

Moving the Negotiation on Trade Measures in Multilateral Environmental Agreements Forward

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Introduction

About thirty of the existing 272 current multilateral environmental agreements (MEAs) incorporate trade measures (UNEP 2005, WTO 2003). Although such MEAs account for a small fraction of the total, many of them play an important role in addressing environmental problems. The follow are examples of such important MEAs:

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (BASEL Convention);
- the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention);
- the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol);
- Cartagena Protocol on Biosafety (Cartagena Protocol), Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention); and
- the Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto Protocol).

MEA trade measures indirectly affect the environment but directly affect international trade. They overlap with the rules of the World Trade Organization (WTO), which represents the world trading system and consists of three fourths of the world's nations. Potential conflicts could result from these regulatory overlaps. A country, for example, applying a trade-restrictive measure pursuant to an MEA for environmental purposes may violate the rules for trade liberalization of the WTO.

There has been no clear guidance on the MEA-WTO interrelationship. Environmental negotiators, however, have to conduct MEAs negotiations, which could eventually lead to trade measure provisions. Although no MEA-WTO conflicts have yet to erupt, the "long shadow of the WTO" (Eckersley 2004: 41) is impeding the negotiating phase of MEAs. "The legal ambiguity surrounding the possibilities of such a challenge causes uncertainty and doubt over the effectiveness and legal status of such measures and thus weakens MEAs." (WTO 2000: 2) Recently, while negotiating the 2000 Cartagena Biosafety Protocol and the 2001 Stockholm Convention on Persistent Organic Pollutants, negotiators experienced tough debates on resolving the relationship between MEAs and the WTO rules.

This paper is intended to put forward some recommendations to facilitate negotiation on trade measures in MEAs, both existing (i.e. amendments) and future, which also will contribute to the prevention of future conflicts between MEAs and the WTO rules. It takes stock of extensive debates on the subject over the past decade to form these recommendations.

The paper, first, analyzes the functions of trade measures in the existing MEAs. If they are necessary for environmental purposes, what makes negotiators reluctant? The paper then examines their major concerns – the MEA-WTO conflict. With a view to moving forward the negotiations on trade measures in amendments for existing MEAs as well as new MEAs, the first recommendation focuses on solving the ambiguity in the MEA-WTO interrelationship and thus, setting a more certain and predictable negotiating context. After exploring solutions in both arenas, the WTO and the MEAs, the paper concludes that a supremacy clause could be feasibly introduced into the WTO law and proposes in detail how to do so. Secondly, in preparation for their negotiations on trade measures in MEAs, negotiators can use a checklist of criteria to test the potential compatibility of such measures with WTO rules. Finally, the paper explores some mechanisms for the two systems to collaborate in negotiation processes and implementation of MEAs, thus enhancing the mutual understanding between these continuously evolving systems.

I. The functions of trade measures in MEAs

Since trade measures are one type of the policy instruments provided in the MEAs, it is virtually impossible to separate out the impact of only trade measures on the effectiveness of MEAs (Sampson and Chambers 2002). If the MEAs are effective and the trade measures are employed pursuant to them, an assumption can be made that trade measures contribute to that effectiveness. It is more significant to examine the functions of these measures to assess their necessity in MEAs.

The WTO Committee on Trade and Environment (CTE) acknowledged that “trade measures have been and will continue to be an important tool for achieving important environmental objectives” (WTO 1996: 8). In some MEAs, trade control is the main instrument to deal with environmental problems. For example, international trade is not as significant a cause of species extinction as other factors such as habitat loss and introduction of alien species to the ecosystem. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) focuses only on international trade as a means of protecting endangered species. Some other MEAs, such as the Montreal Protocol, Cartagena Protocol, and Stockholm Convention--the goals of which are not restricted to the international trade aspect of environmental problems--also incorporate trade measures to make their package of policy instruments comprehensive.

Trade measures are generally understood as any policy instrument that attaches requirements, conditions, or restrictions on imported or exported products or services themselves, or the process of their importation or exportation (OECD 1999).

They can appear in several formats: (1) reporting requirements; (2) labeling requirements; (3) notification and consent procedures; (4) import and/or export bans; and (5) taxes or government procurement (Richard Skeen 2004). They can be compulsory or optional. Parties may have considerable discretion to implement trade measures with objectives specified in MEAs. Despite their different structures and objectives, trade measures in MEAs serve three main functions.

1. To control trade as a source of environmental damage

MEAs are intended to control trade practices where trade is considered a source of environmental damage. Without trade measures or restrictions, countries cannot prevent the cross-border transport and entry of regulated items, such as hazardous waste or endangered species. This might result in their uncontrollable use and an adverse environmental impact. Locating these regulated subjects within national borders is one way to identify the scope and

extent of their use and the responsibilities of the country using them. More importantly, MEA trade restrictions help prevent the spreading of harmful effects of regulated subjects to MEA parties' territories. The function of controlling trade is reflected in the following regulatory tools:

- *Regulating trade in goods sought to be protected or controlled for environmental purposes through divergent conditions and procedures.* CITES, for example, establishes a licensing system for the import and export of specimens of certain wild animals and plans to ensure that international trade in those species does not threaten their survival. Similarly, at the core of the Basel Convention, a prior informed consent mechanism, trade restrictions and labeling and packaging requirements address the risks to human health and the environment posed by transboundary movements of certain hazardous wastes. A movement document is required for each shipment of regulated waste. Under the Cartagena Protocol, the importing country must approve the import of “living modified organisms” (LMOs) according to its own regulatory system to follow the Protocol's decision procedure, which requires a risk assessment before a final decision (Sampson and Chambers 2002).
- *Supporting the phase-out of certain substances.* The trade restrictions in the Montreal Protocol, for example, are designed to supplement and support the phase-out schedules for various categories of ozone depleting substances. The Stockholm Convention also uses trade limitations to support measures eliminating and restricting the production and use of covered chemicals.

In addition, trade measures help to address the lack of adequate information for policy development or decision-making through such measures as notification and prior informed consent requirements. They also facilitate the harmonization of different standards and requirements on trade in regulated subjects. For example, CITES provides for format and content requirements for permits and certificates and the Cartagena Protocol for handling, transport, packaging and documentation requirements for covered organisms and products. These functions are supplementary to make the MEAs' control of international trade more comprehensive.

2. To induce compliance of parties

MEA parties are encouraged to comply when their efforts are taken into fair consideration compared with actions of non-parties. Several trade measures are intended to impede non-parties from taking advantage of environmental gains resulting from party commitments. This free-riding problem is usually solved by trade bans between non-parties and parties that have regulated goods. Non-parties cannot increase production of the restricted good and export it to the parties that have to restrict their own production.

Furthermore, some MEAs induce compliance of parties by imposing trade sanctions on their non-complying parties. The CITES Standing Committee recommends temporary single or multi-species trade bans against parties for non-compliance. The withdrawal of the right to trade in listed species under CITES is lifted when non-complying parties bring their actions into compliance with the Convention. For example, the trade suspension in 1992 with Italy in endangered fauna and flora was essential in obtaining Italy's compliance. Similar successful actions have also been taken against Thailand, El Salvador and Equatorial Guinea. A similar approach can be found in the Montreal Protocol, the Basel Convention, and the Biosafety Protocol.

3. To encourage compliance and participation of non-parties

Trade with non-parties to MEAs is generally prohibited. According to CITES, for example, trade with non-parties is permitted only on the condition that these non-parties provide documentation comparable to CITES permits and certificates. This measure first aims to control the role of non-parties as transit countries for illegal trade under MEAs and thus, secure greater compliance with MEAs. Basel Convention adopts the same approach whereby it requires parties not to permit exports or imports of hazardous or other wastes from a non-party, unless they have concluded a bilateral or regional agreement pursuant to Article 11 with provisions not less environmentally sound than the Basel Convention (OECD 1999). The Montreal Protocol extends trade restriction in ozone depleting substances to non-parties.

Such compliance-based trade rights for non-parties create a powerful incentive for non-parties to join MEAs. Non-parties cannot free-ride if they stay outside the MEAs because if they do not comply, their exports to and imports from MEA parties are banned. Moreover, their non-participation makes them subject to case-by-case procedures to examine their compliance, whereas parties are automatically allowed to trade among themselves except when non-compliance is found. One of the main reasons for the Montreal Protocol's achievement of a universal membership¹ is this incentive-to-join and disincentive-to-stay-outside mechanism. The rationale for this function is that the more countries join MEAs, the more comprehensive the trade controls are on a global scale and thus, the more effective they can be.

II. The interrelationship between MEAs with trade measures and the multilateral trading system

1. Potential conflicts with WTO rules

Could the use of MEA trade measures for environmental reasons against WTO members be considered a violation of WTO law? In general, the incompatibility with WTO rules emerges where a party to both the MEA and the WTO cannot comply with the obligations under both regimes simultaneously.

The WTO's non-discrimination principle embedded in Articles I and III of the General Agreement on Tariffs and Trade (GATT) requires WTO members not to discriminate between their trading partners or between imported and locally-produced goods. MEAs, however, discriminate between imports and domestic goods as well as between parties and non-parties according to the assessment of environmental performance. Article XI of the GATT stipulates that no prohibitions or restrictions other than duties, taxes, or other charges shall be applied to imported or exported products. MEAs, in contrast, require these quantitative restrictions. In addition to the GATT, other WTO agreements contain similar requirements.²

Potential incompatibility could be justified under the exceptions in Article XX of the GATT, which allows WTO parties to adopt and enforce measures "necessary to protect human, animal or plant life, or health" or "relating to the conservation of exhaustible natural resources." In other words, MEAs-based trade measures could be seen as falling within the meaning of these exceptions but there are no clear guidelines for such justifications. In the past, *unilateral* trade measures for environmental purposes were challenged and found inconsistent with WTO rules (See Appendix B). However, such rulings still left ambiguity and uncertainty for future cases, including those relating to *multilateral* MEA trade measures.

So far no disputes over MEA trade measures have been brought before the WTO Dispute Settlement Body (DSB). This fact, however, does not ease the concerns of WTO parties and MEA negotiators. Instead, in the discussions within the WTO and recent MEAs negotiations, they are increasingly aware of MEA-WTO potential conflicts that are reflected in negotiation outcomes. Attempts to include trade provisions in the International Convention for the Conservation of Atlantic Tuna, for example, and in agreements to control driftnet fishing were shelved because of the fear that they would be inconsistent with GATT rules (Sampson and Chambers 2002). Such tensions were also experienced in negotiations during the Kyoto Protocol, Rotterdam Convention, Cartagena Protocol, and Stockholm Convention. Switzerland, a WTO member, remarked that "the mere fact that no conflict has arisen between the two sets of rules as of today does not automatically imply that there will be none in the future, especially given the steady growth of interface between the two sets of law." (WTO 2005b)

To understand the conflicts that WTO members may face, MEA-based trade measures can be divided into three types: (a) trade measures among MEA parties; (b) trade measures between MEA parties and non parties; and (c) non-specific trade measures that could be unilaterally taken by MEA parties pursuant to MEA provisions. *Suppose all hypothetical parties in these potential conflicts are WTO members. WTO-incompatibility of MEA trade measures might be brought by one of the WTO members.*

a. Type A: Conflicts among MEA parties

In cases where both countries are party to the MEA and the WTO, it is not likely that one would challenge in the WTO a measure authorized under the MEA. Both countries have consented to be bound by the MEA's rules including the use of trade measures. This consent could be considered as estoppel,³ legally and politically preventing a party to the MEA from objecting to the implementation of the treaty obligations by another party. Legally, they could challenge such measures after withdrawing from the MEA. They also could claim that WTO rules constitute a fundamental change of circumstances, which would be an excuse for non-compliance with the MEA⁴, but such invocation is not well-grounded. For MEAs concluded before the WTO agreements were concluded in 1994, the GATT 1994 might be the root of overlaps and conflicts; however, the original agreement that is the heart of the GATT 1994, was signed in 1947 when there were few MEAs. Other agreements under Annex I on trade in goods were developed from the GATT 1947. No fundamental new changes, therefore, have been introduced to WTO rules since then. It is also difficult for an MEA party to politically protest against its treaty obligations and sacrifice environmental protection for trade benefits. Therefore, conflicts with regard to trade measures among MEA parties that are also WTO members would not be likely. As to this scenario, the potential disagreement might be over the application of MEA trade measures in practice, but not in law.

b. Type B: Between MEA parties and non-parties

This type of conflict might arise from two scenarios. Scenario I: If countries X and Y are both members of the WTO but only country X is an MEA party, a dispute could arise where country X could be required to take trade measures against country Y, a non-party. For example, country X might impose stricter trade controls on country Y's products than those on country Z, another MEA member. Such measures would discriminate between country Y and country Z while both country Y and country Z are WTO members and should be accorded equal treatment by country X according to the WTO non-discrimination rules. In addition, since Country Y has not agreed to

be bound by the MEA's rules, it may claim the country X's trade measures violate various WTO rules which are binding upon both countries X and Y as stated above.

Scenario II: If country X, however, did not accept the MEA amendments, i.e., it is *not* a party to these amendments, its relationship with country Z, a party to these amendments, would result in analogous conflicts as above. Concerns on this potential conflict have been voiced in the Committee on Trade and Environment (CTE) over numerous new annexes and amendments of MEAs such as those relating to fish and timber in CITES, which increasingly cover economically important sectors. (Brack and Gray 2003)

The rulings of the DSB suggest that this type of MEA trade measures might not be justified under environmental exceptions in Article XX of the GATT. The DSB opposed measures conditioning market access so as to force other WTO members to change their policies within their jurisdictions.⁵ Trade measures in MEAs using sanctions against non-complying parties and non-parties fall in this case. The potential for this type of conflict is high.

c. Type C: Conflicts relating to non-specific trade obligations

Some MEAs do not specify all trade measures. Instead, they authorize their parties unilaterally to choose domestic measures pursuant to their objectives. For example, parties to Kyoto Protocol may lower greenhouse gas emissions by trade-restrictive measures that are not explicitly required in the Protocol, such as border tax adjustments on carbon-intensive imports. Parties could potentially disagree on the compatibility of these measures with the MEA guidance and also claim violation with WTO rules. Non-parties certainly could do the same. If specific trade measures taken between MEA parties such as import and export licenses or requirements for prior informed consent are rarely brought before the WTO (understanding that parties have already explicitly agreed to such provisions beforehand), non-specific trade measures could be subject to challenges for two reasons. First, the parties did not agree on the structure and the rigidity and other details of non-specific trade measures in MEAs except the general and sometimes vague guidance to take them. Second, several WTO panels and the Appellate Body expressed their preference to trade measures agreed to at a multilateral level over those taken unilaterally. Moreover, WTO members did not agree to negotiate the relationship between non-specific trade obligations and WTO rules. They just authorized negotiations on specific trade obligations. This type, therefore, is also a cause for potential conflicts.

The three types of potential conflicts are illustrated in the following Table.

Table of WTO-MEA potential conflicts over MEA trade measures

	<i>Type A</i>	<i>Type B</i>	<i>Type C</i>
<i>Characteristics (all potential disputing parties are WTO members)</i>	Among MEA parties	Between MEA parties and non-parties	Non-specific obligations
<i>WTO rules with which MEA trade measures might be incompatible</i>	Not likely to be raised because of estoppel	Non-discrimination rules Prohibitions on quantitative restrictions Specific rules of the SPS Agreement, TRIPS...	Incompatible with MEA relevant rules Incompatible with WTO rules: same as Type B Potential at the disadvantage compared to measures agreed at multilateral level.
<i>Possible forum</i>	MEA/WTO	WTO	MEA/WTO
<i>Possibility of conflicts</i>	Not very likely	Likely	Likely

2. The trade and environment debate in the WTO

Trade and environment negotiations in the WTO

WTO members are deeply divided over the environment and trade linkage. Efforts to address environmental issues relating to trade originated in 1971, when the contracting parties of the GATT (the WTO predecessor) agreed to form the Working Group on Environmental Measures and International Trade. However, the group did not convene for twenty years.

In 1994, the multilateral trading system started to study in depth the interrelationship between MEAs and WTO rules. The Marrakesh Agreement establishing the WTO, unlike the original GATT, acknowledged environmental concerns and sustainable development.⁶ New trade agreements in Uruguay Rounds provided environmental exemptions.⁷ The Committee for Trade and Environment (CTE) was also established to identify the relationship between trade and environmental measures in order to promote sustainable development and to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable, and non-discriminatory nature of the system.⁸ The CTE is required to report its findings to the WTO General Council. The first result of the CTE intensive discussions on the relationship between MEAs and the WTO is embedded in its report adopted in the 1996 Singapore Ministerial Conference. The 1996 Report dealt primarily with clarifying and improving the relationship between MEAs and the WTO. It produced no substantial recommendations due to irreconcilable viewpoints of WTO members.⁹

In 2001, the CTE's agenda was discussed again at the fourth Ministerial Conference at Doha in Qatar. The CTE was mandated in the Ministerial Declaration to negotiate¹⁰:

- the relationship between existing WTO Rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
- procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting of observer status;
- the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

According to this mandate, discussions are confined to "specific trade obligations" in MEAs and the outcome of the negotiations is limited to apply to WTO members who are parties to a given MEA. These various qualifications have effectively prevented the CTE from negotiating the WTO-MEA two most potential conflicts: (i) those between parties and non-parties to MEAs and (ii) those relating to nonspecific trade obligations. No specific interim deadlines have been set for the negotiations. Such negotiations, encompassing the specific environmental mandate, will be concluded as part of the "single undertaking" agreed in Doha.

Therefore, to this date, WTO members still haven't reached any long-term solution to potential conflicts between MEAs and WTO rules. They have only agreed generally, after a decade of debate and negotiations, that WTO should be supportive of action at the multilateral level of environmental protection.¹¹ This is more a declaratory principle with the term "should" but not "shall" being used to define a binding guideline to solve conflicts between the two bodies of law. It is also true that such a principle is guiding the ongoing negotiation on MEA trade measures.

Concerns of WTO members

Regarding "mutual supportiveness," the questions as to what extent and how they could be mutually supportive are left unanswered. The prudence in CTE reports reflects hot debates and tensions among WTO members. Some members, especially developing countries, are concerned about the abuse of trade measures under the disguise of environmental protection by rich countries, thus impeding the liberalization of trade. The economic costs should be weighed against environmental benefits. Developing countries wanted to keep the Doha agenda focused on development priorities. They were also concerned that environmental negotiations might expand the potential for the use of environmental measures to restrict market access for their goods.¹² Therefore, according to the Ministerial Declaration, the CTE must study "the effect of environmental measures on market access" while focusing on developing countries and least developed countries. It also must identify situations where reducing or eliminating trade barriers would "benefit trade, the environment, and development."

The U.S. and some members of the Cairns group of eighteen agricultural exporting countries were concerned about the potential for the EU to use an environmental mandate to slow down agricultural subsidy reform or to further restrict entry of agricultural goods including - genetically-modified organisms - via eco-labeling or by citing the need for precautionary measures.¹³ Other members wanted to pursue high-standard environmental policies worried about being forced to lower environmental standards. As the reader can see, different interests and motivations make negotiations on WTO-MEA interrelationship tense and hard to reach agreement.

III. Recommendations for moving the negotiation on trade measures in MEAs forward

1. A certain and predictable negotiating context: Solving ambiguity in the MEA-WTO interrelationship

a. Supremacy Clause

The "Supremacy Clause" refers to a binding rule determining the hierarchy between WTO rules and MEAs. In other words, its main purpose is to clarify which rules, MEAs' or the WTO's, will supersede in the event of conflict. The status quo, as analyzed above, threatens potential conflicts that might occur in the implementation of existing MEAs and might impede, if not paralyze, efforts to include trade measures in future MEAs.

i. The possibility of including a supremacy clause in MEAs

The first option is to state in MEAs that either the WTO law or the MEA will prevail in the event of conflict between the two. However, this option is not feasible for three reasons. First, in the case that the WTO law would prevail, negotiators might be reluctant for the fear of undermining the goals of MEAs. Putting all MEA trade measures under the scrutiny of WTO trade rules is to implicitly deny the legitimacy *per se* of a tool that has contributed to the effectiveness of existing MEAs. Multilateral commitments on MEA trade measures would lose their value and their implementation would be subject to more skepticism and more challenges in the WTO. In this case, with a deference of MEA system to the multilateral trading system, *all* disputes relating to MEA trade measures would be likely to be judged in the WTO.

Second, in the case that the Supremacy Clause provides that MEAs would prevail, without any authorization from the multilateral trading system for WTO members to derogate from WTO rules for the sake of MEAs' goals, this clause raises more concerns as to further potential conflicts. Most negotiators would not be enthusiastic about this case. Additionally, without an effective dispute settlement mechanism in MEAs to solve the conflicts between MEAs and WTO rules, it is not of much significance to introduce such clause. If a party loses or thinks that it might lose a case in a MEA dispute settlement mechanism, it can opt for the WTO as a more favorable forum. As discussed below in *Section III.1.b*, it is difficult for a MEA-WTO conflict to be solved by MEA dispute settlement mechanisms.

Third, even if MEAs had powerful dispute settlement mechanisms, the problem of jurisdiction over non-parties remains. Would a WTO member, as a non-party to MEAs, be willing to accept an MEA dispute settlement mechanism which aims to secure compliance with the rules it had not agreed? Above all, would that member be *convinced* that MEA rules *should supersede* WTO rules? If this non-party strongly believed in the legitimacy and benefits of MEA rules, it would join MEAs. Attempting to ensure the benefits of WTO rules against environmental-oriented trade measures of MEAs, non-parties would be much more likely to bring MEA trade measures before the WTO.

CITES, the Montreal Protocol, and the Basel Convention were all negotiated before the WTO came into existence, and do not contain any language regarding WTO-consistency. Negotiators in recent MEAs tried to include such language. The Cartagena Protocol, for example, states that it does *not imply a change* in the rights and obligations under any existing agreement (e.g., WTO rules) and it also is *not subordinate* to other international agreements (e.g., WTO rules). This statement actually reflects the vague concept of "mutual supportiveness" in the WTO. The

disguised balance it sets would be broken in the event of conflict where prevailing rules must be chosen. Uncertainty is not reduced, if not more obvious. Conflicts would be decided on a case-by-case basis without clear guidance. This paper suggests setting a conditional hierarchy in the WTO law (i.e., hierarchy under some conditions and circumstances) in advance to establish a long-term consistency and certainty in WTO-MEA conflict resolution.

ii. **In WTO law - NAFTA model and a more complicated job for WTO negotiators**

Why is more guidance on the WTO-MEA interrelationship needed in the WTO?

Some WTO members thought that it was not necessary to amend the WTO law because of the above-mentioned potential conflicts (see Section II.1). When a real dispute arises, it could be settled under environmental exceptions in WTO rules. Nevertheless, in the WTO dispute settlement mechanisms, it is not clear how an MEA trade measure would be judged since there has been no case related to MEA trade measures before the Dispute Settlement Body (DSB). Two possibilities arise. First, the measure might be justified under environmental exceptions of the WTO. In other words, the measure might satisfy the two tests: (i) it is necessary for human, animal or plant life, or health¹⁴ or relating to the conservation of exhaustible natural resources¹⁵; and (ii) it does not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.¹⁶ The DSB have strictly interpreted these requirements in the past cases and expressed a preference over multilateral trade measures to unilateral ones. However, given the concerns and reluctance to address directly the WTO-MEA interrelationship, there is no certainty they would accept the multilateralism and purposeful discrimination in MEAs within the trade realm.

Second, MEAs might be considered as more specific law because they contain specific measures applied to specific categories of products and thus, according to *lex specialis*, they prevail over general rules of the WTO on trade measures. However, given their mandate constraint of not adding or diminishing the rights and obligations provided in WTO rules, the DSB is not likely to follow this principle unless WTO members reach clear conclusion about WTO-MEA interrelationship.¹⁷

Without guidance for the DSB, MEA trade measures, therefore, would depend on the interpretation of environmental exceptions in the WTO law and on a case-by-case basis. Uncertainty would even increase because the rulings of the DSB are only binding to a specific case and not binding to subsequent cases. A "limited supremacy clause," therefore, should be incorporated to clarify MEA-WTO linkage, which is crucial to set a certain and predictable context for MEA negotiators.

Limited Supremacy Clause – Structure and Significance

There is no reference to MEAs under WTO rules, including the environmental exceptions in Article XX of the GATT, partly because very few MEAs existed when the GATT was first written (Brack and Gray 2003). The recommendation mainly is deference from the WTO to selected MEAs under some conditions. A clause in MEAs, which states that WTO rules would prevail, would raise concern of subordinating all MEA provisions to WTO rules while the two systems are independent and serve different purposes of development. However, a Supremacy Clause that states that some MEAs would prevail in the WTO law would signify only exceptions.

The Supremacy Clause might be adopted as a binding agreement among WTO members and written as follows:

"In the event of any inconsistency between the Agreements in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization and the specific trade obligations set out in the following multilateral environmental agreements, such obligations shall prevail to the extent of the inconsistency:

- a. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973.
- b. The Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987.
- c. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989.

WTO members may agree to include amendments of these listed MEAs and other MEAs in the above list."

Explanations:

NAFTA model: This clause applies the model in Article 104 of the North American Free Trade Agreement (NAFTA). However, NAFTA has three parties and the WTO now has 150. The treaty relationship web, therefore, is much more sophisticated. Initially listed MEAs must be chosen carefully to achieve consensus among WTO members.

Specific trade obligations (STOs): trade measures specified in these MEAs shall prevail over WTO rules in Annex 1A. The supremacy clause does not extend to unilateral trade measures that are taken pursuant to MEAs but not specified in MEAs, given the deep concern of WTO members on such measures. So far, the negotiation mandate of the CTE is also limited to STOs.

Agreements in Annex 1A: The potential conflicts currently relate to several agreements in Annex 1A, namely the GATT, the SPS Agreement and TRIPS. The clause should not restrict to only the GATT. It also should not cover only the current conflicting agreements. Existing and future MEA measures target trade in goods and Annex 1A consists of all Multilateral Agreements on Trade in Goods of the WTO. The inclusion of all Annex 1A is not a redundancy given the growth of MEAs and their amendments. Additionally, selective MEAs, not WTO agreements, will have the effect of restricting which rules would prevail.

Scope: All WTO members are bound by this clause without any exemptions. Exemptions for non-parties to MEAs, for example, will make negotiations on such clause more complicated and might serve as an incentive for not joining MEAs. The clause would be adopted by consensus as stated below.

Listed MEAs: It is more prudent and easier to accept when some MEAs with very universal participation are listed under the MEA supremacy clause while leaving the status of future MEAs open. That means WTO members could wait until those MEAs reach a certain level of universal participation and popularity to negotiate the possibility of listing them in this clause. During that time, trade measures in non-listed MEAs might be justified under environmental exceptions in WTO rules. Despite the limited list of MEAs in the Supremacy Clause, such a clause would still help negotiators to design future MEA trade measures in a way compatible with WTO rules. (See also Section III.2)

The MEAs listed in this clause should be based on the following criteria:

- **Membership test:** Only in the Montreal Protocol are all the parties also members of the WTO.¹⁸ In addition, the Vienna Convention for the Protection of the Ozone Layer and the United Nations Framework Convention on Climate Change also satisfy this membership requirement. However, because they are framework agreements with general commitments, potential conflicts would actually arise out of their protocols that include specific trade measures. The listing of their protocols (e.g., Montreal Protocol and Kyoto Protocol) for the purpose of solving WTO-MEA potential conflicts would be of much more significance to be listed for the purpose of solving WTO-MEA potential conflicts. Seven out of 150 WTO members are non-parties to the Basel Convention, namely Angola, Congo, Fiji, Gabon, Grenada, Haiti and the United States.¹⁹ Seven are non-parties to CITES, namely Angola, Armenia, Bahrain, Haiti, Maldives, Kyrgyz Republic and Solomon Islands.²⁰ (See also Appendix C.) The negotiations on the inclusion of the suggested MEAs in the Supremacy Clause would mainly be the negotiations between the overwhelming majority of WTO members and less than 5% of the membership. As analyzed above, the conflicts among WTO members that are also MEA parties are not likely to occur. Therefore, if these negotiations happened and these MEAs are listed in the suggested clause, the only obstacle is the concern of WTO members to create a precedent and gradually MEAs would take priority over WTO rules. However, the adoption procedure described below would ease such concerns.
- **Implementation test:** The implementation of the MEA should prove its effectiveness and reflect wide international recognition and support.
- **Requirement for the listing of MEAs to be negotiated in the WTO:** Non-parties to the MEA in question should account for less than 10% of the WTO membership. Given the practice of decision-making by consensus in the WTO, a larger percentage could be perceived as a sweeping expansion of MEAs to the international trade sphere even though this requirement would only apply at negotiation stage. This is a very strict requirement but it would pave the way for the MEAs mentioned above to be listed. Such acknowledgement would be a significant step by the WTO to take into account multilateral trade measures for environmental purposes instead of avoiding the confrontation with them. It also would encourage future MEAs, when addressing transboundary environmental problems, to create a policy package to obtain a universal membership. MEA negotiators would feel secure knowing that MEA trade measures would not and could not be stricken down by the WTO.
- **WTO adoption test:** Consensus vote on the listing of the MEA in question.

These criteria might be used in the negotiations on the listing of the MEAs mentioned above in the proposed Supremacy Clause, as well as their amendments or future agreements. At present, it is not easy to include any MEA. The clause is the first effort to pave the way for determining MEAs position in the event of conflicts without making any radical change that will foreseeably be struck down by many WTO members.

Negotiation Procedure for more listed MEAs: The CTE should be given another negotiation mandate with regard to trade and environment. That is to negotiate the listing of MEAs. When an agreement is reached within the CTE by all WTO members' representatives, the CTE would submit a report on that to the General Council to be adopted. Once the consensus is achieved, the

Supremacy Clause would be effective. Future listing of MEAs as well as amendments to the Supremacy Clause should also follow this procedure.

Significance of being listed in the Supremacy Clause: The main difference between being listed in this Supremacy Clause or not is that those listed would automatically pass the requirements of environmental exceptions in the WTO rules. Those MEA trade measures, for example, would presumably not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."²¹ Additionally, they would be recognized to be necessary for their specific environmental purposes (as practice has proved, see "implementation test" above), which means they are the least-trade restrictive.

With this Supremacy Clause the provisions on trade measures in the listed MEAs are *prima facie* compatible with WTO law. However, the recognition of law compatibility does not imply that the implementation of these provisions would also be automatically accepted. The implementation is only accepted if it conforms to the *MEA* provisions. One issue is: Who determine this conformity or non-conformity – the WTO Dispute Settlement Body (DSB) or dispute settlement mechanisms in the MEAs? The paper will address this in the next section.

b. Dispute settlement

Disputes arising out of MEAs listed in the Supremacy Clause

The disputes arising out of the application of trade measures listed in the Supremacy Clause could be brought before *both* the dispute settlement mechanisms (DSM) in MEAs and the DSB. The test is the same in both forums: Does the trade measure in question comply with the MEA? The outcome could be different. What if a WTO member is not satisfied with the rulings of the DSM in the MEA and turn to the DSB? Should the WTO respect the MEA's mechanisms?

The rulings of DSMs in MEAs should have the *res judicata*²² effect, which means they would not be readjudicated. This approach is consistent with the WTO present viewpoint, that is, "if a dispute arises between WTO members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA."²³ However, if two parties could not agree on the use of MEA mechanisms, then the DSB would be used to solve disputes relating to a trade measure in listed MEAs.

Disputes arising out of MEAs not listed in the Supremacy Clause

The same approach could be applied to this type of disputes. The difference is that the provisions on trade measures of these MEAs are *not* assumed to be compatible with the WTO law as are the disputes arising out of MEAs listed in the Supremacy Clause. Therefore, the DSB might examine them under WTO environmental exceptions. With the Supremacy Clause, a new element introduced in this process is that the DSB can infer from the fact that some trade measures prevail over the WTO rules in some circumstances (Supremacy Clause) to give rulings. It is still uncertain but at least clearer than the status quo and under the way towards certainty.

General assessment of dispute settlement mechanisms in MEAs and the WTO Dispute Settlement Body

In MEAs

Typically, MEAs “focus on dispute avoidance rather than dispute settlement. They use ‘sunshine’ methods, such as reporting, monitoring, on-site visits, and transparency to induce compliance... They also use positive incentives, such as financial or technical assistance, training programs, and access to technology.” (Dunoff 2001: 64) In addition, it is widely recognized that coercion is not a sound basis for environmental policy. Some MEAs do not have any dispute-settlement provisions or only very rudimentary structures. MEAs contain more detailed procedures, which, however, have rarely been used. Generally, the DSMs in MEAs can be divided into two categories: (1) procedures with non-binding outcomes including negotiation, good offices, mediation, conciliation; and (2) procedures with binding outcomes including arbitration and International Court of Justice (ICJ).

Several disadvantages of the DSMs in MEAs explain their disutility. They are:

- **Requirement for mutual consent in procedures with binding outcomes.** Almost all MEAs allow their parties to opt out of arbitration or the International Court of Justice (ICJ) if they do not accept such procedures. Under such circumstances, some provide alternative means of dispute settlement, which then return to procedures without non-binding outcomes. The Montreal Protocol, for example, requires its parties to use the conciliation commission if they do not accept arbitration or the ICJ. However, the commission renders only recommendatory awards. Over all, where an MEA party doesn't want to resort to arbitration or the ICJ, there is no means to achieve a binding resolution to the dispute in which it is a concerned party. This voluntary and non-binding approach, therefore, might undermine the confidence in the DSMs in MEAs.
- **No specific time lines in dispute settlement process.** Almost all MEAs with trade measures do not stipulate time lines to prevent prolonged procedures.
- **Opportunity for forum-shopping.** If a MEA dispute settlement organ recommended a trade measure that was inconsistent with WTO rules, the dissenting member might again bring the case to the WTO. Allowing countries to “forum-shop” in the WTO and MEAs, i.e. to choose the court providing the most favorable outcome, “could disrupt the certainty achieved by the regulation of international relations.” (Marceau and Gonzalex-Calatayud 2001: 71)

In the WTO

The DSB has played a critical role in ensuring the “security and predictability to the multilateral trading system.”²⁴ Its purposes are to preserve the rights and obligations of members and to clarify existing WTO rules. The DSB follows a detailed dispute settlement procedure with fixed timetables and virtually automatic adoption of its rulings. Disputing parties first have to talk to each other to see if they can settle their differences by themselves. If these consultations fail, the DSB establishes a panel to hear the case. After examining facts and legal arguments submitted by disputing parties, the panel makes a report, which becomes the DSB's ruling unless a consensus rejects it. If dissatisfied with the outcome, the losing party may appeal to an Appellate Body (AB) for review of issues of law. The losing party, however, must follow the recommendations of the panel report or the AB report.

This mechanism has been highly successful. As of 1 January 2006, there have been 335 WTO complaints filed under the Dispute Settlement Understanding (DSU) (Lester and Leitner 2006). This number shows a confidence by the WTO members in the new procedure. It is considered to be one of the most potent dispute settlement mechanisms at the international level.

Given the above disincentives to use the DSMs in MEAs as well as the difficulty to develop different dispute resolution methods other than those and the analyses of hypothetical conflicts, it would be better for the DSB to resolve WTO-MEA conflicts, rather than the DSMs in MEAs. This paper, therefore, focuses on the improvement of the DSB in the WTO to accommodate MEA trade measures.

Reforming dispute settlement in the WTO for the purpose of harmonizing MEA-WTO conflict

The WTO dispute settlement mechanism is quite successful now and needs no fundamental change in its structure. Some improvements should, however, be made especially when the DSB decisions can affect the public interest concerns such as health and the environment. This analysis proposes two reforms on open hearings and amicus briefs for the purpose of accommodating the settlement of MEA-WTO conflicts in particular and enhancing WTO transparency in general.

Open hearings

Following are the specific suggestions with respect to open hearings on MEA trade measures:

1. *Open hearings for MEA trade measures.* This new rule might be in the form of a binding decision or amendment to the Dispute Settlement Understanding (DSU) or a recommendation of the General Council.

Thus far almost all the hearings in the WTO are closed among members. In September 2005, the first hearing in the history of the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT) was open at the request of the disputing parties. The proceedings in the long-standing *EC-Hormones* case among the European Union, the United States and Canada²⁵ were broadcast through closed-circuit television to an audience consisting mainly of trade negotiators, non-governmental organization (NGO) representatives, media and academics at the WTO in Geneva²⁶. Recently, on 27-28 September 2006 and 2-3 October 2006, the European Commission, the United States and Canada again requested that their two dispute settlement proceedings²⁷ with the scientific experts and respective parties be open to public observation. They remain the only WTO dispute proceedings ever to be opened to the public.

In general, this practice should be encouraged more. The disputes regarding WTO rules generally do not involve confidential information. They are about national policies that have already been made public. In some cases containing confidential information, the public participation may be restricted. A member should have the right to ask for closed hearings because in some circumstances they need to protect confidential information. This right should be considered as a freedom and no approval procedure is required. However, the member should explain the reasons for a closed hearing in writing, based on which the public will be informed. Therefore, closed hearings should be the exception for the purpose of enhancing the transparent image of the WTO.

Regarding the disputes on MEA trade measures, open hearings should be compulsory. Scientific evidence should not be kept secret when used to justify a trade measure for environmental reasons. Secondly, given the ultimate objective of the dispute settlement process is to ensure that

trade measures are legitimately used, such open hearings will inform the public of the legitimacy or illegitimacy of environment-related trade measures, thus facilitating their assessment on the products in question. Such transparency will make trade competition fairer and freer. There could be an assumption that those who try to use trade barriers under the guise of environmental protection fear open hearings. Those who believe in their compliance with WTO law and have a rightful concern of the environment would support open hearings. Lastly, open hearings, especially environment-related ones, will help the WTO gain public support to offset the criticisms that the WTO is anti-environmental and a club of powerful countries, judging others by themselves.

2. *Videotaping the proceedings on MEA trade measures and broadcasting them on the WTO website.* Even though proceedings of the Hormone Case have been open twice to the public observation, relatively few people attended.²⁸ The reason might be the logistical inconvenience. If the disputants were willing to make public their proceedings, they should allow the proceedings to be videotaped and broadcast on the WTO official website. By doing so, anyone interested, such as scholars, journalists, policy makers, and lawyers could access the records when it was convenient for them.

3. *Make scientific evidence provided in the proceedings on MEA trade measures available on the WTO website.* The DSB report only contains their assessment of scientific evidence, but not the scientific evidence itself. If the disputing scientific evidence is made publicly available on the WTO website, it could enhance the understanding of the DSB decisions and trade measures. It might even encourage further study from the governments, NGOs, and the public in general. Such active interest would guarantee that the protection of the environment would be on the right track.

Environmental Expertise and Amicus Briefs

Before exploring the introduction of environmental expertise into the WTO dispute settlement process through an informal channel - *amicus briefs*, a question should be raised as to whether it is possible to do so in a formal way by selecting the WTO "judges" with environmental background or from the MEAs representatives of secretariat. Regarding the criteria for panelists, Article 8.1 of the DSU requires that they must be well-qualified governmental and/or non-governmental individuals. This does not preclude the possibility that panelists have environmental expertise. Pursuant to Article 8.2, "Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience." The "independence" criteria however, pose a significant obstacle for representatives from MEAs to be selected in a WTO panel. From a trade perspective, independence will be the impartiality for the sake of trade. A representative advocating for environmental protection might not be considered impartial and independent within the trade regime for the fear that they would compromise trade concerns for environmental benefits. Therefore, it is likely that disputing parties who are taking the challenged environment-related trade measures will reject such nominations.

At the appeal stage, the focus on trade and law is even greater. The Appellate Body must comprise persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements.²⁹ As discussed above, no agreements in the WTO are devoted wholly to environment. Instead, environmental concerns are sporadically reflected in the form of exceptions to trade rules.

The more feasible way to inject environmental expertise in the WTO dispute settlement process is via *amicus briefs*. Given the fact that MEA Secretariats keep a good and frequent record of the development of and states' commitments in the environmental issues governed by their MEAs and that NGOs are doing intensive research and campaigns on environmental protection, it is useful and necessary for the WTO dispute settlement mechanism to take into account scientific information and expertise from MEAs Secretariats and NGOs. This recommendation is generally applied, but of great importance with regard to environment-related disputes because a major controversy on such disputes is about the lack of information or scientific evidence.

Recently, WTO panels and Appellate Body have received *amicus briefs*, letters, and information submitted by non-parties to dispute settlement proceedings.³⁰ Article 13 of the DSU, entitled *Right to seek information*, authorizes panels to "seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matters." In other words, WTO panels and AB have the authority and discretion to accept such legal briefs, but no obligation to either recognize or consider them. The DSU does not address specifically the *amicus briefs*. The responses of panels and Appellate Body in practice are mainly on a case-by-case basis without any detailed and clear guidance on what is the appropriate source and nature of information and in what circumstances WTO panels and Appellate Body may consider the information relevant and useful. Following are suggestions on criteria and procedures for accepting *amicus briefs*.

First, the WTO panels and Appellate Body should decide to accept *amicus briefs* based on the accountability and expertise of the non-disputing party submitter. Because the parties to a dispute can always attach information submitted to them to support their arguments, this requirement just makes the acceptance transparent and more efficient. This does not exclude any specific interest groups, small or large, based in developed or developing countries.³¹

Further, to avoid abundant information, which places more burden on the dispute settlement process, *amicus briefs* should present evidence or arguments that have not been submitted by the parties. To ensure the speed of the dispute settlement process, there should be a deadline for submission. After this, the panels or Appellate Body will not accept *amicus briefs*. The submitters should also be required to send *amicus briefs* to all parties of the dispute and to translate them into the official languages of the WTO. They also should be required to respond to any questions from the parties on the information they provide.

In the case of NGOs, there might be a fear that *amicus briefs* can be submitted by groups pursuing different interests such as environment, health, human rights; however, not every private actor has the same opportunity to raise their voice in the proceedings due to their financial, technical, or political constraints. Many powerful interest groups are based in industrialized countries, influenced by a certain political, economic, and cultural conditions, and values. Additionally, they can somewhat reflect the positions of host countries. Unlike the divergent approaches of NGOs, MEAs' *amicus briefs* would be likely to focus on explaining the obligations of their parties and scientific information related to their governed environmental issues. They should not be regarded or included in the official standing of MEAs' parties on the disputed case because this would be a direct intervention of the multilateral environmental system in the functions of another independent system, the multilateral trading system. The requirements discussed above aim to enhance the capacity of parties to respond promptly to the

information and arguments in *amicus briefs* and reduce the anxiety of many countries about the motivation of the submitter.

2. Preparation for negotiations: A checklist of criteria to test compatibility with WTO rules

Please note that the following criteria should be used as guidance for MEA negotiators to consider whether or not to introduce trade measure provisions in MEAs. Their overall objective is to separate trade protectionism from environment-related trade measures. The criteria would clarify the legitimacy of using trade barriers for environmental purposes, thus accommodating the compatibility of MEA trade measures with the WTO rules. It should not be binding because the tests of compatibility will formally be conducted by the DSB in case disputes over MEA trade measures are brought before the WTO.

Because future MEAs would not be in the Supremacy Clause yet (*see Section III.1.a*); their trade measures, should be considered in the light of the exceptions in WTO rules, which set forth the general criteria and let room for the DSB's interpretation. It is difficult to include more detailed criteria in WTO rules because trade measures are varied in objectives and designs. The criteria recommended in this paper are based on WTO rules and the rulings of the DSB relating trade measures for environmental purposes. Such a basis does not intend to make the design of trade measures subordinate to WTO rules. Instead, it helps to prevent arbitrary designs that would unnecessarily compromise trade benefits where other WTO less-inconsistent trade measures or policy instruments could achieve the same objective. *See also Appendix B for the summary of rulings in the GATT and WTO cases relating to the environment and health. GATT cases are relevant when they are reaffirmed in WTO cases and can be referred to by the WTO panels and AB.*

With those caveats, the checklist is as follows:

a. Do MEA regulated subjects fall in the categories of WTO environmental exceptions?

The subjects that fall within the meaning of environmental exceptions in the WTO law are:

- Those that are necessary to protect human, animal, or plant life or health (Article XX (b) of the GATT).
- Those that are exhaustible natural resources (Article XX(g) of the GATT). The term "natural resources" has been interpreted in both GATT and WTO cases broadly to include both living and non-living resources. The term "exhaustible natural resources," according to the AB in *Shrimp/Turtle* case, is not "static," but "by definition, evolutionary." Tuna, salmon, and herring stocks, petroleum, dolphins, sea turtles, salmon fisheries, and clean air are ruled as "exhaustible natural resources."

b. Are they necessary for specific environmental objectives?

In *Reformulated Gasoline* case, the "necessary test" in Article XX(b) of the GATT has been defined as the "least trade restrictive" approach. In other words, a trade measure is considered "necessary" only if there is no alternative measure consistent with the GATT.

However, the SPS Agreement, which elaborates this provision, adopts the "not more trade restrictive than required" approach. Article 5.6 of the SPS Agreement states that "Members shall ensure that [their] measures are *not more trade-restrictive than required* to achieve their

appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility." Negotiators on MEA trade measures to protect human, animal, and plant health or life should determine whether there is another measure that: (1) is "reasonably (?) available taking into account technical and economic feasibility"; (2) "achieves the appropriate level of sanitary or phytosanitary protection"; and (3) is *significantly less restrictive* to trade" (See the footnote of article 5.6). If this is the case, negotiators should not adopt the trade measure in question, because it could be considered unnecessary within the meaning of Article 5.6 of the SPS Agreement and Article XX(b) of the GATT by the WTO panels and AB. It is not clear how the WTO panels and AB will address the "necessity test" in the future but the SPS Agreement standards will most likely be used (Leyton 2001).

c. Don't they constitute arbitrary or unjustifiable discrimination or disguised trade restrictions?

This criterion is embedded in the chapeau (introductory paragraphs) of Article XX of the GATT. It has been reviewed in detailed by the Appellate Body in the *Gasoline* and *Shrimp-Turtle* cases. According to these decisions, the purpose of the chapeau is to ensure that the Article XX exceptions are not abused for trade protectionism. In other words, countries may use trade measures to promote the objectives listed in Article XX, but must not do so if they lead to arbitrary or unjustifiable discrimination or disguised restrictions on international trade.

At the multilateral level, a MEA trade measure's design could be considered to pass this test provided that it would not discriminate among parties or between parties and non-parties without taking into account their situation and environmental performance. Its actual application, however, would also be examined in the light of the chapeau of Article XX. Nonetheless, for negotiators only the design would be relevant.

d. Are the environmental objectives of such trade measures scientific based?

The Sanitary and Phytosanitary Agreement (SPS Agreement) defines trade measures as actions governments may take to regulate risks arising from invasive species, genetically modified organisms, and certain other risks to human, animal, or plant life or health (Hunter, Salzman, and Zaelke 2002). It is annexed to the WTO Establishing Agreement, which developed the exception in Article XX(b) of the GATT 1994. It requires that trade measures have to be based on risk assessment. The first question one must ask is whether a risk assessment has been conducted. In the *EC-Hormones* case, the European Communities are ruled to have failed to honor this obligation. The AB, in *Australia-Salmon*, defines the elements of a risk assessment, as: (i) identification of the pests and diseases sought to prevent as well as the biological and economic consequences of their entry; (ii) evaluation of the likelihood of entry and the consequences absent the SPS measure; and (iii) evaluation of the likelihood with the measure in place.³²

Together with the obligation to take a risk assessment, WTO members have the limited right to take *provisional* measures where scientific evidence is insufficient. The AB pointed out four requirements for this right in *Japan-Varietals* whereby a member could adopt trade measures provisionally. First, the situation is one of insufficient scientific information. Second, the trade measures must be adopted based on pertinent available information. Third, the member must obtain the additional information for a risk assessment. Finally, the member reviews the measure within a reasonable period of time.³³