



## Breathing Life into the List: Practical Suggestions for the Negotiators of the Environmental Goods Agreement

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- Participants in the Environmental Goods Agreement (EGA) negotiations face a fundamental and defining decision: will the final agreement aspire to create a living list of environmental goods, or will the list in the ratified agreement be final? The paper identifies basic ingredients that are needed for such a living list to function and offers concrete examples of ways in which those elements might be embedded.
  - A definition of environmental goods in the context of the agreement is not a luxury for a successful EGA; it is a cornerstone. The WTO's ITA has struggled unsuccessfully since 1997 to review and revise its coverage, in no small part because there is no agreed definition of information technology products.
  - The EGA could follow the example of other international treaties, relying on an expert advisory body to assess goods proposed by EGA participants, and to recommend to the participants whether those goods should be added to the list.
  - While the necessary prerequisites for a living list are not easy, they are worth the effort. The resulting agreement need not be overly complex or recklessly experimental; other regimes provide examples of solutions that are straightforward to create and administer. Getting it right is imperative if the EGA is to fulfil its potential and promise: to help trade contribute to shared environmental priorities.

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## 1. Introduction

On the margins of the 2014 World Economic Forum in Davos, 14 countries launched plurilateral negotiations on liberalizing trade in so-called environmental goods.<sup>2</sup> The mandate was to build on the Asia-Pacific Economic Cooperation (APEC) list of 54 green goods slated for preferential tariff treatment within that trading block. As of this writing, negotiations were still ongoing.

Participants in the Environmental Goods Agreement (EGA) negotiations face a fundamental and defining decision: will the final agreement aspire to create a living list of environmental goods, or will the list in the ratified agreement never change?

A living list at its most basic is one to which new items can be added. A more dynamic variation of the living list might also see the possibility of revising existing items on the list, including by changing their status (should the list be segregated into items that merit different treatment – not likely in the EGA context) and by dropping them entirely from the list.

The decision to create a living list – regardless of which of the variations might be chosen – has important implications for the ideal shape of the final agreement. In what follows, we assume that the answer to the question is yes, the Agreement will create a living list. We then ask what this implies by way of necessary ingredients in the Agreement itself, and necessary institutional construction. Finally, we ask how those necessary elements might be achieved, focusing on concrete and pragmatic suggestions, as explicitly shaped as possible, and

drawn from existing practice. The intent is not so much to propose exactly how the final deal should look, but rather to offer the negotiators hope that it is possible to do it right, with a minimal amount of complex and radical institutional architecture.

## 2. What are the implications of a living list?

If we assume for the moment that the participants agree to the most limited form of a living list – one that allows for new goods to be added over time – what are the implications?

We can work backwards to the full complement of needs by starting with a scenario: at some point in the future a participant in the Agreement proposes to add a certain good to the list. What needs to happen in order for the good to be properly considered as a candidate, and either added or rejected?

First, to be accepted or rejected a good must be evaluated against some criteria, some definition – whether explicit or implicit – of environmental goods. This is stating the obvious, though exactly *how* the definition is framed is not at all obvious, as discussed below.

Second, in order to arrive at a definition there needs to be some conception of what the Agreement aims to do – some statement of purpose. As discussed below, this might remain as unstated assumptions, but that would make this agreement something of a legal outlier, and would make it difficult to interpret the definition, should the scenario above make that necessary.

Third, there needs to be some body that does the accepting and rejecting. This could be

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<sup>2</sup> The initial 14 participants are: Australia; Canada; China; Costa Rica; the European Union; Hong Kong, China; Japan; Korea; New Zealand; Norway; Singapore; Switzerland; Chinese Taipei; and the United States. Beginning in 2015, Iceland, Israel and Turkey joined the negotiations. In this paper we assume that the final agreement will be brought into the body of WTO law as a plurilateral agreement. A plurilateral agreement in the context of the WTO is one that is concluded between three or more members, but less than the entire membership.

simply the participants to the Agreement, who would in any case be responsible for legally approving any changes to the Agreement (such as changes in its coverage). Or it could be a more complex arrangement whereby the participants are advised by some expert group before making any legal changes.

### 3. How to obtain the necessary ingredients for a living list to work?

The previous section identified three basic ingredients that are needed for a living list to function. We now turn to considering how those elements might look in the specific context of a green goods agreement.

#### 3.1. Statement of purpose

Almost all treaties contain some statement of their basic purpose. In the WTO's Information Technology Agreement (ITA), for example, the statement comes in the preamble to the Agreement:

*"... Considering* the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy,

*Recognizing* the goals of raising standards of living and expanding the production of and trade in goods;

*Desiring* to achieve maximum freedom of world trade in information technology products;

*Desiring* to encourage the continued technological development of the information technology industry on a world-wide basis;

*Mindful* of the positive contribution information technology makes to global economic growth and welfare; ..."<sup>3</sup>

This passage tells us clearly that the goal of the Agreement is achieving maximum freedom of world trade in information technology (IT) products, and the continued technological development of the IT industry worldwide. It further clarifies why that is considered a good thing: because IT contributes to global economic growth and welfare.

It would be straightforward for the EGA to emulate the precedent set here, with language such as:

*Recalling* our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement, and as reaffirmed in the Doha Ministerial Declaration;

*Mindful* of the contribution of sustainable development to the goal of poverty alleviation and to global economic growth and welfare;

*Considering* the key role of trade in environmental goods in the pursuit of sustainable development;

*Desiring* to achieve maximum freedom of world trade in environmental goods and associated services;

*Desiring* to encourage the continued technological development of environmental goods sectors on a world-wide basis;

Another option for clarifying the purpose of the EGA would be to explicitly state the purpose within the articles of the Agreement. The UN Framework Convention on Climate Change, for

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<sup>3</sup> WTO. 1996. *Ministerial Declaration on Trade in Information Technology Products*, Singapore. 13 December 1996, WT/MIN(96)/16.

example, follows the format established in many international treaties; after the preamble and the first article on definitions, it contains a second article named “Objective,” which reads:

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

This is arguably the most direct manner by which drafters can clarify their ultimate objectives. It does not, however, follow the form traditionally used in WTO agreements, which sees objectives outlined in the preamble.

### 3.2. Definition, or criteria for evaluation

A definition of some sort is not a luxury for a successful EGA; it is a cornerstone. The WTO’s ITA has struggled unsuccessfully since 1997 to review and revise its coverage, in no small part because there is no agreed definition of information technology products. The ITA, at least, covers goods within a narrow portion of the Harmonized Commodity Description and Coding System (“the Harmonized System”, or

“HS”). With just one exception,<sup>4</sup> all the products currently included in the coverage of the ITA are classified under HS Chapters 84, 85 or 90. The APEC list of 54 environmental goods also draws from HS Chapters 84, 85, and 90, with one exception.<sup>5</sup> But a synthesis of submissions on environmental goods submitted to the Committee on Trade and Environment, Special Session, published by the WTO Secretariat in 2005, listed several hundred candidate goods classified across 47 separate HS Chapters.<sup>6</sup> In short, the potential universe of environmental goods is much, much larger.

There are at least four, not necessarily mutually exclusive, options for defining what the drafters mean by environmental goods:

- *Definition by listing:* An annex to the Agreement could specify those goods that are to be accorded special treatment. Inclusion on the list then becomes an implicit definition; anything in the annex can be considered an environmental good.
- *Definition by category:* The Agreement could define specific categories of goods to be covered, and any good falling under those categories would implicitly be considered environmental.
- *Definition by specification:* The Agreement could specify explicitly what it means by environmental goods. This could be done in a section outlining the scope of the Agreement, or in the definitions section.
- *Definition by criteria:* An annex to the Agreement could outline the criteria that are to be applied in considering any goods

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<sup>4</sup> HS 3818.00: Chemical elements doped for use in electronics, in the form of discs, wafers or similar forms; chemical compounds doped for use in electronics.

<sup>5</sup> HS 4418.72: Builders’ joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes — assembled flooring panels — other, multilayer — of bamboo (ex out).

<sup>6</sup> World Trade Organization, Committee on Trade and Environment, Special Session, “Synthesis of Submissions on Environmental Goods” Document Code TN/TE/W/63, 17 November 2005, WTO, Geneva.

that have been proposed for addition to the list. Those criteria would then constitute an implicit definition of an environmental good.

The strengths and weaknesses of these options are briefly considered below. The specific challenge of a “moving definition” – defining what goods are green when the standard changes over time – is considered in section 4.2.

### 3.2.1. Definition by listing

This option amounts to a decision not to define environmental goods, but rather to leave the contents of the list to the process of negotiation. After many years of failing to define environmental goods and services in the context of the WTO’s EGS negotiations, we could expect this option to be attractive to the negotiators.

It may be possible to assemble an initial list in this way (see Box 1: The Initial List), simply by having all participants put on the table their requests, and by being lucky enough to have no controversial requests. But this option makes it difficult to add new items to the list, as there is no basis on which to decide whether they merit inclusion. Dropping a good from the list (i.e., “de-listing”) would be even more difficult, as there would need to be a strong rationale to consider de-listing an item on which there has been agreement for initial inclusion by all participants. Such a rationale is impossible without reference to some definition of what does and does not belong on the list.

### 3.2.2. Definition by category

Another option is to define categories of goods that the participants understand to be “environmental” and to organize both the initial list and any future additions to the list around those categories. As of this writing the negotiators are organizing their discussions around a number of such categories:

- Air pollution control
- Wastewater management and water treatment
- Solid and hazardous waste management

#### Box 1: The Initial List

Assembling the initial list of goods to be covered under an EGA is a very different challenge from managing subsequent changes to that list. In an ideal world that initial list would be assembled using the same elements that are necessary for managing the list thereafter: a definition of environmental goods, a statement of purpose, and an appropriate decision-making structure.

In reality those ingredients are unlikely to be available. The initial list will probably be the result of the aggregated proposals of all the participants, with only the established categories of goods as a basis for assessing the individual candidate goods.

This may well work, given enough political will, and a strong sense of pragmatism. But functioning without the right prerequisites will not work once the list is established and the Agreement is in force. For one thing, there will be less urgency to get the job done and show progress. Moreover, proposals for change will probably come from a small number of participants – a different dynamic from when, during the discussions on the initial list, participants might implicitly agree that it is best not to carefully scrutinize others’ requests lest their own requests be similarly treated.

- Environmental remediation and clean-up
- Noise and vibration abatement
- Environmental monitoring, analysis and assessment
- Cleaner and renewable energy
- Energy efficiency; Resource efficiency
- Environmentally-preferable products

This option is a marked improvement over definition by listing, since it offers details on what sorts of goods would be appropriate candidates

for special treatment under an EGA. Scrubbers for removing harmful pollutants from industrial smokestacks, for example, are clearly covered in the first category. But this option works much better for some types of environmental goods than for others. Box 2 (Types of Environmental Goods) explains the three basic types of goods that might be considered “green”. Of the three,

### Box 2: Types of Environmental Goods

There are at least three distinct types of environmental goods that an EGA might cover:

**Type I goods** operate in their end use or disposal in a manner that causes less environmental damage than some baseline case. High efficiency home appliances, such as washing machines and refrigerators, are examples of type I goods. Renewable energy technologies also fall into this category; in their end use they generate power, but they do so in an environmentally superior manner as compared to conventional technologies.

**Type II goods** have environmental improvement as a primary object. These include environmental remediation technologies, such as centrifuges that can be used to remove oil from water in oil spills; pollution prevention technologies such as chemicals and mechanical inputs used in the end-of-pipe process of carbon capture and storage; and natural resource management technologies such as photogrammetrical surveying instruments used for GIS imaging. Almost all of the APEC list goods are type II.

**Type III goods** use processing and production methods (PPMs) that cause less environmental damage than other similar goods. Organic agriculture is an example of this sort of good. The APEC list contains one such good: bamboo flooring, which is considered green because the raw materials are produced in a way that has a low environmental impact relative to other flooring materials (other woods, plastic and composite products). Bamboo is a renewable resource, and has a shorter growing cycle than most other types of wood so harvesting can be less extensive.

type II goods – those directed at pollution control and remediation – are most straightforward, and most easily covered under definition by categorization. The APEC list of 54 goods,

which is the starting point for the EGA negotiations, contains almost exclusively type II goods.

For type II goods it suffices to simply affirm that the good in question is used in categories like those spelled out above. In some cases (like scrubbers) this may be obvious, and in others it may involve consultation with industry experts for confirmation. The only remaining issue may be the extent to which the good in question is also used in non-environmental applications – the dual use problem. The APEC list, for example, include crushing or grinding machines, which are used in solid waste treatment or recycling. Such machines are widely used in other applications as well.

For type I goods the matter is not always so simple.<sup>7</sup> These are goods that are considered environmental because they perform better in end use than other goods in their class. They are included in the categories above as “environmentally preferable products” (EPPs).<sup>8</sup> It is straightforward to confirm that some products are preferable. Most consumer electrical appliances, for example, are rated on their energy usage, so it is public knowledge that some washing machines are environmentally preferable to others. The key question is how good they have to be to merit listing? Would only the top ten percent be eligible? Only those that qualify for certain energy-related ecolabels? Or take the case of bicycles, which function much more

<sup>7</sup> The challenges of managing a list that includes type I goods are further explored in section 4.2.

<sup>8</sup> Some analysts define EPPs as also including what this paper calls type III goods – those that are considered green because of their production and processing methods. Others exclude those goods from their definition of EPPs.

cleanly than automobiles in their end use as transport devices. If they are listed, should motorcycles also be listed, since they also are cleaner than automobiles? Or are they not clean enough, since they use fossil fuels?<sup>9</sup> No industry expert can answer such questions; it is up to the negotiators to define the parameters. Setting out the category of environmentally preferable products gets us no closer to the end goal here.

Type III goods also have problems with this option. These are goods that are considered environmental because they are processed or produced in ways that are less environmentally damaging than their substitutes. The list above has no category covering such goods, which may suffice as an implicit statement that their coverage is not intended under the EGA.<sup>10</sup> In any case it is worth noting that there are two problems that would not be solved if such a category were created:

- First, it would still be necessary to define which aspects of production are covered. Assessments that just focus on one element of the life cycle up to point of sale – such as “food miles” schemes, which ignore environmental differences in production itself – may be misleading.
- Second, as with type I goods, there is the outstanding question of how good they have to be to merit listing. There are myriad eco-labeling schemes at the international level that assess goods based on their production and processing methods. For exam-

ple, although there are international standards for organic foods, there are also national standards in a score of major producers and importers, and each has important differences that set them apart from the others. Which should be used? Even more vexing, there are many goods for which no such standards exist at all.

To conclude, the option of definition by category may work to create and maintain a list that is composed of only type II environmental goods (though dual use is still a problem). But in and of itself it will not work if the goods in question are type I or type III.

### 3.2.3. Definition by specification

The EGA could specify explicitly what it means by environmental goods for the purpose of the Agreement. This could be done by specifying the scope of the Agreement, stating for example that it only covers certain of the three types of goods described above. While such a specification would be helpful, it would not be sufficient; it would suffer from exactly the same difficulties in dealing with type I and III goods as the option discussed above.

Environmental goods could also conceivably be defined in a definitions section. These sections of treaties, though, are not normally used for such fundamental definitions. The Stockholm Convention,<sup>11</sup> for example, does not define “persistent organic pollutants” in Article 2 – *Definitions*. Rather, it defines them implicitly by means of the lists offered in the Agreement’s indices, and by means of the detailed criteria

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<sup>9</sup> For an argument that bicycles should be considered green goods see Monika Tothova. 2005. “Liberalisation of Trade in Environmentally Preferable Products”, OECD Trade and Environment Working Papers, 2005/06, OECD Publishing.

<sup>10</sup> As noted above, some analysts include PPM-based goods under the heading environmentally preferable products. See UNCTAD. 1995. “Environmentally Preferable Products (EPPs) as a Trade Opportunity for Developing Countries”, UNCTAD/COM/70, Geneva.

<sup>11</sup> Stockholm Convention on Persistent Organic Pollutants. Available at: <http://chm.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/>.

for adding new items (see next section). The Rotterdam Convention,<sup>12</sup> however, does use its definitions section (Article 2) in this way, for example defining “severely hazardous pesticide formulation” as:

“... a chemical formulated for pesticidal use that produces severe health or environmental effects observable within a short period of time after single or multiple exposure, under conditions of use.”

The Rotterdam Convention uses Article 3 (Scope) to specify that it applies to three types of substances: banned chemicals, severely restricted chemicals and severely hazardous pesticide formulations, all of which are defined in Article 2 (Definitions). For greater clarity, it also offers a list in Article 3 of those substances it does *not* apply to.

There are existing definitions on which the negotiators could draw, including the definition used by the OECD and EUROSTAT as a foundation for statistical analysis of environmental goods trade:

Goods that “measure, prevent, limit, minimise or correct environmental damage to water, air and soil, as well as problems related to waste, noise and eco-systems ... [including] cleaner technologies, products and services that reduce environmental risk and minimise pollution and resource use.”<sup>13</sup>

#### 3.2.4. Definition by criteria:

It was noted above that the Stockholm Convention defines its covered goods (persistent organic pollutants) by means of a set of criteria to be considered when a new good is proposed for the list. Annex D to the Convention is in effect a checklist of qualities that the Parties agree must be fulfilled for an item to qualify as a persistent organic pollutant suitable for listing. Annex D includes requirements for information related to:

- Persistence (e.g., evidence that the half-life of the chemical in water is greater than two months)
- Bio-accumulation: (e.g., evidence that the chemical’s bio-concentration factor or bio-accumulation factor in aquatic species for the chemical is greater than 5,000)
- Potential for long-range environmental transport (e.g., monitoring data showing that long-range environmental transport of the chemical may have occurred)
- Adverse effects (e.g., toxicity or ecotoxicity data that indicate the potential for damage to human health or to the environment)

This method of definition has several advantages. First, it allows the Parties the luxury of not negotiating an explicit definition in the body of the Agreement. Second, it provides an essential piece of the architecture for the living list. It helps make possible the assessment of new items to be added to the list, and any revisions proposed to the existing items. A list of such criteria in the EGA setting might contain, for example, requirements such as:

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<sup>12</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. Available at:

<http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx>.

<sup>13</sup> OECD/Eurostat (1999), The Environmental Goods and Services Industry: Manual on Data Collection and Analysis, OECD, Paris.

1. Is this good used to achieve environmental quality in any of the following ways [*negotiators would list categories here if defining by category*]?

*The reduction and mitigation of air pollution;*

*The management of solid or hazardous waste;*

*The improvement of energy or resource efficiency;*

*The remediation of polluted soil or water; or*

*Environmental monitoring or analysis.*

2. Alternatively, is this good used to achieve the objectives of any of the following multilateral environmental agreements or their protocols?

*Convention on International Trade in Endangered Species of Wild Fauna and Flora*

*Vienna Convention for the Protection of the Ozone Layer*

*Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal*

*Convention on Biological Diversity*

*United Nations Framework Convention on Climate Change*

*Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*

*Stockholm Convention on Persistent Organic Pollutants*

*Minamata Convention on Mercury*

3. Is a significant part [e.g., > 25%] of this good's international trade destined for the stated environmental uses?
4. Are there impacts in the life cycle of this good that significantly reduce its net contribution to environmental protection or improvement?
5. Is this good in direct competition with other goods that more effectively achieve the same environmental benefits, or that have fewer environmental drawbacks on a life-cycle basis?

In most cases the criteria are not simple empirical threshold questions, but are designed to be considered by the expert group (see below) as guidance in preparing a recommendation. For example, the criteria used to assess proposed amendments to the CITES lists are all based on empirically gathered information such as rates of decline in the number of individuals in an area or quality of habitat.<sup>14</sup> But there is no specified threshold rate of decline that triggers listing, or any quantitative system for rating habitat quality. These are matters of informed judgment. The point of the criteria is to provide some framework that reflects the purpose of the treaty, in order to help guide decisions on treaty coverage.

### 3.3. A body to accept or reject changes to the list

The third ingredient for a living list in the EGA is some body that can accept or reject proposals to add new items to the list, or to revise existing listings. Legally, the final say would have to vest with the Parties to the Agreement. The question is whether they alone should make such decisions.

In practice such decisions are usually the result of an expert advisory body that either has a mandate from the Parties to accept or reject, or

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<sup>14</sup> CITES. (2007). *Criteria for amendment of Appendices I and II*. CITES Resolution 9.24 (Rev.CoP14).

that makes recommendations to the Parties, who would accept or reject those recommendations in whatever meetings have the legal power to alter the Agreement. The negotiators attending such meetings are often not steeped in the technical knowledge that should inform judgments about what goods belong on the list, and so it makes sense to have expert support for decision-making. The Stockholm Convention, for example, has a Persistent Organic Pollutants Review Committee with the following characteristics:

- Members are appointed by the Parties (striving for a geographically equitable distribution);
- Members are government-designated experts in chemical assessment or management;
- Committee seeks consensus but, as a last resort, 2/3 majority voting is allowed.

In the context of an EGA, such a group could be comprised of government-nominated experts in various areas of environmental policy and management. The group could further consult experts on an ad-hoc basis, to provide support on specific proposals. For example, when assessing the climate change mitigation potential of a particular good, they might call on experts from IGOs such as the International Energy Agency, or representatives from renewable energy industry associations.<sup>15</sup>

The mandate of the expert advisory body could be to assess candidate goods proposed by a Party or Parties to the Agreement, and make recommendations as to whether the goods should be added to the list. The group might

also be called on to recommend whether to revise an existing listing, for example by removing a good from the list (this is discussed further below). The assessment would be based on whatever form of definition is contained in the Agreement, the most straightforward being explicit criteria.

An outside body of experts appointed by governments is not without precedent in trade law. The WTO's Agreement on Subsidies and Countervailing Measures, for example, establishes a Permanent Group of Experts, elected by the Committee on Subsidies and Countervailing Measures, to serve as expert advisors panels and to advise the Committee on the existence and nature of any subsidy.<sup>16</sup>

#### 4. Other institutional elements of an EGA

In thinking about how an EGA might accommodate a living list, three issues deserve more fleshing out:

- Voting for any additions or revisions to the list
- Listing goods for which the standard of "green" changes over time
- Revisions to the list that involve deleting existing goods

These are discussed in turn below.

##### 4.1. Voting on additions or revisions to the list

In the system described above there are two decisions of significance: the decision of the expert advisory body to recommend for or against adding or de-listing; and the decision of the executive body of participants to accept or reject that recommendation. The tradition in the WTO, which would undoubtedly have bearing

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<sup>15</sup> Consulting with private sector representatives carries the risk that vested interests will be promoted. But this possibility is not a reason to neglect the valuable information that might come from industry representatives.

<sup>16</sup> Articles 24.3., 24.4. The fact that this consultative body has never actually been consulted does not negate its value as precedent.

on the EGA's procedures, is to seek consensus; voting is almost never used. Could such a tradition be upheld in an EGA with a living list?

respect to the good in question. This sort of system might be accompanied in the EGA by ongoing efforts to obtain ex-post consensus among

Global trade in green goods is worth hundreds of billions of dollars annually, and is big enough to generate controversy; some of these goods have grown far beyond supplying niche markets. There may well come times when the proposed items being assessed have major economic implications for certain participants, or are environmentally unacceptable in the view of other participants (see Box 3: The Potential for Controversy).

In the event that the expert advisory body was unable to reach consensus, it would probably make sense to have it follow a voting procedure, with some specified type of majority required. This would at least forward any controversial decision to the participants to make for themselves.

At the level of the participants' executive body, a consensus rule for a controversial proposal would probably result in failure to list controversial new items, or to de-list existing items. This is not a critical fault, but it would mean that the EGA misses the potential for listing important green goods, or removing listings in the face of convincing evidence that change is needed. CITES, which has plenty of experience with controversial decisions, approaches this challenge by using a 2/3 majority voting system to which Parties can lodge reservations. A Party issuing a reservation is not considered bound by the treaty commitments with

### Box 3: The Potential for Controversy

In trade negotiations, strong financial interests make everything more challenging. Those strong interests certainly exist in global environmental goods trade which, by some estimates, is at almost USD \$1 trillion per year and growing quickly.

Those challenges are the most powerful argument for an EGA equipped with institutions to manage the living list. A few plausible scenarios should help illustrate the point:

- A participant proposes listing a new good that its firms have patented which, by all objective criteria, renders the competitor goods obsolete. It may even propose deleting the obsolete goods from coverage. The competitor goods are all produced by other EGA participants.
- A participant proposes listing a good which has good environmental qualities in its end use, but which causes enormous environmental damage during the production process.
- A participant proposes listing a good in which it has significant global market share, but which most objective observers would not see as truly environmental.
- A participant proposes listing a good that is controversial in its claims for environmental status. For example, the environmental community is strongly divided on the ultimate benefits of energy-related technologies such as nuclear energy, large dams, clean coal and shale gas extraction.

The point of these scenarios is not that a living list presents insurmountable challenges; those same challenges have been managed for years by other global treaties on special treatment for specific traded goods. The point is rather that it is imperative to build the prerequisite institutions in advance. Some controversy is probably inevitable, and dealing with it when it arrives will not work.

the participants, such as requirements that reservations be: limited in time, restricted to developing countries only, or encouraged to be withdrawn at all stages of the process.

#### 4.2. Listing goods for which the standard of "green" changes over time

Many type I goods pose a vexing challenge. Any good that is listed because of its superior performance in end use will one day be similarly eclipsed by new goods that perform even better. For this reason ecolabelling schemes con-

tinually revise and upgrade their criteria for certification; last year's energy-efficient monitor may be this year's energy hog.

This sort of continuous review and revision requires at least two difficult prerequisites: technical environmental expertise, and a well-resourced ongoing effort. The first can be met by using the expert advisory body discussed above, but the real issue is the magnitude of steady effort involved for what would ideally be an institutionally light agreement. The analogous review processes in ecolabelling regimes are resource-intensive efforts involving proactive and reactive review, consultation, research and testing.

What options are there for addressing this challenge? The simplest option is not to cover type I goods, spelling out that intent in the scope or definition. The problem is that it leaves out some goods that everyone agrees should be listed, such as renewable energy generation technologies. Alternatively, the EGA could use the expert advisory body to recommend changes for type I goods listing: The workload involved would depend on the number and quality of type I goods listed. Some type I goods would almost never need review (e.g., bicycles). Others (e.g., efficient automobiles) would need constant review. To differentiate, the expert advisory body could be given an additional listing criterion: how much effort would it involve to properly manage a candidate good? Where there are existing international standards on which all participants can agree, that level of effort would be low.<sup>17</sup> Where there are not, listing some goods might be ill-advised.

#### 4.3. Deleting existing goods from coverage

There are two reasons for considering deleting goods from coverage under an EGA. The first is technological change. An agreement drafted five years ago would undoubtedly have judged the compact fluorescent lightbulb (CFL) as a green good worth listing (assuming the Agreement covered type I goods), because it performs significantly better than its conventional competitor, incandescent lightbulbs. The latter use much more energy to achieve the same lighting result. But an agreement drafted today would recognize that LED lightbulbs are the "new green" in lightbulbs, achieving as much or more energy savings while not requiring the use of mercury, a toxin used in CFLs. As such, the hypothetical five-year old agreement would ideally drop its coverage of CFLs as an obsolete green technology.

A second reason is new scientific evidence that changes our opinions of whether a listed good is in fact green. Ten years ago the environmental community and policy makers in a score of countries were enthusiastic about the prospects for biofuels to green the transport sector. An agreement drafted at that time might have agreed to cover biofuels. But research since then has led to serious questions about the full life-cycle impacts of biofuels – in particular those grown on formerly forested lands, or produced from corn and using coal-fired electric refining processes. In light of that evidence, participants in that ten-year old agreement might today want to drop some types of biofuels from their list.

For some regimes that offer special treatment to particular goods, revising the list to delete goods from coverage is simply routine business.

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<sup>17</sup> In areas such as energy efficiency finding a common international standard would be, for most goods, a daunting challenge. See Ronald Steenblik, Scott Vaughan and Paul Waide (2006), "Can Energy-Efficient Electrical Appliances Be Considered "Environmental Goods"?", in OECD, *Environmental and Energy Products: The Benefits of Liberalising Trade*, OECD Publishing, p. 131-177.

Ecolabelling regimes, for example, regularly update their criteria in light of technological advances, with the result that items formerly listed are no longer awarded certification.

Not so with the trade regime, where there are major obstacles to delisting. The most critical is legal. Under GATT Article XXVIII, any negotiated concession can only be modified or withdrawn after a difficult process of negotiation and agreement with any significantly affected members (in GATT terms, those with a “principal supplying interest”), and after consultation with other affected members. Unless agreed otherwise by the WTO members, this process can only be initiated January 1<sup>st</sup> every three years. The final agreement may involve compensation to those members in the form of lowered tariffs or increased market access for other goods. Any de-listing of a listed product would involve raising the tariffs on that good above the commitments that the EGA caused participants to make in their GATT schedules of concessions, and would therefore trigger the Article XXVIII procedures.<sup>18</sup>

Such a scenario would basically kill the idea of de-listing goods under the EGA. There are work-arounds, as discussed below. But first it is worth asking whether it would be worth the trouble. Why not just leave all goods listed, even when they might no longer be green? After all, the WTO is dedicated to “substantial reductions of tariffs and other barriers to trade,”<sup>19</sup> so it would seem counterproductive for participants, who are all WTO members, to expend much energy devising ways to increase tariffs under an EGA.

It *would* be worth the trouble. If de-listing were not possible, two types of error could occur. First, in the case of technological change and green obsolescence (e.g., compact fluorescent lights eclipsed by LEDs), the EGA would be undercutting the successful dissemination of truly green goods by promoting trade in the non-green competition. The premise of the EGA is that tariff reductions make a difference, that they significantly improve the environment by increasing the dissemination of needed green goods. The assumption of significant impact does not disappear in the event that the goods in question lose their green credentials; trade in those goods will *still* be promoted by the tariff preferences if they are left in place, to the detriment of the greener substitutes that actually deserve promotion. Second, in the case of new evidence refuting a good’s green credentials (e.g., certain types of biofuels), the EGA might be undercutting the environment by promoting trade in an environmentally damaging good. Either error would contravene any forthright statement of purpose that might be drafted for the Agreement. The end result might not merely be neutral; it might actually make the Agreement work *against* the environment, either by promoting trade in substitutes for green goods, or by potentially promoting trade in environmentally damaging goods. As well as working against the basic purpose of the Agreement, such errors would negate one of the EGA’s important side benefits – demonstrating to the world that the WTO does care about environmental issues.

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<sup>18</sup> It is not clear what rate tariffs would be returned to. The simplest would be a return to respecting pre-EGA bound tariff levels. But if broader liberalization had occurred in the interim, then the picture would become more complicated. Finding an acceptable solution to this problem, though, would not be a particularly daunting challenge. If a participant’s tariff for the de-listed good had been bound or set at zero even before the EGA commitments, the problem disappears; there would be no need to raise tariffs or to undertake the associated bargaining.

<sup>19</sup> GATT 1947, preamble, third recital.

The challenge, then, is getting around GATT's Article XXVIII requirements. It is useful to review the reasoning behind those requirements. They are absolutely necessary to preserve the integrity of a negotiated agreement. In the course of a negotiation, parties trade off their concessions against concessions from other parties. If parties could unilaterally modify or withdraw concessions after the deal was done, the affected parties would have given up some market access to foreign producers, but got nothing in return for it. This would make negotiation in good faith impossible.

It is also useful to contrast that case – the unilateral withdrawal of negotiated concessions – with delisting a good under the EGA. If we assume that the EGA will come under WTO body of law as an open plurilateral agreement, the deal's participants will grant lower tariff rates to non-participants (to be specific, to all other WTO members) *with no expectation of reciprocal concessions*.<sup>20</sup> In other words the non-participants never have to give away anything to get the concession in the first place. In contrast to a unilateral withdrawal of a negotiated concession, then, the non-participant beneficiaries of the concession are *not* worse off as a result of the granting and withdrawal of the concession – they are simply back where they started. And the participant beneficiaries of the concession have all agreed to the withdrawal, so their interests are presumably not harmed either. As such, in the context of an open plurilateral agreement the requirements of GATT Article XXVIII are completely inappropriate.

Be that as it may, the law is still the law. The question is what to do about it, short of amending GATT Article XXVIII, which we will assume is not going to happen. One possibility is for the EGA to oblige participants to lower *applied* tariffs rather than *bound* tariffs. That is, the ITA model involves participants altering their GATT schedules of concessions, which means they are bound to apply the lowered tariff rates, or follow the GATT Article XXVIII process to raise them. The APEC EGS model, by contrast, only obliges participants to lower their applied tariffs, leaving their bound rates unchanged. Such a model in the EGA would mean that the tariffs could be raised again at any point without triggering the GATT Article XXVIII obligations.

It is also possible to turn to GATT's General Exceptions (Article XX), contained within which is a provision allowing breach of GATT obligations for, inter alia, "measures necessary to protect human, animal or plant life or health."<sup>21</sup> In the unlikely event that a de-listing was challenged, the defending member could argue that it breached Article XXVIII in pursuit of environmental ends. It is not clear how a dispute panel would treat such a defense, but given the context – a WTO agreement with an environmental focus – it is highly likely that the chapeau of Article XX, which filters out protectionist measures, would be satisfied.

Another option is a waiver. WTO members can apply to have the membership, sitting in Ministerial Conference, approve a waiver of specific WTO obligations for a member or members.<sup>22</sup> When eleven WTO members wanted to create a regime to reduce trade in conflict diamonds – a regime that necessarily discriminated against

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<sup>20</sup> An "open" plurilateral agreement is one in which the benefits of the Agreement are extended not only to the participants, but also (unconditionally) to all other WTO members. The ITA is such an agreement. The Agreement on Government Procurement, by contrast, applies only among participants to the Agreement.

<sup>21</sup> Article XX(b).

<sup>22</sup> Marrakesh Agreement Establishing the World Trade Organization, Articles IX(3)(b) and IX(4).

traded goods from certain states, in violation of GATT's non-discrimination principles – they submitted a draft waiver to the Council on Goods and had it approved by the Ministerial Conference.<sup>23</sup> Waivers must be approved by a three quarters majority, and are reviewed on an annual basis by the Ministerial Conference. In the event that the EGA desired to remove a good from the list, the participants could seek a waiver for the provisions of the EGA in the same way that participants in the Kimberly Process sought and received a waiver for that agreement's discriminatory trade provisions. They might also seek a waiver proactively, before knowing that they wanted to de-list any particular good.

While it is impossible to say with certainty, the chances are good that the Ministerial Conference – which in the case of the Kimberly Process granted a waiver for a discriminatory non-WTO agreement – would grant a waiver for an agreement incorporated into the WTO as an open plurilateral, with a legitimate environmental objective. The fact that GATT Article XXVIII is patently inappropriate for open plurilateral agreements (as discussed above) arguably increases the odds of success.

## 5. Conclusion

The aim of this brief was first to explore the basic elements that an EGA must have in order to accommodate a living list, and second to offer some concrete examples of ways in which those elements might be embedded in the Agreement. A related aim was to make the case that the effort involved is well worth it. The resulting agreement need not be overly complex

or recklessly experimental; other regimes provide examples of workable solutions that are straightforward to create and administer.

Three basic elements were identified as critical for an EGA that incorporates a living list: a statement of purpose, a definition of environmental goods, and some body that uses that definition to assess proposed changes to the list. The most straightforward solutions seem to be a statement of purpose in the preamble (following WTO precedent), a definition by virtue of an annexed set of criteria for proposed new listings, and a decision-making process involving expert recommendations provided to the participants, who make all final decisions. The brief also explored some of the special challenges associated with voting, with listing goods according to standards that change over time, and with deleting goods from coverage.

The solutions proposed here may not be the final answers to the question of how to accommodate a living list, but in any case they should help negotiators move toward those answers. Getting there is imperative if the EGA is to fulfil its potential and promise: to help trade contribute to shared environmental priorities.

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<sup>23</sup> The waiver was for the so-called Kimberly Process. See WTO. 2003. "Waiver Concerning Kimberly Process Certification Scheme for Rough Diamonds." G/C/W/432/Rev.1, 24 February.

