

**Committee on Trade and Environment**

THE RELATIONSHIP BETWEEN THE PROVISIONS OF THE MULTILATERAL TRADING  
SYSTEM AND TRADE MEASURES FOR ENVIRONMENTAL PURPOSES, INCLUDING  
THOSE PURSUANT TO MULTILATERAL ENVIRONMENTAL AGREEMENTS  
(MEAS)

Proposal from ASEAN

EXECUTIVE SUMMARY

Aim

This paper proposes *inter alia* a multi-year waiver option, on a case-by-case basis, accompanied by the use of non-binding guidelines, as an alternative approach to addressing the issue of MEAs and Members' obligations under the WTO. The elements of the proposal are as follows:

The waiver option accompanied by non-binding guidelines

1. This option will extend to both existing and future MEAs. Under this option, specific trade measures contained in MEAs may be recognized on a case-by-case basis, as exceptional circumstances qualifying for a waiver under Article IX of the Marrakesh Agreement establishing the WTO, subject to the application of the following non-binding guidelines:
  - necessity;
  - least trade restrictiveness;
  - effectiveness;
  - proportionality;
  - the degree of scientific evidence.
2. Non-specific trade measures pursuant to MEAs and the use of unilateral trade measures not pursuant to MEAs will be subject to *status quo*, i.e. the current scope of GATT Article XX does not allow a WTO Member to take such extra-jurisdictional measures against other WTO Members to protect extra-jurisdictional environmental resources.
3. In a *quid pro quo* for the opening of an "environmental window" in relation to specific measures included in MEAs, WTO Members shall formally agree not to in future resort to the use of non-specific measures pursuant to MEAs and the use of unilateral extra-jurisdictional trade measures to protect extra-jurisdictional environmental resources.
4. Pursuant to paragraph 3 of the Understanding in Respect of Waivers of Obligations under GATT 1994, the rights of WTO Members to resort to WTO non-violation dispute settlement action is preserved with regard to measures for which a waiver has been granted.

Benefits

5. The benefits of the multi-year waiver option are:
- (i) its temporary nature which allows the WTO opportunity to revisit the area. As there has been little previous experience in integrating MEAs into the multilateral trading system, and as the nature of the multilateral trading system is dynamic, it is prudent that a cautious approach be adopted.
  - (ii) It preserves the role of the WTO as a trade regulating body. The majority decision required for an MEA to be granted a waiver will reflect broad agreement that the environmental issue in question is of multilateral concern, without a need for the WTO to arrive at a definition for an MEA.

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## I. INTRODUCTION

1. The decision to establish the CTE came at a time when there was wide-spread recognition that the use of trade measures in MEAs could lead to a large number of trade disputes under the WTO. Three years later, such fears appear unfounded. No dispute has yet to be brought to the WTO with regard to the use of specific trade measures included in MEAs.

2. Future MEAs<sup>1</sup> will continue to resort to the use of discriminatory trade measures inconsistent with current WTO provisions. Coupled with the likelihood that existing MEAs would toughen their trade restrictive provisions, the discriminatory trade effects of MEAs will continue to escalate. Thus, for systemic reasons it is necessary to instil clarity and predictability to the current unsatisfactory situation.

3. It is important to note that the types of trade measure used in MEAs vary and are tailored to attain different environmental objectives.<sup>2</sup> Hence, discriminatory trade measures incorporated in existing MEAs should not be used as a precedent for others.

4. It has often been argued that discriminatory trade provisions *vis-à-vis* non-parties are necessary in MEAs to overcome the problem related to "free rider". Although ASEAN is supportive of multilateral efforts to address environmental concerns, it firmly believes that discriminatory trade measures should not be used to coerce countries to become signatories to an agreement. Instead, the "free rider" problem should be resolved through the use of positive measures. Discriminatory trade provisions *vis-à-vis* non-parties should only be used sparingly and only if absolutely necessary as subsidiary measures in ensuring the effectiveness of trade measures between parties to an MEA. Environmental concerns are increasingly taking on a transboundary nature. International cooperation rather than international coercion offer the best solution in addressing these problems.

5. Moreover, the extent of some of the trade provisions incorporated in MEAs remain questionable. For instance, environmentalists themselves have expressed concern over some of the discriminatory measures in the Basel Convention, e.g., the Convention imposes trade restrictions on recyclable products such as scrap metals which have both significant commercial and environmental value. Is it not arguably more beneficial to the environment to encourage recycling, especially in relation to the conservation of resources?

6. The Montreal Protocol, which is frequently considered as one of the most effective MEAs, combines discriminatory trade measures with positive measures like the provision of technical and financial assistance under the Multilateral Fund. As the overall performance of this MEA is dependent on a combination of measures, it is difficult to ascertain the independent effectiveness of trade restrictive measures. The lack of empirical evidence does not help.

7. Thus, for the reasons elaborated above, it would be unwise to accommodate all discriminatory trade measures into the multilateral trading system.

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<sup>1</sup>Such as those in relation to energy, forestry and fisheries.

<sup>2</sup>As evident from a comparison of the major MEAs which include trade measures.

## II. AN EX POST WAIVER APPROACH ACCOMPANIED BY NON-BINDING GUIDELINES

8. ASEAN believes that under GATT Article XX, it is not possible for a WTO Member to take extra-jurisdictional trade measures against other WTO Members to protect extra-jurisdictional environmental resources. Discriminatory trade measures should not and have not proven to be the best option in addressing environmental concerns. In this regard, MEAs should avoid the use of such measures unless absolutely necessary and as a "last resort" to achieve environmental objectives.

9. The temporary nature of a waiver is erroneously considered by some WTO Members to be a disadvantage. As trade and environment is relatively new to the WTO, it is prudent that a cautious approach be adopted. Just as the nature of future trade measures in MEAs cannot be known in advance, the full implication of accommodating trade measures in MEAs within the multilateral trading system cannot be known until much later. The waiver approach has the advantage, by being temporary, of allowing the WTO the opportunity to re-visit the issue in future.

10. Hence, the waiver option does not preclude other substantive alternatives that may emerge in the future. As there has been little experience in integrating MEAs into the multilateral trading system, the entire process should be viewed as a cautious but incremental approach to addressing the issue. The *ex post* waiver accompanied by the use of non-binding guidelines provides a starting point to bringing environmental needs into the WTO, not an end point.

## III. STEP 1: THE SPECIFICITY OF MEASURES

11. To instil greater certainty and predictability in the use of trade measures embodied within MEAs, ASEAN agrees with both New Zealand and Korea on the need to distinguish between specific measures incorporated in MEAs and "non-specific measures pursuant to MEAs".

12. For the purposes of ASEAN's approach, only specific measures (whether between Parties or *vis-à-vis* non-parties to an MEA) would qualify to be considered for a waiver. Non-specific measures (whether between Parties or *vis-à-vis* non-parties to an MEA) are excluded from consideration. The latter is to promote greater certainty in the use of trade measures pursuant to MEAs and as a safeguard against abuse for protectionistic purposes.

13. Specific measures *vis-à-vis* non-parties have been included as they may sometimes be absolutely necessary to achieve the environmental objectives. The strength of the latter may be eroded if trade with non-parties were to be allowed, especially in the case where a non-party is a significant exporter of products restricted or banned under an MEA. Ironically, such a move, could help ensure that such trade measures would not be used solely to coerce non-parties into becoming signatories to an MEA. This is because for the measures to be waived, they must be deemed absolutely necessary i.e. as subsidiary measures in ensuring the efficacy of trade measures between Parties. Furthermore, such an approach would encourage the use of positive measures in dealing with the problem of "free riders".

14. Non-specific discriminatory trade measures pursuant to an MEA should be avoided to promote certainty and predictability. The same would apply to unilateral extra-jurisdictional discriminatory measures. For both these forms of measures, ASEAN advocates the maintenance of the *status quo* as it is not possible under the current scope of GATT Article XX to take extra-jurisdictional trade measures against other WTO Members to protect extra-jurisdictional

environmental resources. In accordance with Principle 12 of the Rio Declaration, countries should and must remain firmly committed to a multilateral approach as the most effective way of tackling global and transboundary environmental problems.

#### IV. STEP 2: THE SETTING OF NON-BINDING GUIDELINES

15. It is necessary to set non-binding guidelines for the application of a waiver as these would provide both *ex ante* predictability for MEA negotiators and also set parameters for dispute settlement panels considering environment-related disputes. Such guidelines would be based on the need to examine any specific discriminatory trade measure against criteria such as necessity, least trade restrictiveness, effectiveness, proportionality and the degree of scientific evidence. Such an examination of trade measures is necessary to ensure that they do not constitute arbitrary or unjustifiable means of discrimination or disguised restrictions.

16. The guidelines will play an important role in ensuring that trade restrictions incorporated in MEAs do not go beyond what is absolutely necessary in the achievement of their environmental objectives, as MEA negotiators will make every effort to comply with the guidelines in order to be granted a waiver. In short, these guidelines will serve as *ex ante* guidelines for MEA negotiators.

#### V. STEP 3: MULTI-YEAR WAIVER

17. A multi-year waiver is granted in accordance with Article IX of the Marrakesh Agreement<sup>3</sup> and, thereafter, subject to regular annual review.<sup>4</sup> As long as the two basic requirements for a waiver, i.e. "exceptional circumstances" and the "terms and conditions" are met, the waiver is to be extended annually until its termination.

18. For the purposes of ASEAN's approach, "exceptional circumstances" would refer to specific trade measures included within MEAs. This does not mean that such measures are unusual but rather that they require special attention under the multilateral trading system. The review process is not burdensome as it does not require voting but only the identification of the continued existence of previously accepted requirements.

19. There have been a number of circumstances where multi-year waivers have been granted and subjected to annual review.<sup>5</sup> Non time-bound waivers have also been granted in selected cases.<sup>6</sup> It is worth noting that of the 115 original waiver decisions by GATT Contracting Parties<sup>7</sup>,

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<sup>3</sup>Paragraph 4 of Article IX of the Marrakesh Agreement Establishing the WTO provides for multi-year waivers, and it makes specific review and extension procedures available for such waivers. Paragraph 3 of Article IX provides the procedures and requirements for a waiver request. It explicitly provides that a request for a waiver be submitted pursuant to the practice of decision-making by consensus. If consensus is not reached, a decision to grant a waiver shall be taken by three-fourths of the Members.

<sup>4</sup>In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council.

<sup>5</sup>A detailed list of these can be found in the Analytical Index of the GATT.

<sup>6</sup>Ibid.

<sup>7</sup>As of 1 April 1994. See footnote 5 *ibid*.

ten were granted to more than one Contracting Party (these included three requested by the EU<sup>8</sup>, two by all Contracting Parties<sup>9</sup> and one by all developed Parties<sup>10</sup>).

20. To qualify for a waiver, an MEA must obtain the support of three-quarters of WTO Members. The need for a majority decision would in itself ensure that the MEA meets the basic requirement of being a truly multilateral agreement as such a decision would be indicative of the broad participation of Members in an MEA. This approach overcomes to a certain extent, the need for a definition of an MEA as required by most other proposals. As evident from previous discussions, arriving at an acceptable definition of an MEA may prove extremely problematic. The need for subjective interpretation of criteria is further complicated by the fact that a definition must be broad enough to encompass both existing and future MEAs, and yet narrow enough to ensure that these agreements would not be abused to arbitrarily or unjustifiably curb on trade.

21. Only two waiver requests have ever been denied by the WTO.<sup>11</sup> In the event that waiver is denied, Contracting Parties to the MEA can amend the measures for accommodation into the multilateral trading system. This aspect of the waiver has been criticised as allowing the WTO to restrict the scope of MEAs on the premise that WTO provisions predominate over those contained within MEAs. However, by the same token, why should it be assumed that trade measures incorporated within MEAs predominate over WTO obligations? Most of the proposals on this issue seem to stem from such an assumption. Furthermore, although it has been argued that a waiver approach would lead to the WTO being the "judge and jury" of MEAs, is it not also the case that other approaches would also at some point in the process, entail subjective interpretation of MEAs such as the need for a definition of an "MEA" and the term "environment"?

## VI. GATT ARTICLE XX, MEASURES PURSUANT TO MEAs AND UNILATERAL EXTRA-JURISDICTIONAL TRADE MEASURES

22. In a *quid pro quo* for the creation of an "environmental window" via the *ex-post* waiver approach, WTO Members shall formally agree not to resort to both the use of non-specific measures pursuant to MEAs and the use of unilateral extra-jurisdictional trade measures pursuant to environmental objectives. Although ASEAN believes that the current scope of GATT Article XX does not allow for extra-jurisdictional measures, a formal agreement would inject certainty and clarity to the current situation.

23. A formal agreement would also serve as a positive step in encouraging developing countries to become signatories to MEAs. A key reason why certain developing countries have been reluctant and hesitant in their attitude towards MEAs is that the conclusion of an MEA does not necessarily rule out the use of unilateral extra-jurisdictional trade measures.

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<sup>8</sup>Ibid.

<sup>9</sup>Ibid.

<sup>10</sup>As of 4 April 1994, *ibid.*

<sup>11</sup>As of 4 April 1994, *ibid.*

## VII. THE WTO DISPUTE SETTLEMENT MECHANISM

24. Paragraph 3 of the Understanding in Respect of Waivers of Obligations under GATT 1994 specifies that WTO non-violation dispute settlement action is preserved with regard to measures for which a waiver has been granted. The potential for non-violation compensation should and need not be seen as a negative feature of the waiver approach. Rather, the opportunity to obtain compensation, if merited, may lead to countries being more forthcoming in the granting of a waiver as compensation provides a safety net in cases of nullification and impairment. It should also be borne in mind that cases of non-violation may also arise under the *status quo*.

25. This proposal is not intended in any way to affect the rights of WTO Members to bring a case before a WTO dispute settlement panel should Members consider their rights infringed following the implementation of trade measures pursuant to MEAs. Under international law, GATT 1994 in the context of trade can be regarded as "*lex specialis derogat generali*", i.e. as being the more specific agreement in relation to trade. It is important to keep this in mind as this is applicable even in disputes between two Members to an MEA over the interpretation of the use of trade measures within the MEA.

26. In this connection, to balance the right of WTO Members to use the dispute settlement mechanism, ASEAN proposes that for environment-related cases the panels may resort to the use of independent experts, including experts from outside the WTO. This is in line with the Uruguay Round reforms to the WTO dispute settlement mechanism.

## VIII. RECOMMENDATION

27. ASEAN's current proposal will extend to both future and existing MEAs, and includes the following elements:

- (i) Specific trade measures contained in MEAs may be recognized, on a case-by-case basis, as exceptional circumstances qualifying for a waiver under Article IX of the Marrakesh Agreement establishing the WTO, subject to the guidelines under paragraph (ii) below.
- (ii) A need to examine the specific trade measures under the following principles:
  - necessity;
  - least trade restrictiveness;
  - effectiveness;
  - proportionality;
  - the degree of scientific evidence.

Measures need to be broadly examined in such a context to avoid abuse for protectionistic purposes.

- (iii) In relation to non-specific trade measures pursuant to MEAs and the use of unilateral trade measures, ASEAN advocates the maintenance of the *status quo*. ASEAN firmly believes that it is not possible under the current scope of GATT Article XX to take extra-jurisdictional trade measures against other WTO Members to protect extra-jurisdictional environmental resources.

- (iv) In a *quid pro quo* for the opening of an "environmental window" in relation to specific measures included in MEAs, WTO Members shall formally agree not to resort to the use of non-specific measures pursuant to MEAs or of unilateral extra-jurisdictional trade measures to protect extra-jurisdictional environmental resources.
- (v) Without prejudice to paragraph (i), the right of any WTO Member to resort to WTO non-violation dispute settlement action is preserved with regard to measures for which a waiver has been granted. This is pursuant to Paragraph 3 of the Understanding in Respect of Waivers of Obligations under GATT 1994. It is especially important in the context of WTO Members who are not parties to MEAs.

## IX. CONCLUSION

28. An *ex post* waiver granted on a case-by-case basis and complemented by non-binding guidelines, provides a measured and incremental response to the possibility that in future it may be necessary to include discriminatory trade measures in environmental agreements, and that the nature of such measure cannot be anticipated. The inclusion of non-binding guidelines will ensure that the subject of discriminatory trade measures pursuant to MEAs will be dealt with in a manner consistent with both environmental and trade objectives. The possibility of the non-binding guidelines evolving into a more permanent code should not be discounted, especially if these guidelines prove effective. However, for the time being, such an extension is not necessary.

29. ASEAN's proposal allows for a flexible approach whereby the interests of both regimes will be preserved. MEA negotiators will still be able to use discriminatory trade measures if absolutely necessary to achieve their environmental objectives, whilst WTO Members will retain the right to raise justifiable trade implications within the WTO through its dispute settlement mechanism. It would also ensure that both regimes will work towards greater co-ordination in the achievement of their differing objectives. In ASEAN's view, this offers a balanced approach which takes into account the interests and needs of both developed and developing countries.

30. Lastly, it remains a fact that the current debate in the CTE has centred mainly on Item 1 and that there has been inadequate discussion on item 6 in relation to market access. It is important to keep in perspective that countries are dependent on trade as an important source of economic growth and prosperity. Thus, it is imperative that any discussion on trade and environment be in the context of sustainable development, taking into account the synergies between trade liberalization, economic development and the attainment of higher environmental standards. In ASEAN's opinion, it is further trade liberalization within the context of Item 6 of the CTE work programme rather than the lengthy discussions on Item 1 which offers the key to ensuring environmental protection in its broadest context. The hindering of economic growth will not result in greater environmental protection.