

The WTO and MEAs—Time for a Good Neighbor Policy

Introduction

Potential and unnecessary conflicts loom between the international trade rules in the World Trade Organization (WTO) and the international environmental rules in the Multilateral Environmental Agreements (MEAs).¹ These two important bodies of international law have different objectives and have evolved separately, without regard to one another. They also operate in very different ways.

Many in the environmental community believe that the WTO's trade rules have a "chilling effect" on the ability of MEAs to deal with global environmental problems.² And many in the business community believe that MEAs are sometimes developed without sufficient consideration either for trade rules or for business concerns.³

It is critical to bridge these divides to avoid future conflict between the WTO and the MEAs. Indeed, the European Union has stated that these issues must be resolved in the next trade round.⁴ In addition, while the WTO-MEA relationship is a significant point of disagreement between the trade and environmental communities, it is by no means the only one.⁵ Other concerns include how the WTO affects domestic environmental and health regulations as well as its treatment of foreign investment.

The vast majority of actions taken pursuant to MEAs do not have trade implications, and most of the actions taken in the WTO do not have environmental implications. However, there is some overlap between these two bodies of international law, and this has drawn all the attention. These two systems of law are equally valid and have equally critical objectives; what is needed is for each to better respect the other's jurisdiction. The WTO and MEAs are neighbors in the world legal community, and we need to better define their relationship so that these neighbors can operate in mutual support and harmony.

A Good Neighbor Policy for the WTO and MEAs

This brief argues for a two-pronged approach to accomplish this good neighbor policy:

1. The WTO needs to be clarified to ensure appropriate deference to MEAs.
2. The ad hoc structure of the MEAs (particularly with regard to how they handle compliance and dispute resolution) needs to be clarified and strengthened.

The launching of a new round of multilateral trade negotiations⁶ provides an excellent opportunity to begin clarifying global trade rules to ensure they do not infringe on important MEAs. Additionally, the September 2002 World Summit on Sustainable Development in Johannesburg will provide the opportunity to launch the parallel process of strengthening MEA governance—particularly their mechanisms for obtaining compliance and resolving disputes.

¹ For the purposes of this brief, a Multilateral Environmental Agreement is considered to be (a) a legally binding instrument pertaining to some aspect of environmental protection, and (b) open to more than two countries.

² See for example item 20 on page 5 of UNEP (2001), or Krajewski (2001).

³ See for example Hagan (2000), p. 30.

⁴ See for example, WTO (2000, October 19), p. 2.

⁵ See for example Esty (1994), p. 218.

⁶ As of October 2001, a new multilateral round of trade negotiations is anticipated to be launched at the WTO Ministerial Meeting in Doha, Qatar from November 9-13, 2001.

Clarification of global trade rules can be done in a number of ways, including an amendment or statement by the parties. This brief suggests that the next trade round include negotiations on a new agreement that better defines the WTO relationship with MEAs. This new agreement would become an integral element of the WTO upon implementation of the agreements reached in the next trade round, and would be applicable to all WTO members. Such an agreement might include:

- Recognition that trade liberalization and environmental protection are both important values and that neither should take precedence over the other.
- Recognition that trade measures, including sanctions, may be (a) an integral part of some MEAs, and (b) necessary under appropriate circumstances to ensure that non-signatories do not undermine critical environmental objectives or gain unfair commercial advantage.
- Agreement that, in the event of a dispute between parties to an MEA, the WTO would defer resolution to the MEA for a set period (perhaps one year). (This would not be applicable if the dispute involved a non-party of the MEA.) After that period, the WTO could address the dispute.
- Agreement that, in the event of a WTO dispute involving an MEA, the WTO dispute settlement panel would be required to consult with the Secretariat of the MEA. Additionally, the WTO dispute-settlement process needs to be made more transparent—for example, by including amicus briefs from non-governmental organizations. (The issue of transparency, of course, is much broader than the WTO-MEA relationship, and accordingly this would presumably not be part of this proposed agreement on MEAs.)
- Agreement that the WTO would defer all disputes for those MEAs that meet a very high standard—even disputes involving non-MEA parties. To prevent against trade protectionist actions in an MEA, this brief proposes a “mega-deference” standard for MEAs that include as parties countries that account for at least 85 percent of world trade. (The 85 percent standard would ensure that all major trade blocs and a substantial number of developing countries are participating in the MEA.)

But countries will clearly be very reluctant to defer their WTO rights to an MEA unless they are confident that the MEA will responsibly balance both trade and environment objectives. Accordingly, a parallel negotiation should be launched at Johannesburg 2002 with the objective of strengthening governance of MEAs. Possible specific goals for these negotiations might include:

- Recognition that trade liberalization and environment protection are both important values and that neither should take precedence over the other.
- Establishment of an MEA compliance mechanism either for those MEAs that do not have such a mechanism or as a separate, stand-alone mechanism. (Such a mechanism could be under the auspices of the United Nations Environment Programme, the International Court of Justice, or another body.) Parties to MEAs could bring complaints regarding non-compliance to this mechanism, which would have positive tools to encourage compliance as well as options for sanctions. Since many MEAs do not currently have a dispute-settlement mechanism, this institution would ensure a forum for addressing complaints regarding non-compliance that would otherwise have gone to the WTO or would not have had any forum.

- Development of a range of compliance tools, building on the best current practices in MEAs. These tools could be used to encourage compliance, and might include reporting mechanisms, technical assistance, financial support, and other practices now included in some MEAs. Trade sanctions should be a last resort.
- Consider modification of MEAs with total memberships that fall short of 85 percent or more of world trade (and are thus ineligible for this brief’s proposed “mega-deference” from the WTO). This might mean renegotiations of some of the provisions of these MEAs to expand the membership base. (For example, U.S. membership in the Convention on Biological Diversity might be facilitated if that Convention’s provisions regarding transfer of intellectual property were clearly consistent with the WTO Trade Related Intellectual Property Agreement.)
- Agreement that future MEAs would consider international trade rules. Civil society, including the business community, should be consulted in negotiation of future MEAs.

These two sets of negotiations *should proceed in parallel but not be linked*, since each is important in its own right. The objective of the work in both of these negotiations is to create a system where the WTO and the MEAs each give appropriate deference to the other body of international law. In short, the objective is a system in which the WTO and the MEAs are *good neighbors*.

Operation of This Good Neighbor Approach

Under current WTO rules, a dispute brought by a member must be taken up by the WTO—the WTO does not have the discretion to turn down a complaint.⁷ As noted above, the proposal described in this brief would allow the WTO to defer settlement of a dispute involving MEA parties to the MEA for a set period of time. If the WTO member still wished to press its WTO rights after that period, its own dispute-settlement process would be triggered.

For those MEAs whose parties account for 85 percent or more of world trade, the WTO would completely defer all disputes regarding the MEA to the MEA. Clearly, WTO members would only agree to waive their WTO rights if there were broad consensus both on (a) the nature of the particular environmental problem and (b) the approach to addressing the problem. An MEA that is able to gain membership from countries that account for 85 percent or more of world trade has demonstrated such a level of trust. In practice, it would be extremely unlikely that such an MEA would operate in a protectionist manner, since it would have to include both developed and developing countries as well as countries from each of the major trade blocs.

The specific criteria for such “mega-deference” will undoubtedly be a subject of substantial negotiation. However, to give a sense of how this proposal might operate, the five MEAs with more than 100 parties each were analyzed based on 1999 import data as reported by the International Monetary Fund. (See Appendix 1 for this data.) The percentage of world imports accounted for by the parties to each of these agreements is found in Table 1.

Table 1: Percentage of Trade Encompassed By Five Largest MEAs

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)	94.2%
Convention for the Protection of the Ozone Layer (Montreal)	96.0%

⁷ See page 10 of this brief for a full explanation of this mandate.

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel)	74.7%
Convention on Biological Diversity (CBD)	74.6%
UN Framework Convention on Climate Change	87.3%

CITES, Montreal, and the United Nations Framework Convention on Climate Change exceed the 85-percent threshold and thus would qualify for the mega-deference. As is described in the following background section, parties to CITES and Montreal have both responsibly used prescribed trade measures against non-members to implement the agreements. Again, this brief's proposal envisions that any dispute regarding one of these MEAs would be referred first to the MEA for resolution. Possible such disputes might include: (a) any dispute brought by a WTO member that was *not* a member of the MEA, or (b) any formal allegation that a country acting in the name of an MEA was actually acting unilaterally.

Basel and CBD as currently constituted would not qualify for the proposed mega-deference. However, under the proposal, they would both be consulted by the WTO in the event of a dispute brought to the WTO—as would any MEA. If the dispute was between parties to the MEA, the WTO would defer dispute resolution to the MEA for one year.

The negotiations launched at Johannesburg should aim to modify MEAs so that they attract enough member states to account for almost all global trade. This, of course, would mean finding ways to gain U.S. adherence. (For example, the United States has expressed concerns regarding a proposed ban in the Basel agreement on the export of hazardous waste to any non-OECD country, and to the provisions on transfer of intellectual property to developing countries in the CBD.) Additionally, many developing countries are not members of the Basel agreement. If these negotiations were successful in attracting member parties to Basel and CBD comprising 85 percent of the world's imports, these conventions would of course then qualify for mega-deference status.

The MEA negotiations would also have to clarify (a) which body would handle a dispute deferred by the WTO, and (b) the procedures for handling such disputes. Current MEA procedures for gaining compliance, including more capacity building, could be strengthened. Additionally, some MEAs would benefit from clearer dispute-resolution processes. For example, the International Convention for the Regulation of Whaling does not contain any formal dispute settlement language.

Background

The World of the WTO

The World Trade Organization came into existence on January 1, 1995 as a result of the Uruguay Round trade negotiations (1987 to 1994). It now has 142 members. The WTO addresses matters readily under governmental control, such as duty levels or imposition of quotas. It has a decision-making body (the Ministerial Conference, which meets at least every two years) as well as a defined decision process.

Although relatively new as an organization, the WTO's roots go back more than 50 years. The WTO's predecessor—the General Agreement on Tariffs and Trade (GATT)—began shortly after World War II as an international body focused on regulating tariffs. GATT periodically convened

trade rounds aimed at reducing duties. In the Tokyo Round in the 1970s, GATT addressed non-tariff barriers such as standards and quotas in a comprehensive way for the first time. Additional non-tariff barriers were addressed in the Uruguay Round in the early 1990s, along with services and trade aspects of investment and intellectual property.

The WTO incorporated all these elements in a comprehensive agreement that included a binding dispute-settlement mechanism. Until the launching of the WTO, GATT members could be a party to whichever trade agreements they chose. However, the WTO required all members to participate in all agreements, except for plurilateral agreements on government procurement and civil aircraft.

The United Nations Environment Programme (UNEP) has identified some specific WTO rules that could cause potential conflicts with MEAs. These rules include the following:

- The *most favored nation* (Article I) clause requires equal treatment among WTO signatories with two exceptions: regional free trade agreements and special treatment for developing countries. However, a number of MEAs require their member parties to apply more restrictive trade provisions against non-parties than to members.
- *National treatment* (Article III) requires imported products to be treated no less favorably than “like” domestic products. (The term “like” products is generally considered to refer to two goods that compete against each other in the market as substitutes.) Because environmental problems are often caused by the way a product is produced, MEAs sometimes include “production process method” requirements. Such requirements may conflict with the “like” requirement in national treatment. (For example, the Montreal Protocol could apply to a semiconductor made with ozone depleting substances, which would be prohibited. However, the WTO would consider the finished products as “like” and would prohibit trade discrimination based on how the product was made.)
- *Prohibition of quotas, import or export licenses* (Article XI). The WTO bans these tactics because they distort trade more than tariffs, and are prohibited other than for specific exemptions defined by the WTO. Some MEAs impose license requirements, which could conflict with this article. (For example, the Basel agreement prohibits trade with non-parties, while Article XI generally prohibits restrictions other than duties on products of any other contracting party.)

However, the WTO does include some provisions that explicitly recognize environmental concerns.

- The Preamble to the WTO Agreement states: “[R]elations in the field of trade and economic endeavor should be conducted with a view to raising standards of living...seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...” (WTO, 1994)
- *Specified exemptions from GATT obligations* (Article XX). This article allows under certain conditions some actions that would be otherwise prohibited under WTO obligations. The article states: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...(b) necessary to protect human, animal or plant life or health...(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...” (WTO, 1994)

The World of the MEAs

There are more than 200 MEAs currently in effect.⁸ MEAs are generally considered the appropriate way to deal with environmental problems that cross international borders, such as preserving migratory animal species, protecting the atmosphere or oceans, or trade in hazardous substances. As globalization continues, we can expect the implementation of even more MEAs.

There is no umbrella organization for MEAs. Some are under the auspices of UNEP, some under the Food and Agricultural Organization of the United Nations, and some are stand-alone agreements. However, in resolution 53/242, the UN General Assembly did approve an annual, ministerial-level, global environment forum under UNEP auspices. This forum is to review “important and emerging policy issues in the field of the environment, with due consideration for the needs to ensure the effective and efficient functioning of the governance mechanisms” of UNEP.

Businesses have often perceived advantages in MEAs. An MEA’s single coherent system of rules may be replacing a number of disparate national rules that had previously required corporations to maintain duplicative systems for compliance. Multiple rules imposed by different countries, ostensibly to deal with the same problem, add to costs as companies struggle to comply with often-conflicting regulations. For example, the chemical industry supports the recent worldwide agreement on Persistent Organic Pollutants because the agreement sets out a consistent set of rules that must be followed globally. Additionally, if U.S. companies have to comply with a set of standards, an MEA can level the playing field by requiring all countries to comply.⁹

The WTO has identified 33 MEAs that have trade implications (WTO, 2000 September 19). Of these, four are not yet in force, fifteen are regional agreements, and one is no longer in force. Table 2 lists those MEAs open to any country for signature that are considered to have WTO implications (as well as the whaling convention, since trade sanctions have been imposed in the name of this agreement). However, because our environmental knowledge and problem-solving abilities are steadily growing, many MEAs are continuously evolving.¹⁰ Accordingly, an MEA that does not currently have trade implications could be amended by its parties to include a trade dimension.

Table 2: MEAs with Trade Implications

<u>MEA¹¹</u>	<u>Date in Force</u>	<u>Parties</u>	<u>Products Affected</u>
Whaling Convention	11/10/48	49	Whales
Bird Protection	5/3/50	15	Birds and bird eggs
Plant Protection	4/3/52	69	Plants
Quarantine of Plants	10/19/60	8	Plants and weeds
Atlantic Tuna/ICCAT	3/21/69	28	Tuna and tuna-like fish

⁸ See UNEP & IISD (2000), p. 11.

⁹ As Kathleen Kunzer of the American Chemistry Council writes, “the industry prefers multilateral environmental agreements to unilateral action – for the level playing field, uniformity and certainty” (Kunzer, 2000, p. 61).

¹⁰ For example, Werksman (n.d.) notes on p. 4 that the Montreal Protocol has (a) expanded the list of covered items through the amendment process, and (b) included stricter timetables for phase-outs by adjustments. Both amendments and adjustments result in new legally binding obligations.

¹¹ MEAs tend to have long complex names, and there is no generally agreed short name for each. Very abbreviated names are used in this table; a listing of the full names, in corresponding order, are in Appendix 2.

CITES	7/1/75	152	Plants, animals
Atlantic Fish	1/1/79	19	Fish
CCAMLR	4/7/82	27	Antarctic Marine Living Resources
Tropical Timber	4/1/85	54	Non-Coniferous tropical woods
Protection of Ozone Layer	9/22/88	175	Substances that deplete ozone layer
Drift Nets	5/17/91	15	Marine living resources
Basel Convention	5/5/92	141	Hazardous wastes
Biological Diversity/CBD	12/29/93	168	Conservation of biological diversity
Climate Change	3/21/94	176	Six greenhouse gases

Source: ENTRI (2001).

In addition to the above MEAs, there are also a number of regional agreements that have trade implications.

Below is a brief discussion of how the trade provisions of three major MEAs overlap WTO rules:

- *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES):* With 175 parties (including the United States), CITES has been considered an effective MEA since entering into force in 1975. Parties to the agreement are required to establish national management authorities that monitor and license import and export of endangered species. CITES requires its parties to periodically report on their implementation of the agreement, and these reports are a major tool for implementation.

While CITES does not contain explicit provisions for enforcement, its parties did impose trade sanctions against Italy in 1992 by suspending all trade with that country in endangered fauna and flora. These sanctions were key to obtaining Italy's full compliance. Similar successful actions have also been taken against Thailand, El Salvador, and Equatorial Guinea. And the United Arab Emirates was expelled from CITES for illegal trade in ivory. Analysts credit these sanctions and the threat of sanctions as leading to greater efforts by CITES parties to respect the treaty's provisions.¹² However, analysts also note that these trade provisions raise questions of consistency with WTO Articles I and XI (which deal with the most-favored nations' treatment and licenses, respectively).

- *Montreal Protocol on Substances that Deplete the Ozone Layer:* With 175 parties (including the United States), the Montreal Protocol is generally considered the most effective MEA. The Protocol bans trade in ozone-depleting substances (ODS) with non-members, and strictly controls production and trade of ODS by members. In fact, the agreement not only applies to ODS but could also apply to products made with these substances (such as semiconductors).

The Montreal Protocol has very sophisticated tools to obtain compliance from both parties and non-parties, and the agreement is credited with having significantly reduced the threat from ODS.¹³ It has a specific procedure for considering reports regarding compliance by parties, and an effective science-based approach to its decisions. It also has a financial mechanism to help countries comply; 32 industrialized countries had contributed \$1.2 billion to this fund by 2001. Since going into effect in 1989, the Montreal parties have amended the agreement to extend coverage to additional substances, and have adjusted the agreement to include stricter timetables.

¹² See for example Werksman (n.d.), p. 4.

¹³ See Werksman (n.d.), p. 4.

The Protocol provides for the imposition of trade sanctions in the event of non-compliance. For example, parties to the Protocol used all its available enforcement tools—including the threat of trade sanctions—during the mid-1990s in addressing problems with compliance by Russia. In this process, Russia raised substantial concerns with threatened sanctions and might have resorted to a WTO complaint had the country been a WTO member.¹⁴ WTO issues could have included: (a) the Article 1 requirement for treating all trading partners equally; (b) the Article III requirement that “like” imported products be treated the same as domestic products; and (c) the Article XI prohibition on quotas and import/export licensing.

The ability of the Montreal Protocol to address the non-party problem is key to its effectiveness. A major producer of ODS such as Russia that violated the agreement would have both nullified protection of the ozone layer as well as gained commercial advantage at the expense of the agreement’s adherents. In obtaining compliance, the Protocol’s parties adopted a very sophisticated approach over a period of several years using the full array of financial incentives and the threat of trade sanctions.

- *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (The Basel Convention)*: The Basel Convention regulates the flow of trade in hazardous substances. This Convention requires parties intending to export hazardous waste to notify the importing country and obtain consent through a “prior informed consent” procedure. Parties to the agreement thus have the right to refuse importation. Trade between parties and a non-party is prohibited, unless the non-party has measures in place as effective as that required by the Convention. At the second Conference of the Parties, a proposal was approved to ban all trade in hazardous wastes from OECD countries to non-OECD countries, but this amendment has not been approved to date.

The Convention, which entered into force in 1992, now has 141 parties; the United States is not a party. Some of the developing-country parties lack capacity in their customs services to effectively implement the agreement. Trade sanctions have not been used thus far to encourage compliance; instead, the parties have relied on capacity-building measures such as training and technology transfer. If sanctions were to be used, however, issues might be raised regarding the relationship of Basel with the most-favored-nation-treatment requirements of the WTO and its prohibition of quotas.

Other MEAs—such as the International Convention for the Regulation of Whaling and the International Convention for the Conservation of Atlantic Tunas (ICCAT)—have also used trade sanctions as a means to enforce compliance. And still other MEAs could have conflict with other WTO provisions—for example, the Convention on Biological Diversity’s provisions on technology transfer could conflict with the WTO’s agreement on Trade Related Intellectual Property Protection.

Major pending MEAs that will have trade implications upon their implementation include: the Cartagena Protocol on Biosafety to the Convention on Biological Diversity; the Kyoto Protocol to the United Nations Framework Convention on Climate Change; the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the Stockholm Convention on Persistent Organic Pollutants.

¹⁴ For a description of this process, see Werksman (n.d.), p.5.

WTO and MEA Dispute Settlement

The WTO has a sophisticated dispute settlement procedure—arguably the most developed of any international institution. As Gabrielle Marceau of the WTO Legal Affairs Division writes, under this procedure, “any WTO member that considers that any of its WTO benefits have been nullified or impaired has an absolute right to trigger the WTO dispute settlement mechanism and request consultations and the establishment of a panel” (Marceau & González-Calatayud, 2001, page 85). The WTO process leads to (a) adoption of a WTO panel report or a WTO Appellate Body report within 12 months, and (b) implementation of the panel’s recommendations in 18 months from the time the dispute was formally registered.

This process seeks to remove barriers or policies found incompatible with WTO rules. If this cannot be done, the second best solution is for the injured party to be compensated by the offending party. If this is not done, then the WTO allows for trade retaliation as a last resort. The WTO process is basically legalistic, and a complaining member can insist on a decision. The WTO does not have the option to postpone consideration of the case or to decline to take up the dispute.

Despite its sophistication, this dispute settlement system has its problems and its critics. A major concern of the environmental community is that the proceedings of WTO dispute settlement panels are closed and not transparent to the public. Indeed, the dispute settlement mechanism is restricted for government use; amicus briefs submitted by non-governmental organizations to the mechanism have generally not been accepted. Another concern of some in the private sector is that the WTO dispute-settlement process seems to work best for traditional trade cases that involve well-established trade rules and less effectively for addressing issues not explicitly covered by WTO rules (such as competition policy or environmental issues).

By contrast, dispute settlement provisions in the MEAs are still largely in an early stage of development.¹⁵ As Jeffrey Dunoff notes, “MEAs typically focus on dispute avoidance rather than dispute settlement. They use ‘sunshine’ methods, such as reporting, monitoring, on-site visits and transparency to induce compliance...MEAs also use positive incentives, such as financial or technical assistance, training programs and access to technology” (Dunoff, 2000, p. 64)

Some MEAs do not have any dispute-settlement provisions or only very rudimentary structures. Other MEAs contain extensive procedures for resolving disputes, even though these have not been used. For example, the dispute-settlement mechanism in the Basel Convention calls first for settlement through negotiation or other peaceful means of the disputant’s choice. If this is not successful, and if the parties to the dispute agree, then the dispute is to be submitted to the International Court of Justice or to arbitration.¹⁶ Unlike the WTO, Basel provides no time lines and no set means of resolution if the parties to the dispute do not agree as to how to proceed. As Marceau writes, MEA dispute settlement provisions—where they exist—are “characterized by their optional nature and by the fact that in most cases their result is not binding on the parties” (Marceau and González-Calatayud, 2001, page 85).

This is not surprising. Since implementation of WTO provisions are assumed to be entirely under a party’s control, failure by a party to abide by a WTO provision is considered by the agreement to be a willful avoidance of obligation for trade advantage. In contrast, failure to comply with an MEA is normally approached as a *capacity failure* for which the appropriate response is not sanctions but assistance and consensus pressure rather than a legalistic approach. In fact, a number of observers believe that overly-tough dispute-settlement provisions coupled with possible sanctions within an

¹⁵ See for example conclusions reached in UNEP (2001), report item 6.

¹⁶ See Basel Convention (1992), Article 20.

MEA might discourage countries from becoming party to the agreement—particularly if a country is concerned with its ability to comply.¹⁷

To date, however, there has been no direct conflict between the WTO and MEAs. Nevertheless, many in the environmental community believe that there could easily be conflicts in the future. There have been a number of high-profile cases in the WTO regarding unilateral country environmental actions (such as the tuna-dolphin decision¹⁸). These cases have caused substantial concern in the environmental community, particularly about their potential implications for MEAs and for international environmental governance. For example, if a WTO member were today accused of non-compliance with the Montreal Protocol and threatened with trade sanctions, that country could go to the WTO to block action.

An ongoing instance of such a dispute is the disagreement between Chile and the European Union (EU) regarding EU harvesting of swordfish. Chile had threatened to ban from its ports those EU factory ships that disregard its conservation measures. In turn, the EU has argued that the WTO provides for the free transit of goods along the members' territories and threatened to bring this dispute to the WTO, while Chile has threatened to bring the dispute to the International Tribunal for the Law of the Sea Convention (WTO, 2000 August). In the event parallel disputes were brought to the WTO and either the Law of the Sea or an MEA dispute-settlement mechanism, the WTO would almost certainly rule first—and its ruling would be enforceable by trade sanctions.

Several points about this possible WTO-MEA conflict need to be made:

- Given the WTO's relatively short decision-making period and its ability to enforce its rulings with trade sanctions, any dispute brought before both an MEA and the WTO will likely be decided first and decisively by the WTO.
- If a country were to bring to the WTO a case regarding an MEA trade action, it would in all likelihood seek to prevent application of the MEA. For this reason, many argue that the WTO rules have had a "chilling" effect on drafting of new MEAs. As the European Community argues, "the legal ambiguity surrounding the possibilities of such a challenge causes uncertainty and doubt over the effectiveness and legal status of such measures and thus weakens MEAs" (WTO, 2000 October 19, page 2).
- Finally, the existence of alternative mechanisms for dispute resolution creates substantial confusion—both for countries in establishing policy and for business wondering which set of rules are binding. As we move forward to develop appropriate global rules, confusion created by potential "forum shopping" must be avoided.

Other Proposals to Reconcile WTO-MEA Dispute Settlement

This issue of how to handle disputes involving MEAs and the WTO has long been on the agenda of the WTO's Committee on Trade and the Environment (the CTE). New Zealand has expressed the view of many of the participants in these discussions that potential conflict between WTO provisions and MEAs "are only likely to arise where the provisions of an MEA are unclear as to the action they

¹⁷ For example, Joy Hyvarinen and Duncan Brack note that "Developing Countries often express the concern that enhanced international enforcement capability in the area of environment could be used to impose standards that they lack the capacity to implement and that in practice it might retard their economic development and export opportunities; in their view, implementation should be guaranteed through financial assistance and technology transfer, not through punitive measures" (Hyvarinen & Brack, 2000, p. 18).

¹⁸ This dispute arose in 1991 over a US law to protect dolphins from injury in tuna fishing nets. A good, brief description of the issue can be found in Runge (1994), pp. 71-77.

mandate, even among the Parties to it, or in situations where the Parties to an MEA are applying trade measures against a non-party” (WTO, 2000 October 10, page 1).

This is probably far too optimistic a view. As has been discussed, many MEAs are vague. Additionally, MEAs are constantly evolving (as is the WTO), so that the actions mandated by a specific agreement may change. And sanctions may be applied unilaterally by a party to an MEA in the name of the MEA, but without formal sanction from the MEA. All of these situations could lead to conflict.

Three other solutions to the possible conflict between the WTO and MEAs have recently been broached:

World Wildlife Fund Approach: A number of environmental groups have proposed that the WTO defer to MEAs. For example, the World Wildlife Fund states that “trade measures pursuant to MEAs should be considered consistent with WTO rules, and their necessity or effectiveness should be beyond review by WTO dispute panels” (WWF, 2001 October, page 2). However, as has been discussed, some MEAs are vague and only have a few members. It is doubtful that any WTO member would be comfortable deferring their trade rights to these MEAs.

Additionally, this proposal dismisses too readily the real risk of “green protectionism” in an MEA. Protectionist features could be deliberately included in an MEA, perhaps as an inducement for domestic industry to support the MEA by gaining market-share at the expense of foreign producers. This protectionism can also happen inadvertently. For example, MEAs often contain “production process method (PPM)” standards, which specify how something is to be made. Such standards may be necessary and legitimate in an MEA to achieve the agreement’s objectives, since the environmental damage may come from the production process. (For example, the Montreal Protocol contains a PPM because it could apply to products made with ODS.) However, production process method standards have often been used as trade barriers in the past. Even where protectionism is not deliberate, the risks of inadvertently causing harm are real. A major concern in the business community is that an MEA may contain a production-process-method standard that specifies a business process used by the MEA party countries but not by some non-parties. This could easily happen because the drafters of the MEA are familiar with their own business practices but not with those followed elsewhere that may be equally valid. Accordingly, the WTO has strict rules to ensure PPMs are not used to block trade; the WTO requires that all “like” products be treated the same.

The risk that an MEA might have protectionist features is clearly far greater where there are fewer participants in the agreement. An agreement that includes the major trading nations and a number of other countries would be very unlikely to have protectionist features that were not critical to achieving the environmental objective. Since the main differences in standards tend to be differences between North America, Europe, and Asia, an agreement that included these three areas would be extremely unlikely to contain a protectionist PPM. Additionally, to ensure that an MEA does not threaten growth prospects of the developing countries, any MEA should have a substantial number of developing countries in order to gain the mega-deference from the WTO proposed here.

EC Approach: Under current WTO rules, if a WTO member that had adopted an MEA-mandated measure had to defend that adoption on the grounds that the measure was a legitimate exception to WTO rules under Article XX, the member would be required to prove that the MEA measure meets the requirements of Article XX. The European Community approach would reverse this burden of proof in a case involving an MEA to require that the *complainant* prove the measure inconsistent with Article XX. This approach is innovative, but it would not really address environmental concerns about the WTO’s primacy over MEAs: WTO dispute-settlement panels would still be making quick

judgments about actions taken under MEAs. Similarly, the EC proposal would not allay the business community's fears that MEAs could be used for protectionist purposes. And if there were a complaint about eco-protectionism, under the EC approach the complainant would have a bigger hurdle to overcome than before.

Laissez-Faire Approach: A number of countries (including the United States, Brazil, India, and others) have advocated that the issue of WTO-MEA dispute settlement simply be allowed to evolve. Arguments for this approach are numerous. First, advocates point out that no cases have to date been brought to the WTO regarding an MEA. Second, the WTO is becoming more sensitive to environmental issues in its handling of cases. A UNEP- and WTO-sponsored dialogue has in fact been opened up between the WTO and the MEAs; this dialogue appears to be leading to greater understanding. Third, the price demanded by developing countries for clarifying the WTO-MEA relationship might be too great—either with regard to trade or environmental policy.

This approach, however, has fundamental flaws:

- As emphasized in this paper, the chances of future conflict between the WTO and MEAs is very real.
- A number of WTO members and observers have expressed real concerns regarding allowing dispute settlement panels to establish policy in an area as sensitive as the trade-environment nexus. Panels are simply supposed to apply policy as established by WTO members in agreements to the facts of a specific case, not develop new policy.¹⁹
- The current situation in which the WTO has de facto dominance over MEAs relegates international environmental policy to a secondary role.

Concluding Comments

The potential for conflict between the WTO and MEAs is real—conflict that would damage both the WTO and efforts to strengthen international environmental protection. The approach outlined here would have the following key advantages:

- Clarifying the relationship between the WTO and MEAs would reinforce the integrity of both systems. As Marceau notes, allowing countries to “forum-shop” between the WTO and MEAs “could disrupt the certainty achieved by the regulation of international relations” (Marceau & González-Calatayud, 2001, page 71).
- Future drafters of MEAs would be clear as to what they needed to do to avoid potential WTO problems. Clarification of the MEA-WTO relationship would remove the “chill factor.” And this approach would provide substantial incentive to build the membership of MEAs.
- The WTO could concentrate on trade issues, which it handles well, without its decisions causing consternation in the environmental community.

Resolving this issue will allow the World Trade Organization and the MEAs to operate together as good neighbors.

¹⁹ Ulf Jaeckel of the German Ministry for Environment argues: “It is not enough to leave the clarification to panelists or to an appellate body. Elected governments should decide how such an important issue is being dealt with and not a small group of people without democratic mandate” (Jaeckel, 2000, page 104).

Appendix 1: Imports of Members of Five Major Multilateral Environmental Agreements

	<u>Imports</u>	<u>UNFCC</u>	<u>Montreal</u>	<u>Basel</u>	<u>CBD</u>	<u>CITES</u>
Afganistan	ns	Not a party	Not a party	Not a party	Not a party	ns
Albania	1,140	1,140	Not a party	Not a party	1,140	Not a party
Algeria	8,840	8,840	8,840	Not a party	8,840	8,840
Angola	ns	Not a party	Not a party	Not a party	Not a party	Not a party
Antigua & Barbuda	414	414	414	414	414	Not a party
Argentina	25,508	25,508	25,508	25,508	25,508	25,508
Armenia	800	800	Not a party	Not a party	800	Not a party
Australia	69,158	69,158	69,158	69,158	69,158	69,158
Austria	69,555	69,555	69,555	69,555	69,555	69,555
Azerbaijan	1,077	1,077	Not a party	Not a party	Not a party	Not a party
Bahamas	1,911	1,911	1,911	1,911	1,911	1,911
Bahrain	3,588	3,588	3,588	3,588	3,588	Not a party
Bangladesh	7,694	7,694	7,694	Not a party	7,694	7,694
Barbados	1,108	1,108	1,108	1,108	1,108	1,108
Belarus	6,674	Not a party	6,674	Not a party	6,674	6,674
Belgium	164,617	164,617	164,617	164,617	164,617	164,617
Belize	366	366	Not a party	Not a party	366	366
Benin	664	664	664	Not a party	664	664
Bhutan	137	137	Not a party	Not a party	137	Not a party
Bolivia	1,755	1,755	1,755	1,755	1,755	1,755
Bosnia & Herzeg	ns	Not a party	ns	Not a party	Not a party	Not a party
Botswana	2,387	2,387	2,387	Not a party	2,387	2,387
Brazil	51,675	51,675	51,675	51,675	51,675	51,675
Brunei	ns	Not a party	ns	Not a party	Not a party	ns
Bulgaria	5,453	5,453	5,453	5,453	5,453	5,453
Burkina Faso	617	617	617	Not a party	617	617
Burundi	118	Not a party	Not a party	Not a party	Not a party	118
Cambodia	ns	ns	Not a party	Not a party	ns	ns
Cameroon	1,318	1,318	1,318	Not a party	1,318	1,318
Canada	220,183	220,183	220,183	220,183	220,183	220,183
Cape Verde	ns	ns	Not a party	Not a party	ns	Not a party
Central African Rep	145	145	Not a party	Not a party	145	145
Chad	316	316	316	Not a party	316	316
Chile	15,137	15,137	Not a party	15,137	15,137	15,137
China (Mainland)	165,788	165,788	165,788	165,788	165,788	165,788
Columbia	10,659	10,659	10,659	Not a party	10,659	10,659
Comoros	ns	Not a party	ns	ns	ns	ns
Congo, Dem Rep	424	424	424	Not a party	424	424
Congo, Rep of	821	821	821	821	Not a party	Not a party
Cook Islands	ns	ns	Not a party	Not a party	ns	Not a party
Costa Rica	6,320	6,320	6,320	6,320	6,320	6,320
Cote d'Ivoire	3,252	3,252	3,252	3,252	3,252	3,252
Croatia	7,799	7,799	7,799	7,799	7,799	Not a party
Cuba	ns	ns	ns	ns	ns	ns
Cyprus	3,618	Not a party	3,618	3,618	3,618	3,618
Czech Republic	29,482	29,482	29,482	29,482	29,482	29,482

Denmark	44,165	44,165	44,165	44,165	44,165	44,165
Djibouti	ns	ns	Not a party	Not a party	ns	ns
Dominica	141	141	Not a party	Not a party	141	141
Dominican Republic	5,988	Not a party	5,988	Not a party	5,988	5,988
Ecuador	3,017	3,017	3,017	3,017	3,017	3,017
Egypt	16,022	16,022	16,022	16,022	Not a party	16,022
El Salvador	3,130	3,130	3,130	3,130	3,130	3,130
Equatorial Guinea	32	Not a party	32	Not a party	32	32
Eritrea	ns	ns	Not a party	Not a party	ns	ns
Estonia	4,094	4,094	4,094	4,094	4,094	4,094
Ethiopia	1,317	1,317	1,317	Not a party	1,317	1,317
Fiji	721	721	721	Not a party	721	Not a party
Finland	30,726	30,726	30,726	30,726	30,726	30,726
France	289,906	289,906	289,906	289,906	289,906	289,906
Gabon	1,104	Not a party	1,104	Not a party	1,104	1,104
Gambia	192	192	192	Not a party	192	192
Georgia	887	887	887	Not a party	887	Not a party
Germany	473,539	473,539	473,539	473,539	473,539	473,539
Ghana	3,505	3,505	3,505	Not a party	3,505	3,505
Greece	25,433	25,433	25,433	25,433	25,433	25,433
Grenada	200	200	Not a party	Not a party	200	Not a party
Guatemala	4,382	4,382	4,382	4,382	4,382	4,382
Guinea	ns	ns	ns	ns	ns	ns
Guinea-Bissau	69	69	Not a party	Not a party	69	69
Guyana	630	630	630	Not a party	630	630
Haiti	1,025	1,025	1,025	Not a party	1,025	Not a party
Honduras	2,728	2,728	2,728	2,728	2,728	2,728
Hong Kong	179,520	Not a party	Not a party	Not a party	Not a party	Not a party
Hungary	27,923	27,923	27,923	27,923	27,923	27,923
Iceland	2,503	2,503	2,503	2,503	2,503	Not a party
India	47,047	47,047	47,047	47,047	47,047	47,047
Indonesia	24,004	24,004	24,004	24,004	24,004	24,004
Iran	14,165	14,165	14,165	14,165	14,165	14,165
Ireland	46,521	46,521	46,521	46,521	46,521	Not a party
Israel	33,160	33,160	33,160	33,160	33,160	33,160
Italy	220,322	220,322	220,322	220,322	220,322	220,322
Jamaica	2,899	2,899	Not a party	Not a party	2,899	Not a party
Japan	311,262	311,262	311,262	311,262	311,262	311,262
Jordan	3,717	3,717	3,717	3,717	3,717	3,717
Kazakhstan	3,687	3,687	Not a party	Not a party	3,687	Not a party
Kenya	2,832	2,832	2,832	Not a party	2,832	2,832
Kiribati	ns	ns	ns	Not a party	ns	Not a party
Korea	119,752	119,752	119,752	119,752	119,752	119,752
Kuwait	7,617	7,617	7,617	7,617	Not a party	Not a party
Kyrgyzstan	ns	Not a party	Not a party	ns	ns	Not a party
Lao	525	525	Not a party	Not a party	525	Not a party
Latvia	2,945	2,945	2,945	2,945	2,945	Not a party
Lebanon	6,207	6,207	6,207	6,207	6,207	Not a party
Lesotho	781	781	781	Not a party	781	Not a party
Liberia	ns	Not a party	ns	Not a party	Not a party	ns

Libya	5,466	Not a party	5,466	Not a party	Not a party	Not a party
Liechtenstein	ns	ns	ns	ns	Not a party	ns
Lithuania	4,835	4,835	4,835	Not a party	4,835	Not a party
Luxembourg	10,786	10,786	10,786	10,786	10,786	10,786
Macedonia	1,796	Not a party	1,796	Not a party	Not a party	Not a party
Madagascar	514	514	514	Not a party	514	514
Malawi	698	698	698	698	698	698
Malaysia	64,966	64,966	64,966	64,966	64,966	64,966
Maldives	402	402	402	402	402	Not a party
Mali	753	753	753	Not a party	753	753
Malta	2,846	2,846	2,846	Not a party	Not a party	2,846
Marshall Islands	ns	ns	ns	Not a party	ns	Not a party
Mauritania	ns	ns	ns	ns	ns	Not a party
Mauritius	2,247	2,247	2,247	2,247	2,247	2,247
Mexico	148,648	148,648	148,648	148,648	148,648	148,648
Micronesia	ns	ns	ns	ns	ns	Not a party
Moldova	1,018	1,018	1,018	Not a party	1,018	Not a party
Monaco	ns	ns	ns	ns	ns	ns
Mongolia	426	426	426	Not a party	426	426
Morocco	9,925	9,925	9,925	9,925	9,925	9,925
Mozambique	1,139	1,139	1,139	Not a party	1,139	1,139
Myanmar	2,300	2,300	2,300	Not a party	2,300	Not a party
Namibia	ns	ns	ns	ns	Not a party	ns
Nauru	ns	ns	Not a party	Not a party	ns	Not a party
Nepal	1,422	1,422	1,422	1,422	1,422	1,422
Netherlands	187,525	187,525	187,525	187,525	187,525	187,525
New Zealand	14,299	14,299	14,299	14,299	14,299	14,299
Nicaragua	1,862	1,862	1,862	Not a party	1,862	1,862
Niger	389	389	Not a party	Not a party	389	389
Nigeria	10,002	10,002	10,002	10,002	10,002	10,002
Norway	34,041	34,041	34,041	34,041	34,041	34,041
Oman	4,674	4,674	Not a party	4,674	4,674	Not a party
Pakistan	10,297	10,297	10,297	10,297	10,297	10,297
Panama	3,516	3,516	3,516	3,516	3,516	3,516
Papua New Guinea	1,188	1,188	1,188	1,188	1,188	1,188
Paraguay	1,725	1,725	1,725	1,725	1,725	1,725
Peru	8,075	8,075	8,075	8,075	8,075	8,075
Philippines	32,568	32,568	32,568	32,568	32,568	32,568
Poland	45,903	45,903	45,903	45,903	45,903	45,903
Portugal	39,825	39,825	39,825	39,825	39,825	39,825
Qatar	2,500	2,500	2,500	2,500	2,500	Not a party
Romania	10,392	10,392	10,392	10,392	10,392	10,392
Russia	43,588	43,588	43,588	43,588	43,588	43,588
Rwanda	253	Not a party	Not a party	Not a party	253	253
Saint Kitts & Nevis	149	149	149	149	149	149
Saint Lucia	335	335	335	335	335	335
Saint Vincent	201	201	201	201	201	201
Samoa	115	115	115	Not a party	115	Not a party
San Marino	ns	ns	Not a party	Not a party	ns	Not a party

Saudi Arabia	28,011	28,011	28,011	28,011	Not a party	28,011
Senegal	1,471	1,471	1,471	1,471	1,471	1,471
Seychelles	434	434	434	434	434	434
Sierra Leone	81	81	Not a party	Not a party	81	81
Singapore	111,060	Not a party	111,060	111,060	111,060	111,060
Slovakia	11,888	11,888	11,888	11,888	11,888	11,888
Slovenia	9,952	9,952	Not a party	9,952	9,952	Not a party
Solomon Islands	151	151	151	Not a party	151	Not a party
Somalia	ns	Not a party	Not a party	Not a party	Not a party	ns
South Africa	26,696	Not a party	26,696	26,696	26,696	26,696
Spain	144,436	144,436	144,436	144,436	144,436	144,436
Sri Lanka	5,876	5,876	5,876	5,876	5,876	5,876
Sudan	1,915	1,915	Not a party	Not a party	1,915	1,915
Surinam	298	Not a party	Not a party	Not a party	298	298
Swaziland	ns	ns	ns	Not a party	ns	Not a party
Sweden	68,621	68,621	68,621	68,621	68,621	68,621
Switzerland	75,438	75,438	75,438	75,438	75,438	75,438
Syria	3,832	3,832	3,832	3,832	3,832	Not a party
Tanzania	1,556	1,556	Not a party	1,556	Not a party	\$1,556
Thailand	50,342	50,342	50,342	Not a party	Not a party	50,342
Togo	597	597	597	Not a party	597	597
Tonga	73	Not a party	Not a party	Not a party	Not a party	Not a party
Trinidad & Tobago	2,741	2,741	2,741	2,741	2,741	2,741
Tunisia	8,474	8,474	8,474	8,474	8,474	8,474
Turkey	40,692	Not a party	40,692	40,692	Not a party	40,692
Turkmenistan	ns	ns	ns	ns	ns	Not a party
Tuvalu	ns	ns	ns	Not a party	Not a party	Not a party
Uganda	1,342	1,342	1,342	Not a party	1,342	1,342
Ukraine	11,846	Not a party	11,846	Not a party	11,846	Not a party
United Arab Emir	24,728	24,728	24,728	24,728	Not a party	24,728
United Arab Rep	ns	Not a party	Not a party	ns	Not a party	Not a party
United Kingdom	317,968	Not a party	317,968	317,968	317,968	317,968
US	1,059,435	1,059,435	1,059,435	Not a party	Not a party	1,059,435
Uruguay	3,357	3,357	3,357	3,357	3,357	3,357
Uzbekistan	ns	ns	ns	ns	ns	Not a party
Vanuatu	96	96	96	Not a party	96	96
Venezuela	14,064	14,064	14,064	Not a party	14,064	14,064
Viet Nam	ns	ns	ns	ns	ns	ns
Yemen	2,008	2,008	2,008	2,008	Not a party	Not a party
Zambia	819	819	819	819	819	819
Zimbabwe	2,803	2,803	2,803	Not a party	2,803	\$1,653
Total Imports	\$5,607,570	\$4,894,368	\$5,382,418	\$4,191,384	\$4,185,442	\$5,283,638
Percent Covered by MEA:		87.3%	96.0%	74.7%	74.6%	94.2%

Source: IMF (2001, July). Amounts shown are 1999 import data—except where 1999 statistics were not available; then, the most recent previous data was used. If data from 1996 on was not available, this is indicated by “ns.”

- 1998 data was used for the following countries: Botswana, Madagascar, Nigeria, Sudan
- 1997 data was used for the following countries: Central African Republic, Gabon
- 1996 data was used for the following countries: Algeria, Democratic Republic of Congo

Appendix 2. Full names of MEAs presented in Table 1 (in corresponding order):

1. International Convention for the Regulation of Whaling
2. International Convention for the Protection of Birds
3. International Plant Protection Convention
4. Agreement Concerning Co-Operation in the Quarantine of Plants and Their Protection Against Pests and Diseases
5. International Convention for the Conservation of Atlantic Tunas
6. Convention on International Trade in Endangered Species of Wild Fauna and Flora
7. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries
8. Convention on the Conservation of Antarctic Marine Living Resources
9. International Tropical Timber Agreement
10. Convention for the Protection of the Ozone Layer (Montreal)
11. Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific
12. Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel)
13. Convention on Biological Diversity (CBD)
14. United Nations Framework Convention on Climate Change

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The WTO and MEAs—Time for a Good Neighbor Policy

A Policy Brief from the Trade and Environment Forum, Woodrow Wilson International for Scholars

This report was prepared by William Krist, a Senior Policy Scholar at the Woodrow Wilson Center. Mr. Krist directs the Trade and Environment Forum in the Center's Environmental Change and Security Project. The initial focus of the Trade and Environment Forum has been Multilateral Environmental Agreements (MEAs)—analyzing their trade implications and developing ideas about how MEAs should mesh with the World Trade Organization (WTO). Through September 2002, the major focus of the Forum will be the World Summit for Sustainable Development, which will be the key platform for making progress in dealing with the problems related to economic development and environment.

Before becoming a Woodrow Wilson Scholar, Mr. Krist was senior vice president at the American Electronics Association. Previously, he had been Assistant Trade Representative for Industry in the Office of the U.S. Trade Representative, and had been responsible for coordinating the U.S. Department of Commerce's work supporting the Tokyo Round trade negotiations. He has an MA in economics from George Washington University and a BA from Swarthmore College.

Founded in 1994, the Environmental Change and Security Project (ECSP) explores the connections between environment, population and security since 1994. Through its meetings, its publications, its comprehensive Web site, and the original research carried out by its staff and scholars, ECSP serves as an information clearinghouse for scholars, policymakers, practitioners, and citizens. (Please see ECSP's Web site at <http://ecsp.si.edu>.) ECSP is directed by Geoffrey D. Dabelko and is housed in the Wilson Center's Division of International Studies, headed by Robert S. Litwak.

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