

# THE DEBATE ON ENVIRONMENTALLY MOTIVATED UNILATERAL TRADE MEASURES IN THE WORLD TRADE ORGANIZATION: THE WAY FORWARD

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## I. INTRODUCTION

The links between trade and the environment are complex and multifaceted.<sup>1</sup> The relationship between international trade and the environment has only recently attained a prominent place in the trade agenda, although it has been a concern of environmentalists for some

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1. MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 393 (3d ed. 2005).

time.<sup>2</sup> In the aftermath of the Rio Declaration<sup>3</sup> and with the advent in the 1990s of some disputes touching on trade and the environment, environmentalists demanded a restraint on the pursuit of free trade. While some environmentalists tend to identify liberal trade with environmentally destructive, unrestrained economic growth, many free traders label states' resort to environmentally motivated unilateral trade measures as either "disguised protectionism" or "irrational fanaticism."<sup>4</sup>

By coupling trade with the environment in environmentally motivated unilateral trade measures, the World Trade Organization ("WTO") causes disagreements between countries in different stages of development. The members of developing countries and economies in transition voice concern over the proclivity of high-income countries to use unilateral trade measures to induce or threaten less wealthy countries to implement discriminatory environmental regulations in favor of high-income countries; they challenge the legality of such measures under the WTO rules. Against this background, the WTO initiated negotiations and discussions on important aspects of the linkages between trade and the environment—one such discussion focuses on clarifying the status of unilateral trade measures that are taken on environmental grounds.<sup>5</sup>

Both before and after the initiation of these negotiations and discussions, WTO Members propagated different approaches to resolve the conflict between trade and the environment. Two major approaches dominate the discussions and negotiations for the clarification of the status of environmentally motivated trade measures in the WTO: the status quo approach, the proponents of which argue that unilateral trade measures are already recognized by the General Agreement on Tariffs and Trade ("GATT") system, and thus there is no need for further progress on the issue;<sup>6</sup> and the environmental integrative approach, the proponents of which insist that the rules are not broad enough to accommodate

2. *Id.* at 331.

3. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Annex I) (June 13, 1992) [hereinafter *Rio Declaration*].

4. TREBILCOCK & HOWSE, *supra* note 1, at 507.

5. The Doha Declaration, a document agreed upon by the trade ministers of the Member countries of the World Trade Organization, mandates the Committee on Trade and Environment to start negotiation on: (a) the relationship between WTO rules and specific trade obligations in Multilateral Environment Agreements ("MEAs"); (b) reduction of tariff and non-tariff barriers to environmental goods and services; and (c) the procedure for information exchange between the Secretariats of MEAs and WTO Committees. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶¶ 32, 33, 51, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 751 (2002) [hereinafter *Doha Declaration*].

6. See discussion *infra* Part II.A.

environmental values, and thus propose various mechanisms to govern the overall relationship of trade rules with environmental rules.<sup>7</sup>

These approaches contain a number of drawbacks that hindered the consensus required for clarifying the status of environmentally motivated trade measures in the WTO. Most of the proposals do not seem well suited to address the concern of low-income countries, which by far constitute the majority of WTO Members.<sup>8</sup> This Article analyzes and critically examines the various approaches to resolving the trade and environment conflict in the WTO, with specific regard to the regulation of unilateral trade measures. Part II describes the various approaches by WTO Members to the reconciliation of the two regimes. Part III discusses the responses to the various approaches. An appraisal is made from the perspective adopted by the paper in Parts IV through VI, and finally conclusions are drawn.

## II. APPROACHES TO CLARIFYING ENVIRONMENTALLY MOTIVATED TRADE MEASURES IN THE WORLD TRADE ORGANIZATION

After the launch of the Doha round of negotiations in 2001, there was a large influx of proposals addressing the issue of trade measures for environmental purposes. The proposals, submitted by Member states both prior to and after the Doha round, can broadly be grouped into two approaches: the “status quo approach” and the “environmental integrative approach.” The former focuses on how trade measures should be placed at the service of environmental goals—as, for example, in the U.S. push for language ensuring the continued use of unilateral trade measures as an effective tool for environmental protection.<sup>9</sup> The environmental integrative approach, while accommodating legitimate environmental concerns, strongly opposes the unilateral use of environmentally motivated trade measures as a pretext for disguised protectionism or extra-jurisdictional application of environmental laws. Rapprochement between the two approaches appears unlikely.

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7. See discussion *infra* Part II.B.

8. See WTO, Understanding the WTO: The Organization-Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Mar. 3, 2010).

9. See *infra* note 13 and accompanying text.

*A. The Status Quo Approach to Trade Measures in the World Trade Organization*

The proponents of the status quo approach assail motions towards a link between trade and the environment beyond what is already provided under article XX of GATT.<sup>10</sup> They believe that there are already adequate provisions in the WTO dealing with unilateral trade measures for environmental purposes. “Interestingly, these countries include those who believe that the WTO rules are clear in sanctioning many such measures (e.g. the United States) as well as those who believe the rules are clear in prohibiting them (e.g. India).”<sup>11</sup> The former group of countries proposed that environmental and trade policies in the WTO should continue with the existing, but strengthened, relationship. They thus advocated for a state’s right to use trade measures for environmental purposes within the existing GATT framework.

Maintaining the status quo between Multilateral Environmental Agreements (“MEAs”) and WTO rules under this approach is built on the premise that only a small number of MEAs contain trade measures, and that so far there has not been any conflict between MEAs and the WTO.<sup>12</sup> Moreover, the proponents of the status quo approach frequently emphasize that article XX of GATT provides a wide scope of environmental exceptions, and that WTO rules incorporate the concept of sustainable development and form the environmental foundation of some WTO decisions.

According to the United States, the leading proponent of this approach, the MEA–WTO relationship has worked and continues to work “quite well.”<sup>13</sup> The WTO rules have not interfered with trade obligations among MEA parties, nor have they stifled MEA negotiators’ willingness to include trade obligations that are deemed important for environmental purposes. “For their part, MEA negotiators have generally sought to tailor their trade provisions to meet particular environmental purposes . . . in a

10. See General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

11. Alexey Vikhlyayev, *The Use of Trade Measures for Environmental Purposes—Globally and in the EU Context* 18 (Fondazione Eni Enrico Mattei, Note di Lavoro No. 68.2001, 2001), available at <http://www.feem.it/userfiles/attach/Publication/NDL2001/NDL2001-068.pdf>.

12. Risa Schwartz, *Trade Measures Pursuant to Multilateral Environmental Agreements—Developments from Singapore to Seattle*, 9 REV. EUR. COMMUNITY & INT’L ENVTL. LAW 43, 43 (2000).

13. Special Session of the Comm. on Trade & Env., *Sub-Paragraph 31(I) of the Doha Declaration: Submission by the United States*, ¶ 5, TN/TE/W/20 (Feb. 10, 2003).

way that takes account of WTO implications.”<sup>14</sup> In its submissions to the Committee on Trade and Environment (“CTE”) in June 2004, the United States stressed the critical importance of enhanced domestic coordination between MEA and WTO policymakers and negotiators, and contended that both the design of the Specific Trade Obligations (“STOs”) in MEAs and the implementation practice of MEA Parties could contribute to a “mutually supportive relationship” between trade and the environment.<sup>15</sup>

This proposal was first introduced to the CTE in 1996, and the United States has pursued it strongly throughout the post-Doha negotiations. The Singapore Report echoed in its recommendations some elements of the status quo approach and, thus, MEA negotiators have been invited to the CTE to give presentations on new trade-related developments in their respective agreements.<sup>16</sup>

### *B. The Environmental Integrative Approach*

The environmental integrative approach calls for the integration of environmentally motivated measures into trade agreements and for the enunciation of detailed environmental exceptions. Unlike the status quo approach, the environmental integrative approach is based on the premise that article XX does not permit unilateral trade measures to address extra-jurisdictional environmental problems.<sup>17</sup> Therefore, the WTO must approve a state’s protection of the environment beyond its own territory. The proposals made before the CTE under this category have generally taken either *ex post* or *ex ante* approaches to the application of environmental exceptions under the WTO rules. The following discussion considers such proposals in more detail.

#### *1. The Ex Post (Waivers) Approach*

This proposal attempts to resolve the trade and environment policy conflict through the waiver provisions of the WTO rules, i.e., the *ex post*

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14. *Id.*

15. Special Session of the Comm. on Trade & Env., *Sub-Paragraph 31(I) of the Doha Declaration: Submission by the United States*, ¶ 6, TN/TE/W/40 (June 21, 2004) [hereinafter *2004 Submission by the U.S.*]. It argued that improved designs of Specific Trade Obligations in MEAs based on science, revisions in light of new data, and flexibilities in implementation can enhance the mutual support of the two regimes. It also proposed that MEAs must be designed and implemented in such a way as to enlist countries’ maximum participation. Regarding the design, the package of measures must contain trade measures, production and consumption regulations and positive measures.

16. Schwartz, *supra* note 12, at 67.

17. Vikhlyev, *supra* note 11, at 25.

means available under the WTO dispute settlement mechanism. This approach, as proposed by the EU, asserts that trade measures arising from MEAs may be accepted by the WTO “either on a case-by-case basis or automatically” through the waiver provisions in the WTO.<sup>18</sup> In practice this means that trade measures arising from MEAs might be specially exempted from WTO rules by means of a waiver under either articles IX(3) and (4) of the Marrakesh Agreement that establishes the WTO,<sup>19</sup> or article XXV(5) of GATT.<sup>20</sup> Such an exemption runs for a limited period of time and must be reviewed within one year.<sup>21</sup>

Another aspect of the waiver approach, adopted by the Ministerial Conference in Singapore, provides that WTO Members, which are also parties to MEAs, can resolve disputes over the use of trade measures applied among themselves pursuant to the dispute settlement mechanism available under the appropriate MEA.<sup>22</sup> This view is based on the presumption that MEAs that have a broad multilateral consensus would also enjoy wide support from the international community, including WTO Members.<sup>23</sup> This international consensus would help to establish the merits for granting a waiver to the proposed MEA.

A related proposal by the EU suggests the possible use of an *ex post* waiver under the WTO Dispute Settlement Body, through a reversal of the burden of proof when a non-party to an MEA challenges a measure taken by another WTO Member pursuant to that MEA.<sup>24</sup>

At the moment, the onus falls on a WTO Member defending a measure under GATT Article XX to prove that the measure, if deemed incompatible with other GATT provisions, nevertheless meets the requirements laid down in Article XX. The reversal of the burden of proof would [mean] that the country challenging the

18. “The criteria proposed for trade measures to support environmental objectives include such notions as necessity, proportionality, least-trade restrictiveness, effectiveness, broad multilateral support, and adequate scientific evidence.” *Id.* at 18.

19. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Marrakesh Agreement].

20. These provisions allow the WTO Ministerial Conference, by a three-quarters or two-thirds majority, to release a Member from contractual obligations under exceptional circumstances. *See id.* art. IX(3)–(4); GATT, *supra* note 10, art. XXV(5).

21. Marrakesh Agreement, *supra* note 19, art. IX(4).

22. Comm. on Trade & Env., *Report (1996) of the Committee on Trade and Environment*, ¶ 38, WT/CTE/1 (Nov. 12, 1996) [hereinafter *1996 WTO Committee Report*].

23. Vikhlyaev, *supra* note 11, at 18.

24. Comm. on Trade & Env., *Resolving the Relationship Between WTO Rules and Multilateral Environmental Agreements: Submission by the European Community*, ¶ 15, WT/CTE/W/170 (Oct. 19, 2000) [hereinafter *Submission by the E.C.*].

measure would . . . have to prove the measures imposed by the other party do not meet the conditions of Article XX.<sup>25</sup>

The EU argued that this approach “provide[s] greater security without altering the rights and obligations of WTO Members,” and also addresses the specific issue of non-parties.<sup>26</sup>

“The waiver approach was not considered to be the optimal solution by some WTO Members as waivers are time-limited, leaving MEA negotiators in a state of uncertainty as to the situation after the expiry.”<sup>27</sup> Moreover, granting a waiver to an obligation under the WTO rules can only be done through a two-thirds majority—a number considered too difficult to achieve for every waiver request. As a result, some delegations felt “that obtaining a waiver could be time-consuming and possibly cumbersome.”<sup>28</sup>

It has also “been noted [by some writers] that Article XXV is meant to address exceptional circumstances and it is not clear [whether the WTO] would wish to treat MEAs as exceptions.”<sup>29</sup> Therefore, as suggested by Risa Schwartz, the waivers approach may be an unsatisfactory resolution of the relationship between WTO rules and environmental policies.<sup>30</sup>

Owing to these doubts—as well as the contention by some Members that the proposals are outside the Doha Declaration in paragraphs 31(i) and 32—the *ex post* proposals have been largely omitted from the discussions following the launch of the Doha round of negotiations.<sup>31</sup> After the Declaration of the Doha Agenda, discussions and proposals mostly focused on the *ex ante* approaches.

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25. *Id.*

26. *Id.* ¶ 10.

27. Schwartz, *supra* note 12, at 66.

28. Ambassador H. Ukawa (Japan), Chairman of the Group on Environmental Measures and International Contracting Parties, *Report to the 49th Session of the Contracting Parties*, ¶ 23, L/7402 (Feb. 2, 1994).

29. *Id.*

30. Schwartz, *supra* note 12, at 66.

31. The United States, for example, has argued that these proposals tend to add burdens on WTO Member states on top of those recognized under existing WTO agreements. This would contravene paragraph 32 of the Doha Declaration (also referred to as the Doha agenda or Doha mandate), which provides that “the negotiations must not add to or diminish the rights and obligations of Members under existing WTO agreements.” See *2004 Submission by the U.S.*, *supra* note 15, ¶ 4.

## 2. *The Ex Ante (Environmental Window) Approach*

A second approach advanced by some WTO Members, mainly the EU, is described as creating an “environmental window” in GATT.<sup>32</sup> This involves defining the conditions for the use of trade measures in the context of an MEA—conditions, which, as long as they were met, would ensure GATT accommodation of the measures.

Although many European and other developed-country WTO Members supported clarifying the relationship in this way, the various proposals differed drastically so that there was no common agreement about which was the preferred method: an amendment of the GATT provisions or an independent instrument of understanding for the clarification of the existing rules.<sup>33</sup> The proponents of the *ex ante* approach argue that greater certainty is needed on the use of unilateral trade measures in the WTO and that the waiver approach fails to provide this certainty. Hence, they propose to clarify the relationship between the WTO and MEAs through an amendment to article XX so as to accommodate the use of trade measures pursuant to MEAs—the EU’s original proposal before the first WTO Ministerial Conference in Singapore in 1996<sup>34</sup>—or through a negotiated interpretation or understanding of article XX as suggested by Switzerland and the EU in the post-Doha negotiations.<sup>35</sup> Some writers have also argued that clarifying the WTO-MEA relationship and accepting the legitimate use of trade measures in MEAs would send a message that, while these MEA-based trade measures may be acceptable under article XX, unilateral actions are not welcome in the multilateral trading system.<sup>36</sup>

A version of this approach that has gained much support among WTO Members involves a collective interpretation of the applicability of the provisions of article XX of GATT in circumstances where trade measures

32. 1996 WTO Committee Report, *supra* note 22, ¶ 15.

33. Schwartz, *supra* note 12, at 66.

34. It is important to note that a similar provision has been included in article 103 of the North American Free Trade Agreement (“NAFTA”), where in cases of conflict between itself and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol, or the Basel Convention, the MEA provision takes precedence, subject to the parties using the means least inconsistent with NAFTA in the MEA’s implementation. See North American Free Trade Agreement, U.S.-Can.-Mex., art. 104, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

35. Special Session of the Comm. on Trade & Env., *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda: Submission by the European Communities*, ¶ 30, TN/TE/W/1 (Mar. 21, 2002) [hereinafter *Doha Development: European Submission*].

36. Sabrina Shaw & Risa Schwartz, *Trade and Environment in the WTO: State of Play*, 36 J. WORLD TRADE 105, 148 (2002).



in an MEA are applied to non-parties.<sup>37</sup> There have also been discussions about whether this should be done by expanding subsection (b), (g) or (h) of article XX, or whether it would be preferable to add a new subsection (k).<sup>38</sup>

The European Union supported the collective interpretation technique because it believed that this “would provide gains to all WTO members and contracting parties to MEAs, provide greater legal security, make both systems more effective and improve policy formulation in both areas.”<sup>39</sup> The EU’s position was that WTO rules should not be interpreted in “clinical isolation” from other bodies of international law, including MEAs. MEAs would therefore have considerable relevance for the application of WTO rules in a particular dispute, even in relation to non-parties.<sup>40</sup> The EU cited the WTO Appellate Body’s reference in the *Shrimp-Turtle* case<sup>41</sup> to a number of MEAs and its clarification of the term “exhaustible natural resources” under article XX(g) of GATT in support of the conclusion that MEAs have a significant role in justifying trade measures taken for environmental purposes.<sup>42</sup>

The European Union also suggested some principles that should govern the relationship between MEAs and WTO rules.<sup>43</sup> Switzerland went considerably further by proposing a “coherence clause,” according to which the provisions of an MEA would have to be treated equally to those of the WTO in the event of a dispute.<sup>44</sup>

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37. *Submission by the E.C.*, *supra* note 24, ¶ 24.

38. Tilman Santarius et al., *Balancing Trade and Environment* 8 (Wuppertal Inst. for Climate, Env., and Energy, Wuppertal Paper No. 133e, 2004), available at [http://www.wupperinst.org/en/publications/entnd/uploads/tx\\_wibeitrag/WP133e.pdf](http://www.wupperinst.org/en/publications/entnd/uploads/tx_wibeitrag/WP133e.pdf).

39. U. Sankar, *Trade Measures in Multilateral Environmental Agreements and the WTO Rules* 12 (Dec. 2007) (unpublished report, presented at the International Society of Ecological Economics Conference, New Delhi, Dec. 15–18, 2007), available at <http://www.mse.ac.in/Trade%20Measures.pdf>.

40. *Doha Development: European Submission*, *supra* note 35, ¶ 29.

41. *See infra* note 87.

42. The European Union noted that “jurisprudence of the Appellate Body in environment-related cases strongly suggests that the conclusion of an MEA could well be a key element to determine the justification of certain measures under Article XX of the GATT.” *Doha Development: European Submission*, *supra* note 35, ¶ 29. The EU also reiterated the Appellate Body’s decision that the GATT rules “must be read by a Treaty interpreter in the light of contemporary concerns of the Community of nations about the protection and conservation of the environment.” Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan, Thailand)*, ¶ 129, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle case*].

43. It suggested the implementation in the WTO of principles of: (1) mutual supportiveness, (2) no subordination, (3) deference, and (4) transparency. Special Session of the Comm. on Trade & Env., *Proposal for a Decision of the Ministerial Conference on Trade and Environment: Submission by the European Communities*, ¶ 2, TN/TE/W/68 (June 30, 2006).

44. *1996 WTO Committee Report*, *supra* note 22, ¶ 19.

Doubts have been raised about the *ex ante* approach generally. It has been argued, for example, that the approach could upset the existing balance of GATT rights and obligations. WTO Members that are not party to many MEAs, such as the United States, wish to invoke their GATT rights if they believe they are suffering from unfair trade practices or unnecessary discrimination. They, therefore, insist that the provisions of an MEA, or the judgments of parties to an MEA, should not be allowed to override those GATT rights, especially without any obligation to explain the case for trade discrimination if the measure is challenged under GATT.<sup>45</sup>

Another basic doubt of a more practical nature is whether it would be possible to find a single formula for implementing the approach that would, on the one hand, be general enough to encompass all legitimate requirements—present and future—for the use of trade measures in the context of MEAs and, on the other, neither over-stretch the basic concept of an exception clause which underlies this approach nor open the door to protectionist abuse.<sup>46</sup> Also, some commentators express the concern that it may be difficult to establish criteria for implementing this approach without stepping outside the competence of the GATT agreement and entering into an examination of the environmental justification for the use of trade provisions in an MEA. Such writers, therefore, recommend consideration of the individual merits of each case as it arises rather than pursuing concepts of general application.<sup>47</sup>

### 3. *The Principles and Criteria Approach*

The “principles and criteria approach” has been advanced by Canada since June 1996 and throughout the Doha round of negotiations.<sup>48</sup> This approach takes an *ex ante* form. As the Canadian trade representative stated, the approach emanated from the formulation of Canada’s national position for MEA negotiations.<sup>49</sup>

The “principles and criteria approach” attempts to clarify the existing WTO rules, possibly “in some form of interpretative or ministerial statement [which can assist] WTO panels in assessing the legitimacy of

45. *Report to the 49th Session of the Contracting Parties*, *supra* note 28, ¶ 26.

46. *Id.* This is a concern raised by most developing countries, which are afraid that most MEAs have been negotiated through the coercive actions of powerful nations.

47. *Id.*

48. Special Session of the Comm. on Trade & Env., *Summary Report on the Eleventh Meeting of the Committee on Trade and Environment in Special Session*, ¶ 4, TN/TE/R/11 (May 30, 2005).

49. *Id.* ¶ 3.

MEA trade measures and international MEA negotiators in contemplating the appropriate use of trade measures.”<sup>50</sup> According to this approach, principles specify the requirements for the acceptability of MEAs and specific trade measures, while criteria determine how the trade measure is applied.<sup>51</sup> In this way, “Canada believes that a balanced outcome in the WTO negotiations could have the effect of facilitating the negotiation of trade measures within MEAs that take account of WTO rules and contribute to environmental protection.”<sup>52</sup>

This approach looks to “MEA qualifying principles and criteria for determining the need for trade provisions in MEAs.”<sup>53</sup> More significantly, the proposal also provides that other principles and criteria could be added “so that context of a particular trade agreement is accounted for such as scenarios where almost every negotiating party is a developing country.”<sup>54</sup>

### *C. Other Approaches in the World Trade Organization*

Although the above approaches are the major proposals that have been advanced in the discussions and negotiations on the trade and environment agenda, there are also other proposals that incorporate elements of one or more of the approaches discussed. For example, taking a tack similar to Canada’s, Switzerland proposed an interpretative understanding that would ensure that MEAs determine the objectives, proportionality, and necessity of trade measures while the WTO Dispute Settlement Body would have the authority to assess whether a particular trade measure is

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50. General Council, *Preparations for the 1999 Ministerial Conference: Canadian Approach to Trade and Environment in the New WTO Round*, ¶ 6, WT/GC/W/358 (Oct. 12, 1999).

51. The qualifying principles include the MEA: “(1) being open to all countries; (2) reflecting broad-based international support; (3) precisely drafting those provisions that specifically authorize trade measures; [and] (4) permitting trade with non-parties on the same basis as parties, when non-parties provide equivalent environmental protection.” Special Session of the Comm. on Trade & Env., *Multilateral Environmental Agreements (MEAs) and WTO Rules; Proposals Made in the Committee on Trade and Environment (CTE) from 1995–2002*, at 13, TN/TE/S/1 (May 23, 2002) [hereinafter *MEAs and WTO Rules Proposals*].

52. Foreign Affairs and International Trade Canada, *Trade & Environment at the WTO*, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/t-e\\_wto.aspx?lang=en&menu\\_id=5&menu=R](http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/t-e_wto.aspx?lang=en&menu_id=5&menu=R) (last visited Sept. 22, 2009).

53. Kevin R. Gray, *Accommodating MEAs in Trade Agreements* 8 (paper presented at the International Environmental Governance Conference, Paris, Mar. 15–16, 2004), available at <http://www.worldtradelaw.net/articles/graymea.pdf>. In this context Gray proposed the additional requirement that “the MEA must make appropriate provision to facilitate implementation by developing country parties to the agreement (i.e., technology transfer, capacity building) and otherwise give effect to the common but differential responsibilities principle.” *Id.* at 9.

54. *Id.*

applied in an arbitrary, discriminatory, or protectionist manner.<sup>55</sup> The responsibility for setting the principles is thus assigned to the environmental regime, while the criteria of their application are left to the trade regime. Switzerland considered four options for regulating the issue of trade measures in MEAs:

- i. Leave the issue to be settled by the dispute settlement mechanism of the WTO.
- ii. Amend article XX(g) of GATT by introducing a reference to the environment.
- iii. Reverse the burden of proof.
- iv. Adopt an interpretative decision on article XX.<sup>56</sup>

Other positions vary between a mixture of status quo, *ex post*, and *ex ante* approaches with strict criteria,<sup>57</sup> such as: (i) the Korean approach indicating that any trade measure not specifically mandated in an MEA should be treated as a unilateral trade measure;<sup>58</sup> and (ii) the Japanese proposal to establish procedural guidelines for MEA negotiators on the WTO-consistency of various trade measures.<sup>59</sup>

So far, it has been difficult to find common ground among all the approaches suggested. The proposals have encountered sharp criticism from WTO Member states, which either have advanced their own approach or opposed discussions and negotiations on the agenda at all.

55. Comm. on Trade & Env., *The Relationship Between the Provisions of the Multilateral Trading System and Multilateral Environmental Agreements (MEAs): Submission by Switzerland*, ¶ 7, WT/CTE/W/139 (June 8, 2000).

56. Special Session of the Comm. on Trade & Env., *Statement by Switzerland at the CTE Special Session on 10 October 2002*, at 3, TN/TE/W/16 (Nov. 6, 2002). Regarding option (i), Switzerland noted that the Appellate Body's decisions determined only the legal situation of a specific case in relation to two members, but that it did not constitute a general rule for the relationship between the WTO and MEAs. *Id.* ¶ 11. Regarding option (ii), it wanted an environmental clause that would explicitly define the relationship between WTO rules and MEAs. *Id.* Regarding option (iii), it stated that when a Member, pursuant to an MEA, prohibits the marketing of a product for environmental reasons, such a ban is considered to be WTO-consistent and the Member would no longer have to show that its measure was covered by the exceptions under article XX(b). *Id.* at 3. With regard to option (iv), its view was that it neither added to nor diminished the rights and obligations of members, but simply clarified the texts. *Id.* ¶ 9. See also Special Session of the Comm. on Trade & Env., *Submission by Switzerland: The Relationship Between Existing WTO Rules and Specific Trade Obligations (STOs) Set Out in Multilateral Environmental Agreements (MEAs): A Swiss Perspective on National Experiences and Criteria Used in the Negotiation and Implementation of MEAs*, TN/TE/W/58 (July 6, 2005).

57. See generally Santarius et al., *supra* note 38 (outlining other approaches).

58. *MEAs and WTO Rules Proposals*, *supra* note 51, at 9–10.

59. *Id.* at 14–15.

Some countries are concerned that the window approach would set dangerous precedents for other social issues—such as labor and indigenous rights—and open the WTO to protectionism. The waiver approach has been criticized for failing to provide certainty and guidance to MEA negotiators.

Both the waiver approach and the principles and criteria approach have been branded as an opportunity for trade policymakers to pass judgment on international environmental law.<sup>60</sup> Most developing countries are totally opposed to any move to incorporate environmental policies in the WTO through unilateral action and, in particular, have raised serious objections to the view that the existing WTO rules already have room available for unilaterally imposed trade measures. These developing countries are wary of the unilateral imposition of protectionist trade measures by the well muscled Member states in pursuit of their own economic interests. In the following pages I will discuss suggestions made outside the WTO framework before pointing to the notable arguments and counter-proposals of WTO Members in response to the approaches discussed.

### III. ALTERNATIVES OUTSIDE THE WORLD TRADE ORGANIZATION FRAMEWORK: THE INTEGRATED ASSESSMENT OF ENVIRONMENTAL STANDARDS

Numerous reform proposals have been suggested outside the framework of the WTO. The “integrated assessment approach” is one proposal in particular that merits discussion due to the support it attracts amongst writers and the significance it may have in contributing to the clarification of the status of unilateral trade measures taken on environmental grounds.

The “integrated assessment approach,” as proposed and explained by experts on trade and the environment from the United Nations Environment Program (“UNEP”), “considers the economic, environmental and social effects of trade measures, the linkages between these effects, and aims to build upon this analysis by identifying ways in which . . . positive effects can be enhanced.”<sup>61</sup> The approach has both *ex post* and *ex*

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60. This critique has its basis in the fact that some MEAs are older and have more members than the WTO. Int'l Inst. for Sustainable Dev., *Legal and Policy Linkages: MEAs and the WTO*, [http://www.iisd.org/trade/handbook/5\\_10.htm](http://www.iisd.org/trade/handbook/5_10.htm) (last visited Sept. 22, 2009).

61. U.N. Env. Prog. [UNEP], *Reference Manual for the Integrated Assessment of Trade-Related Policies*, at iii, UNEP/01/4 (2001), available at <http://www.unep.ch/etb/publications/intAssessment/refmaniaFinal.pdf>.

*ante* applications. The *ex post* application aims to articulate standards that will help policymakers and stakeholders judge the results of trade measures that have already been introduced, while the *ex ante* assessment contributes to the process of developing policy prior to the start of formal international negotiations.<sup>62</sup>

Although the harmonization of environmental standards has been supported by many writers, there remains conflict as to which body should be given the responsibility for assessing the standards so designed: the WTO, environmental organizations such as the UNEP, or an independent organization established for this purpose. Some writers have argued that the WTO dispute resolution system is ill equipped to take into account factors outside the “four corners” of the WTO, and therefore environmental experts should be included in the system in all cases involving environmental concerns.<sup>63</sup>

While this would theoretically be possible in the WTO, other writers express the concern that GATT or the WTO may well not permit GATT Panels to take into account environmental concerns outside of GATT, “rendering the presence of the environmental expert all but useless.”<sup>64</sup> Hence, they argue for an objective body that would be better able to accommodate the concerns of both regimes as to the application of the harmonized standards. Their proposal is either to strengthen the UNEP or create a separate Global Environmental Organization as a counterpoise to the WTO.<sup>65</sup> Such an organ, as proposed by Charles Cowan, would take the form of an objective third body likely established under the umbrella of the United Nations, which involves experts of both trade and the environment.<sup>66</sup>

This approach, though it dominates the literature on the subject, has not yet been officially introduced in the CTE discussions. Hence, it has little or no role in the discussions and negotiations carried out in the Committee on Trade and Environment Special Session (“CTESS”). As such, this Article will not explore the proposal further.

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62. *Id.* at 15.

63. Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT’L L. 79, 101–02 (2006).

64. Charles Cowan, *Separate Spheres: Conflict and Congruence between International Trade and Environmental Law*, 61 J.L. & POL’Y (Japan) 1336, 1307 (1995).

65. UNEP, *supra* note 61.

66. Cowan, *supra* note 64, at 1307.

#### IV. UNILATERALISM AND THE THREAT OF GREEN PROTECTIONISM

The position of WTO Members that are developing economies and economies in transition on the agenda for the clarification of the legality of unilateral trade measures in the WTO is formed more as a response than a distinct approach per se. From an early point, most developing countries opposed environmental discussions in the WTO. For example, they opposed the convening of the Environmental Measures and International Trade (“EMIT”) group and the formation of the CTE precisely because they feared these entities could be used to justify U.S. and European unilateral trade measures against exports from developing countries, resulting in “green protectionism.”<sup>67</sup> In the GATT Council meetings building up to the EMIT group’s convening, the Thai representative, on behalf of the Association of Southeast Asian Nations (“ASEAN”), asserted that “for GATT to address environmental [protection] problems as a general trade policy issue was inappropriate.”<sup>68</sup> The Moroccan delegate expressed no definitive views on whether GATT had the “competence to legislate on this subject.”<sup>69</sup> The Egyptian delegate concurred that GATT “was not the forum to deal with this matter.”<sup>70</sup>

Sequential to the inflow of proposals into the WTO, critics both in the North and South began to voice their concern that the initiatives for environmental reform in the WTO might open a venue for protectionism.<sup>71</sup> Some object that “even without the ‘new issues’, the present agenda of the WTO is very full and indeed already overloaded.”<sup>72</sup> Most of the

67. Gregory C. Shaffer, *The Nexus of Law and Politics: The WTO’s Committee on Trade and Environment*, in *THE GREENING OF TRADE LAW* 85 (Richard H. Steinberg ed., 2002).

68. GATT Council, *Minutes of Meeting Held in the Centre William Rappard on 6 February 1991*, at 22, C/M/247 (Mar. 5, 1991) [hereinafter *Feb. 1991 GATT Meeting Minutes*]. The members of ASEAN within the WTO at the time were Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand. See, WTO, *Understanding the WTO: The Organization—Members, Observers*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Mar. 3, 2010); ASEAN, *About ASEAN: Overview*, [http://www.aseansec.org/about\\_ASEAN.html](http://www.aseansec.org/about_ASEAN.html) (last visited Mar. 3, 2010).

69. *Feb. 1991 GATT Meeting Minutes*, *supra* note 68, at 25.

70. *Id.* at 26.

71. The term “South” refers to biodiversity-rich but economically disadvantaged countries of Africa, Asia (excluding Japan), Latin America, and Oceania. See Nassau A. Adams, *WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* 5 (2d ed. 1993).

72. Third World Network, *The WTO, the Post-Doha Agenda and the Future of the Trade System: A Development Perspective* 22 (paper presented at the Asian Development Bank’s Annual Meeting, Shanghai, China, May 10, 2002), available at [http://www.networkideas.org/featart/may2002/Post\\_Doha\\_Agenda.pdf](http://www.networkideas.org/featart/may2002/Post_Doha_Agenda.pdf). In addition to the “new issues,” such as various environmental initiatives pursuant to the Doha Declaration, the critics argue that the WTO already has a full agenda, which includes

implementation issues, the built-in agenda of agriculture and services negotiations and the mandated reviews of the TRIPS [Trade Related Aspects of Intellectual Property Rights] and

developing countries contend that introducing environmental issues into the WTO would distract the WTO from its work on trade and other existing issues.<sup>73</sup> Because developing countries do not have the manpower and financial resources to cope with negotiations on new issues in addition to other items on the Doha agenda, they argue that the WTO should only address trade issues legitimately tied to multilateral trade rules. Further, these rules and the system ought to be designed to benefit developing countries, which form the majority of the WTO membership.<sup>74</sup>

A related ground for resisting discussion on the accommodation of environmental policies in the WTO stems from the need to re-think trade liberalization and re-orient the WTO towards development objectives. Developing countries and their supporters argue that introducing “new issues” into the WTO would be counterproductive as it would further burden the developing countries with inappropriate obligations, causing greater imbalance in the system, even before reforms reflecting development objectives are implemented.<sup>75</sup> Developing countries are also apprehensive of the potential use of environmentally motivated trade measures as non-tariff barriers. At the GATT Marrakesh Ministerial Meeting in April 1994, for example, Dato’ Seri Rafidah Aziz, the Malaysian Minister of International Trade and Industry, stated that environmental issues “are now clearly being used to promote protectionist motives, particularly to keep out imports from countries which have a better competitive edge and comparative advantage.”<sup>76</sup> As far as the accommodation of environmental issues in the WTO is concerned, for inventions based on biological resources and traditional knowledge, for example, most developing countries want no more than an amendment to

TRIMS [Trade Related Investment Measures] Agreements, the many other items of the post-Doha programme and the routine work of the many committees, the trade reviews, and the dispute cases.

*Id.*

73. *Id.*

74. Dato Azmi Khalid, Minister of Rural Dev., Malay., Statement at the International Conference on Financing for Development (Mar. 22, 2002), available at <http://www.un.org/ffd/statements/malaysiaE.htm>.

75. For example, Jagdish Bhagwati, a prominent figure representing the position of developing countries in the trade and environment debate and a former adviser to the U.N. on globalization, argues that trade instruments are not ideal instruments to achieve the goals of MEAs. He asserts: “we need to recognize and proactively pursue the numerous possibilities of fashioning alternative policies that are more cost-effective than burdening trade treaties and negotiations with social agendas as preconditions for the freeing of trade.” Jagdish Bhagwati, *On Thinking Clearly about the Linkage between Trade and the Environment*, 5 ENV’T & DEV. ECON. 485, 495 (2000).

76. Trade Negotiations Comm., *Malaysia: Statement by Dato’ Seri Rafidah Aziz, Minister of International Trade and Industry*, at 2, MTN.TNC/MIN(94)/ST/41 (Apr. 13, 1994).



the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) that incorporates benefit-sharing obligations from the Convention on Biological Diversity (“CBD”).<sup>77</sup> They recognize that the international economic and financial crisis of the early 1990s appears to have induced renewed recourse to protectionism and unilateral measures, including measures taken under the guise of environmental objectives.<sup>78</sup> Hence, developing countries and their supporters insist that proposals for the explicit recognition of trade measures for environmental purposes may actually be driven by disguised economic objectives.

Protectionism is especially conspicuous to Members who believe that “greening” the WTO is inappropriate because the WTO is not an environmental organization and “cannot claim any expertise in solving” environmental problems.<sup>79</sup> These states complain that the implementation of measures such as financial and technical assistance, capacity building, and technology transfer on favorable terms to developing countries has been tardy, even though they have been incorporated in many multilateral agreements to implement principles such as “common and differentiated responsibilities” and “special and differential treatment.”<sup>80</sup> In light of this, even if proposals for the integration of MEAs with the WTO seem to work in their favor, many developing countries feel that they have not yet reaped the anticipated benefits of joining the WTO and that the situation may not change if MEAs are given force in the WTO. Hence, they argue that environmental requirements—even those included in the MEAs—would only become non-tariff barriers used by powerful states as disguised restrictions on international trade.<sup>81</sup>

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77. World Trade Organization, TRIPS Council, *The Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge: Technical Observations on the United States Submission IP/C/W449* by Bolivia, Brazil, Colombia, Cuba, India and Pakistan, ¶ 2, IP/C/W/459 (Nov. 18, 2005).

78. Rubens Ricupero, *Trade and Environment: Strengthening Complementarities and Reducing Conflicts*, in *TRADE, ENVIRONMENT, AND THE MILLENNIUM 25* (Gary P. Sampson & W. Bradnee Chambers eds., 2001).

79. Santarius et al., *supra* note 38, at 18.

80. See U.N. Env. Prog. [UNEP], *Developing Responses to Factors Inhibiting Implementation and Enforcement of Multilateral Environment Agreements: Background Paper 14* (UNEP High-Level Meeting Envisioning the Next Steps for Compliance with and Enforcement of Multilateral Environmental Agreements, Sri Lanka, Jan. 21–22, 2006) (Despite “the evident needs and claims of the least developed countries,” acceptance of “the need for distributive justice in sharing the burdens of international society [in the enforcement of MEAs] has been slow in coming.”).

81. See Jenny Bates, *Backgrounder: Multilateral Environmental Agreements and the World Trade Organization*, PROGRESSIVE POLICY INSTITUTE, Oct. 1, 1999), [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=108&subsecID=128&contentID=777](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=128&contentID=777) (“Most developing countries oppose [exemption of MEAs from WTO challenge], seeing it as a way for developed countries to use environmental regulations as disguised protectionism.”).

The Third World Network, a group of organizations and individuals involved in third world interest areas, sums up the objections against the proposals:

The major proponents are seeking to bring non-trade issues [environment and labor standards] into the WTO not because this would strengthen the trade system, but because the WTO has a strong enforcement mechanism . . . . [I]f developing countries are members to agreements lodged in the WTO, there is the strong possibility of their compliance.<sup>82</sup>

According to the Network, if non-trade issues are brought into the WTO, developing countries will be at a serious disadvantage because they would “lose a great deal of their policy flexibility and the ability to make national policies of their own.”<sup>83</sup>

As reflected in the previous discussion, there are widely differing approaches to dealing with the relationship between MEAs and WTO rules, and, specifically, how trade measures for environmental purposes are to be addressed in the WTO. It is difficult and beyond the scope of this Article to comprehensively assess the merits and faults of the approaches and country positions. Nevertheless, an understanding of the approaches to the treatment of unilateral trade measures in the WTO requires such an evaluation, at a minimum, to a limited degree. Therefore, the following discussion critically evaluates the proposals in the WTO with regard to their clarification of the status of environmentally motivated unilateral trade measures.

#### V. CRITICAL APPRAISAL OF THE EXISTING APPROACHES

The first and most important point is that, with respect to scope, most of the proposals focus on trade measures arising from MEAs only. This restricts the trade-environment debate to a narrow subset of the wider issue—that is, as explained above, the legality of unilateral trade measures in the trading system, whether arising from MEAs or non-MEAs, solely based on a state’s own criteria as prescribed by its domestic legislation.

Even with respect to trade measures arising from MEAs, the proposals and discussions focus on those applied between MEA parties. The issue of trade measures by or against non-parties to MEAs, which raised serious uncertainties in the WTO Dispute Settlement Body (“DSB”) on several

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82. Third World Network, *supra* note 72, at 2.

83. *Id.*

occasions, dropped out of the post-Doha discussions and negotiations.<sup>84</sup> It is difficult to conceive of any issue within the ambit of the Doha agenda likely to be taken to the WTO because the major MEAs now in force, including the Montreal Protocol, the Basel Convention, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), the International Convention for the Conservation of Atlantic Tunas (“ICCAT”), and the Convention on the Conservation of Antarctic Marine Living Resources (“CCAMLR”), will most likely address such issues within their own frameworks.<sup>85</sup> Greater uncertainty exists over trade measures imposed single-handedly by a WTO Member (i.e., not in accordance with an MEA) and over the party/non-party relationship in trade measures arising from MEAs. Both of these issues, however, are excluded from the Doha mandate.

The Doha Declaration explicitly excludes the MEA non-party issue from the negotiating agenda, and paragraph 31(i) stipulates that discussions and negotiations are to be “limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question.”<sup>86</sup> This approach is in line with that of earlier GATT Panels that excluded, for example, CITES from consideration in a number of cases, such as *Tuna-Dolphin*, “because GATT members were not all parties to the MEA.”<sup>87</sup> Moreover, this approach is consistent with the principle of public international law that a treaty cannot create obligations for a third state without its consent.<sup>88</sup> Recent WTO cases, however, have seen a different approach. In the *Shrimp-Turtle* case, the Panels paid particular attention to MEAs, including CITES and the CBD, in deciding how to interpret the

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84. The relationship between MEAs that incorporate trade restrictive measures (such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)) and the WTO rules remain uncertain. Although general principles of public international law provide that where two treaties address the same subject matter, the latter treaty should be given preference, this rule does not apply to a non-party to either treaty. See Robyn Eckersley, *The Big Chill: The WTO and Multilateral Environmental Agreements*, GLOBAL ENVTL. POL., May 2004, at 24, 30; The Vienna Convention on the Law of Treaties art. 30(3), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

85. These MEAs have a relatively wide membership and hence, disputes that may arise will likely be dealt with within the MEA’s well-developed compliance and dispute settlement systems. The MEA framework is also capable of addressing disputes involving other issues such as the questions of jurisdiction or conflict of laws.

86. Doha Declaration, *supra* note 5, ¶ 31(i), 41 I.L.M. at 751.

87. DUNCAN BRACK & KEVIN GREY, THE ROYAL INST. OF INT’L AFFAIRS MULTILATERAL ENVIRONMENTAL AGREEMENTS AND THE WTO 31 (2003), available at [http://www.chathamhouse.org.uk/files/3125\\_meas\\_and\\_wto.pdf](http://www.chathamhouse.org.uk/files/3125_meas_and_wto.pdf).

88. *Id.*

GATT article XX exceptions in disputes involving non-parties to the MEAs.<sup>89</sup>

The EU's proposals, as well as the Doha mandate, by dwelling exclusively on the issue of trade measures arising from MEAs and the relationship between MEAs and WTO rules in general, fail to address the real problem in the WTO. While it is generally accepted that trade measures pursuant to MEAs create a potential for conflict, many states insist that there is already a "broad scope for applying trade measures in a WTO-consistent manner" within the realm of the MEAs themselves.<sup>90</sup> In addition to the benefits that accrue from "good neighbourhood, Win-Win possibilities, such as increased trade in environmental goods and services and the harmonisation of technical standards, are often mentioned as positive features of the MEA-trade relationship."<sup>91</sup> It is also significant to note that all environmental measures challenged in the WTO to date have been unilaterally imposed rather than required under an MEA.<sup>92</sup>

As a result, the Doha mandate and the proposals initiated therefrom have mostly failed to address the crux of the environmental issues in the WTO—namely, the scope of permissibility of unilateral trade measures by or against non-parties to MEAs. The WTO Dispute Settlement Bodies have often been confronted with trade measures imposed unilaterally by Members and have continued to make decisions that, in one way or another, bear on the issues being discussed in the CTE. Hence, the negotiations and discussions are focused on the narrower agenda while the DSB continues to develop its own way of dealing with the problem in the wider context. In effect, this allows the DSB to assume a rule-making position, surpassing the judicial responsibility endowed to it under the WTO Understanding on Dispute Settlement.<sup>93</sup>

89. In this decision, the Appellate Body referred to sections of those MEAs that declared multilateral actions to be the most effective conservation measures. See *Shrimp-Turtle case*, *supra* note 42.

90. MARKUS KNIGGE, REPORT ON TRADE AND MULTILATERAL ENVIRONMENTAL AGREEMENTS 4 (2005), available at [http://www.ecologic.de/download/projekte/1800-1849/1800/3\\_1800\\_cate\\_meas.pdf](http://www.ecologic.de/download/projekte/1800-1849/1800/3_1800_cate_meas.pdf).

91. *Id.*

92. *Id.*

93. Current debate as to the proper mandate of the WTO Dispute Settlement Body—rule-making or judicial—has been exacerbated by its greater reference to public international law and its increasing reliance on the Vienna Convention on the Law of Treaties as a guide to interpretation in its recent decisions. Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, art. 23, Legal Instruments—Results of Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 335 (1999).

With regard to the proposal discussed earlier for retaining the status quo, the WTO jurisprudence by itself is a clear indication that unilateral trade measures are not welcome in the WTO system. The Appellate Body's recitation of a number of MEAs in justifying unilateral measures as well as the rejection of the U.S. measure in the *Shrimp-Turtle* and the *Tuna-Dolphin*<sup>94</sup> cases by GATT and WTO Panels and the Appellate Body, albeit with some confusion and uncertainties, indicates that the door is shut on the free use of unilateral trade measures under the article XX exceptions as proposed by the United States. After all, it is the U.S. measure in the *Tuna-Dolphin* case, guided by this approach, that instigated the negotiations and discussions on environmental matters in the WTO.

As to the earlier discussed EU proposal, "the problem is that even multilateral agreements are not necessarily protection against a WTO challenge of environmental measures by non-members."<sup>95</sup> While it is generally accepted that some MEAs with a large membership may reflect an international consensus, it does not seem to be the case that all Members of the WTO will accept MEAs as legitimate litmus tests for determining the acceptability of trade measures imposed by other WTO Members. The major WTO power, the United States, is not yet party to many such MEAs, and even some parties to MEAs are hostile towards the idea that an MEA can be used to justify measures in a trade forum such as the WTO.

Moreover, consideration of an amendment to, or an understanding on, the MEA-WTO relationships brings to the debate a whole different set of issues, such as what criteria should be used to define an MEA and whether it is the role of the WTO to decide these criteria.<sup>96</sup> Leaving aside such complications, an amendment as proposed by the European Union could be based on the NAFTA approach, accepting certain MEAs while leaving the status of future MEAs open pending a new paragraph to be added to article XX.<sup>97</sup> That paragraph would refer to the relationship to trade measures taken pursuant to MEAs or newly created agreements on trade-related environmental measures.<sup>98</sup> However, as amendments require a two-thirds majority, any amendment of WTO rules is not likely in the

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94. Panel Report, *United States—Restrictions on Imports of Tuna (Complaint by Mexico)*, GATT Doc.DS21/R (Sept. 3, 1991) [hereinafter *Tuna-Dolphin case*].

95. Sir Leon Brittan, Keynote Address at the High Level Symposium on Trade and the Environment (March 15–18, 1999), *transcript reprinted in* ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 336 (2002).

96. Shaw & Schwartz, *supra* note 36, at 149.

97. *See supra* note 43.

98. *MEAs and WTO Rules Proposals*, *supra* note 51, at 6–7.

foreseeable future.<sup>99</sup> Developing countries, which constitute the majority in the WTO, do not support the EU proposal of exemptions to trade measures in MEAs because such a decision would affect their access to developed countries' markets.<sup>100</sup>

Most developing countries opposed proposals clarifying the place of environmentally motivated trade measures in the WTO and initially opposed even the EMIT group's convening because environmental issues fell "outside the WTO's competence."<sup>101</sup> However, they did not hesitate to wield environmental arguments to limit other countries' exports after the CTE was formed. For example, African states asserted that the WTO should restrict the export of waste materials and domestically prohibited goods to protect the African environment and health.<sup>102</sup> The United States has countered these claims by arguing that these issues are more appropriately addressed in other international environmental fora and not in the WTO.<sup>103</sup> Other developing countries and economies in transition, led by India, have pressed for changes in the TRIPS Agreement to limit patent rights, create "farmer rights," and recognize "indigenous knowledge" in order to promote environmental interests incorporated in the CBD.<sup>104</sup> In turn, the United States responded that "the WTO was not an environmental organization and it lacked the competence to insert MEA goals in WTO Agreements."<sup>105</sup>

As correctly understood by Gregory Shaffer, what mattered in the CTE debates and the positions of the Member countries was not the consistency of a state's arguments on the WTO's competence to address environmental issues, but the specific state objectives at stake, i.e., its economic interest.<sup>106</sup> States have argued about the WTO's limited competence only when they believed that environmental arguments prejudiced their economic interests. In this sense, as correctly expressed by Shaffer, states

99. AARON COSBEY, INSTITUTIONAL CHALLENGES AND OPPORTUNITIES IN ENVIRONMENTALLY SOUND TRADE EXPANSION: A REVIEW OF THE GLOBAL STATE OF AFFAIRS 11 (2000).

100. Shaw & Schwartz, *supra* note 36, at 152.

101. KOFI OTENG KUFUOR, WORLD TRADE GOVERNANCE AND DEVELOPING COUNTRIES: THE GATT/WTO CODE COMMITTEE SYSTEM 46 (2004).

102. Egypt, for example, argued that "commercial interests should not prevail over the protection of human, animal or plant life or health." Comm. on Trade & Env., *Report of the Meeting Held on 16 February 1995*, ¶ 5, WT/CTE/M/1 (Mar. 6, 1995) [hereinafter *Feb. 1995 Meeting Report*].

103. See Comm. on Trade & Env., *Report of the Meeting Held on 14 December 1995*, ¶ 32 WT/CTE/M/6 (Jan. 17, 1996) (containing the United States' position that other agreements "had the competence and expertise" to address these items, unlike the WTO).

104. See Shaffer, *supra* note 67, at 91.

105. Comm. on Trade & Env., *Report of the Meeting Held on 11–13 September 1996*, ¶ 39, WT/CTE/M/12 (Oct. 21, 1996).

106. Shaffer, *supra* note 67, at 91.

made “dollars and cents of the trade and environment linkage before this dollars and cents” organization.<sup>107</sup>

This suggests that the stumbling block in the discussions and negotiations on trade measures in the WTO may be neither a concern with the impropriety of linking environmental objectives with trade policies (on the part of developing countries), nor altruistic environmental objectives (as contended by the United States), but rather the economic cost involved in complying with the environmental requirements. Some of the states with large markets, such as the United States, want to reduce the cost differentials arising from lower environmental and labor standards in the developing countries by raising the bar for environmental standards for exports from such countries. It seems that the developing countries oppose this not because of an insensitivity to environmental concerns, but rather because of the economic encumbrance involved in building capacity in the relevant legal, administrative, and technical areas to comply with the standards. For example, in imposing trade measures in the *Shrimp-Turtle* case, the United States effectively attempted to level the playing field by forcing its competitors to adopt similar, more expensive, fishing technology.<sup>108</sup> In this sense, the use of environmentally motivated trade measures is heavily influenced by the economic implications of such measures.

Though the economic cost involved in the imposition of unilateral trade measures is of critical importance in shaping the proposals for and against trade measures for environmental purposes and in determining the acceptability of unilateral trade measures, the proposals submitted to the CTE so far have not responded to this issue. As John Cuddy, former Director of the Division of International Trade at the UNCTAD, stated, a full understanding of the economic and developmental implications of the use of trade measures is important for ensuring their acceptability and effectiveness.<sup>109</sup> These proposals so far do not assess the economic capabilities of Member states to respond to environmental challenges in the form of trade measures. In this regard, significant input from the Doha Declaration’s other items, such as the reduction of environmentally destructive subsidies, is conveniently neglected.<sup>110</sup>

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107. *Id.*

108. See *Shrimp-Turtle case*, *supra* note 42, ¶¶ 163–165.

109. John Cuddy, *Linkages Between Trade and Environment Policies*, in *TRADE, DEVELOPMENT AND THE ENVIRONMENT* 53 (WTO Secretariat ed., 2000).

110. The Doha Declaration initiated negotiations in multiple subjects that, in addition to the relationship between MEAs and trade measures, include other issues of key concern in consecutive rounds of Ministerial Meetings such as agricultural subsidies. See Doha Declaration, *supra* note 5,

As a result, it seems that protectionism is a justified suspicion on the part of the developing countries. In particular, the recognition of trade measures in the manner proposed by the United States, i.e., the possibility of a WTO Member imposing trade measures unilaterally, makes environmental measures susceptible to serving as a means for disguised economic protection.

It is “true that developing countries dependant on agricultural exports are generally far more vulnerable to severe environmental disruptions than industrial countries that usually can switch agricultural suppliers quite easily.”<sup>111</sup> Due to the global nature of these environmental disruptions, the industrialized world has a responsibility to contribute to a comprehensive effort aimed at improving developing countries’ trading positions, especially when the developing countries’ export supplies are encumbered due to measures taken for environmental purposes.<sup>112</sup>

The “principles and criteria approach” seems to remedy some of the shortcomings of the other approaches. It provides definitive guidance on some of the complicated issues of MEA accommodation, such as non-party status and specific trade obligations. The “principles and criteria approach” would assist WTO Panels and the Appellate Body in assessing unilateral trade measures not included in MEAs, and may also help MEA negotiators contemplating the drafting of trade measures. Furthermore, the approach contributes to greater predictability in the system and “minimizes the grey area between legitimate MEA measures and ones that unnecessarily disrupt trade.”<sup>113</sup>

However, this approach also has its drawbacks. To mention one, the approach puts decision-making on the MEA-trade relationship in the hands of the WTO Dispute Settlement Bodies. While this may draw attention to the particular context of the trade measures’ application, assigning this mandate to the WTO Dispute Settlement Body may have negative repercussions in light of the skepticism raised as to the neutrality

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¶ 13, 41 I.L.M. at 748. Environmentally destructive subsidies are subsidies by governments of industrialized countries to finance activities that environmentalists deem environmentally destructive. Examples include subsidies for global fishing fleets, national and multinational logging companies, and other environmentally destructive activities. See Urs P. Thomas, *Trade and the Environment: Stuck in a Political Impasse at the WTO after the Doha and Cancun Ministerial Conferences*, GLOBAL ENVTL. POL., Aug. 2004, at 9, 18. Though discussions on such subsidies were made part of the negotiation agenda at the Doha Declaration, the debate on trade measures is “held hostage” to other negotiations, and stalled until the debate is over. *Id.*

111. *Id.*

112. *Id.*

113. Gray, *supra* note 53, at 8.



of the DSB by both environmentalists and the developing countries, which often lodge accusations of judicial activism.<sup>114</sup>

Although the “principles and criteria approach” assists MEA negotiators when crafting specific trade obligations and informs trade partners of the type and scope of measures acceptable in the WTO, its retrospective effect “raises additional concern since its application to previously agreed MEAs may limit their effect. The ability to amend pre-existing MEAs, necessitating the reopening of the text, to suit the principles and criteria would be nearly impossible.”<sup>115</sup> Therefore, this approach may be somewhat ineffective insofar as the application of trade measures in existing MEAs is concerned.

Despite the many proposals and the intense discussions and negotiations carried out since the establishment of the CTE and the launch of the Doha agenda, WTO Members have not yet succeeded in formulating criteria for clarifying the issue of environmentally motivated unilateral trade measures. It is in the interest of all WTO Members to negotiate a clear understanding of the interaction between the two legal regimes and, in particular, a clarification of unilateral trade measures. The divergence in outlook on unilateral trade measures, the wide variations in the form and content of the proposals addressing the issue, and the intense altercations on other items in the trade and environment agenda all serve to indicate that a realization of the Doha Development Agenda is unlikely in the near future.

#### VI. POSITIVE ASPECTS OF THE EFFORTS TO RESOLVE THE TRADE AND ENVIRONMENT CONFLICT

Despite the drawbacks discussed earlier, there is still some hope for a better integration of the trade and environment regimes through the clarification of the status of unilateral trade measures for environmental purposes. The adoption of the Doha Declaration and the initiation of discussions in the CTE are significant, as these mark the first multilateral attempt—and demonstrate the general will of WTO Members—to negotiate particular aspects of the trade-environment relationship and, specifically, the fate of environmentally motivated unilateral trade

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114. There are also other accusations levelled against the WTO’s Dispute Settlement procedures, such as that they are not well suited for the developing countries’ participation, that they do not accept unsolicited submissions from NGOs, and third party status questions. *See generally*, Marco M. Slotboom, *Participation of NGOs Before the WTO and EC Tribunals: Which Court is the Better Friend?*, 5 *WORLD TRADE REV.* 69, 80–84, 86–88 (2006).

115. Gray, *supra* note 53, at 9.

measures. These steps will help in advancing the much needed mutually supportive behavior between the two regimes by injecting substantively concrete terms that outline the relationship between the rules governing trade and the environment.

Whereas the earlier debate was characterized largely by fears of major contradictions between trade and environment policies, the post-Rio debate and the consequent agenda in the CTE have focused on exploring the scope of complementarities between trade liberalization, economic development, and environmental protection.<sup>116</sup> Moreover, the issue has recently become much more participatory as it has attracted the attention of a very large range of stakeholders, including different government ministries, NGOs, the business community, and academic institutions in both industrialized and developing countries.<sup>117</sup> This paves the way for knowledge-based and constructive proposals, instead of proposals guided by competitive short-term national interests.

The ongoing dialogue between the MEA secretariats and the CTE plays a useful role in enhancing mutual confidence and understanding between the two regimes and improves the interaction between trade, the environment, and development considerations.<sup>118</sup> This, in turn, plays a key role in preserving the interests of developing countries, as some MEAs are specifically aimed at addressing the concerns of developing countries. Additionally, the recognition by the WTO Appellate Body that WTO agreements cannot be interpreted in isolation from international law is significant in resolving the complicated relationship between environmental policies and WTO rules.

Within this context, many developing countries are “fully committed to both trade liberalization and enhanced environmental protection.”<sup>119</sup> Although developing countries tended to lift their objections to environmentally motivated trade measures and even sometimes favored their application,<sup>120</sup> they urge that their application should be guided by principles that are negotiated among countries and not through unilateral action by a single, powerful nation.<sup>121</sup> Their complaint against the United

116. JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 30 (2d ed. 1999).

117. *Id.*

118. Fernand Thurmes, acting for James Currie, *Chapter 20, in TRADE, DEVELOPMENT AND THE ENVIRONMENT* 106 (WTO Secretariat ed., 2000).

119. Ricupero, *supra* note 78, at 82.

120. *See generally Feb. 1995 Meeting Report, supra* note 102.

121. Shalmali Guttal, Coordinator of Micro-Macro Programmes, Focus on the Global South, Presentation at the Alternatives to Neoliberalism Seminar: Trading the Environment (Feb. 9, 2000),

States' unilateral measure in the *Shrimp-Turtle* case, for example, was that the United States, before imposing the ban, had not raised the issue in the CITES conferences, had not signed the Convention on the Conservation of Migratory Species or the United Nations Convention on the Law of the Sea, nor had it ratified the Convention on Biological Diversity—all possible avenues for multilateral action for the protection of endangered species.<sup>122</sup> This approach is encouraging when compared to the previous sharp opposition to any discussion on environmental issues in the WTO.

## VII. CONCLUSION

WTO Members' understanding of the legality and acceptability of unilateral trade measures in the WTO is widely divergent. While some states construe the rules as allowing them to conduct their own environmental policy without being barred by trade restrictions,<sup>123</sup> others consider such measures as a mere façade for protectionism and a vehicle for green imperialism.<sup>124</sup> Still other states, mainly within the EU, interpret the rules as allowing MEAs to serve as a litmus test for the legality of such measures. Similar measures did not raise much concern in the 1970s primarily because they were few in number and trade-related effects of environmental measures were not as politicized as they are today.<sup>125</sup> What should be questioned, therefore, is whether the specific methods adopted for environmental protection are taken with just this goal in mind.

Demanding that developing countries adopt stringent, costly, and inappropriate environmental standards or risk import bans on shipments of goods to developed countries will only punish the technologically disadvantaged developing countries' producers and may defeat the original purposes for such a demand. As indicated above, one of the most important grounds of controversy concerning unilateral trade measures relates to their effectiveness in achieving their purported objectives. Unilateral trade measures are deficient as environmental policies because they are likely to address only environmental concerns in the export

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available at <http://focusweb.org/publications/researchpapers/Research%20Papers.htm> (follow "Trading the Environment" hyperlink).

122. Stephen L. Kass & Jean M. McCarroll, *Fidel, Saddam and the World Trade Organization*, LINKAGES J., Feb. 1, 1999, at 13, 15.

123. For an advocacy of such a policy, see Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 750, 751 (1993).

124. For such assertions, see Walden Bello, *View and Comment: The Rise of 'Green Unilateralism'*, BUSINESS WORLD (Phil.), June 10, 1997, at 7.

125. Laurence Boisson de Chazournes, *Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues*, 11 EUR. J. INT'L L. 315, 321 (2000).

sector, ignoring the damage occurring in the majority of economic sectors of the state against which the measure is applied.<sup>126</sup> Coupling unilateral trade measures with positive measures will forestall the discordance of such measures with trade policies and will ensure that they effectively achieve stated purposes.<sup>127</sup>

The effectiveness of unilateral trade measures as practiced so far—strict enforcement of which sometimes amounting to green protectionism—depends on the relative market power of the importing and exporting countries.<sup>128</sup> In practice, this policy instrument is only available to WTO members with substantial markets, i.e., developed and fast-developing countries. While, in theory, trade measures are available to all WTO members, the least developed countries will not be able to use them to great effect. As a result, only the environmental concerns and preferences of developed and fast-developing countries would have any chance of redress, and this redress would be achieved at the economic expense of the least-developed countries. The extension of differential treatment in the form of positive measures to developing and least-developed countries, which are in weaker market positions to utilize such trade measures by themselves, may mitigate these ill effects.

Accordingly, it is in the interest of all WTO Members, including developing countries, to arrive at a clear understanding on the permissible scope of unilateral trade measures in the WTO. Such an understanding would bring great rewards: clarity on the rules to be met, fairer competition between developing countries and developed countries, and stronger guarantees against unilateral action. If the WTO Members opt for the reopening of the GATT rules to achieve this, there will most likely be demands for change in a number of areas over which the Members are not yet ready to achieve consensus.

In moving towards the reconciliation of the trade and environmental regimes through the regulation of unilateral trade measures, states should also recognize their ever-growing interdependence. It is important to note that trade barriers in the form of trade measures are important in restraining destructive environmental practices; however, these barriers

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126. Ian Johnson, *Chapter 5, in TRADE, DEVELOPMENT AND THE ENVIRONMENT* 29 (WTO Secretariat ed., 2000).

127. These measures, often included in some MEAs as an implementation of the principle of common but differential responsibilities, take the form of “financial resources, technology transfer, and capacity building.” See Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT’L L. 276, 278 n.8.

128. Carrie Wofford, *A Greener Future at the WTO: The Refinement of the WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563 (2000).

must not follow the old imperialist logic of the North imposing itself on the South. Accordingly, an adjustment in the form of positive measures should be made to offset the economic disruption that such measures may entail.

As a rule, unilateral measures are inconsistent with the letter and the spirit of the WTO, which is founded on the principle of multilateralism and the consensus and cooperation that flow from it. Article 23 of the Dispute Settlement Understanding (“DSU”) explicitly prohibits members from invoking unilateral measures that are not based on the WTO dispute settlement procedures.<sup>129</sup> In the specific circumstances of most developing countries—where poverty, not lack of will, is usually the root of environmental degradation<sup>130</sup>—unilateral responses risk defeating the environmental objectives they seek to resolve. For example, some developing African countries have a keen interest in environmental protection due to a concern for their immense biodiversity.<sup>131</sup> It may therefore be in their interest for WTO Members to be allowed to take unilateral trade measures for environmental purposes. However, how unilateral trade measures have been applied thus far raises a reasonable fear that this could be used as a protectionist device to legitimize inconsistent trade measures within the WTO.

Unilateral trade measures may be better suited to certain fields over others, if only because of the objectives pursued. For example, the Appellate Body’s decision in the *Shrimp-Turtle* case on the illegality of the United States’ unilateral measure would have been unacceptable had the complaining WTO Member states obstinately refused to enter into a conservation agreement that was the only effective way to protect sea turtles from extinction.<sup>132</sup> Therefore, instead of avoiding discussions about environmentally motivated unilateral trade measures and denying their utility in the system, members should, to the greatest extent possible, try to harness the legitimacy of such measures according to WTO rules.

In this context, the plausible and realistic option for lessening the chilling effect of unilateral trade measures is to regulate their applicability by means of a Ministerial statement, which may have the effect of making official certain principles on the regulation of unilateral trade measures.

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129. Understanding on the Rules and Procedures Governing the Settlement of Disputes, *supra* note 93, Annex 4, art. 23.

130. Shaw & Schwartz, *supra* note 36, at 145.

131. Paul Gepts, *Who Owns Biodiversity, and How Should the Owners Be Compensated?*, 134 PLANT PHYSIOLOGY 1295, 1297 (2004).

132. Bhagwati, *supra* note 75, at 495.

This will provide the WTO Appellate Body with specific guidelines on the interpretation of WTO rules while paving the way for a second stage of negotiations on the trade and environment agenda and the full realization of the Doha mandate. It is important that such guidelines allocate corresponding responsibilities to facilitate coordination amongst Member states for the common goal of environmental protection. This will have significance in guiding the actions of the WTO Dispute Settlement Body towards more certainty by stipulating the hoops to be jumped through before the application of unilateral trade measures.