

International Environmental Agreements and the GATT: an Analysis of the Potential Conflict and the Role of a GATT "Waiver" Resolution

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NOTES AND COMMENTS

INTERNATIONAL ENVIRONMENTAL AGREEMENTS AND THE GATT: AN ANALYSIS OF THE POTENTIAL CONFLICT AND THE ROLE OF A GATT "WAIVER" RESOLUTION

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I. INTRODUCTION

The growing nexus between international trade and environmental protection has brought a great deal of the underlying tension between the goals and objectives of the two widespread disciplines to the forefront of international relations.¹ In particular, representatives of both the trade and environmental communities have noted the potential for inherent conflict between the trade provisions of International Environmental Agreements (IEAs) and the liberalized trade principles of the General Agreement on Tariffs and Trade (GATT).²

This paper will attempt to carve through the rhetoric and distrust both sides have exhibited on this issue³ and assess the merits of the claim that trade provisions of three prominent international environmental agreements⁴ are inconsistent with the GATT.⁵ This paper also

1. The general dimensions of the trade and environment relationship have been discussed in several recent articles and symposia. See Steve Charnovitz, *The Regulation of Environmental Standards by International Trade Agreements*, 16 INT'L ENVTL. REP. (BNA) 631 n.17 (Aug. 25, 1993); Peter L. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L ENVTL. L. REV. 3, 519 (1993); Thomas J. Schoenbaum, *Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L. L. 700 (1992); Symposium, *Trade and the Environment: The Role of Regional Trade Agreements*, 5 GEO. INT'L. ENVTL. L. REV. 3, 515 (1993); Symposium, *Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict?*, 49 WASH. & LEE L. REV. 4 (1992); TRADE AND ENVIRONMENT COMMITTEE OF NACEPT, *THE GREENING OF WORLD TRADE*, (Jan McAlpine & Patricia LeDonne eds., 1993) [hereinafter NACEPT REPORT]; *Trade and the Environment*, 23 ENVTL. L. 3, 387 (1993).

2. See GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE AND THE ENVIRONMENT (Feb. 12, 1992) [hereinafter GATT TRADE AND ENVIRONMENT REPORT]. See also NACEPT REPORT, *supra* note 1.

3. As one newspaper report noted:

The Green view of the General Agreement on Tariffs and Trade (GATT) is succinctly expressed on thousands of anonymously produced posters littering the streets of Paris, Tokyo and Washington, featuring a monstrous Gattzilla devouring the globe, smashing the Capitol building, spilling DDT with one hand and squeezing a dolphin to death with another.

Nancy Dunne, *Fears over "Gattzilla the Trade Monster,"* FIN. TIMES, Jan. 30, 1992, at 3. See also, Schoenbaum, *supra* note 1, at 704, where it has been noted that "[t]he environmentalists who argue that free trade will destroy the environment are short-sighted and wrong."

4. This paper will limit its analysis to the trade provisions of the United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, *reprinted in* 12 I.L.M. 1085 (1973) [hereinafter CITES]; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, UN Doc. UNEP/IG/80/3 (1989), *partially*

evaluates the feasibility of a potential temporary solution to the alleged conflict: a waiver of all GATT obligations applicable to the trade measures of the IEAs.

Part II of this study presents an overview of the GATT and its basic principles. Parts III and IV examine the use-of-trade provisions in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), and the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol). Parts III and IV will also examine the potential for inconsistencies with the GATT. Part V presents a brief analysis of the Vienna Convention on the Law of Treaties and its relationship to the IEAs and GATT. Part VI offers a thorough examination of a GATT waiver's applicability to the trade obligations of the IEAs.

II. GATT PRINCIPLES

In order to understand the areas of potential conflict between GATT and International Environmental Agreements (IEAs), one must comprehend the major underlying principles that govern all functions of the GATT.⁶ Article I establishes the Most-Favoured-Nation principle (MFN). The MFN principle aims to ensure that each contracting party "immediately and unconditionally" grants to all other contracting parties equal treatment for their similar import and export products.⁷ MFN effectively requires all contracting parties to treat products from other contracting parties equally. Article III establishes the National Treatment Principle which requires contracting parties to treat any imported product in the same manner as they treat domestic products.⁸ National Treatment is designed to prevent discrimination against imported products that would secure advantages for domestic products. Article XI establishes a prohibition on quantitative restric-

reprinted in 28 I.L.M. 657 (entered into force May 1992) [hereinafter Basel Convention]; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT].

6. Although GATT has technically never come into force, it is applied by the 1947 Protocol of Provisional Application (PPA) and is considered a binding treaty obligation in theory and in the practice of the parties. See John H. Jackson, *Changing GATT Rules in NACEPT REPORT*, *supra* note 1, at 105.

7. GATT, *supra* note 5, art. I, at 96.

8. *Id.* art. III, at 204.

tions and seeks to prohibit such trade actions as quotas, embargoes, and licensing schemes on imported or exported products.⁹

If a contracting party is challenged with violating any of the above principles, they have recourse to the GATT General Exceptions.¹⁰ Article XX(b) and (g) are the exceptions most frequently cited in trade disputes that involve the environment and natural resources.¹¹ Article XX(b) allows contracting parties to take measures "necessary to protect human, animal or plant life or health;"¹² and XX(g) allows measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."¹³

When a trade dispute arises between contracting parties, Article XXII encourages the parties to enter into informal negotiations to resolve the impasse.¹⁴ If an agreement cannot be reached through consultation, the parties can request the GATT Council¹⁵ to appoint a GATT Dispute Resolution panel to settle the disagreement in accordance with Article XXIII. The panel hearings are between governments and are generally closed to the public and non-governmental organizations (NGOs).¹⁶ In practice, the burden of proving that the trade measure is justified and/or falls within one of the GATT Article XX exceptions is on the party seeking to invoke the exception.¹⁷ The primary aim of the

9. *Id.* art. XI.

10. Article XX only permits exceptions when it can be shown that the "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." *Id.* art. XX, Preamble.

11. *See, e.g. Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R 208-09, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 200 (37th Supp. 1990) (entered into force Nov. 7, 1990); *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 98 (35th Supp. 1988) (entered into force Mar. 22, 1988); *United States — Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Sept. 3, 1991) (not adopted by the GATT Council), 30 I.L.M. 1594, 1606-07 (1991) [hereinafter Tuna/Dolphin Report].

12. GATT, *supra* note 5, art. XX(b).

13. *Id.* art. XX(g).

14. *Id.* art. XXII.

15. The GATT Council serves as the executive chamber of the GATT and most contracting parties have representatives within the Council. *See generally* JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 154 (1969).

16. Durwood Zaelke et al., *Frictions Between International Trade Agreements and Environmental Protections*, NACEPT REPORT, *supra* note 1, at 51.

17. *Id.* at 48.

dispute resolution process is to maintain the lines of communication between the parties in the interest of upholding the GATT system.¹⁸ However, if a contracting party fails to comply with a panel decision that has been accepted by the full GATT Council, the contracting parties may suspend the application of their respective GATT obligations towards the recalcitrant party.¹⁹

III. TRADE MEASURES AND THE INTERNATIONAL ENVIRONMENTAL AGREEMENTS

A. *Why Do International Environmental Agreements Use Trade Provisions?*

The GATT Secretariat has identified seventeen international environmental agreements that contain a variety of trade provisions.²⁰ The reasons and rationales behind employing trade measures often vary with the subject matter of the agreement. Generally, many IEAs employ trade provisions to accomplish objectives that parties to the agreement deem to be in their individual and collective interests.²¹ These goals include: i) the attainment of the environmental objective of the agreement itself; ii) the encouragement of greater support among nations for the agreement; iii) the elimination of incentives that en-

18. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 112 (1989).

19. GATT, *supra* note 5, art. XXIII:2.

20. GATT TRADE AND ENVIRONMENT REPORT, *supra* note 2, Appendix 1. These agreements and the date they were signed include: Convention Relative to the Preservation of Fauna and Flora in their Natural State (1933), Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1940), International Convention for the Protection of Birds (1950), African Convention on the Conservation of Nature and Natural Resources (1968), Benelux Convention on the Hunting and Protection of Birds (1970), Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), Agreement on the Conservation of Polar Bears (1973), Convention for the Conservation and Management of the Vicuna (1980), Convention on Conservation of North Pacific Fur Seals (1957), Montreal Protocol on Substances That Deplete the Ozone Layer (1987), European Convention for the Protection of Animals during International Transport (1968), International Plant Protection Agreement (1951), Plant Protection Agreement for the South East Asia and Pacific Region (1956), Phyto-sanitary Convention for Africa (1967), Agreement Concerning the Cooperation in the Quarantine of Plants and their Protection against Pests and Diseases (1959), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), ASEAN Agreement on the Conservation of Nature and Natural Resources (1985). *Id.*

21. For a brief discussion of the reasons why countries join and comply with IEAs, see ANDREW HURRELL AND BENEDICT KINGSBURY (eds.), *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 22-25 (1992).

courage non-party nations to take environmental and economic advantage of other nations that are parties to the agreement.

For example, IEAs utilize trade measures to discourage or prohibit the transfer from one nation to another of the actual product or substance that is the "target" of the agreement. Thus, IEAs may specifically seek to control the trade in endangered species, hazardous waste, or substances that deplete the ozone layer because trade in these areas has been deemed harmful to the environment.²²

Secondly, trade provisions in IEAs will often attempt to use a "carrot-and-stick" approach to create incentives for non-parties to become parties to the agreement. The existence of trade sanctions and preferences may spur the development of a strong national interest in becoming a party to the IEA. Incentives to join may be as concrete as the continuance of a market presence in the prohibited substance or as subtle as diplomatic pressure accompanied by the fear of international isolation.²³ The special concerns of developing countries also play a large role in this context. IEAs may use trade measures as incentives to encourage reluctant and skeptical developing countries to become parties to the agreement.²⁴ The use of special delays in compliance or agreements on facilitating technology transfer may also be incorporated into an IEA.²⁵

Finally, the existence of non-parties to IEAs acting as "free riders" poses several different problems for the parties to the agreement. In general, free riders derive the environmental benefits of the IEAs without having to pay any of the costs. Trade measures may be used to counter competitive economic advantages that industries in non-party countries may enjoy as a result of the increased costs of compliance with the IEA in member nations.²⁶ Non-parties may also seek to prosper by filling the market vacuum left behind by the various prohibitions imposed on parties.²⁷ Thus an elimination of free riders will, in all likelihood, lead to more members of the IEA and a strengthening of the global consensus on the international environmental issue. If free riders

22. See *infra* part III(B),(C),(D).

23. HURRELL AND KINGSBURY, *supra* note 21, at 24.

24. For example, developing countries may be hesitant to become parties to IEAs because of concerns regarding the costs of compliance and the inequities of forgoing the use of a banned substance at the expense of potentially less revenue and a slower pace of economic development. Thus, the Montreal Protocol is one example of an IEA that has included special ten-year compliance delay provisions for qualifying developing countries. See Montreal Protocol, *supra* note 4, art. 5.

25. *Id.*

26. RICHARD E. BENEDICK, OZONE DIPLOMACY 91 (1991).

27. *Id.*

are able to reap rewards for non-compliance, membership in IEAs will more than likely be reduced substantially.²⁸

B. United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The worldwide trade in wildlife is now estimated to be valued at \$5-\$8 billion a year.²⁹ For several species such as the African elephant, the Orinoco crocodile, the Sumatran rhinoceros, and other wildlife that are in high demand on the international market, trade represents a powerful and direct threat to their continued existence.³⁰

The United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) recognizes in its Preamble that "international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade."³¹ CITES, originally drafted in 1973 and currently in force with 113 parties, invokes trade restrictions and regulations to protect listed species of animals and plants threatened with extinction, and protects species deemed endangered unless trade is strictly regulated.³² The Convention prohibits, through a permit system, the import or export of listed wildlife and wildlife products unless a scientific finding is made that the trade in question will not threaten the existence of the species.³³ The objective is to eliminate the economic incentive to exploit a particular species by destroying the international market demand for the wildlife product. Articles III, IV, and V of CITES regulate international trade in listed species with parties *and non-parties*.³⁴ Article X allows trade in listed species with non-parties, if the non-party provides documentation that conforms with the provisions of CITES.³⁵

C. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)

The increased shortage of waste management capacity in many

28. HURRELL AND KINGSBURY, *supra* note 21, at 22-25.

29. Hilary F. French, *Reconciling Trade and the Environment* in WORLDWATCH INSTITUTE, STATE OF THE WORLD 1993 158, 162 (1993).

30. *Id.*

31. CITES, *supra* note 4, Preamble.

32. *Id.* Appendix I and II.

33. *Id.* art. III 2(a)-3(a), IV(a).

34. *Id.* art. III, IV, V (emphasis added).

35. *Id.* art. X.

countries, and the prohibitive costs associated with building large-scale disposal facilities in nations that may produce relatively small amounts of hazardous waste, have contributed substantially to the increase in global hazardous waste export.³⁶ In addition, several high-profile international incidents have focused dramatic attention on the economic and political pressure many developing nations face when confronted with a shipment of hazardous waste from the developed world.³⁷ According to NGO analysts, ten million tons of waste have been exported over the past several years and more than half of the waste has been delivered to the relatively weaker-regulated areas of the world in Eastern Europe and several developing countries.³⁸ Despite the benefit of profit realization that these shipments offer, developing nations often have limited disposal capability. Shipments frequently present the problem of potential contamination of groundwater, surface water, soil, and air if waste is dumped illegally.³⁹

In response to these and other concerns, the United Nations Environment Programme (UNEP) sponsored the negotiations of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).⁴⁰ The Basel Convention prohibits exports of waste to parties or *non-parties* unless it can be demonstrated that the importing nation "will manage the waste in an environmentally sound manner."⁴¹ Article 4(5) provides that a party shall not permit hazardous waste or other wastes to be exported to or imported from a non-party unless that party enters into a bilateral, multilateral, or regional agreement regarding transboundary movement of waste with the non-party pursuant to Art. 11.⁴² In trans-

36. Notification Concerning the Basel Convention's Potential Implications for Hazardous Waste Exports and Imports, 57 Fed. Reg. 20602 (1992).

37. One particular incident involved the ship *Khian Sea*. The vessel left Philadelphia in August 1986 bound for Haiti with 15,000 tons of incinerator ash (the shipping papers falsely indicated the cargo was construction material and fertilizer). When Haiti refused the shipment, the *Khian Sea* left on a two-year search for a country that would accept the waste. The ship's name was changed several times and after several ports refused its cargo, it arrived in Singapore under a different name and with the ash allegedly dumped in the Indian Ocean. In June 1993, the owners of the *Khian Sea* were convicted of illegal ocean dumping and perjury for denying the ash had been dumped. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION (Supplement) 338 (1993).

38. French, *supra* note 29, at 165.

39. Notification Concerning the Basel Convention's Potential Implications for Hazardous Waste Exports and Imports, 57 Fed. Reg. 20602, 20603 (1992).

40. Basel Convention, *supra* note 4.

41. *Id.* at art. 4(2)(e) (emphasis added).

42. *Id.* at art. 4(5).

fers between parties, other conditions require the exporter to receive the prior informed consent of the importing party and any other parties through whose territory the waste will be transported.⁴³ In addition, a party may only export hazardous waste if it lacks the technical capacity, necessary facilities, or suitable domestic waste-disposal sites.⁴⁴ The Basel Convention went into force in May 1992 and, as of June 1992, had been ratified by 21 of its 53 signatory parties.⁴⁵

*D. Montreal Protocol on Substances that Deplete the Ozone Layer
(Montreal Protocol)*

In the past two decades, scientific evidence has increasingly established a strong link between the depletion of the stratospheric ozone layer and the release into the atmosphere of chlorine and bromine-laden chemicals such as chlorofluorocarbons (CFCs), halons, carbon tetrachloride, methyl chloroform, and fully halogenated CFCs.⁴⁶ The stratospheric ozone layer acts as a shield to protect the earth against the harmful effects of ultraviolet radiation. A decrease in stratospheric ozone could potentially lead to the increased incidence of skin cancer, cataracts, suppression of the immune system, crop damage, and harm to the marine food chain.⁴⁷ As an initial effort to respond to these and other serious consequences of ozone depletion, the 1985 Vienna Convention for the Protection of the Ozone Layer provided a general commitment by its signatories to cooperate in protecting the ozone layer.⁴⁸ In 1987, the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) established specific commitments by the parties to reduce their consumption and production of CFCs by 50% of 1986 levels by 1999.⁴⁹ As evidence of ozone depletion grew, and scientific assessments indicated further deterioration of the ozone layer over Antarctica, the parties to the Montreal Protocol agreed in 1990 at

43. *Id.* at art. 6(4).

44. *Id.* at art. 4(9)(a).

45. In signing the Convention, a country indicates that it agrees with the goals of the Convention and is moving towards ratification. Ratification is acknowledgement of a country's ability to implement the provisions of the Convention. See Notification Concerning the Basel Convention's Potential Implications for Hazardous Waste Exports and Imports, *supra* note 39, at 20603.

46. Protection of Stratospheric Ozone, 57 Fed. Reg. 33755 (1992).

47. *Id.*

48. Vienna Convention for the Protection of the Ozone Layer, Sept. 22, 1987, 26 I.L.M. 1516 (1987).

49. Montreal Protocol, *supra* note 4, art. 2. Halon production is to be frozen at 1986 levels. *Id.*

London to speed up their commitments by calling for a phase-out of the consumption and production of CFCs, halons, and carbon tetrachloride by the year 2000 and methyl chloroform by 2005.⁵⁰ The Fourth Meeting of the Parties at Copenhagen in November 1992 accelerated the timetable for the complete production phase-out of CFCs, carbon tetrachloride, and methyl chloroform by 1996, and halons by 1994.⁵¹

The Montreal Protocol uses trade restrictions to encourage participation in the agreement, to prevent non-parties from gaining a competitive advantage at the expense of parties, and to inhibit the flow of ozone depleting substance (ODS) production facilities to non-party countries.⁵² Article 4 prohibits the import and export of controlled substances⁵³ to and from *non-parties* unless the non-party has demonstrated its full compliance with the control measures under the Protocol.⁵⁴ Limited trade in quota production levels and controlled substances is allowed among parties to promote economic efficiency and to act as an incentive for non-parties to join the Protocol.⁵⁵ The export of technology or financial aid to non-parties to assist in the manufacture of controlled substances is strongly discouraged.⁵⁶

Article 4:3 and Article 4:4 call upon the parties to ban the import of products *containing* ODS and examine the feasibility of banning imports of products *produced with* ozone depleting substances from non-parties, respectively.⁵⁷ The restrictions on products containing or produced with ODS are considered a crucial element in discouraging the shift by parties of ODS-manufacturing facilities to offshore pollution havens in an attempt to circumvent their responsibilities under the Protocol.⁵⁸ The Montreal Protocol has been in force since January 1, 1989

50. London Adjustments and Amendments to the Protocol, Aug. 10, 1992, 30 I.L.M. 537 (1991). As of May 21, 1993, 62 nations had deposited their instruments of acceptance. 57 Fed. Reg. at 33756 (1992).

51. Copenhagen Adjustments and Amendments to the Protocol, Nov. 25, 1992, 32 I.L.M. 874 (1993). Methyl bromide is also to be frozen at 1991 levels by 1995.

52. BENEDICK, *supra* note 26, at 91.

53. Montreal Protocol, *supra* note 4, Annex A.

54. *Id.* art. 4 (emphasis added).

55. *Id.* art. 2.

56. *Id.* art. 4(5), (6).

57. *Id.* art. 4(3), (4) (emphasis added).

58. BENEDICK, *supra* note 26, at 92. The parties to the Montreal Protocol were concerned that a party could commit to specific reductions within its boundaries and then use a non-party for all its ODS-use needs. The result would be no effective reduction in the world's use of ODS and a disincentive to the development of ozone friendly substitutes. *Id.*

and had 86 parties as of October 1992.⁵⁹

IV. CONFLICTS BETWEEN THE IEAs AND THE GATT

A. MFN and IEAs

Each of the three international environmental agreements employs trade provisions in varying forms against *non-parties* to the environmental agreements.⁶⁰ These particular trade restrictions are potentially vulnerable to challenge as a violation of GATT's Most Favoured Nation (MFN) principle.⁶¹ For example, a non-party to the IEAs but a contracting party under GATT could challenge the import and export restrictions against non-parties contained in CITES, the Basel Convention, and the Montreal Protocol. The challenging nation could conceivably argue that its MFN right under GATT to have its "like products" treated equally has been violated by the prohibitions imposed on its products by the trade provisions of the IEAs. As a result, a nation could argue that its products are being unfairly discriminated against by other GATT contracting parties simply because it has not joined the IEA(s).

B. National Treatment and IEAs

The variety of import restrictions the IEAs impose on parties *and* non-parties alike may also be subject to challenge as violations of the GATT's Article III national treatment principle.⁶² National treatment requires that imported goods not be discriminated against in favor of domestic goods through economic policies that regulate terms of sale, use, internal taxes, etc.⁶³ In response to the Mexican GATT challenge to the embargo provisions of the Marine Mammal Protection Act (MMPA) for tuna caught in the Eastern Tropical Pacific (ETP) in a manner that harms dolphins, the United States relied heavily in its defense on the provisions of the MMPA that are consistent with the GATT's national treatment standard.⁶⁴ However, the GATT Panel construed national treatment narrowly and ruled that the United States trade measure was not justified because it distinguished the imported product from the domestic product on the basis of whether the im-

59. Copenhagen Adjustments and Amendments, 32 I.L.M. 874 (1993).

60. See *supra* notes 33, 40, 53 and accompanying text (emphasis added).

61. GATT, *supra* note 5, art. I.

62. *Id.* art. III.

63. *Id.* art. III:4.

64. Tuna/Dolphin Report, *supra* note 11, 30 I.L.M. at 1601.

ported product's production and processing methods (PPMs) were environmentally sound.⁶⁵ The Panel took the view that the "end product" of tuna in the can was, quite literally, tuna in the can, and no distinction using trade measures should be made based on how the product was produced.⁶⁶ The Panel noted that national treatment "calls for a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*."⁶⁷

The failure of the GATT to distinguish products based on their PPMs will certainly have a profound impact on the ability of the Montreal Protocol to ensure compliance with its requirements that parties ban the import from non-parties of products *containing* and/or *manufactured with* ozone depleting substances.⁶⁸ For example, an imported computer circuit board could be manufactured with the use of controlled substances in its regular production process but it may not contain controlled substances in its final form. If the circuit board, in all other respects, is identical to its domestic counterpart, each circuit board would be considered a "like product" for purposes of GATT MFN and national treatment.⁶⁹ Thus, any discrimination against the imported "like product" based on its manufacturing process would be considered a violation of a contracting party's obligations under the GATT's Article I MFN and Article III national treatment standards.⁷⁰ The prohibition on imported products *containing* controlled substances may not violate MFN and national treatment if a dispute resolution panel could be convinced that a product containing ozone depleting substances and a product not containing ODS were not "like products."

C. Article XI Quantitative Restrictions

The import restrictions that do not satisfy national treatment and the export restrictions of the IEAs that take the form of bans, embargoes, and prohibitions of trade are vulnerable to challenge as quantitative restrictions under Article XI of GATT.⁷¹ Article X provides for some exemptions to its prohibition on quantitative restrictions for such things as shortages of foodstuffs and temporary domestic surpluses.⁷² However, none of the listed exemptions specifically acknowledges envi-

65. *Id.* at 1617.

66. *Id.* at 1618.

67. *Id.*

68. *See supra* note 58 and accompanying text (emphasis added).

69. GATT, *supra* note 5, art. I, III.

70. Tuna/Dolphin Report, *supra* note 11, 30 I.L.M. at 1617.

71. GATT, *supra* note 5, art. XI.

72. *Id.* art. XI:2.

ronmental concerns.⁷³

D. Article XX

If a party to the IEAs is challenged by a contracting party to the GATT for violating one of the core GATT principles through its obligation to the IEAs, the challenged party has recourse to the GATT general exceptions incorporated in Article XX.⁷⁴ Nevertheless, recent dispute resolution panel decisions have cast considerable doubt on the effectiveness of the Article XX exceptions in defense of environmental objectives.⁷⁵

The Tuna/Dolphin Panel's interpretation of the applicability of Article XX(b) and (g) to the protection of resources outside of a contracting party's jurisdiction may represent the most direct impact on the relationship between the GATT and the IEAs.⁷⁶ In that decision, the Tuna/Dolphin Panel stated that Article XX(b) and (g) should be limited to protecting resources within the jurisdiction of the importing country.⁷⁷ This interpretation raises serious concerns about the ability of the IEAs' parties to effectively implement measures to protect the global commons. Most of the nations that are signatories to the IEAs have become parties to the agreements because they recognize a national interest and international responsibility in acting collectively to discourage further global environmental degradation. Ultimately, the citizens of the parties to CITES, the Basel Convention, and the Montreal Protocol will arguably receive direct benefits from the actions taken in pursuance of these agreements. However, the GATT, specifically Article XX(b) and (g), currently fail to acknowledge the legitimacy of nations acting in concert, not only to benefit their own citizens, but also to protect citizens and resources outside their jurisdictions.⁷⁸

73. *Id.*

74. *Id.* art. XX.

75. *See e.g., supra* note 11.

76. Tuna/Dolphin Report, *supra* note 11, at 1620.

77. *Id.* at 1619-1621. The Tuna/Dolphin panel reached its interpretation of the inapplicability of Article XX(b) and (g) to extraterritorial environmental concerns by relying heavily on the drafting history of the GATT. *Id.* However, at least one commentator has noted that the original drafters were well aware of various existing international environmental agreements that sought to protect species in the global commons through the use of trade measures. The author contends that the drafters' refusal to adopt an Explanatory Note that would have limited the scope of Article XX(b) to "domestic life or health" is particularly indicative of their intent that Article XX(b) be applicable extraterritorially. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 52 (1991).

78. *Id.*

Article XX(b) provides an exception for the adoption or enforcement of measures “[n]ecessary to protect human, animal or plant life or health.”⁷⁹ The GATT Secretariat has recently noted that whether “a particular trade measure is ‘necessary’ involves one or both of two considerations: whether other measures consistent with the General Agreement are reasonably available to achieve the goal and, if not, whether it is the least trade-distorting way of achieving the goal.”⁸⁰ In the Tuna/Dolphin Report, the Panel ruled that the United States had not demonstrated that it had exhausted all of the available options to achieve its goal before imposing the tuna embargo upon Mexico.⁸¹ As a result, the measures taken by the United States could not be deemed “necessary” to protect the life or health of humans, animals, or plants.⁸² The Panel emphasized that a multilateral solution to the concern over dolphin deaths as a result of tuna harvesting in the ETP would have been much more appropriate.⁸³

The Tuna/Dolphin Panel’s stated preference for multilateral solutions is particularly ironic in the context of the IEAs. In early negotiations surrounding the use of trade provisions against non-parties to the Montreal Protocol, the parties specifically requested a GATT Secretariat review of the trade restriction proposal to assess its consistency with GATT.⁸⁴ At the time, the GATT Secretariat representative declared that the trade measures would be upheld as exceptions under Article XX(b) and (g).⁸⁵ However, as late as 1992, the GATT Secretariat has implied that the trade measures of the Montreal Protocol are discriminatory to non-parties.⁸⁶ Presumably, the trade restrictions against non-parties in the Basel Convention and CITES could come under similar challenges for not using the least trade-restrictive means and/or exhausting all other options available for achieving their respective environmental goals. Thus, the GATT Secretariat appears to be encouraging the use of multilateral strategies to address global environmental problems while simultaneously undermining their effectiveness by implying that many of their trade-related principles are not compatible with the GATT.

The scope of the exception in Article XX(g) for trade measures

79. GATT, *supra* note 5, art. XX(b).

80. GATT TRADE AND ENVIRONMENT REPORT, *supra* note 2, at 8.

81. Tuna/Dolphin, *supra* note 11, ¶ 5.28, at 1620.

82. *Id.*

83. *Id.*

84. BENEDICK, *supra* note 26, at 91.

85. *Id.*

86. GATT TRADE AND ENVIRONMENT REPORT, *supra* note 2, at 12.

“relating to the conservation of exhaustible natural resources” has also been limited by recent panel interpretations.⁸⁷ One panel found that a trade measure “had to be *primarily aimed* at the conservation of an exhaustible resource to be considered as ‘relating to’ conservation within the meaning of Article XX(g).”⁸⁸ Thus, a challenging party could argue that the trade provisions of the IEAs are not “primarily aimed” at conservation, but are included in the agreements to serve the commercial interests of the parties to the IEAs at the expense of non-parties. A challenging nation may also argue that the trade provisions are primarily aimed at encouraging participation in the IEA and are not directed at improving resource conservation. One observer has even gone so far as to suggest that a GATT panel could refuse to recognize the atmosphere as an “exhaustible resource,” and therefore reject an Article XX(g) exception in the Montreal Protocol context.⁸⁹

V. THE IEAs, GATT, AND THE VIENNA CONVENTION ON THE LAW OF TREATIES

Several commentators have suggested that the traditional international law of treaties may establish priority of the IEAs over the GATT sufficient to enable the IEAs to withstand a challenge based on the obligations of the GATT.⁹⁰ However, reliance on this approach involves several limitations and is complicated by major areas of uncertainty⁹¹ in the interpretation of the language and practice of the IEAs, GATT, and the Vienna Convention on the Law of Treaties (Vienna Convention).⁹²

Article 30 of the Vienna Convention provides that when the provisions of two treaties concerning the same subject matter conflict as between parties to both treaties, the later-in-time prevails, unless one treaty explicitly notes otherwise.⁹³ The requirements that the treaties

87. GATT, *supra* note 5, art. XX(g).

88. *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, *supra* note 11, at 114 (emphasis added).

89. Janet McDonald, *Greening the GATT: Harmonizing Free Trade And Environmental Protection In The New World Order*, 23 ENVTL. L. 398, 452 (1993).

90. See James Cameron and Jonathan Robinson, *The Use of Trade Provisions In International Environmental Agreements and Their Compatibility with the GATT*, 2 Y. B. INT'L ENVTL. L. 3, 16 (1992).

91. *Id.*

92. Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, U.N. Doc. A/CONF.39/27, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

93. *Id.* art. 30.

concern the same "subject matter" and that the parties are members of both treaties may pose some difficulties for the IEAs. The subject matter of the IEAs (e.g. conservation, ozone protection, hazardous waste transportation) is not necessarily the same as the subject matter that is covered by the GATT (liberalization of world trade).⁹⁴ Nevertheless, the existence of a conflict between the two treaties, presumably concerning trade measures, may be sufficient evidence to suggest that the two treaties share overlapping subject matter.

However, the requirement that the parties be members of both treaties will severely limit the effectiveness of this approach, as non-parties will undoubtedly pose the majority of the challenges to the trade provisions of the IEAs. This situation exists because it is unlikely that a party that has voluntarily committed to the terms of the IEA will subsequently challenge the agreement's consistency with the GATT. In addition, the majority of trade restrictions of the IEAs are specifically directed at non-parties.⁹⁵ The Vienna Convention also stipulates that if two nations are parties to one treaty, the commonly shared treaty takes precedence over a treaty to which only one nation is a party.⁹⁶ Under likely GATT challenges, that common treaty will be the GATT and its Protocol of Provisional Application.⁹⁷

On the other hand, the Vienna Convention implies that treaties worded specifically take precedence over treaties worded more generally.⁹⁸ An additional factor that may benefit the IEAs is that none of the IEAs have explicitly indicated deference to the GATT in their texts.⁹⁹ However, regardless of whether or not deference to the GATT can be established in the current IEAs, the significance of resisting all references to the GATT in future IEAs should not be overlooked.¹⁰⁰ The potential long-term implications of language implying deference to

94. See Cameron and Robinson, *supra* note 90, at 16.

95. See *supra* notes 33, 40, 53 and accompanying text.

96. Vienna Convention, *supra* note 92, art. 30 (4)(b).

97. See *supra* note 6 and accompanying text.

98. Vienna Convention, *supra* note 92, art. 30 (2).

99. Cameron and Robinson, *supra* note 90, at 18. The authors note that there is no provision within CITES that indicates a party's express deference to their GATT obligations. *Id.* However, this point is far from settled. For example, CITES Article XIV:2 states: "The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade. . . ." CITES, *supra* note 4, art. XIV:2 at 1093 (emphasis added).

100. United Nations Conference on Environment and Development: Framework Convention on Climate Change, *opened for signature* May 9, 1992, 31 I.L.M. 849 (1992) [hereinafter Climate Change Convention].

the GATT should be carefully analyzed by the negotiators of future IEAs.¹⁰¹

However, the major difficulty associated with relying on the hierarchical treaty argument is that the GATT is constantly evolving through practice and further negotiation.¹⁰² The current round of GATT negotiations, the Uruguay Round, will expand the GATT in several areas such as intellectual property and services, and dramatically alter its dispute resolution processes.¹⁰³ The Uruguay Round also proposes to establish a Multilateral Trade Organization (MTO) that will provide "legal personality" for the GATT.¹⁰⁴ If the Uruguay Round is eventually adopted, an argument could be presented that the later-in-time treaty is the GATT, not the IEAs.

VI. THE GATT WAIVER

A. *History and Practice*

Article XXV, paragraph 5 of the GATT contains what one commentator has labeled, "[P]erhaps the most important single power of the contracting parties. . . ."¹⁰⁵ The text of Article XXV:5 reads:

In exceptional circumstances not elsewhere provided for in this Agreement, the contracting parties may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The contracting parties may also by such a vote

- (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
- (ii) prescribe such criteria as may be necessary for the application of this paragraph.¹⁰⁶

101. D. Goldberg, *Trade and the Climate Convention: Beware of GATT*, CIEL MEMO, (Feb. 1992) (on file with author).

102. Cameron and Robinson, *supra* note 90, at 16.

103. *Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft].

104. Dunkel Draft, Agreement Establishing the Multilateral Trade Organization (Annex IV), *supra* note 103, at 91. Art. VIII:1 of the draft MTO states: "The MTO shall have legal personality." *Id.* at 95.

105. JACKSON, *supra* note 15, at 541.

106. GATT, *supra* note 5, art. XXV:5.

The drafting history of the GATT indicates that the waiver was designed to be broad and apply to all obligations under the general agreement.¹⁰⁷ One GATT Working Party interpreted the character of the waiver in stating:

The Working Party is of the view that the text of paragraph 5(a) of Article XXV is general in character; it allows the contracting parties to waive any obligations imposed upon the contracting parties by the Agreement in exceptional circumstances not provided for in the Agreement, and places no limitations on the exercise of that right.¹⁰⁸

There has been no attempt to formulate a definition of "exceptional circumstances."¹⁰⁹ However, the waiver provision does provide a measure of flexibility in that contracting parties may define "specific categories of exceptional circumstances" and/or "prescribe such criteria as may be necessary for the application of the [waiver] paragraph."¹¹⁰ In general, the historical practice of the waiver provision has been that a waiver will be granted when a contracting party secures the required number of votes.¹¹¹

The broad and flexible authority of the waiver provision to exempt a contracting party from its GATT obligations has led many contracting parties to view its application with concern. In 1957, the contracting parties issued a decision entitled "Guiding Principles to be Followed by the Contracting Parties in Considering Applications for Waivers."¹¹² This decision called for a 30-day notice period and full consultation before waivers were considered. It also called for an annual report and review of the waiver in operation.¹¹³ Most of the apprehension, and arguably the attraction, surrounding the waiver provision is due to its potential use as a *de facto* amendment power to the GATT.¹¹⁴ The Article XXX GATT amendment process requires unanimous endorsement and does not bind those contracting parties that re-

107. JACKSON, *supra* note 15, at 543.

108. *Id.*

109. *Id.* at 544.

110. GATT, *supra* note 5, art. XXV:5(i),(ii).

111. JACKSON, *supra* note 15, at 544.

112. *Guiding Principles to be Followed by the Contracting Parties in Considering Applications for Waivers*, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 25 (5th ed. Supp. 1957).

113. *Id.* at 27.

114. John H. Jackson, NACEPT REPORT, *supra* note 1, at 106.

fuse to accept the amendment.¹¹⁵ As a result of the cumbersome amendment requirements, many contracting parties have viewed an open-ended and/or time-limited waiver as an efficient means of changing GATT rules for a temporary period of time.¹¹⁶

In partial response to these concerns, several waivers have required regular reports outlining the commercial progress that has occurred during the waiver's implementation.¹¹⁷ Some waivers include expiration dates and others expressly reserve the right of contracting parties to initiate dispute resolution proceedings in accordance with Article XXIII if a waiver is allegedly being abused by a contracting party.¹¹⁸ Indeed, the proposed changes to Article XXV as expressed in the Uruguay Round Dunkel Draft require a contracting party seeking a waiver to provide a detailed statement of its policy objective.¹¹⁹ The Dunkel Draft also provides that a decision of the contracting parties granting a waiver "[S]hall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate."¹²⁰ An express provision granting contracting parties access to the dispute resolution process for waiver disagreements is also codified in the Dunkel Draft.¹²¹

In the past, GATT contracting parties have allowed other contracting parties to waive their General Agreement obligations for a variety of reasons.¹²² Waivers have been used to allow import quotas on agricultural goods,¹²³ special regional agreements¹²⁴ and the granting of tariff preferences to developing countries by developed countries.¹²⁵

115. *Id.* A unanimous amendment has never succeeded. *Id.*

116. *Id.* at 107.

117. JACKSON, *supra* note 15, at 547.

118. *Id.*

119. Dunkel Draft, Article XXV of the General Agreement on Tariffs and Trade, *supra* note 103, at V.1.

120. *Id.* at V.1, ¶ 2.

121. *Id.* at V.1, ¶ 5.

122. *See generally*, JACKSON, *supra* note 15, at 549-52.

123. *U.S. Waiver for Agricultural Adjustment Act*, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 32 (3rd ed. Supp. 1955).

124. *U.S.-Can. Auto Pact*, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 37 (14th ed. Supp. 1966).

125. *1971 Generalized System of Preferences Waiver*, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 24 (18th ed. Supp. 1972).

B. Waiver and the IEAs: Inappropriate Response to Potential Conflict?

The effectiveness of a waiver as an adequate means of ensuring consistency between the GATT and CITES, the Basel Convention, and the Montreal Protocol, has engendered healthy skepticism.¹²⁶ Some critics have found the proposition of a waiver undesirable because it would provide no assurances as to the consistency of trade provisions with GATT in future IEAs.¹²⁷ Procedurally, a waiver to these three specific IEAs could institute a precedent whereby all future IEAs seeking to use trade provisions would have to receive approval from the GATT before they were able to proceed.¹²⁸ Closely related to this point is the overall impression that a GATT waiver has on the legitimacy of the IEAs. The grant of a waiver reinforces the perception, particularly frustrating to the environmental community, that the GATT and the goals of liberalized trade it represents have priority over all other concerns.¹²⁹ A waiver, it is argued, would only perpetuate the status quo deference to the GATT on environmental matters. In addition, the waiver's applicability to the IEAs has also been criticized in that the GATT can never provide assurances that an existing or future IEA's trade provisions will satisfy the "exceptional circumstances" criteria of Article XXV:5.¹³⁰

Other observers have pointed to the fundamental problem that the grant of a waiver by the contracting parties is effectively a *de facto* acceptance of the IEA by those non-parties who have resisted joining the agreement at an earlier date.¹³¹ It would be unlikely that those nations who have continually resisted becoming signatories to the IEAs would suddenly indirectly accept the obligations of the IEAs through a GATT waiver.¹³² Another important issue is the potential of a non-party to the IEAs to take a reservation to the GATT waiver vote in an attempt to "reserve" its GATT rights and obligations.¹³³ This "reservation" could severely limit a waiver's effectiveness primarily because of the propensity of the IEA's important trade provisions to specifically target non-parties to the agreements.¹³⁴

126. See e.g., McDonald, *supra* note 89, at 464 and CIEL MEMORANDUM (Draft), (on file with the author) (Feb. 1992) [hereinafter CIEL IEA Memo].

127. McDonald, *supra* note 89, at 464.

128. *Id.*

129. *Id.*

130. *Id.*

131. CIEL IEA Memo, *supra* note 126, at 2.

132. *Id.*

133. *Id.* at 3.

134. See *supra* notes 53, 54 and accompanying text.

C. Trade Measures in IEAs: GATT's Response and the International Context

The GATT contracting parties have not been completely silent on the use of trade provisions in existing multilateral environmental agreements.¹³⁵ In October 1991, despite considerable consternation and misgivings among the contracting parties, the GATT Council requested the activation of the GATT Group on Environmental Measures and International Trade (EMIT).¹³⁶ The GATT EMIT Group had originally been established in 1971 but had *never met* until November 1991.¹³⁷

Most of the concern surrounding the reemergence of the EMIT Group can be attributed to a combination of the international context in which it arose and the developing world's deeply rooted distrust of the developed world's trade policies. The EMIT Group was reconvened in the wake of the Tuna/Dolphin Panel report in which many contracting parties had openly expressed their support for the Panel's decision.¹³⁸ Several contracting parties viewed the decision as an appropriate response to what was perceived as the growing tendency of the United States and other nations to impose unilateral trade embargos on goods produced extraterritorially in the name of environmental protection.¹³⁹ Thus, the Tuna/Dolphin decision quickly became an international lightning rod for the contracting parties' traditional aversion to unilateral trade sanctions.

In addition to the perception that environmental protection policies were increasingly employing unilateral trade provisions extraterritorially, developing country GATT members in particular expressed apprehension of the trade and environment relationship as a whole.¹⁴⁰ Much of the South's concern can be traced to the historical inequities inherent in the North/South trade dynamic. The 1992 UNDP Development Report estimated that developing countries' GNPs are reduced by 3% or an annual loss of \$75 billion as a result of tariff and non-tariff barriers.

135. See GATT TRADE AND ENVIRONMENT REPORT, *supra* note 2, and GATT Group on Environmental Measures and International Trade, *Interim Report by the Chairman, Ambassador H. Ukawa (Japan)*, Dec. 3, 1992 [hereinafter GATT EMIT Report].

136. GATT EMIT Report, *supra* note 135, at ¶ 4.

137. *Id.* at ¶ 2 (emphasis added).

138. Tuna/Dolphin Report, *supra* note 11, "Submissions by Third Parties", 30 I.L.M. at 1610.

139. *Id.*

140. GATT EMIT Report, *supra* note 135, at ¶ 4.

ers imposed on their goods by developed countries.¹⁴¹ In addition to raising concerns of national sovereignty, many developing countries view the imposition of stringent environmental laws applied extraterritorially as illegitimate non-tariff barriers to trade.¹⁴² The enforcement of the North's environmental policies upon the South has been labeled "eco-imperialism" and has been increasingly interpreted as one more means of stifling economic development and trade in the South.¹⁴³

Thus, within this volatile international context, the GATT EMIT Group has managed to examine in a very generic manner the relationship between the IEAs and GATT principles.¹⁴⁴ The Group's discussions have focused on the application of trade measures in IEAs against non-parties and the need for a more comprehensive interpretation of the GATT principles that apply to the IEAs.¹⁴⁵ There have also been recent indications that the contracting parties favor an "all or nothing", (as opposed to allowing some contracting parties to take reservations) acceptance of the trade provisions in CITES, the Basel Convention, and the Montreal Protocol.¹⁴⁶ Although it has not been expressly mentioned, an Article XXV:5 waiver would be the most effective means of effectuating such a comprehensive acceptance of the trade measures in the IEAs.

D. *GATT Waiver: Appropriate Response to Potential Conflict?*

Despite the important criticisms of the waiver approach as a solution to the inconsistencies inherent in the GATT-IEA relationship, the potential benefits a waiver can accomplish and the realities of the present international political climate argue strongly for the adoption of a waiver by the GATT contracting parties. The current uncertainty surrounding the GATT-IEA relationship is unacceptable. In the past, the GATT contracting parties have shown a willingness to recognize excep-

141. 1992 *United Nations Development Programme: Development Report*, 6 (1992).

142. Gerald Brooks, *Environmental Economics and International Trade: An Adaptive Approach*, 5 *GEO. INT'L ENVTL. L. REV.* 277, 288 (1993).

143. *Id.*

144. GATT EMIT Report, *supra* note 135, at ¶ 12. The Group's preliminary agenda included: (i) trade provisions of existing multilateral environmental agreements vis-a-vis GATT principles and provisions; (ii) the transparency of trade-related environmental measures; and (iii) possible trade effects of packaging and labelling requirements. *Id.*

145. *Id.*

146. *GATT Committee Continues Discussions of Melding Trade, Environment Matters*, 16 *INT'L ENVTL. REP.* (BNA) no. 3, at 87 (Feb. 10, 1993).

tions to their GATT obligations for such issues as national security,¹⁴⁷ international peace,¹⁴⁸ and to enforce trade sanctions against South Africa.¹⁴⁹ Clearly, the importance of legitimate efforts to protect the global commons for present and future generations stands as an equally critical undertaking worthy of unique treatment. The political climate and tenor of discussions within the GATT EMIT Group indicates that the time may be ripe for a well-structured waiver of the trade measures employed in CITES, the Basel Convention, and the Montreal Protocol.¹⁵⁰ The North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico, has incorporated an express right of the parties to enforce the trade obligations of the above-mentioned IEAs.¹⁵¹ The trade measures of the IEAs will take precedence over NAFTA provisions where, when a party has a choice between equally effective and reasonably available means of complying with such trade obligations, the party chooses the alternative that is the least inconsistent with the NAFTA.¹⁵² This language, in general, is too deferential to the overall obligations of the trade agreement to be incorporated into an effective waiver, but it still represents an important precedent for the inclusion of the goals of IEAs in regional trade agreements. The GATT waiver is a powerful and flexible tool for initiating GATT reform without the need to resort to the cumbersome amendment process.¹⁵³ It should not be seen only as a substitute for meaningful environmental reform within the GATT but also as a stepping stone to more wholesale structural changes of the GATT.

The implementation of a waiver on behalf of specific IEAs establishes a *positive* precedent within GATT for present and future environmental agreements. Most of the tension and misunderstanding that has developed between the trade and environmental communities is the result of mutual distrust of objectives.¹⁵⁴ A waiver presents the opportunity to demonstrate, in practice, that the two disciplines can coexist and support one another. The establishment of a waiver for three envi-

147. GATT, *supra* note 5, art. XXI.

148. *Id.*

149. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?* 49 WASH. & LEE L. REV. 4 1227, 1244, n.47 (1992).

150. *See supra* note 146 and accompanying text.

151. North American Free Trade Agreement, December 17, 1992, U.S.- Can.- Mex., Pub. L. No. 103-182, 107 Stat. 2057, *reprinted in* 32 I.L.M. 605 (1993) [hereinafter NAFTA].

152. *Id.*

153. *See supra* note 115 and accompanying text.

154. *See* Michael B. Smith, *GATT, Trade, and the Environment* 23 ENVTL. L. 3, 533 (1993).

ronmental agreements will facilitate the employment of trade provisions in future IEAs and may underscore the importance of trade measures to the effectiveness of environmental protection before future GATT dispute panels.¹⁵⁵ This result will not perpetuate the status quo deference to GATT on environmental matters.¹⁵⁶ On the contrary, a waiver will express in concrete terms the legitimate goals of international environmental agreements and provide acknowledgement that particular trade measures are the best means of achieving those environmental objectives.

The major obstacle to the successful grant of a waiver will be the perception by non-parties to the IEAs that a GATT waiver constitutes a *de facto* acceptance of the IEA.¹⁵⁷ In the case of CITES and the Montreal Protocol, the number of countries who are parties to both the environmental agreements and the GATT may be sufficient to achieve the necessary two-thirds vote to secure a waiver.¹⁵⁸ In the situation of the Basel Convention and future IEAs, it can be argued that the presentation to the GATT Council of an application to waive the trade obligations of these agreements coupled with the diplomatic pressure of those countries seeking the waiver may be enough to persuade the recalcitrant nations to approve a waiver. The presentation of the IEA in the GATT forum may demonstrate in explicit fashion the extent of a non-party's international isolation on an issue and thereby initiate a reevaluation of its respective policy. In response to those non-parties seeking to take a reservation of their GATT rights on a waiver vote, the GATT contracting parties have the capability under the Vienna Convention on the Law of Treaties to require that the reservation be accepted by all contracting parties before it is declared valid.¹⁵⁹

E. How Should a Waiver Be Structured?

In order for a waiver to secure passage by the contracting parties and be effective, it must be well-structured. The challenge will be to frame the language and conditions of the waiver in such a way as to guarantee its acceptance by the contracting parties while at the same time avoiding limits on its overall effectiveness. One approach to developing such a waiver would include the following characteristics:

- (i) The waiver should be specific. At present, the waiver should

155. CIEL IEA Memo, *supra* note 131, at 3.

156. *See supra* part VI(b).

157. *Id.*

158. GATT, *supra* note 5, art. XXV:5.

159. Vienna Convention, *supra* note 92, art. XX:2, 3.

only name CITES, the Basel Convention, and the Montreal Protocol without showing prejudice to any current or future IEAs that may come under the waiver at a later date. In keeping the focus on these three well-established agreements, the risk of "overwhelming" the contracting parties with IEAs that include trade provisions will be minimized. The naming of these agreements, as opposed to a blanket waiver for all IEAs, also presents the GATT Council with established language it can clearly refer to and scrutinize. Specificity will also prevent the waiver from coming under false challenge as a non-tariff barrier at a later date.

(ii) The waiver should have a time limit. An open-ended waiver would be ideal, but its chances of being approved by the contracting parties are small. The waiver should be for at least five years with an express provision that nothing will preclude its extension at the end of the initial five-year period.

(iii) The waiver should be comprehensive. It should specifically apply to all of the trade measures authorized by the three IEAs and not just the mandatory trade measures included in the agreements. It should also apply to *unilateral* trade measures taken by parties to the IEAs as long as they are within the boundaries of the authority granted in the IEAs. Comprehensiveness also requires that nothing in the waiver should preclude the addition of future IEAs to the waiver provisions at any time during its existence or interfere with provisions granted in regional agreements. It would also be preferable not to include the language of the proviso in NAFTA requiring an alternative trade measure of the IEAs to be "the least inconsistent with the other provisions of this Agreement."¹⁶⁰ On the contrary, the waiver language should assert the contracting parties deference to the trade measures in the IEAs.

VII. CONCLUSION

The current potential for conflict between the trade measures of the IEAs and the principles of GATT must be resolved. A continuation of the *status quo* will result in the simultaneous failure to recognize the critical role trade measures play in the ultimate success of international environmental agreements and an intensification of global trade friction. The adoption of a GATT waiver should not be understood as a replacement for meaningful environmental reform within GATT, nor should it inhibit further discussion of the potential fundamental conflict between the GATT system and the goals of global environmental pro-

160. See NAFTA, *supra* note 151, art. 104(1).

tection generally.¹⁶¹

In the long-term, the GATT must undertake serious environmental reform in a number of areas. It must become a more open and transparent multilateral institution. Environmental NGOs should be consulted in all GATT discussions and GATT dispute resolution panels addressing the links between trade and the environment. Innovative policies such as adjusting tariff schedules based on the pollution intensity of products should be examined.¹⁶² The legitimacy of applying countervailing duties (CVDs) against environmentally unsound imported products that gain competitive advantages over domestic products should also be seriously considered.¹⁶³

Despite the important reforms these ideas represent, the need for an immediate and practical resolution is paramount. The GATT waiver is an effective tool for ensuring that objectives of the trade provisions of IEAs are achieved. The waiver will not be susceptible to the glacial pace of GATT negotiations and it offers a short-term means of diffusing North/South tension over trade and environmental policy. A waiver has the capability of fulfilling a critical role as bridge to significant environmental reform of the GATT. In the current international climate, the GATT waiver represents the most practical method of securing immediately the legitimate environmental protection goals of the international environmental agreements.

Douglas Jake Caldwell

161. See Herman Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 LOY. OF L.A. INT'L & COMP. L.J. 33 (1993) (Daly views the goals of liberalized international trade to be in fundamental conflict with individual nations' domestic environmental policy and other domestic policies).

162. See Ernst-Ulrich Petersmann, *Trade Policy, Environmental Policy and the GATT*, *Aussenwirtschaft*, 46, Jahrgang, Heft II, Zurich:Ruegger, 197, 219-221 (1991).

163. See U.S. Senator Seeks GATT "Green Round", *Changes In Proposed Uruguay Text*, 16 INT'L ENVTL. REP. (BNA) no. 14, at 521 (Jul. 14, 1993). Senator Baucus has proposed the establishment of a countervailing duty mechanism to be applied against imports if it can be shown that the imported product has gained a competitive advantage over a domestic product by means of its environmentally unsound production processes. *Id.*