

International Environmental Governance

Conference, Paris, 15 & 16 March 2004

Accommodating MEAs in Trade Agreements

Kevin R. Gray

*Environment Canada**

Introduction

The trade-environment interface has historically been characterized in conflictual terms. This provokes a deeper question as to whether trade liberalization and environmental protection can be reconciled. Such “conflict” is wholly evident in the discourse regarding the relationship between Multilateral Environmental Agreements (MEAs) and international trade obligations. International trade rules can potentially inhibit States’ efforts to meet MEA objectives. Moreover, the drafting of new MEAs is circumscribed by negotiators’ concerns that new provisions may render a State in violation of international trade rules.

Recent developments in dispute settlement and academic discussions suggest a possible overstatement of the problem. Decisions from the Appellate Body of the WTO have shown a greater sensitivity to the environmental objectives of challenged trade measures. This has opened the door to bridging a mutually supportive relationship since the scope of the conflict is limited to specific circumstances. There would only be a true conflict where implementing one treaty would require activity that would explicitly violate obligations set out in another treaty. In a narrow sense, there are only a few examples where a conflict would exist. Some MEAs require discriminatory treatment against the imports and exports of certain products which would run afoul of national treatment or most-favoured nation treatment obligations in international trade agreements. Where such conflict exists however, parties who have agreed to the obligations requiring activity inconsistent with trade rules would not raise the conflict in a particular dispute¹

The existence of MEAs reinforces the global nature of the environmental problems buttressing the “necessity” of the particular trade measure despite its possible arbitrariness or discriminatory effect. These are the types of questions that could be assessed in dispute settlement mechanisms such as under the WTO, where a party claims justification under the general exceptions.² Article XX of the GATT, mirrored in several other trade agreements, is regularly interpreted by the WTO Appellate Body providing wider scope for the application of such exceptions. Seen in

* The opinions expressed in this paper do not reflect the position of the Government of Canada

¹ See D. Brack & K. R. Gray, *Multilateral Environmental Agreements and the WTO*, (Royal Institute of International Affairs, London), <http://www.riia.org/pdf/research/sdp/MEAs%20and%20WTO.pdf>.

² For instance, see Article XX of the *General Agreement on Tariffs and Trade*.

a continuum of more environmentally -friendly jurisprudence, some may assert that dispute settlement perhaps provides the most efficacious forum to clarify the MEA - trade relationship.³

However, addressing this relationship is still a relevant issue for policy makers and treaty negotiators. In fact, the Doha Development Agenda calls for negotiations precisely on the issue.⁴ Irrespective of the limited scope for actual conflict, ideological as well as practical concerns about the MEA -trade interface engender arduous efforts to achieve a satisfactory negotiated outcome. This is evident not only in trade agreement negotiations but also in MEAs themselves, where concerns about the consistency with international trade obligations can complicate, and in some cases, stymie drafting efforts.⁵

Due to the proliferation of both MEAs and international trade agreements, a number of approaches to accommodating MEAs in trade agreements have emerged. This can range from the *NAFTA* regime, which specifically carves out selected MEAs from the ambit of trade rules under certain conditions, to the technical approach used in the WTO Committee on Trade and Environment Special Session, which aims to achieve mutual supportiveness under a prescribed mandate. Savings clauses, environment exceptions, information exchange and choice of dispute settlement forum are all tools employed to ensure that MEAs and international trade obligations can co-exist.

However, exercising certain options to achieve mutually supportive outcomes is perhaps more nuanced, reflecting the uniqueness of the proposed trade agreement and the needs of the State members. This becomes more disaggregated when the trade agreement is bilateral, regional or global in representation, potentially creating greater asymmetries in the overall trade-environment relationship.

Overall Objectives of the MEA-Trade Relationship

WTO members have agreed that the optimal use of the world's resources in accordance with the objective of sustainable development is an objective of the world trading system.⁶ Many of the same States have also agreed, in other fora, to a mutually supportive relationship between international trade and environmental policies including MEAs.⁷

Other trade agreements have also called for the pursuit of free trade in a manner consistent with the protection and preservation of the environment and the strengthening of environmental laws and their enforcement.⁸ Similar commitments to mutual supportiveness have been made in several MEAs.⁹ In light of these

³ See H. Mann & S. Porter, *State of Trade and Environmental Law: Implications for Doha and Beyond*, http://www.iisd.org/pdf/2003/trade_enviro_law_2003.pdf.

⁴ Paragraph 31(i), *Doha Ministerial Declaration*.

⁵ The recent 7th Conference of the Parties to the *Convention on Biological Diversity* saw trade as a prevailing horizontal issue for a number of the working groups, becoming the crucial deal-breaking issue in some cases.

⁶ *WTO Agreement*, preamble.

⁷ See, World Summit on Sustainable Development, *Plan of Implementation*, (2002), para 92, http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm. See also Principle 12 of the *Rio Declaration*, (1992), 31 *International Legal Materials* 874.

⁸ See *North American Free Trade Agreement*, preamble (1993) 32 *International Legal Materials* 289. The Environmental Side Agreement to the *NAFTA (North American Agreement on Environmental Cooperation)* (1993) 32 *ILM* 1480 includes commitments to improve environmental protection through cooperation in environmental and economic policies. There is also an explicit commitment to avoid trade distortions and erect new barriers to trade in the form of disguised protectionism.

⁹ See for instance, the *Biosafety Protocol*, preamble, (2000) 39 *International Legal Materials* 127 and the *Stockholm Convention on Persistent Organic Pollutants (POPs Convention)*, UNEP/POPs/CONF/4, <http://www.pops.int/>, preamble.

objectives, there is still some degree of uncertainty on how to ensure that trade and environment will be mutually supportive where country measures that enforce, implement, apply or are simply motivated by MEAs, run afoul of international trade obligations.

A proscriptive route would be to allow for identified MEA provisions to prevail over trade rules although this may defeat the mutually supportive objective. In the absence of any operative clarification of the MEA-trade rules relationship however, there is perpetual uncertainty about how global environmental agreements can be reconciled with international trade agreements. Such clarification should provide guidance not only on how to deal with a dispute pitting two agreements against each other but generally how international environmental imperatives can be met without unduly impacting the free flow of trade in goods and services.

Article 104 – NAFTA and Choice of Forum

Perhaps the most optimal model to accommodate MEAs in trade agreements is to simply preclude MEA measures from the purview of trade rules. This can be done most effectively by listing the MEAs that would benefit from the exclusion. Under the NAFTA, three MEAs are listed in Article 104¹⁰ in addition to two bilateral agreements between NAFTA parties.¹¹ To prevent parties from bringing trade cases related to these MEAs to other bodies, a choice of forum provision was added so that the party, who relied on the MEA in their defence, could have the dispute adjudicated under a NAFTA panel.¹² Choice of forum provisions are integral to the operation of provisions like Article 104 to ensure that parties do not attempt to circumvent the codified MEA-trade relationship by resorting to another forum that is not bound by such provisions. Under the NAFTA, Article 2005(3) stipulates that if the responding party to a dispute is claiming NAFTA Article 104 as a defense, the complaining party would only have recourse under the NAFTA. Without such a provision, the complaining party could pursue their claim under other bodies such as those available at the WTO, who lack the authority to apply a NAFTA clause.¹³

Measures pursuant to such MEAs are exempt from the NAFTA rules subject to a few conditions;

- the MEA prevails only to the extent of the inconsistency;
- the party to the MEA must choose the alternative, where there is a choice among equally effective and reasonably available means of complying with the MEA, that is least inconsistent with NAFTA; and,
- the measure must be a specific trade obligation (STO).

Although Article 104 has not been interpreted by any dispute settlement body, it is likely that the party introducing the measure would have the burden of

¹⁰ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, (1989), 28 *International Legal Materials* 657; *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, (1973) 12 *International Legal Materials* 10, *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987) 26 *International Legal Materials* 1550.

¹¹ *Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*; *Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*.

¹² Article 2005, NAFTA.

¹³ In addition, the WTO *Dispute Settlement Understanding* does not instil any authority to refer a dispute to another forum be it a regional trade agreement or a non-compliance or dispute settlement mechanism under a MEA.

demonstrating that their measure meets the aforementioned conditions. Considering that these conditions allow for differences in interpretation, such as what constitutes a specific trade obligation, the residual uncertainty may negate the benefits of having a prescriptive list.

In addition, the prescriptive list approach may be less workable in a multilateral setting consisting of a large number of parties, some of whom may not be parties to all the proposed MEAs. By carving out specific MEAs, it could result in trade restrictions being imposed on parties exercising their sovereign right not to join a particular MEA. If the problem is corrected by limiting the applicability of that section to MEA parties, it could foster a two-tiered relationship in the trade agreement, where non-parties to the MEAs would receive more favourable or less discriminatory treatment than MEA parties. In turn, the marked trade disadvantages may act as a deterrent to join the MEA. This phenomenon however will ultimately depend on how the list functions and whether the individual country taking the measure makes some concessions for non-parties who comply with the MEA.

Notwithstanding the non-party issue, a list of MEAs will most likely represent a low common denominator. Adding new MEAs to the list will be burdensome, often contingent on the ratification process of the MEA in all parties' domestic systems, in addition to any amendment procedure in the trade agreement.¹⁴ The MEAs that would be chosen will probably be the least contentious, since the parties have already agreed to the provisions requiring trade restrictive measures when signing the MEA. Inversely, an implication could be drawn that a MEA, not included in the list, would not benefit from the exception and even be deemed subordinate to the rules of the international trade agreement. This may serve as an artificial basis for differentiation between MEAs. Furthermore, there would not be guidance on how to incorporate new MEAs or even subsequent agreements and protocols made under the MEAs designated in the list. Overall, a more holistic clarification of the trade-environment relationship, which would be helpful in these situations, would fall outside the scope of a prescriptive list provision.

Although there is a degree of symbolic importance and operational efficiency in having a list of MEAs, it may produce a countering effect. A hierarchy may be assumed that trade agreements normally supersede MEA obligations and therefore there is a strong need to exempt certain MEAs. Acting as a waiver or exception, it could imply that such a mechanism is needed in order to ensure that a MEA is consistent with a trade agreement. An MEA absent from such list could be held to be inherently inconsistent with trade provisions, reversing the burden of proof to the party to explain why the MEA is not on the list but should still benefit from the effect of such provisions that list certain MEAs. However, it is much more likely that measures taken pursuant to an unlisted MEA would simply be subject to the same rigorous analysis applied to any measure based on a general exception.

General Environmental Exceptions

Most trade agreements will allow for unilateral trade-restricting measures for environmental protection purposes. None explicitly articulate an exception for measures pursuant to a MEA or even the environment.¹⁵ Article XX of the GATT stipulates that parties can adopt or enforce measures necessary to protect animal or

¹⁴ Parties to the trade agreement would still have the option to agree to new MEAs in the list despite not having signed or ratified that particular treaty.

¹⁵ Prior to the Doha Round, the European Union was proposing in the Committee on Trade and Environment that a new exception be added to Article XX of the GATT allowing for measures pursuant to MEAs.

plant life or health or measures relating to the conservation of exhaustive natural resources although the word “environment” is not mentioned in the text.

Other trade agreements import the Article XX exceptions into its text although they can be modified. For instance, Article 2101 (1) of the NAFTA incorporates Article XX explicitly, while offering supplementary textual interpretation - Article XX (b) is to include “environmental” measures necessary to protect human, animal or plant life or health, while Article XX (g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

The jurisprudence under the WTO has shown an expansive interpretation of Article XX revealing an approach that can accommodate MEA measures. The *Shrimp-Turtle*,¹⁶ *Asbestos*¹⁷ and *US Gasoline* rulings have renewed optimism that future cases can address the MEA-WTO relationship in a positive way.¹⁸ None of these cases have directly involved an MEA trade measure but the evolutionary rules of treaty interpretation, requiring the WTO Agreements to be interpreted in light of the “contemporary concerns of the community of nations about the protection and conservation of the environment” has opened the door for a broader interpretation of Article XX, reinforced by the preamble references in the WTO Agreement to sustainable development as being an objective of the WTO. Although not relevant to the challenged measure, a number of MEAs were referred to in the *Shrimp-Turtle* dispute to provide a modern context to consider the meaning of the GATT, which was agreed to in 1947.

These rulings could lessen the urgency to negotiate text on the MEA-trade relationship especially since there has never been a dispute involving a MEA trade measure heard before a WTO panel. Environmental exceptions may be seen as sufficient to facilitate the requisite judicial scope to clarify and elucidate the MEA-trade relationship. The exceptions permit States to take measures that restrict trade for the purpose of environmental protection, irrespective of any relationship between the MEA and the measure.

Disputes at the WTO have effectively laid the ground rules for when trade restricting environmental measures are WTO compatible. Despite the WTO rulings that have effectively set such framework, those decisions are not binding on future decisions and cannot operate to alter or amend the WTO Agreements.¹⁹ The interpretation of WTO Agreements must also be in conformity with international law which can preclude the applicability of MEA provisions to non-parties.²⁰ Although MEAs would form part of the corpus of international law that could be referenced, their use would be restricted to merely clarifying the interpretation of the WTO Agreements.

Whether the Appellate Body, or a WTO panel, can review the provisions of a MEA for the purpose of interpreting the WTO Agreements will depend largely on

¹⁶ The *Shrimp-Turtle* Article 21.5 panel, concerning the implementation of the previous Appellate Body decision which had already reinforced the WTO objective of sustainable development, ruled that the US measure, motivated although not mandated by a particular MEA, was consistent with WTO requirements.

¹⁷ The *Asbestos* case did not concern so much an environmental issue (mainly an occupational, health and safety issue) but it did widen understanding on the “necessity” test by holding that necessity of a measure can be assessed against the significance of the objective. The salience of the MEA objectives could easily apply by analogy buttressed by the international consensus on such necessity as manifest in a multilateral agreement.

¹⁸ Mann & Porter (2003).

¹⁹ See Article 3(2) of the *Dispute Settlement Understanding*. Although the rulings can assist in better understanding the provisions of the WTO Agreements, the Agreements can only be amended through negotiations at the General Council or a Ministerial Conference.

²⁰ It is a general rule of international law that international treaties cannot be enforced against States that are not parties unless the State had consented or the rule forms part of what is known as customary international law.

the facts. If the particular nature of the dispute would necessitate such analyses, it invites a situation where a body without environmental expertise and with less exposure to the non-confrontational nature of MEA compliance and enforcement, is making determinations concerning MEA provisions. Without the power to interpret the MEA itself, it could create difficulties when ruling on Article XX questions such as the necessity of the measure, its least trade restrictiveness, whether it was enacted in good faith (not intended to be discriminatory or endure financial hardships for the exporter), as well as other issues including how the negotiating process for the MEA was inclusive and fully participatory for all nations.²¹ The complexity of the analyses can produce varying judgments on which MEAs would be deemed WTO compatible. The fact-specific nature of the dispute could also lead to rulings with opposite results regarding the same MEA.

The overall comprehension of the MEA-WTO relationship would not be elucidated in a decision unless the panel or Appellate Body's interpretative role toward resolving a particular dispute depends on such clarification. The amorphous concept of mutual supportiveness, which is not even expressed in the WTO Agreements per se, may not be delineated, although this concept could be imported into a deliberation where the concept is deemed to be recognised as a principle of customary international law. These functional limitations of dispute settlement hinder the ability of the Appellate Body to conclusively and comprehensively determine the MEA-trade relationship.

Primarily, the strongest support for the view that MEAs are already accommodated by the general exceptions is the fact that there has never been a dispute where a trade measure taken pursuant to an MEA obligation, has been challenged. Historical record where no WTO members, be them party or non-party to the MEA, has ever launched dispute settlement, reinforces that there may be no need to codify the relationship. The developments in the jurisprudence, seen mainly in the Shrimp-Turtle and the Asbestos disputes where the WTO agreements have been interpreted in a broader fashion, could open up greater potential for MEA sanctioned measures to be held consistent with WTO obligations in a dispute.

The absence of MEA related disputes however may be premised on factors unrelated to any perception of the MEA-trade relationship. Small volumes of MEA related trade and the general international consensus behind the MEA (and resolution of a fledgling dispute under the MEA institutional body) could all equally explain why no MEA related dispute has occurred.²² In addition, the existence of no MEA-trade disputes does not account for the number of MEA related conflicts that do not reach a final resolution by a trade dispute settlement body. The Chile-EU Swordfish dispute, invoking several provisions under the United Nations Convention on the Law of the Sea,²³ was resolved albeit temporarily. Moreover, the potential of WTO challenges has also been raised in MEA negotiations themselves.²⁴

The clarification of the MEA-trade rules question would also be subject to the ad hoc nature of dispute settlement that is focused on the particularities of the dispute and therefore does not engage all parties to the international agreement in the process. Dispute settlement would not be the preferred approach of many States who are ill-resourced to participate in dispute settlement proceedings, or unwilling

²¹ The *Shrimp Turtle* dispute, although recognising that States can take unilateral measures, still scrutinised the "good faith" efforts of the U.S. to negotiate a multilateral solution

²² See W. A. Kerr (2002), "Who Should Make the Rules of Trade? – The Complex Issue of Multilateral Agreements", 3:2 *Estey Centre Journal of International Law and Trade Policy* 6.

²³ (1985) 21 *International Legal Materials* 1261.

²⁴ D. Brack (2002), "Environment Treaties and Trade", in G. Sampson & B. Chambers, *Trade, Environment and The Millennium* (UNU University: Japan) at 14.

to initiate a dispute, and therefore would not have the opportunity to participate in discussions concerning how MEAs should be accommodated.

Negotiating the outcome - WTO Doha Declaration

The Doha Ministerial Declaration²⁵ is significant as it marks the first multilateral attempts, and demonstrated general will of the WTO members, to negotiate particular aspects of the MEA-WTO relationship. This advances the mutually supportive objective by injecting substantive concrete terms outlining the MEA-WTO relationship. Paragraph 31(i) of the Doha Ministerial Declaration limits the mandate to the relationship between WTO rules and specific trade obligations (STOs) in MEAs, where the WTO Members are both party to the MEA in question. Since then, discussions on that paragraph have focused on examining individual MEAs; delineating and classifying STOs in those MEAs; and identifying the relevant WTO rules. These discussions are currently ongoing, with a mandate to conclude by January 1, 2005. The outcome from the Doha negotiations may have an impact in other international trade regimes

In the Special Session of the WTO Committee on the Environment (CTESS), STOs have been broken down into four categories:

- trade measures explicitly provided for and mandatory under MEAs;
- trade measures not explicitly provided for nor mandatory under the MEA but consequential of the obligation de resultant of the MEA (where MEA lists possible measures and policies in order to achieve compliance)';
- trade measures not identified in the MEA but that parties may decide to implement in order to comply with the MEA; and,
- trade measures not required in the MEA but where parties may implement them if the MEA contains a general provision stating parties can adopt more stringent measures in accordance with international law.

Some WTO members have put forth submissions on STOs in specific MEAs.²⁶ The WTO Secretariat has also compiled a list of trade measures pursuant to selected MEAs.²⁷ There appears to be a general consensus that STOs are present in six MEAs.²⁸

Considering that developing an international consensus is difficult, yielding limited results, the Doha Mandate is not effecting definitive clarity in the overall MEA-trade relationship. The focus on specific trade obligations primarily addresses situations where MEAs potentially conflict with trade rules but does not account for the wider objectives the MEAs are designed to achieve. A narrow approach to STOs, thereby excluding discretionary measures of the State parties, may perpetuate the uncertainty held by States when attempting to implement the MEA. WTO Members would still be free to take such measures but these would be subject to the regular Article XX analysis.

At the CTESS, there has been little discussion on the overall effects of accommodating the MEA. It is uncertain whether a measure pursuant to a STO obligation in a MEA would benefit from a presumption of conformity with trade rules and therefore be wholly exempt from WTO disciplines, or still be assessed as

²⁵ http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

²⁶ Submission by China, TN/TE/W/35/Rev.1, 3 July 2003.

²⁷ WTO Secretariat, *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements*, TN/TE/S/5 WT/CTE/W/160/Rev.2

²⁸ *Cartagena Protocol, POPs Convention, PIC Convention, Montreal Protocol, CITES, and the Basel Convention.*

to whether it is more trade restrictive than necessary or whether the measures are arbitrarily or discriminatorily applied in contravention of the chapeau of Article XX. As an interim solution to these questions, would adjudication of the validity and/or necessity of the STO measure be deferred to an MEA decision-making mechanism? These are practical issues that have not yet received full attention in the dialogue that remains largely at the conceptual level.

Moreover, how MEA measures could be enforced against non-parties of the MEA is explicitly removed from the Doha Mandate. Confining the applicability of the MEA-WTO relationship to between MEA parties, may only confirm what MEA parties have already agreed to. It is unlikely that parties to an MEA would impugn a measure based on a specific trade obligation. If there is some level of contention, it is most likely that such a dispute would be resolved by the dispute settlement or non-compliance mechanism available under the relevant MEA.²⁹ These can be enhanced by mandatory language requiring the MEA parties to bring their dispute exclusively to the MEA mechanism. However, the exclusion of the non-party issue does not prejudice WTO members in introducing MEA trade measures against non parties, but those members would not benefit from the Doha outcome and therefore would be under the Article XX scrutiny generally applicable to all environmental measures that violate WTO rules. Depending on the ruling, a two-tier MEA-WTO relationship could result depending on party status. If the discrepancy is wide, there may be disincentives to join MEAs thereby undermining global environmental governance objectives.

Principles and Criteria Approach

The principles and criteria approach has been advanced by Canada at the WTO dating back to June of 1996. The proposed approach or model aims to provide definitive guidance on some of the complicated issues of MEA accommodation such as non-party status and specific trade obligations. The principles and criteria would assist WTO Panels and the Appellate Body in assessing MEA trade measures and MEA negotiators when contemplating the drafting of trade measures. The utility of this approach is that it contributes to greater predictability in the system and minimizes the grey area between legitimate MEA measures and ones that unnecessarily disrupt trade.

This approach would look to MEA qualifying principles and criteria for determining the need for trade provisions in MEAs. Qualifying principles could consist of the MEA:

- being open to all countries;
- reflecting broad-based international support;
- containing precisely drafted provisions that specifically authorize trade measures;
- permitting trade with non-parties on the same basis as parties, where non-parties provide equivalent environmental protection; and,
- requiring the negotiators to have explicitly considered the criteria for the use of trade measures.

The criteria would consist of:

- trade measures being chosen only when effective and when other alternative measures are considered to be ineffective in achieving the

²⁹ See WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

particular environmental objective, or when other measures are ineffective without a trade component;

- trade measures not being more trade-restrictive than necessary to achieve the environmental objective; and,
- trade measures not constituting arbitrary or unjustifiable discrimination.

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. In this vein, one additional requirement could be 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.

Ultimately, the principles and criteria approach would put decision-making on the MEA-trade relationship in the hands of dispute settlement bodies. It might be additionally useful for MEA negotiators to be mindful of this approach although the legitimacy of the principles and guidelines will ultimately depend on which body endorses it. If it is under WTO auspices, it would not be binding on MEA negotiators. The existence of such principles and criteria would more easily guide panels in rendering their decisions and better inform trade partners on the type and scope of MEA provisions that would meet such principles and criteria. One concern is that a decision in dispute settlement, although not formally setting a precedent, would indicate whether the particular MEA meets the principles and criteria. This could prejudice the issue of whether other provisions set out in that MEA meet the principles and criteria and therefore preclude any consideration of the particular facts and circumstances of the case.

The retrospective effect of the principles and criteria 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. Where the principles and criteria are applied prospectively, it may assist MEA negotiators when crafting specific trade obligations as well as other trade related measures. This may even thaw the possible “chill” in negotiations since WTO compliance could be measured in advance. Particularly, the principles and criteria could operate so that negotiators would include specific objectives in the MEA akin to the wording of the Article XX exceptions (i.e. for the protection of human, animal, plant life or health); or explicitly state the objective of sustainable development as expressed in the preamble to the WTO Agreement; or be designed for the purpose of preventing transboundary pollution.

There may also be other uses for the principles and criteria. If a prescriptive list of MEAs is made, or even a narrower list of STOs, the principles and criteria could inform efforts of how to include new MEAs. The difficulties in obtaining consensus in a multilateral setting on inclusion of new MEAs could be avoided.

For the principles and criteria to be relevant for dispute settlement, they will have to reflect the qualifications set out in the other provisions, including the environmental exceptions, of a trade agreement. A finding that the principles and criteria are met must respond to the general questions regarding the “necessity”, “effectiveness”, “least trade-restrictiveness”, “proportionality”, or the “sound scientific basis” of the measure. In addition, whether such a finding concludes the matter or only answers certain questions regarding the legitimacy of the measure but not its method of application requires further thought. Dispute settlement

bodies may be interested in the universal application of the measure and even any concessions afforded to States that are in compliance with the MEA without being a party to it.

Finally, principles and criteria will be applied solely to MEAs and not to trade agreements. This suggests a hierarchy exists between MEAs and the WTO, where the latter's rules dictate the outcomes of the former. However, principles and criteria developed at the WTO may have practical value by drafting less ambiguous MEA provisions and pre-empting conflicts.

Preamble references including use of a "savings clause"

Mutual supportiveness is the term most used in preamble language to characterize the MEA-trade agreement relationship. It aims to ensure the equivalence between MEAs and trade rules and avoid any interpretation suggesting that one is subordinate to the other. However, mutual supportiveness is premised on the lack of any conflict between MEAs and trade rules, be it real or imagined. The use of savings clauses may assist in resolving the question of what happens when two agreements conflict – i.e. implementing one treaty or meeting its obligations will lead to a violation of another agreement. The rules of treaty interpretation provide for such situations, recognising that where a treaty specifies that it is not to be considered incompatible with an earlier or later treaty, its provisions would only apply to the extent of the compatibility.³⁰

Ultimately, a savings clause can provide a quick answer and even establish a subordinate status of one agreement to another when there is conflict. Savings clauses however, may be at odds with the objective of achieving mutual supportiveness. In trying to attain a balance, the wording of the savings clause can contribute to muddling rather than clarifying the MEA-trade relationship. For instance, the wording of the savings clause in the Cartagena Protocol, stipulates that the Protocol cannot be interpreted as implying a change in the rights and obligations of a party under existing international agreements but that the Protocol is not to be subordinated to other international agreements. Other MEAs, such as the Rotterdam Convention, contain similar language in their preambles.

In addition, savings clauses are frozen in time, not operating to waive rights under future agreements. Therefore, continual uncertainty persists when future agreements (either MEAs or WTO agreements) are reached unless their subordination to earlier agreements is provided for in the agreement. If not, the residual rules of treaty interpretation in light of a conflict would prevail.³¹

Accommodating MEAs in other international agreements

Related to the need to ensure that MEAs are accommodated in international trade agreements, are concerns about how to ensure MEA measures are immune from challenges in other agreements such as ones concerning investment. International investment agreements, which are mainly bilateral, do not specifically address how MEA related investment measures that impact an investor's property or interest, should be accommodated. Greater clarification is desirable where States attempt to regulate investor activity consistent with MEA

³⁰ *Vienna Convention on the Law of Treaties*, Art. 30(2).

³¹ *Ibid*, Article 30(3) provides that when States are parties to two agreements, the early treaty applies only to the extent that its provisions are compatible with the latter treaty.

obligations or objectives. Unlike a specific trade obligation in a MEA, a MEA related measure affecting an investment would cover a broader range of regulatory activity. MEAs themselves would unlikely mandate that a specific investment-related environmental measure be taken.

Expropriation or other measures geared towards MEA compliance may impact the value of an investment. One case where an MEA arose, concerned a Costa Rican measure to preserve an environmentally fragile area, effectively expropriating the land owned by an investor. Costa Rica conceded that this measure had a discriminatory effect but that because of the measures' objectives stemming partly from the country's obligations under the Convention on Biological Diversity,³² this should be considered to be a mitigating factor when awarding compensation. The arbitration panel ruled that this was not a relevant consideration in determining the quantum of damages owed as compensation.³³ The question in this case dealt with the assessment of compensation owed which differs from the principled argument that MEA related expropriation measures should be exempt entirely from investment agreement requirements.³⁴

In a report done by the OECD Secretariat during the negotiations for the Multilateral Agreement on Investment (MAI), it was concluded that there was no prima facie legal incompatibilities between the MAI text and existing MEAs.³⁵ However, the report indicated that other concerns about the investment-MEA relationship may still exist. Some commentary was offered on the relationship between investment measures and the Kyoto Protocol,³⁶ in addition to a potentially discriminatory regime governing access and benefit sharing pursuant to the Convention on Biological Diversity.³⁷ Another point raised is that international donor assistance given for the purposes of MEA implementation could conflict with of national treatment for investor obligations where the State receiving the assistance plays a role in selecting the enterprises or projects to benefit from such assistance.³⁸ Technology transfer provisions, common in many MEAs, are also problematic when these are demanded by recipient countries as a condition of foreign investors.

³² (1992) 31 *International Legal Materials* 818.

³³ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, 39 *International Legal Materials* 317

³⁴ In *S.D. Myers v. Government of Canada*, (2001) 40 *International Legal Materials* 108, Partial Award, November 13, 2000, one of the arguments raised by Canada was that their ban on the export of PCBs was required under their international commitments pursuant to the *Basel Convention* and the *Canada-U.S. Agreement Concerning the Transboundary Movement of Hazardous Waste*. The arbitration panel ruled that where a NAFTA party had a choice among equally effective and reasonably available alternatives for complying with the *Basel Convention*, the party should choose the option that is least inconsistent with the NAFTA. It also ruled that the Canada-US Agreement did not authorize the use of domestic law to ban the import or export of hazardous waste.

³⁵ OECD (1998), *Relationships Between the MAI and Selected Multilateral Environmental Agreements (MEAs)*, (OECD: Paris).

³⁶ (1997) 32 *International Legal Materials* 1480. Questions include whether a permit or quota allocated for emissions would constitute an investment? Is a right to emit in other countries considered an investment in those countries or more of a cross border trade? For more on the Kyoto Protocol -investment interface, see J. Werksman and C. Santoro (1999), 'Investing in sustainable development: the potential interaction between the Kyoto Protocol and the multilateral agreement on investment', in W. Bradnee Chambers (ed.), *Global Climate Governance: a Report on the Inter-Linkages between the Kyoto Protocol and other Multilateral Regimes*. (Tokyo: United Nations University).

³⁷ It should be noted the parties to the *Convention* are currently negotiating the rules governing access and benefit sharing regimes although this is still at an early stage even with regard to the legal bindingness of the regime itself.

³⁸ OECD (1998).

Conclusions

It is unlikely that any of these methods of MEA accommodation can stand alone in order to reach a satisfactory result. These methods are not mutually exclusive and can even work together to concretize mutual supportiveness in practical terms. The prescriptive list of MEAs would obviously provide the most determinative outcome although there is danger that it could be subject to the limitations seen in Article 104 of NAFTA. Guidelines in tune with the principles and criteria approach, could supplement a list so that new MEAs, in addition to subsequent agreements and protocols under existing MEAs, could more easily be included in the list. Moreover, general exceptions allow for MEA accommodation although a more guaranteed outcome would be enhanced by an agreed list of principles and criteria. This would provide more predictability in dispute settlement, establishing a coherent test or checklist to inform WTO members on what type of measures they can introduce. Legitimate expectations of WTO Members could be based on such principles and criteria.

Negotiating the technical aspects of the MEA-trade agreement relationship on questions such as what constitutes an MEA or a STO, offer a valuable opportunity to finalize the discussion. Similar to the prescriptive list approach, it is subject to a limited mandate that only partially addresses the entire relationship. Principles and criteria or environmental exceptions could buttress the overall value of the negotiated outcome but the potential for a two-tiered relationship based on a strict understanding of what is an STO for instance is a relevant consideration. Reliance on savings clauses, although politically expedient, may not advance significantly the MEA-trade rules issue where the overriding objective is mutual supportiveness. As a result, it can only complement the other ways to accommodate MEAs in a superfluous fashion.

Kevin R. Gray

Kevin R. Gray, LL.M. is a Senior Policy Analyst at Environment Canada in the Trade and Environment Branch. He is an international lawyer and academic, having taught at the London School of Economics and the School of Oriental and African Studies. He has also been a research fellow at the Royal Institute of International Affairs and the British Institute of International and Comparative Law.