Multilateral Environmental Agreements and the GATT/WTO Regime

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(Revised Version, April 1998)
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I. EXECUTIVE SUMMARY

The relationship between the trade measures of the Multilateral Environmental Agreements (MEAs) and the GATT/WTO regime has been at the center of discussions concerning trade and the environment for some time. While MEAs have used trade measures to accomplish their environmental objectives for several decades, the increase in scientific and public knowledge of global environmental problems has spurred the rapid growth of recent MEAs containing trade measures.

Some MEAs employ trade measures to encourage cooperation among nations in the attainment of their environmental objectives. To accomplish these goals, trade measures in MEAs use a variety of "positive" incentives that encourage participation in the MEA, discourage free-riders, and are specifically directed at a particular product associated with the environmental harm being addressed.

The use of trade measures in MEAs is widely recognized to be in potential conflict with the GATT/WTO regime. In particular, trade measures that are specifically directed at non-parties of MEAs may be in violation of GATT/WTO Most Favoured Nation (MFN), national treatment, and the prohibition on quantitative restriction obligations. The applicability of Article XX(b) and XX(g) to the MEA trade measures is uncertain given the inconsistent interpretations of such Article XX terms as "arbitrary and unjustified", "disguised restriction on international trade", "necessary", "relating to the conservation of exhaustible natural resources", and the extrajurisdictional relevance of Articles XX(b) and XX(g).

The immediate clarification of these issues is essential to a consistent, rule-based, functioning relationship between trade measures of the MEAs and the GATT/WTO regime. Multilateral trade measures negotiated in MEAs may encourage transparency and nondiscrimination, and can simultaneously discourage alternative unilateral measures that may lead to further trade tensions. However, there is no guarantee that all MEAs achieve these objectives and some have argued that the Basel Convention is particularly weak in these areas. Nevertheless, in general, the negotiation of MEAs and their trade measures in international fora make it increasingly unlikely that they serve protectionist ends.

In order to clarify the relationship between the trade measures of the MEAs and the GATT/WTO regime and to ensure that future MEA's will be as consistent as possible with nondiscriminatory trade objectives as well as the environmental goals they seek, this paper describes several options currently under consideration, including a proposal for the adoption of a criteria approach through a GATT/WTO regime collective interpretation (or other procedural device the members conclude will best achieve their objective). In this approach, the trade measures of MEAs that meet the flexible list of criteria would qualify per se for an Article XX exception to the other GATT/WTO regime obligations as long as the trade measure at issue did not conflict with the Article XX Preamble. The criteria adopted may include, inter alia: Open Accession and Membership; Adequate Levels of Participation from Affected Parties; Number of
Parties; Transparency; Non-Parties of MEA Acting in Compliance Should Receive Benefits; the MEA's Trade Measures Must be Consistent with the Environmental Objectives of the MEA; and, overall Compliance Flexibility of the MEA.

II. BACKGROUND

A. What are Multilateral Environmental Agreements and Why Do They Exist?

Multilateral environmental agreements (MEAs) are voluntary commitments among sovereign nations that seek to address the effects and consequences of global and regional environmental degradation. MEAs address environmental problems with transboundary effects, traditionally domestic environmental issues that raise extrajurisdictional concerns, and environmental risks to the global commons. International agreements to protect human health and the environment have used trade measures in varying forms since the 1870's. Despite the early examples of employing trade provisions to advance the objectives of environmental agreements, the vast majority of MEAs currently in force and to which the United States is a signatory were negotiated in the last twenty-five years.

The dramatic growth of MEAs as an integral component of international relations is attributable to several factors:

1. The development of environmental problems with global implications. The last two decades have seen unprecedented scientific research and public acknowledgement of the environmental threats to our planet. In particular, stratospheric ozone depletion, climate change, hazardous waste transportation, and biological diversity loss, have increasingly received greater attention from national governments and the non-governmental business and environmental communities.

   * **Stratospheric Ozone Depletion.** In the past several years, scientific evidence has established a strong link between the depletion of the ozone layer and the release into the atmosphere of chlorine and bromine-laden chemicals such as chlorofluorocarbons (CFCs), halons, and carbon tetrachloride. The ozone layer acts as a shield to protect the earth from the harmful effects of ultraviolet radiation and further depletion may lead to increases in the incidences of skin cancer, loss of biodiversity, and crop damage. The major MEA dedicated to halting the depletion of the ozone layer by encouraging restrictions on the production and consumption of ozone depleting substances (ODS) is the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).

   * **Loss of Biodiversity.** The extinction of plant and animal species throughout the world is occurring at a rapid rate and on a wide scale basis. Increases in world population growth, deforestation, and unsustainable harvesting of plant and animal wildlife have contributed to a severe weakening in the fragility of the Earth's delicate balance of biological diversity. The loss of species not only has profound impacts on the evolutionary process, but may also inhibit the
development of medical and chemical discoveries of immeasurable value. In addition to a multitude of regional agreements, the United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity (Biodiversity Convention) are the two most prominent MEAs dedicated to the global protection of plants, animal species, and habitat.

*Hazardous Waste Transportation and Disposal.* The growing shortages of waste management capacity in many countries and the prohibitive costs of building hazardous waste disposal facilities within other nations, has led to dramatic increases in the export of hazardous waste. The expansion of global hazardous waste shipments poses potential direct risks to the environment that become exacerbated by inadequate facilities at final destinations. Despite the benefit of profit realization that these shipments offer, many nations accepting waste imports often have limited disposal capability. The potential environmental impacts of such shipments include ocean spills, contamination of groundwater, surface water, and soil and air pollution. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) is widely recognized as the primary MEA associated with international hazardous waste transportation.

2. The need for cooperative multilateral solutions among sovereign nations to address global environmental threats. Principle 7 of the Rio Declaration at the 1992 United Nations Conference on Environment and Development (UNCED) emphasizes the duty of countries to cooperate in the quest for solutions to global or transboundary environmental problems. As evidence of environmental degradation with and without transboundary effects has intensified, the global economic and political repercussions have intensified. The dedication of scientific resources to the study of the planet's biosphere, coupled with the improved dissemination of information retrieved from satellites and other sources has increased the understanding of our world's essential biological functions. Increasingly, nations recognize that the threats to resources both within a particular nation's territory, and in the global commons, require a collective response.

3. Environmental problems are not exclusively restricted to their environmental consequences. The issues of ozone depletion, climate change, loss of biodiversity, and hazardous waste transportation, for example, have profound international economic competitiveness, political, and social implications. The establishment of an international rule-based regime to protect the environment can have both positive and negative effects on current investment opportunities, foreign relations and, domestic regulations. The integration of the global economy ensures that any international effort to protect the environment will have multilateral consequences.

**B. The Principles of the GATT/WTO Regime**

The General Agreement on Tariffs and Trade (GATT 1947) and its recent successor, the World Trade Organization (WTO), perform several functions in their combined roles as binding treaty obligation and multilateral institution. At its center, the GATT/WTO regime is a multilateral
institution that exists to promote the liberalization of global trade. The GATT/WTO regime seeks to promote a common set of international trade rules, a reduction in tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations. The GATT/WTO also attempts to provide an effective dispute resolution system to facilitate the settlement of trade disputes among its member nations.

The GATT/WTO regime accomplishes many of these goals primarily through the use of "negative" obligations. In general, the GATT/WTO regime does not impose an affirmative requirement that members (and their domestic regulatory regimes) meet a minimum baseline standard of compliance with its goals. Additionally, the liberalized trade regime does not establish minimum benchmark levels for individual member protection of the environment and public health. Instead, the GATT/WTO regime seeks to distinguish national standards adopted for legitimate health and environment purposes from those regulatory standards enacted to promote protectionism. If a regulatory standard is deemed inconsistent with the GATT/WTO regime, a "negative" obligation to remove or correct the offending measure is imposed on the member.

The core principles of the GATT/WTO regime are reflected in the original GATT 1947 text. Article I of GATT 1947 establishes the Most-Favoured-Nation principle (MFN), and aims to ensure that each member grant any privilege or advantage it provides to a product from one member immediately and unconditionally to like products from, or destined for, all GATT/WTO members. MFN effectively requires all members to treat products from other members in the same manner. Article III establishes the national treatment principle and requires members to treat any imported "like product" in the same manner as they would treat domestic "like products". National treatment is designed to prevent the discrimination of imported products in order to secure market advantages for domestic products. Article XI establishes a prohibition on quantitative restrictions and seeks to prohibit such trade actions as quotas, embargoes, and licensing schemes on imported or exported products.

If a GATT/WTO member is challenged with violating any of the above obligations, the member has recourse to the GATT 1947 Article XX General Exceptions. Article XX only permits exceptions when it can be shown that the "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Article XX(b) and (g) are the exceptions most frequently cited in trade disputes that involve the environment and natural resources. Articles XX(b) and XX(g) do not apply to all measures taken to protect the environment. Rather, Article XX exceptions are only applicable when a violation of a general obligation of the GATT/WTO regime is alleged to have occurred.

Article XX(b) allows members to take measures "necessary to protect human, animal or plant life or health". Article XX(g) allows measures "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 also allows exceptions from the GATT/WTO general obligations to, inter alia, protect public morals, distinguish products manufactured with prison
labor, exclude commodity agreements that meet certain criteria, and meet emergency shortages of supplies.

The WTO Agreement on Technical Barriers to Trade (TBT Agreement) seeks to ensure that the nondiscrimination and national treatment provisions of the GATT/WTO regime as a whole are specifically applied to the adoption of technical regulations by members. The TBT Agreement emphasizes deference to international standards in the creation of regulations governing, among others, product characteristics, process and production methods, labeling, and packaging.

When a trade dispute does arise between members, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes encourages members to enter into informal negotiations in an effort to reach a mutually agreed solution. If a resolution of the matter is not forthcoming, a challenging member invoking the dispute settlement procedures is entitled to a *prima facie* assumption that the measure being challenged is inconsistent with the GATT/WTO regime. The burden of proof to rebut the charge is on the defendant member.

A complaining party may request the appointment of a panel to settle the disagreement. The panel hearings are between governments and are generally closed to the public and non-governmental organizations (NGOs). Panel reports are adopted within sixty days of their issuance unless a member initiates an appeal or it is the consensus of the other members not to adopt the report. If a member chooses to ignore the recommendations of a panel, the complaining member may seek compensation in the area of trade directly related to the dispute or, if necessary, may cross-retaliate in another trade sector.

III. WHY DO MEAs USE TRADE MEASURES?

MEAs use trade measures to promote cooperation through the use of a variety of incentives related directly to the environmental problem at issue. The GATT Secretariat has acknowledged that "none of the existing MEAs contain provisions for discriminatory trade measures to be taken against unrelated products in the case of non-participation or defection." Specific examples of trade measures as incentives in the MEAs are listed below:

A. Product- Specific Measures

An MEA may use trade measures to regulate trade among parties and non-parties of the product that is considered a major contributor to the environmental degradation the agreement seeks to curtail. In existing MEAs, these products or substances may include, endangered species of fauna and flora, ozone depleting substances, and waste shipments. To facilitate analysis, the following examples are drawn from the trade measures employed in CITES, the Basel Convention, and the Montreal Protocol.
In general, MEAs direct trade measures at specifically designated products in three ways:

1. *Prohibit or limit the trade in "target" product or substance of MEA.*

CITES invokes trade restrictions against parties and *non-parties* to protect listed species of animals and plants threatened with extinction and endangerment.  

The Basel Convention prohibits the export of hazardous waste to parties and *non-parties*. As among parties to the Convention, the prohibition against waste shipments is maintained unless it can be demonstrated that the importing nation "will manage the waste in an environmentally sound manner."  

The Montreal Protocol prohibits trade in ozone depleting substances (ODS) with *non-parties* unless the non-party has demonstrated its full compliance with the control measures under the Protocol. The prohibitions extend to a ban on the import from non-parties of products containing ODS, and eventually, to products manufactured with ODS.

2. *Establish a regulatory framework through which to regulate trade in the target product or substance of the MEA.*

CITES utilizes a permit and listing system to prohibit the import or export of listed wildlife and wildlife products unless a scientific finding is made that the trade in question will not threaten the existence of the species.

The Basel Convention provides that a party shall not permit hazardous waste or other wastes to be traded with a *non-party* unless that party enters into a bilateral, multilateral, or regional agreement regarding transboundary movement of hazardous waste with the non-party. In transfers between parties, other conditions require the exporter to receive the prior informed consent of the importing party and any other parties through whose territory the waste will be transported. In addition, a party may only export hazardous waste if it lacks the technical capacity, necessary facilities, or suitable domestic waste-disposal sites.

The Montreal Protocol allows limited trade in actual ODS to promote economic efficiency and further regulate the global trade in ODS among parties to the Protocol. The export of technology to *non-parties* to assist the production of ODS is discouraged.

3. *Limit markets in goods that contribute to the environmental problem.*

The trade provisions of CITES are designed to severely constrict the market demand for wildlife and wildlife products. The strategy is to reduce the international market demand for products through the use of trade restrictions and thereby discourage the initial taking of the wildlife.
The Basel Convention uses trade measures to limit the market for the transboundary movement and disposal of hazardous waste by conditioning the trade in waste on compliance with the agreement. For example, the agreement's trade provisions encourage the management of waste in an environmentally sound manner and with prior informed consent. In addition, the Basel Convention indirectly encourages the source reduction of hazardous waste by attempting to limit disposal capacity alternatives throughout the world.

The Montreal Protocol clearly seeks to restrict the global market in consumption and production of ODS. The agreement uses trade provisions to encourage the phase-out of ODS and to discourage the establishment of "pollution havens" whereby parties shift their ODS-manufacturing capabilities to non-parties. In reducing market demand, the Montreal Protocol reduces the release of ODS into the atmosphere and provides an incentive for the development of benign ODS substitutes.

B. Create Incentives to Encourage Participation in the MEA:

Some MEAs use trade measures to create incentives for non-parties to become parties to the agreement and to fully implement the obligations of the agreement.

CITES allows the trade in listed species with non-parties if a non-party provides documentation that conforms with the provisions of the agreement.

The Basel Convention provides incentives to non-parties to either join the Convention or enter into alternative bilateral, multilateral, or regional agreements governing the transboundary movement and disposal of hazardous waste. A non-party's failure to join Basel or another agreement may result in a Basel party's refusal to trade in hazardous waste with the non-party.

The trade provisions of the Montreal Protocol create incentives to join the MEA through special trading privileges granted to parties and denied to non-parties. For example, parties may continue limited trade among other parties in ODS (or products containing ODS) at agreed levels but are prohibited from trading with non-parties. Technology transfer, financial aid, and compliance delays are also often made available to parties and not to non-parties.

C. Discourage "Free-Riders" of the MEA:

Non-parties to the MEAs acting as "free-riders" pose several different problems for the parties to the agreement. In general, free riders derive the environmental benefits of the MEAs without having to pay any of the costs. Trade measures may be used, as in the Montreal Protocol and Basel Convention, to counter competitive economic advantages that industries in non-party countries may enjoy as a result of the increased costs of compliance with the MEA in member nations. Non-parties may also seek to prosper by filling the market vacuum for products and services such as ODS and hazardous waste disposal that are left behind by the various prohibitions imposed on parties. Thus, an elimination of free riders generally leads to greater
membership in the MEA and a strengthening of global consensus on the international environmental issue. If free riders are able to reap rewards for non-compliance, the interest in membership of MEAs will erode substantially.

IV. THE POTENTIAL CONFLICT BETWEEN MEAs AND THE GATT/WTO REGIME

The actions of a GATT/WTO member acting in compliance with the trade measures of the MEAs have never been challenged by another member. As a result, a GATT/WTO dispute settlement panel has never ruled on the consistency of the trade provisions of the MEAs with the obligations of the GATT/WTO regime. Nevertheless, the potential for conflict has been recognized by the members of the GATT/WTO and numerous independent observers. Indeed, the GATT Secretariat has previously indicated that some of the trade provisions of the Montreal Protocol may not be compatible with members’ obligations under the GATT. In the context of a general analysis of the interconnections between trade and the environment, the GATT/WTO-sponsored Committee on Trade and the Environment (CTE) and its predecessor, the Environmental Measures and International Trade (EMIT) Group, have devoted a great deal of their respective discussions and workplans to the relationship between the MEAs and the GATT/WTO regime.

It is important to emphasize that the area of greatest concern is the effect of trade provisions in MEAs on those countries that are members of the GATT/WTO regime but are not parties to the MEA. Non-parties to the MEAs will undoubtedly represent the majority of the potential challenges to the trade measures of the MEAs. This is due to the unlikelihood of a country that has voluntarily joined the MEA and agreed to the trade measures of the agreement, to later challenge its terms in the GATT/WTO regime forum. A party to the GATT/WTO regime who has become a party to the MEA, has essentially consensually waived their GATT/WTO rights in those areas in which the MEA applies. In addition, the majority of the trade restrictions of the MEAs are specifically directed at non-parties.

The following represent some of the potential inconsistencies between the trade measures of the MEAs and the GATT/WTO regime:

A. MFN and Non-parties:

The import and export restrictions against non-parties of the MEAs are potentially vulnerable to challenge by a GATT/WTO member and non-party to the MEA as a violation of the Most Favoured Nation principle of the GATT/WTO regime. In the context of the Montreal Protocol, for example, a non-party may assert that its like products (i.e. ODS, refrigeration unit containing ODS, etc.) are being discriminated against because they are not a member of the MEA. The MFN principle entitles all GATT/WTO members to equal treatment of their like products and therefore, a member may argue that they are not receiving equal MFN treatment when their products are subject to the trade restrictions of the MEA.
B. National Treatment and MEAs:

The import restrictions of the MEAs similarly may be subject to challenge. Article III's national treatment provision requires that imported like products not be discriminated against in favor of domestic like products. The recent unadopted 1994 panel report, *United States - Taxes on Automobiles* (Auto Taxes) recognizes that two individual products can never be exactly the same in all aspects and that regulatory distinctions by different national governments may be required in certain circumstances. Indeed, the panel stated:

Noting that a primary purpose of the General Agreement was to lower barriers to trade between markets, and not to harmonize the regulatory treatment of products within them, the Panel considered that Article III could not be interpreted as prohibiting government policy options, based on products, that were not taken so as to afford protection to domestic production.

Nevertheless, to satisfy national treatment, domestic regulatory measures that distinguish like products are reviewed as to whether the measure was applied, either in its aim or effect, "so as to afford protection to domestic production."

In addition, a regulatory measure that distinguishes a like imported product and a like domestic product arguably must be applied directly to the product as a product. In other words, a regulatory measure should be closely related to the end product as an end product and not to the process and production methods (PPMs) by which the product was manufactured. Thus, import restrictions in MEAs that restrict the use of certain substances in products may be challenged as violations of national treatment as a result of their PPM-based distinction of like products. The Montreal Protocol's use of trade measures to distinguish products based on whether they contain ozone depleting substances (ODS) is arguably such a PPM-based distinction. The Protocol's plan to distinguish products based on whether or not they were made with ODS is similarly problematic.

C. Article XI Quantitative Restrictions:

The import restrictions that do not satisfy national treatment and MFN, and the export restrictions of the MEAs that take the form of bans, embargoes, prohibitions, etc., of trade, are potentially vulnerable to challenge as quantitative restrictions under Article XI of GATT.

D. Article XX:

Article XX contains the general exceptions to GATT/WTO obligations. Traditionally, the determination of whether or not a particular trade measure qualifies for an Article XX exception has been determined on a case-by-case basis before a GATT/WTO dispute settlement panel. Occasionally, the GATT/WTO Secretariat proffers interpretations of the standards to employ
when a member seeks to invoke an exception.\textsuperscript{47}

Unfortunately, the relationship between the trade measures of the MEAs and GATT/WTO regime is further complicated by the range of interpretations concerning Article XX exceptions that have been issued by several recent GATT/WTO dispute settlement panels. (See Box 1.1 for further Article XX analysis). As a result, immediate clarification of such issues as the interpretation of Article XX's preamble of "arbitrary and unjustified discrimination" and the term "disguised restriction on international trade"; Article XX(b)'s "necessary" requirement and Article XX(g)'s "relating to the conservation of natural resources" standard; and, the extrajurisdictional applicability of Article XX, are all essential to a consistent, functioning relationship between the trade measures of the MEAs and the GATT/WTO regime.

V. THE IMPLICATIONS OF CONTINUED CONFUSION IN THE RELATIONSHIP BETWEEN TRADE MEASURES OF MEAs AND THE GATT/WTO REGIME:

Clarification of the relationship between the MEAs and the GATT/WTO regime will:

A. Reduce international trade friction. Immediate clarification promotes many of the major goals of U.S. corporations, investors, consumers, environmentalists, and the objectives of the GATT/WTO regime. Further elucidation as to the status of the trade measures contained in MEAs will enhance the principles of nondiscrimination, national treatment and fair market access. It improves transparency in rule making, assists dispute resolution and, promotes rule-based disciplines to enforce non-participation in the obligations of the MEAs and/or the GATT/WTO regime.

B. Improve global environmental protection and cooperation. Trade measures in the MEAs are integral components of the agreements and are critical to the overall success of the MEAs. The use of trade measures provides for the most effective and efficient means of achieving the environmental objective on a global scale while supporting the aims of the multilateral trading system. The current experience with such MEAs as CITES, Basel, and the Montreal Protocol substantiate these claims.\textsuperscript{48} For example, the measures embodied in the Montreal Protocol have been effective in achieving the goals of broad participation in the agreement. In general, multilateral solutions discourage the development of alternative unilateral measures.

C. Provide much needed clarity of policy and certainty of implementation in the business and environmental communities. In order to achieve their respective goals, the business and environmental communities require a consistent and well-established set of rules. The potential for disruption of previously formed expectations may produce competitive disadvantages if legitimate rules agreed to and implemented are subsequently thrown out. The current uncertainty surrounding the trade measures in the MEAs creates confusion and frustrates essential future planning.

D. Minimize distortions and discrimination of goods in open markets. MEAs promote the
same environmental standards for imports and exports throughout the global economy.
E. Stabilize the new WTO regime. Clarification on these issues will signal an important early victory for the WTO and avoid hobbling the organization with unnecessary trade tension in its formative years. Resolution of the MEA-GATT/WTO regime relationship may also further defuse North-South friction in the trade policy area in general.

F. Provide certainty and predictability in further negotiations of MEAs. A consistent understanding of the relationship between the GATT/WTO regime and the MEAs will provide important guidance to negotiators of current and future MEAs.

VI. MULTILATERAL TRADE MEASURES NEGOTIATED IN MEAs ARE THE MOST DESIRABLE POLICY:

A. Transparency and Nondiscrimination:

When governments conclude that the remedying of a specific environmental harm cannot be achieved in the absence of some trade measures (which in the past, has been limited to a relative handful of instances), the negotiation of such measures in MEAs and in a multilateral forum in general, can provide the most effective means of eliminating many of the same obstacles to liberalized trade that the GATT/WTO regime seeks to eliminate. For example, thoroughly transparent negotiations of trade provisions in a multilateral forum that achieve widespread support from many nations are more apt to be consistent with the MFN and national treatment principles of the GATT/WTO regime. MEAs provide open, transparent, and non-discriminatory negotiating forums. MEAs and the GATT/WTO are equally intent on diminishing the negative influence of free riders on their respective regimes. Past experience indicates that there is likely to be a close nexus between the environmental policy goals and trade measures authorized by a MEA. Many of the nations negotiating a MEA are the same negotiating nations at the GATT/WTO. Indeed, some MEAs have greater participation levels than the GATT/WTO. The likelihood of measures that are "arbitrary and unjustified" and/or "disguised restrictions on international trade" is reduced substantially through open and nondiscriminatory multilateral discussions.

In addition, MEAs make significant contributions to the development of international standards and harmonization. The GATT/WTO regime explicitly recognizes a deference to international standards in several areas of international trade that it addresses. (TBT Agreement; Sanitary and Phytosanitary (SPS) Agreement, etc.) GATT/WTO dispute settlement panels have openly encouraged multilateral efforts to protect the environment. The greater the cooperation and agreement on international standards, the lesser the risk of unilateral non-tariff barriers and their attendant trade disputes.

B. Multilateral v. Unilateral:

MEAs address problems of the global commons in a multilateral fashion and are far more appropriate for dealing with these issues than the alternative uncoordinated unilateral
MEAs acknowledge the reality of dealing with sovereign nations in these efforts and minimize the impact of conflicting legal regimes. Principle 12 of the Rio Declaration supports multilateral efforts to protect the environment and also discourages unilateral measures. MEAs offer an effective means of implementing the goals of Principle 12.

International environmental problems that either literally spill across borders or affect the biosphere in their own regions with global consequences, are most efficiently solved through multilateral efforts. In addition, trade measures of the MEAs are characterized by their specific focus on provisions that are necessary to accomplish the objectives of the environmental agreement. Rarely, if ever, are MEA trade provisions directed at a product or substance that has no association with environmental degradation. The negotiation of these MEAs in multilateral fora make it increasingly unlikely that they serve protectionist ends.

C. Disparate Interests:

MEAs represent disparate nations with a wide range of interests and concerns. Major international environmental agreements have traditionally reflected an impressive cross-section of representatives from around the world. Developed and developing countries, importers and exporters of affected products, producers and consumers, etc.

D. Traditional Practice:

The use of trade measures in MEAs is not a novel or radical concept that began only a few years ago. Since the 1870's, many nations have negotiated agreements that utilize trade restrictions to protect resources and public health inside and outside of their jurisdictions.

E. Growth of MEAs:

The number of MEAs being negotiated and implemented continues to increase. Several agreements utilize trade measures to assist the achievement of their environmental objective. The simultaneous existence of both MEAs and the GATT/WTO regime appears incontrovertible. Preservation of the status quo and the accompanying confusion surrounding the relationship of trade measures in MEAs and the GATT/WTO regime will only inhibit the effectiveness of the agreements to protect the environment and will potentially lead to greater instability in the international trade system.

F. MEA Flexibility:

MEAs are relatively flexible in allowing parties to choose the most efficient means of meeting their obligations to the environmental agreements. In addition, several MEAs include provisions to ease the effects of market shifts that are directly or indirectly caused by the agreements.
For example, the Montreal Protocol utilizes innovative instruments such as "industrial rationalization" to allow the trading of allowable levels of ODS production among parties. Industrial rationalization is designed to encourage economic efficiencies and offset the anticipated shortfalls in supply of ODS in some countries as a result of plant closures.

Most MEAs allow non-signatories to receive the benefits of the environmental agreement if they can show compliance with the agreement's general provisions. Many developing countries are allowed more time to meet their obligations under the MEA. These two measures act as incentives to encourage compliance with the agreements.

VII. ALTERNATIVE APPROACHES TO RESOLVING THE CONFLICT:

A. Criteria Approach and Article XX

This approach to clarifying the relationship between the MEAs and the GATT/WTO regime involves the development of specific criteria or list of attributes to determine whether the trade measures of the MEAs satisfy the objectives of the Article XX exceptions. The trade measures of MEAs that meet the flexible list of criteria (no single criterion would be determinative) would qualify per se for an Article XX exception to the other GATT/WTO obligations as long as the national measure chosen by the party state to the MEA also did not conflict with the Article XX Preamble. For example, in the context of Article XX(b) and XX(g), relevant trade measures in MEAs that satisfy the criteria and the Article XX Preamble would be deemed consistent with the GATT exceptions because they are "necessary" and "primarily aimed at conservation".

Several different versions of the criteria approach have been proposed from a variety of sources. A representative selection of the range of factors or criteria that have been discussed to ensure the consistency of the trade measures of the MEAs with the GATT/WTO regime is listed below. The procedural options available to implement this approach follow the discussion of the main criteria.

**Criteria:**

1. *Open Accession and Membership:*

   A global MEA must be open to participation by any interested nation on equitable terms with those accorded to any other country.

2. *Adequate Levels of Participation from Affected Parties:*

   The MEA must reflect in its membership sufficient representation from a substantial number of countries directly affected by the trade restrictions on the product or substance deemed detrimental to the objectives of the MEA. Parties to the MEA should include a range of
producers, consumers, importers, exporters, transporters, etc.

3. Number of Parties:
   An analysis of the MEA's number of parties may afford an immediate calculation of the agreement's level of support in the international community. The GATT/WTO regime ought not to decree the level of membership in MEAs, nor would it appear to be appropriate to assign a random number of parties that would legitimize a MEA. Nevertheless, an MEA with a large representative membership should be given special consideration vis a vis an Article XX exception. A related concern may focus on the universal acceptance of such an MEA and whether its well-supported objectives are at risk from a slight minority of the world's nations.

4. Transparency:
   The negotiation and operation of the MEA should reflect full disclosure and publication of all aspects of the MEA's obligations to states.

5. Non-Parties of MEA Acting in Compliance Should Receive Benefits:
   The MEA should include provisions that would allow non-parties who act in compliance with the MEA's obligations to receive the same treatment as parties to the MEAs regardless of their non-signatory status. CITES, the Basel Convention, and the Montreal Protocol already include such incentives to participate in their respective legal frameworks.

6. The MEA's Trade Measures Should be Consistent with the Environmental Objectives of the MEA:
   A minimum relationship must exist between the trade measures of the MEA and the environmental goals of the MEA. The product or substance restricted must contribute in some manner to the environmental degradation the MEA seeks to correct.

7. Compliance Flexibility of MEA:
   An MEA that utilizes trade measures should be analyzed as a whole package to determine whether it allows flexibility in meeting its obligations so as to minimize distortion in international trade while achieving the objectives of the agreement.

   The United States Council for International Business has also recommended the following criteria:

8. Where trade measures are deemed necessary to make the agreement effective, such agreements shall ensure that the measures adopted are not unnecessarily restrictive of trade. Measures adopted should meet the following criteria:
1) The burden imposed on trade is not excessive in relation to the putative beneficial environmental effects, as determined by a balancing of interests.

2) The purpose served by the standard or requirements fixed in the agreement could not be promoted by measures or programs with a lesser impact on trade.

9. Such agreements shall provide that... no other trade or other sanctions (including criminal penalties such as some are proposing for the Basel Convention) shall be authorized to assure enforcement of the agreement.

10. Even if the trade measures affecting non-parties are justified under the new criteria for application of Article XX(h) to IEAs, GATT parties retain their right to claim nullification and impairment pursuant to Article XXIII. In case such a claim went to settlement by a GATT panel, the panel should rule on the merits of the case, primarily as to whether, when the concession was first granted, the complaining country had a basis for a reasonable expectation that the conditions of access would not be changed in the future. However, the panel should also be required to find that the effect of the trade measure taken pursuant to the IEA was disproportionately concentrated on the country bringing the complaint before finding that compensation is due.

B. Implementing the Criteria Approach:

The criteria approach could be implemented into the GATT/WTO legal framework through an 1) Amendment to Article XX; or, 2) a collective interpretation of Article XX by the WTO members. The legal effect would appear to be equivalent but, of the two, the latter would seem to be more expeditious.

1. Amendment to Article XX:

Proposals to amend the GATT/WTO Article XX General Exceptions to accommodate a "criteria" (sometimes referred to as an "ex ante") approach take many different forms. The suggestions include: (1) adding an Article XX "(k)" that would list the appropriate criteria in the text of the amendment; (2) amending Article XX(h), which currently covers commodity agreements to include MEAs that meet the listed criteria; (3) amending Articles XX(b) and (g) to add the word 'environment'; and incorporating criteria for evaluating an MEA into the text of Article XX.

Amending the GATT/WTO regime under the new WTO regime is a lengthy, difficult, and potentially disruptive process. Article X of the Final Act governs amendments and provides that any party may initiate the amendment process by submitting a proposal to the WTO Ministerial Conference. After a proposal is tabled formally, the Conference has 90 days or more to submit the proposed amendment via consensus to the GATT/WTO members for acceptance. If a consensus cannot be reached in the established period, the Conference shall decide by two-thirds majority of
the members whether to submit the proposed amendment to the members for acceptance. Amendments to several key provisions of the Final Act, including any potential amendment to Article XX, require the acceptance of all the members. Amendments to other provisions of the agreement require acceptance by two-thirds of the members. The amendments are binding on those members that accept them and non-accepting members may be requested to withdraw from the WTO. If they choose to remain members of the WTO after an established period of non-acceptance, they must obtain the consent of the Ministerial Conference.

2. Collective Interpretation of the Members:

Article XXV of GATT 1947 provides that the GATT parties "shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement." This broad language and past practice forms the legal basis of the GATT members' power of interpretation.

In addition, the Final Act provides that the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the agreement. The decision to adopt an interpretation is to be taken by a three-fourths majority of the members and may not undermine the amendment provisions of Article X of the Final Act. An interpretation is generally acknowledged to be legally binding on all GATT/WTO regime members, whether or not they agree to the interpretation.

A collective interpretation of Article XX(b) and XX(g) by the members would incorporate the criteria approach to the trade measures in the MEAs. A list of criteria to apply to the MEAs in an interpretation would offer an effective clarification of the relationship between the MEA trade provisions and the GATT/WTO regime while avoiding the arduous GATT/WTO amendment process. An interpretation is also appropriate as a matter of principle because it doesn't disrupt the existing legal structure. In practice, a GATT/WTO member challenged by a non-party regarding its actions taken in compliance with a MEA would be able to rely on the new criteria approach detailed in an interpretation as a defense. If the MEA satisfied the listed criteria and the Article XX Preamble, then it would be presumed to be consistent with Article XX(b) and XX(g).

C. The Waiver Approach:

Many trade and environment fora, including meetings of the GATT/WTO regime members, have discussed the potential adoption of a waiver as a means to clarify the relationship of the MEA trade provisions with the obligations of the GATT/WTO regime. As generally envisioned, a waiver would be granted by the GATT/WTO members to allow derogations from members' obligations for actions taken pursuant to the MEAs. A waiver may be specifically directed at a select group of named agreements or it could encompass all MEAs that use trade measures to accomplish their environmental objective.
In order to secure a waiver regarding the MEAs, a member will have to demonstrate "exceptional circumstances" and generally obtain three-fourths of the members' support for such action. Requests for a waiver are to be submitted to the Ministerial Conference and the request is to be decided upon by consensus within 90 days. If the request is not considered within 90 days, three-fourths of the members' support will be required. Waivers must state the terms and conditions governing their application and the specific date of termination. All waivers, regardless of length of time, are to be reviewed annually by the Ministerial Conference.

In addition to cumbersome procedural hurdles, the adoption of a waiver presents several other potential impediments to its ultimate effectiveness. A waiver will be viewed by those non-parties that have been resisting membership in the MEA as a de facto acceptance of the MEA. If the waiver applies only to specifically named MEAs, there are no assurances that future MEAs will be eligible for the waiver's protection. Criteria involved in weighing the appropriateness of a waiver may vary from case to case. This uncertainty creates an atmosphere of unpredictability that may produce more problems than it resolves.

On the other hand, a successful waiver does establish a positive precedent in the GATT/WTO regime of cooperation between the trade and environment disciplines. It also has the potential to ease current North/South tension exacerbated by mutual distrust in the trade and environment policy relationship. Finally, it does provide immediate effective clarification of the MEA-WTO relationship and places it in a context of limited duration. (i.e. through the annual review of the waiver). However, the annual review process may also create uncertainty about the durability of the agreement and the legitimacy of the trade measures used that may work against the desirability for certainty which both business and environmental interests seek.

D. The Status Quo Option:

In addition to the criteria and waiver approaches to clarifying the relationship between the MEAs and the GATT/WTO regime, the possibility of taking no action should also be explored. In essence, the status quo option can be reduced to a continued reliance on GATT/WTO dispute settlement panel decisions.

1. Panel Decisions:

In the dispute settlement procedures of the WTO, a complaint by one member challenging the actions taken by another member in compliance with a MEA is considered prima facie to constitute a case of nullification or impairment. The burden is on the member being challenged to rebut the complaint that its actions infringe on the complainant state's obligations to the GATT/WTO regime and have an adverse impact on other members. Within 60 days of a panel report being issued, the report will be adopted by the Dispute Settlement Body (DSB) unless there is an appeal or the DSB refuses to adopt the report by consensus.

In the rare instance that a panel report is not adopted under the new WTO regime, the
The panel report is not likely to have any binding legal status on the members and probably serves only as an advisory opinion of important GATT/WTO regime experts. In the more probable event of the panel report being adopted by the members, it is generally recognized that the panel's decision settles the dispute between the members and is binding exclusively on the parties involved in the dispute. The panel decisions do not have *stare decisis* effect and thus, no future panel is bound to the precedent of the previous panel's ruling as to the subject of the dispute. In practice, however, GATT/WTO regime panels frequently rely on a previous panel's reasoning in the interpretation of the GATT/WTO regime's obligations and often refer to earlier panels in their opinions. Nevertheless, a later panel is under no obligation to follow a previous panel's reasoning as to a particular dispute or even the same dispute involving the same parties.

In current practice, a panel could be called upon to assess whether a particular member's action in compliance with a MEA was a violation of its MFN, national treatment, quantitative restriction prohibition, or other GATT/WTO obligations. A panel may also offer its interpretation of the applicability of the Article XX exceptions to the trade measures in MEAs. In particular, a panel report could clarify the "arbitrary and unjustified discrimination" standard in the preamble to Article XX and the "necessary" and "primarily aimed at conservation" standards of Article XX(b) and (g). In addition, a panel could explain the extraterritorial applicability of Article XX.

Despite the potential for increased clarity on these issues a panel report offers, the current confusion on the relationship between MEAs and the GATT/WTO regime is strong evidence that this practice will not be satisfactory in the long term. Previous panel decisions have arguably contributed significantly to the inconsistent interpretations of GATT/WTO regime obligations vis-à-vis actions taken in the name of the environment. The result is a lack of a coherent and predictable policy from which to base actions taken with the trade measures in the MEAs. The recent facilitation of panel report adoption procedures will approve and implement decisions more quickly but it may also expedite the adoption of fundamentally flawed panel reports. An increased reliance on the dispute settlement system will ensure uncertain interpretations of GATT/WTO regime obligations and may exacerbate future trade disputes.

Notes

*See generally* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 39 (1991). For example, a 1906 treaty banned the production and importation of phosphorous matches because their production process was deemed harmful to workers. A 1911 treaty banned the hunting of seals in water and also banned the importation of seal skins taken in violation of the treaty. *Id.* *See also*, Organisation for Economic Cooperation and Development (OECD), Joint Session of Trade and Environment Experts, *Case Study: Transboundary Living Resources and Trade*, COM/ENV/TD(93)90, Sept. 28-30, 1992

international agreements currently in force were signed after 1970).


Governments recognized co-operation was needed to address the growing amount of hazardous waste generation and transboundary movements. Precise estimates of world-wide hazardous wastes volumes are difficult to determine, but range from 30 to 400 million tonnes or more of hazardous wastes generated each year. With increased volumes come increased problems related to environmentally sound disposal practices. Stockpiles of corrosive acids, organic chemicals, toxic metals and other wastes pose serious long-term health and ecological threats, because of groundwater contamination, leeching and other means of contamination. The costs of safe disposal are mounting, while the bills for cleaning up existing landfills will run into the tens of billions of dollars.

In response to a growing "not in my backyard" rejection of hazardous wastes, the international movement of hazardous wastes has become a boom industry. Cross-frontier traffic in wastes in Europe alone exceed 20,000 West-East border crossing[s] a year. North-South shipments, representing about 10 per cent of total transboundary movements pose a particularly serious threat. Shipments from industrialized to developing countries largely entail disposal or attempted disposal, of wastes to developing countries that do not possess, and are unlikely to possess [sic] in the near future, environmentally-sound hazardous wastes disposal facilities. A growing army of immoral, unscrupulous "waste brokers" are benefitting from a global commerce in poison.

In short, transboundary movements of hazardous wastes have become a
global problem, demanding global solutions.

_Id._


Principle 7:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.


14. _Id._

31/R, at 3-4 (Sept. 29, 1994) (unadopted by GATT Council) [hereinafter Auto Taxes Panel].

16. Agreement on Technical Barriers to Trade, GATT/WTO (1994). A technical regulation is defined as:

   Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

   Id. at Annex 1, para. 1.

17. TBT Agreement, Article 2.


20. Id.


22. Id. at Article 16:4 (emphasis added).


25. Id.

26. CITES, Appendix I, II (emphasis added).

27. Basel Convention, art. 4(2)(e) (emphasis added).


30. CITES, art. III 2(a),3(a), IV(a).

32. Basel Convention, art. 6(4).


34. Montreal Protocol, art. 2.

35. Montreal Protocol, art. 4(5),(6) (emphasis added).


38. GATT Trade and Environment Report, at 8.


   Article 30 of the Vienna Convention provides that when the provisions of the two treaties concerning the same subject matter conflict, as between parties to both treaties, the later-in-time prevails, unless one treaty explicitly notes otherwise. The Vienna Convention also stipulates that if two nations are parties to one treaty, the commonly shared treaty takes precedence over a treaty in which only one nation is a party. Under likely GATT challenges, that common treaty will be the GATT/WTO regime.

   The major difficulty associated with relying on the hierarchial treaty argument is that the later-in-time provision of the Vienna Convention will not adequately serve the GATT/WTO regime or future MEAs. For example, the GATT/WTO regime has a tradition of negotiating additional agreements in new areas of trade liberalization over the course of several years. The latest adoption of the Uruguay Round Final Act clearly places the GATT/WTO regime as the later-in-time treaty in relation to many of the current MEAs. Similarly, the negotiation of future MEAs may result in their achieving priority over the GATT/WTO regime. The final result would
be a patchwork of differing treaty priorities and minimal clarification of the relationship between the GATT/WTO regime and the MEAs.

41. *Auto Taxes Panel*, (Sept. 29, 1994) (unadopted by GATT Council), para. 5.6, 5.8.

42. *Id.* at 5.8.

43. *Id.* at para. 5.5. To determine the "aim" of the measure, a panel will review legislative history and interpretative language. Factors such as sales, trade flow data, and competitive conditions are examined to determine whether the "effect" of a particular measure affords protection to domestic production. *Id.* at para. 5.10 (emphasis added).

44. *Id.* at para. 5.54.

45. Montreal Protocol, art. 4(3).

46. *Id.* at art. 4(4).

47. GATT Trade and Environment Report, at 8.


49. Tuna/Dolphin I, at para. 5.28.


Principle 12 of the Rio Declaration:

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.
CIEL/UNEP MEA Report, at 40.


Montreal Protocol, art. 1.8.


USCIB IEA Statement, at 4; EU MEA Report, at 9; CIEL/UNEP MEA Report, at 325. The appropriate applicability of this criteria towards regional agreements requires further exploration. However, in most instances, regional environmental agreements have rarely included trade measures.

USCIB IEA Statement, at 4; EU MEA Report, at 9; CIEL/UNEP MEA Report, at 324.

EU MEA Report, at 9; CIEL/UNEP MEA Report, at 324.

EU MEA Report, at 9.

CIEL/UNEP MEA Report, at 326.

USCIB IEA Statement, at 5.

USCIB IEA Statement, at 4.

EU MEA Report, at 8; USCIB IEA Statement, at 5.

CIEL/UNEP MEA Report, at 326.

USCIB Statement at 5.

*Id.*

*Id.* at 6.

EU MEA Report, at 4.

USCIB MEA Report, at 2.

GATT/WTO, Agreement Establishing the World Trade Organization, at Article X:1. The WTO
Ministerial Conference is composed of representatives of all members and is to meet at least once every two years as it carries out the major functions of the WTO. *Id.* at Article IV:1.

*Id.* at art. 10:1.

*Id.* at art. X:2.

*Id.* at art. X:3.

*Id.* at art. X:5.

*Id.*


GATT/WTO, at art. XI:2.

Jackson Changing GATT Rules, at 107.


GATT/WTO, at art. IX:3.

*Id.* at art. IX:3(a).

*Id.* at IX:4.


*Id.* at art. 16:4.

Jackson, Changing GATT Rules, at 108.

GATT/WTO Dispute Settlement, art.3; Jackson, Changing GATT Rules, at 8.