

- any one or combination of adjustments to the general exceptions provision of GATT (Article XX) to accommodate necessary trade measures.⁶¹

Without engaging in the waiver versus amendment debate in any detail, one particularly innovative technique could be to build further on the so-called "trumping treaty clause" developed by the NAFTA negotiators.⁶² Although this trilateral provision clearly does not apply to non-Parties to the NAFTA, it does establish the broad precedence of several IEAs in the case of a conflict between the specific trade obligations of a listed IEA and the NAFTA obligations of Canada, the U.S. and Mexico.⁶³ This approach has the merit of ensuring a sense of permanency and stability about the exemption created coupled with a review of each IEA when presented for inclusion in the list of exempted agreements.

The criteria to apply in this vetting process lie at the heart of the matter. In light of the concerns raised throughout this Paper, I would suggest that a good candidate IEA for inclusion in a "trumping treaty" provision for global commons or other environmental issues of broad interest should contain several key characteristics. Such an IEA should:

- be open to all countries on equal terms through an accession provision;
- enjoy the support of at least two-thirds of the world's economies responsible for two-thirds of the production and consumption of the substance or good disciplined in the agreement (e.g., Parties to the Montreal Protocol account for more than 90% of world consumption and 99% of world production of halons and certain CFCs);
- contain clearly defined obligations that are at least as onerous on Parties in practice as the standard expected of non-Parties if they were to seek accession;

⁶¹ Note that the Agreement to establish the World Trade Organization is scheduled to enter into force in July 1995 and will cover, inter alia, both goods and services. Article IX of this Agreement provides for a waiver if approved by three-fourths of the Members. This is a higher threshold than the current GATT rule requiring the approval of two-thirds of the votes cast. Article X provides for amendments that shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members. This tracks the current GATT amending formula.

⁶² See Article 104 of the NAFTA.

⁶³ The IEAs are the Montreal Protocol, the Basel Convention and CITES. Note that the "trumping" feature relates to mandatory trade provisions requiring a Party to take a certain course of action, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations (e.g., seeking arbitration on questions of science related to environmentally sound practice), the alternative that is least inconsistent with the NAFTA shall be chosen.