



“The Relationship between MEAs and WTO Rules”

**Seminar to raise awareness of trade issues in civil society
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**“Multilateral Environmental Agreements in the Trade
and Environment Debate”**

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Liberalized or “free” trade agreements are designed to assure open access to global markets and the free movement of goods. To accomplish this goal, these agreements equate liberalized trade with the absence of governmental intervention in the marketplace in the form of, for instance, tariffs, subsidies, or prescriptive regulations. The history of multilateral trade regime, including General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), can be seen as incremental but persistent progress in extending the scope of this effort to include not just tariffs, but also export subsidies and non-tariff barriers. Indeed, the efficacy of the international trade regime can be explained to a large extent by the simplicity of the central message that less governmental intervention promotes liberalized trade.

From this perspective, environmental regulation, more or less by definition, constitutes a subcategory of governmentally-established requirements that may act as barriers to international trade. The operative structure of international trade agreements mirrors this perspective by articulating "negative" obligations in which states party agree to refrain from certain actions such as unjustified regulatory requirements. But in contrast to the point of view taken by international trade agreements, international and domestic environmental programs anticipate and require the implementation of affirmative governmental actions. Indeed, this fundamental tension encapsulates the recent clash between trade and environment: the conflict between the "negative" obligations in trade agreements and the prophylactic governmental action required to assure environmental quality. One regime -- environment -- is designed to facilitate the implementation of affirmative governmental measures, and the other -- trade -- is intended to assure their absence.

Fundamental GATT/WTO obligations or “disciplines” that apply to environmental and public health regulation, as in other areas, include the most-favored-nation (MFN) principle, specifying non-discrimination among imported products on the basis of their national origin, and the requirement for national treatment, a complementary obligation specifying non-discrimination between foreign and domestic products. A third fundamental GATT/WTO discipline is a prohibition on quantitative restrictions for imports or exports. Taken together, one can think of the basic strategy as a sort of "equal protection clause" for foreign and domestic goods, specifying treatment foreign goods on the same footing as domestic and prohibiting discrimination among various foreign sources.

Article XX of GATT contains a number of exemptions from the General Agreement for specific categories of national measures. Of particular importance in the fields of environment and public health are two express exceptions in article XX of GATT 1994:

- paragraph (b), applying to measures "necessary to protect human, animal or plant life or health;" and
- paragraph (g), exempting measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

As environment as a public policy issue was little appreciated when the GATT was drafted in 1947, environmental measures are likely to be treated under one of these two provisions. If applicable, the effect of article XX is to allow a state to maintain a measure that would otherwise be inconsistent with the basic disciplines.

A number of multilateral agreements, including the Convention on International Trade in Endangered Species and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, regulate trade in environmentally sensitive sectors or hazardous products. Others, such as the Montreal Protocol on Substances That Deplete the Ozone Layer, utilize trade measures as ancillary tools to achieve the larger policy goals of the

agreement. Without trade measures, the Montreal Protocol would create considerable incentives for non-parties to serve as pollution havens, to serve as an external source of chlorofluorocarbons (CFCs) to countries that have taken on obligations under the agreement, and to continue to invest in outmoded, environmentally harmful technologies. The trade provisions of the Protocol reverse those incentives by allowing trade among parties, but authorizing restrictions on trade in bulk CFCs, products containing CFCs, and products manufactured with CFCs with non-parties. With those trade restrictions, the Protocol creates incentives for non-parties to accept the obligations in the agreement and removes the rewards for states remaining outside the agreement.

As between parties to a multilateral environmental agreement (MEA), both of which are WTO members, the MEA operates as *lex specialis* or an agreed derogation from GATT/WTO rules, which consequently do not apply in this situation. However, trade provisions, such as those in the Montreal Protocol, potentially run afoul of GATT/WTO rules because those measures discriminate between parties and non-parties to the multilateral environmental agreement, all of which may be WTO members. There has been no concrete dispute in the WTO challenging such measure, but the likelihood that article XX would apply is greater than in the case of a purely unilateral measure. The WTO Appellate Body's report in the turtle-shrimp case, as well as the arbitrators' reports, are also encouraging in suggesting that discriminatory trade measures in MEAs would withstand scrutiny.

Attempts to deal with the "MEA problem" have not been entirely successful. The WTO's Committee on Trade and Environment (CTE) has failed to endorse a "legislative" solution. Article XXV of GATT, the waiver provision, and article 104 of NAFTA are less than entirely satisfactory solutions as a matter of principle. Since this issue began to penetrate the consciousness of policymakers and the public, a number of new agreements that raise the "MEA problem" have been negotiated, most notably the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Cartagena Protocol on Biosafety. The persistence of the "MEA problem" has a potential for a chilling effect on necessary and effective trade measures in newly-negotiated agreements.