by means of a domestic law. If that domestic measure takes its inspiration from a "cooperative agreement," a certain level of validity based on the cooperative purpose of the agreement should be presumed, even if only one state is acting under the relevant treaty at any given time. This presumption does not mean that the measure is automatically exempt from meeting all of the other Article XX requirements, but simply that it strengthens the claims for exemption.

This notion of cooperative purpose holds true in the face of the Panel's critique of unilateral actions by one state to enforce its domestic environmental standards outside its jurisdiction. The Panel rejected the United States claim that the import bans and the MMPA provisions on which they were based "served solely the purpose of protecting dolphin life and health and were necessary [under XX(b)] . . . in respect of the

71. *Id.* para. 5.29.

72. *Id.* para. 3.36. The United States also referred to the Law of the Sea Convention (to which it is not a party) and the Inter-American Tropical Tuna Commission as proof that "the need to conserve dolphin [sic] was recognized internationally." *Id.* para. 2.40.

73. *Id.* para. 3.44.

protection of dolphin life and health outside its jurisdiction."⁷⁴ The Panel apparently understood the broad interpretation proposed by the United States to be an interest in enforcing domestic environmental standards in areas outside of its jurisdiction, a practice which the Panel clearly felt violates GATT rules. However, under the idea that when a state acts under specific multilateral treaty obligations (which was not the case here), cooperative purpose could help to transform a unilateral action into one that is informed by and even, to the extent the treaty sets standards, enforces international standards.

The GATT Panel understood the essential question to be whether a GATT party may act under Article XX(b) to protect "human, animal or plant life or health" outside its jurisdiction or only within its jurisdiction. The Panel answered this question narrowly, unfortunately relying on the GATT drafting history, which it viewed as indicating that Article XX(b) was intended to protect health only "within the jurisdiction of the importing country."⁷⁵ One problem with the Panel's argument is that the awareness of transboundary global environmental problems, basically ignored during the drafting process almost fifty years ago, must be taken into account in considering how natural resources are affected today. The Panel, in spite of having itself recognized the sometimes tenuous nature of borders by acknowledging that "dolphins roam the waters of many states and the high seas,"⁷⁶ failed to give any more credence to the

74. *Id.* para. 5.24. The Panel commented:

[I]f the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a *multilateral* framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

Id. para. 5.27 (emphasis added).

75. *Id.* para. 5.26. McDorman believes that Article XX exceptions should be limited to protection of environmental goods within the acting state's jurisdiction, McDorman, *supra* note 3, at 520, including among his supporting sources a quotation from the GATT authority John H. Jackson, who acknowledges that the Article XX(b) language "is not *explicitly* restricted to health and safety of the *importing* country" but then concludes that "it can be argued that that is what Article XX, means." *Id.* (emphasis added) (quoting JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 209 (1989)). McDorman does not, however, make clear that in the same paragraph Jackson also acknowledges that "[i]t might be possible to argue the contrary." JACKSON, *supra*. Such a "contrary" argument that Article XX can apply to environmental protection outside the acting state's jurisdiction is strengthened when that state's measures are backed by an international treaty obligation.

76. Mexican Tuna Panel Report, *supra* note 11, para. 5.28.

transboundary realities of many contemporary environmental problems.

The question that in fact needs to be asked is whether, and to what extent, a GATT party can protect human, animal, or plant life or health outside its territorial jurisdiction if the protecting actions have their bases in an international agreement to which the acting state is party. Because the text of Article XX(b) provides no specific language on this point, a decision must be based on a weighing of national and international interests in protecting the environmental good in question. Legitimately grounded protective actions should be GATT-acceptable whether they are based on national laws or on international laws that have become a part of the acting state's national legal system.

More precisely formulated, the question is why the national protection of legal objects within a state's jurisdiction should be considered as a GATT-compatible, nonprotectionist trade restriction, when the national protection of the same object is unacceptable under the GATT the moment it swims, flows, or otherwise moves outside the acting state's jurisdiction. Why, for example, can the United States protect a gray whale within its Exclusive Economic Zone⁷⁷ but not when it is twenty meters outside of that zone?

The decisive factor in national actions to protect the environment is not whether the protected good lies inside or outside the national jurisdiction, but whether a legal order to protect the environmental good exists that is agreed upon by the parties involved. If this legal order exists, then actions based upon it are no longer arbitrary or at least are no longer automatically presumed to be so. A measure supported by the existence of this legal order is still subject to other GATT requirements. The important point, however, is that the international justification for the measure can provide an equally or even perhaps more valid basis than the national interests that have to date been the focus of GATT panel reports.

77. The United States may protect the gray whale as a species threatened with extinction under Appendix I to the CITES, *supra* note 41, as implemented in the United States by the Marine Mammal Protection Act, 16 U.S.C. § 1361 (1988) or the Endangered Species Act, 16 U.S.C. § 1531 (1988). This legislation provides for a direct ban on imports of the endangered species in question (*e.g.*, the gray whale), as opposed to banning the import of one species or product (*e.g.*, tuna) to protect another species (*e.g.*, dolphin). As McDorman points out, the treatment of endangered whales is "governed by CITES, not the International Whaling Convention." McDorman, *supra* note 3, at 509.

2. Article XX(g)

The Mexican Tuna Panel's discussion of whether the United States embargo was justified under Article XX(g) is especially pertinent to the GATT's interaction with environmental treaties. Article XX(g) exempts measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on *domestic* production or consumption" (emphasis added).

The United States measures evidently failed to qualify for exemption under Article XX(g) on at least two grounds. First, the exhaustible resource protected by the United States measures was dolphin, not tuna, and the relevant law banned the import of tuna. Importing dolphin, the exhaustible resource arguably protected by the MMPA, was not banned. This point was of concern to several contracting parties that submitted comments⁷⁸ as well as to the Panel, which unfortunately did not clearly enunciate the reasons for its concern.

The second Article XX(g) test which the United States tuna ban failed to meet deals with the extraterritorial reach of the embargo. Article XX(g) requires that measures relating to the conservation of exhaustible natural resources be taken "in conjunction with restrictions on domestic production or consumption." Here, the Panel refers to the 1988 GATT Herring-Salmon Panel Report,⁷⁹ which found that "a measure could only be considered to have been taken 'in conjunction with' " production restrictions "if it was *primarily aimed at* rendering effective these restrictions."⁸⁰ This conclusion standing alone would not qualify a trade measure enacted by a state pursuant to an environmental treaty for exemption under Article XX(g), to the extent the measure had effects beyond the state's jurisdiction. But the Panel later noted that adoption of its report would not affect the right of contracting parties "acting jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules of the General Agreement."⁸¹ Does this mean that joint action under an environmental

78. Mexican Tuna Panel Report, *supra* note 11, paras. 4.8 (Canada), 4.14 (EEC), 4.19 (Japan), 4.21 (Norway), 5.15, 5.30 (Panel).

79. GATT Herring/Salmon Panel Report, *supra* note 57.

80. *Id.* para. 4.6 (emphasis added). The Mexican Tuna Panel Report states:

A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption *within their jurisdiction*.

Id. para. 5.31 (emphasis added).

81. Mexican Tuna Panel Report, *supra* note 11, para. 6.4. Australia, submitting

treaty would help to justify any conflict with the present GATT rules? The Panel only hinted at this but refused to consider that perhaps a country can effectively control exhaustible natural resources outside its own jurisdiction. That is, in fact, what states do by engaging in agreements like the Basel Hazardous Waste Convention and the Montreal Ozone Protocol.⁸² In the Panel's insistence that this control can only be GATT-compatible if it is done cooperatively with other nations, perhaps it unwittingly acknowledged that the very status of being party to a multilateral environmental agreement effectively expands the jurisdiction of all states party to the agreement beyond traditional conceptions of territorial jurisdiction.

B. *Canadian Measures Affecting Exports of Unprocessed Herring and Salmon (1988)*⁸³

In the Canadian Unprocessed Herring and Salmon dispute settlement procedure, Canada relied directly on its international obligations to protect species as a justification for restricting the export of unprocessed herring, sockeye salmon, and pink salmon. Canada argued that the restrictions "constituted an integral part of a complex and longstanding system of fishery resource management" that had "evolved in response to the Federal Government's domestic *and international* responsibility for the conservation, allocation, management and development of the sea coast fisheries of Canada."⁸⁴

The Panel recognized that national and bilateral stock conservation and management efforts had been "embodied, *inter alia*, into various

written comments as an interested Contracting Party in the Mexican Tuna Panel process, also recognized the importance of international frameworks for justifying trade measures with extraterritorial application, making a useful distinction as to a GATT Panel's competencies: a Panel "could not resolve conflicts" between a party's obligations under GATT and other conservation instruments. "Controls on trade flows necessary to give effect to international conventions, for instance on narcotics, should be considered as incidental to GATT obligations." However, "where a contracting party takes a measure with extraterritorial application outside of any international framework of cooperation," a Panel *could* appropriately analyze the measure for compatibility with GATT obligations. Mexican Tuna Panel Report, *supra* note 11, para. 4.1.

82. Regarding this aspect of the Ozone Protocol, see Betsy Baker, *Eliciting Non-Party Compliance with Multilateral Environmental Treaties: U.S. Legislation and the Jurisdictional Bases for Compliance Incentives in the Montreal Ozone Protocol*, 35 GER. Y.B. INT'L L. 333 (1993).

83. GATT Herring/Salmon Panel Report, *supra* note 57.

84. *Id.* para. 3.5 (emphasis added). Canada made further reference to "international agreements" in general, as set out in paragraphs 3.27 and 3.37 of the Report.

bilateral and multilateral treaties and conventions relating to fisheries."⁸⁵ Yet, the Panel's only decisive statement on international agreements basically excludes them from the Panel's scope of review.⁸⁶ The Panel rejected Canada's export restrictions because they were "contrary to Article XI:1 and were justified neither by Article XI:2(b) nor by Article XX(g)."⁸⁷ Canada subsequently removed the export restrictions but replaced them with landing requirements, which then became the subject of the Canada-United States Free Trade Agreement Landing Requirement Panel Report.⁸⁸

C. *The 1989 Canada-United States Free Trade Agreement Panel Report on Canada's Landing Requirement for Pacific Coast Salmon and Herring*⁸⁹

The Panel in this case, established under the Canada-United States Free Trade Agreement (FTA) rather than under the GATT,⁹⁰ offers perhaps the most helpful analysis of the relationship between GATT rules and measures arising under international agreements to protect the environment. The FTA incorporates many provisions of the GATT *verbatim*, including Article XI:1⁹¹ and Article XX.⁹²

As mentioned, the Landing Requirement Panel grew out of the 1988 GATT Panel Decision on Unprocessed Salmon and Herring, in which

85. *Id.* para. 2.5.

86. The Report stated:

Canada referred in its submissions to international agreements on fisheries and the Convention on the Law of the Sea. The Panel considered that its mandate was limited to the examination of Canada's measures in the light of the relevant provisions of the General Agreement. This report therefore has no bearing on questions of fisheries jurisdiction.

Id. para. 5.3.

87. *Id.* para. 5.1.

88. Without affecting the Panel's decision, the United States also mentioned international agreements, but only to point out that "other international agreements did not modify obligations under the General Agreement," GATT Herring/Salmon Report, *supra* note 57, para. 3.40, and that presumably the international agreements on which Canada was relying, *e.g.*, the Inter American Pacific Tuna Convention, should not modify GATT obligations either. The argument was too general to allow a determination of whether the *lex posterior* rule applied to whichever international agreements the United States may have had in mind.

89. FTA Landing Requirement Report, *supra* note 58.

90. The FTA allows for dispute settlement under either the GATT or the FTA. The parties here chose the latter option.

91. FTA Landing Requirement Report, *supra* note 58, art. 407.

92. *Id.* art. 1201.

the Panel found no justification under Article XX(g) for Canada's export restrictions. Canada subsequently enacted new landing requirements calling for "off landing" of the salmon and herring at a shore station where biological sampling, catch reports, and other "conservation" data could be gathered.⁹³ Only then could the shipments continue to their next destination, be it processing or unprocessed exportation to the United States.

Canada based its data-collecting activities in part on the Pacific Salmon Convention of 1985, which requires the parties, *inter alia*, to prevent overfishing and to cooperate in management and research.⁹⁴ Canada referred to no specific international agreement regarding herring, but claimed a general right derived from its status as a coastal state under the 1982 Law of the Sea Convention to conserve and manage the herring and salmon resources. It argued that "the right to require the landing of the catch is linked to conservation under that Convention."⁹⁵

The United States complained of the extra time, product deterioration, and costs imposed by the landing requirement. It argued that the landing requirement served no useful conservation purpose and therefore was not "primarily aimed at" conserving the herring and salmon stocks,⁹⁶ noting that "Canada's data-collection justification had been rejected" by the 1988 GATT Panel.

The FTA Panel readily concluded that the landing requirement was a restriction within the meaning of GATT Article XI(1) on the "sale for export" of herring and salmon. In deciding if the measure was excepted from GATT rules, the Panel's most detailed inquiry was whether the landing requirement was "relating to the conservation of" the natural resource in question. The Panel observed that it "was not the intention of Article XX(g) to allow the trade interests of one state to override the legitimate environmental concerns of another."⁹⁷ Then the Panel determined whether a measure is "relating to the conservation of" the natural resource in question by asking if "there is a *genuine conservation reason for choosing the actual measure in question* as opposed to other measures that might accomplish the same objective." Although no panel has made the connection, examining the conservation reasons behind a measure is one possible test of whether it is a disguised trade restriction under Article XX's Preamble.

93. FTA Landing Requirement Report, *supra* note 58.

94. *Id.* para. 4.04.

95. *Id.* para. 5.04.

96. *Id.* para. 5.03.

97. *Id.* para. 7.05.

The Panel concluded that ultimately the test is that "if the measure would have been adopted for conservation reasons alone," Article XX(g) allows a government to use it.⁹⁸ If an international environmental agreement that has conservation or environmental protection as its very purpose is the reason a domestic measure is enacted, that would seem to allow its use under Article XX(g). Indeed, the existence of an international environmental treaty should lend support to the position that the measure was adopted for conservation reasons alone.

The Panel finally concluded that the landing requirement could have been structured more selectively, and that one hundred percent of the catch did not need to be landed to obtain sufficient data for conservation management purposes.⁹⁹ Conservation management, however, is a substantially different goal, which requires less comprehensive coverage of the resource in question" than the goal of prohibiting as much transboundary movement of hazardous waste as possible, or reducing production and consumption of ozone-depleting substances as far as technically feasible. This suggests that looking to the purposes of the international environmental agreement in question may be relevant. The Panel, curiously, showed little interest in analyzing the purposes of the Pacific Salmon Treaty and paid only passing attention to the purposes of the Canadian landing legislation.¹⁰⁰

D. *Thailand's Restrictions on Importation of and Internal Taxes on Cigarettes*¹⁰¹

In the Thai Cigarette Panel Report, Thailand relied on purely domestic grounds for its import ban on United States cigarettes. Nonetheless, the Panel's discussion in the Report of what is necessary under Article XX(d) relates to the validity of international environmental treaties as justification for otherwise GATT-incompatible trade measures. The Panel points out that Article XX(d) provides an exemption for measures which are "necessary to secure compliance with laws or regulations which are not inconsistent" with GATT provisions.¹⁰² Although not an-

98. *Id.* para. 7.07.

99. *Id.* para. 7.38.

100. *Id.* para. 4.04.

101. Thai Cigarette Panel Report, *supra* note 57.

102. *Id.* at 223. The Thai Cigarette Panel cited an earlier panel report to elaborate on the meaning of "necessary":

A contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other

swered by any panel report, the question arises, if a country is bound by international agreement obligations to impose trade restrictions, is an "alternative measure" even available? The answer arguably depends on how much leeway the international agreement gives to the party in effecting trade provisions.

E. *United States Prohibition of Imports of Tuna and Tuna Products from Canada*¹⁰³

In the 1982 Canadian Tuna Panel Report, the United States relied extensively on its obligations under international fisheries treaties¹⁰⁴ to attempt to justify its ban of Canadian tuna imports under the United States Fishery Conservation and Management Act of 1976 (the FCMA). It pointed out to the Panel that the purpose of the Act was, *inter alia*, "to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of such agreements as necessary."¹⁰⁵ The Panel simply noted the language in its "Findings and Conclusions," making no comment as to whether an international agreement can justify import bans, and noting further that FCMA Section 205 "contained provisions designed to discourage other countries from seeking to manage tuna unilaterally."¹⁰⁶ Canada pointed out that the IATTC never specified a management regime (implying that the United States was simply choosing its own methods of complying with the IATTC) and indeed concluded that "the United States prohibition of Canadian tuna imports contributed in [no] way to improved conservation."¹⁰⁷ This is a notably different situation from when a convention obligates parties to take more specific forms of action, such as when the Basel Convention requires parties, *inter alia*, to ensure reduction to a minimum of hazardous waste generation,¹⁰⁸ not to

GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

Id. at 74 (emphasis in original) *citing* United States—Section 337 of the Tariff Act of 1930, GATT Doc. L/6439, para. 5.26 (adopted on Nov. 7, 1989).

103. Canadian Tuna Panel Report, *supra* note 57.

104. *E.g.*, Inter-American Tropical Tuna Commission (IATTC) and the International Convention for the Conservation of Atlantic Tunas (ICCAT). *Id.* para. 3.10.

105. *Id.* para. 4.5.

106. *Id.* para. 4.5.

107. *Id.* para. 3.15.

108. Basel Convention, *supra* note 15, art. 4.2(a).

export hazardous waste to areas which have banned its import,¹⁰⁹ and not to permit its export to or import from a nonparty,¹¹⁰ notwithstanding that the form of the export ban is not specified in the Convention.¹¹¹

In the end, the Panel decided that the United States ban of Canadian tuna was not consistent with GATT Article XI, in part because the Panel had received "no evidence that domestic consumption of tuna and tuna products had been restricted in the United States."¹¹²

V. GATT COMPATIBILITY: THE BASEL CONVENTION AND MONTREAL PROTOCOL

The Mexican Tuna Report indicated that, in addition to domestic legislation, the United States relied more on an amorphous sense of international obligation to protect the environment, rather than on any specific treaty obligation in applying domestic measures to protect dolphins by banning imports of yellowfin tuna. In the future, should a contracting party be faced with having to defend trade measures based on the Montreal Protocol or the Basel Convention, it must articulate more specifically the international obligations on which it relies.¹¹³ Only a specific reliance on these treaties will allow them to play a larger role in the panel dispute settlement process or in the GATT system generally.

Measured against the requirements of the Preamble to GATT Article XX, parties' obligations in the Basel Convention and Montreal Protocol lay the groundwork for trade measures that can be GATT-compatible. The treaties' distinction between parties and nonparties does not merit the criticism of GATT incompatibility because the very condition of being a party or nonparty to either treaty creates an acceptable basis for determining that the same conditions do not prevail in two states. Also, the purpose and multilateral consensus behind the treaties protect their trade measures from charges of being arbitrary or unjustifiable. How

109. *Id.* art. 4.2(e).

110. *Id.* art. 4.5.

111. *See supra* part II.A., and the discussion regarding Article 4.5 of the Basel Convention.

112. Canadian Tuna Panel Report, *supra* note 57, para. 4.11. Recall that to be excepted under Article XX(g) from GATT rules, measures relating to the conservation of exhaustible natural resources must be "made effective in conjunction with restrictions on domestic production or consumption."

113. Of course states are interested in the appearance, if not the reality, of maintaining the independence of their own national interests from any other single or collective authority. In the context of environmental protection, Schoenbaum, *supra* note 2, at 717, discusses the implications of states with relatively strong standards agreeing to a lower collective standard.

they are applied will be more determinative of their arbitrariness, a judgment that cannot be made until measures are enforced.

The Montreal Protocol, like the Basel Convention, distinguishes on its face between parties and nonparties. Under Article 4 of the Protocol, controlled substances may not be exported from or imported to nonparties. Nevertheless, on closer examination, the distinction made by the Montreal Protocol for purposes of applying trade bans is not between parties and nonparties, but between those states that comply with the Protocol standards and those that do not.¹¹⁴ Similarly, under Article X of CITES, parties may trade with nonparties that provide documentation which "substantially conforms" to convention requirements. Under the reasoning that parties applying the same treaty thus constitute states in which the same conditions prevail, the Montreal Protocol distinction between compliers and noncompliers is not unacceptable discrimination under GATT Article XX. However, because the Basel Convention has no similar option for nonparties to receive the same treatment as parties, it is more open to charges of discrimination under the Preamble to GATT Article XX.

Analyzing the Basel and Montreal agreements for possible exemptions under Article XX(b) or XX(g), according to GATT panel report decisions, trade measures must be primarily aimed at rendering effective restrictions on domestic production or consumption within the jurisdiction of the acting state. The import and export ban of wastes against nonparties in Article 4.5 of the Basel Convention certainly meets this test in that it is primarily aimed at rendering effective the Article 4.2 restrictions on the generation of hazardous wastes. Banning imports and exports helps to ensure minimized transboundary movement of the wastes. With regard to the Article 4.2(a) restriction on the domestic generation of wastes, standing alone, the export ban is clearly aimed at rendering that restriction effective. However, a determination of whether the import ban is "primarily aimed at" rendering domestic generation restrictions effective would have to consider whether the import ban would instead encourage domestic production. With a product such as hazardous waste, it is conceivable that if a company within one state has particularly advanced technology for hazardous waste disposal, it may want to encourage generation domestically to make up for the loss of business from disposing of imported waste.

The import and export bans in Article 4 of the Montreal Protocol are clearly aimed at rendering domestic consumption and production of con-

114. See discussion of Montreal Protocol, *supra* note 8.

trolled substances effective. Without the bans, the detailed obligations in Article 2 for each party to reduce and eventually eliminate its production and consumption of controlled substances would be largely ineffective. The criticism still stands that measures other than trade bans could have reached this same result.¹¹⁵ Any analysis using the "necessity" test of whether a state "could reasonably be expected to employ" other measures should consider that a state should reasonably choose the quickest, most effective method to diminish global dangers such as ozone depletion.¹¹⁶ Environmental economists must determine if trade bans are the most effective means to that end.

VI. CONCLUSION

The collective interest behind multilateral environmental treaties provides strong justification for GATT compatibility of trade measures arising under those treaties. Even the GATT Panel that criticized unilateral United States trade bans on Mexican tuna acknowledged the importance of cooperative agreements for dealing with natural resources (and by implication, damages thereto) that, in effect, know no national boundaries. This concept should be expanded in GATT decisionmaking so that a trade measure exercised by an individual state in reliance on or under obligation to an international environmental agreement is no longer presumed to be *prima facie* protectionist but is given a presumption of GATT compatibility. This presumption should not, however, exempt the measure from having to meet other appropriate GATT requirements. To encourage the contracting parties' acceptance of such a presumption, GATT compatibility of trade provisions in international agreements should be taken seriously by lawmakers even when there is no possibility of a legal challenge from a GATT contracting party not bound to such agreements. Attention should focus not so much on how the party challenged can rely on environmental treaty obligations to provide exceptions to its GATT responsibilities. Rather, a more important task is to construct ways for those treaty obligations and GATT obligations to support each other and strengthen trade relations so as to improve the environment. This will require honest and regular expert evaluation of the effectiveness of both the environmental treaty provisions and the environmental aspects of the GATT and resulting revisions¹¹⁷ to

115. See *supra* note 8.

116. Regarding the necessity test generally, see *supra* note 102 and accompanying text.

117. Regarding amendment of the GATT, see Beacham, *supra* note 34, at 679; Cameron & Robinson, *supra* note 3, at 18; Eliza Patterson, *GATT and the Environ-*

better harmonize the two systems when necessary. The review mechanisms already provided in the Basel, Montreal, and Climate Change agreements¹¹⁸ should lead to revisions of the trade mechanisms themselves if they are found to be counterproductive to their goals. The GATT is also in the process of evaluating its own environmental effectiveness.¹¹⁹

All of these processes should be informed by the goals and the consensus of international opinion underlying both the GATT and environmental treaties, which are not, after all, diametrically opposed. Both can work toward protecting the environment in a world sufficiently free of trade barriers to allow economies at all levels to support a healthier planet.

ment: Rules Changes to Minimize Adverse Trade and Environmental Effects, 26 J. WORLD TRADE 99, 107 (1992); and Ross, *supra* note 68, at 358.

118. See *supra* note 49 and accompanying text.

119. Witness the activation of the Environmental Working Group (*supra* note 14) and the proposed Draft on Domestically Protected Goods, GATT Doc. L/6769, Code #90-1760; GATT Doc. SR.47/2, which would obligate Contracting Parties not to export goods they ban domestically, with possible specific acknowledgment of rights under the Basel Convention and Montreal Protocol. See Patterson, *supra* note 117, at 103 n. 18.