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“The Relationship between Multilateral Environmental Agreements and WTO Rules”

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1 Introduction

Within the discussion on trade and its impacts on the environment, the relationship between multilateral environmental agreements (MEAs) and the World Trade Organization (WTO) has long been of particular interest. An ample body of literature on these issues already exists, but many questions remain unresolved. Indeed, no clear consensus on how to best address this relationship has emerged, and so further debate is to be expected. The number of MEAs is growing, and the policy and legislative activities of existing MEAs continue to evolve quite rapidly, often in ways that are likely to increase their interaction with the WTO. The developments of recent years—the Biosafety Protocol in the Convention on Biodiversity, the Rotterdam Convention on Prior Informed Consent (PIC), the Convention on Persistent Organic Pollutants (POPS) and the continuing negotiations on the Framework Convention on Climate Change—reaffirm this assumption. In addition, a number of other policy areas, such as consumer protection, labelling issues and technology transfer, are affected by the negotiations on the relationship between trade-related measures pursuant to MEAs and WTO rules.

At present, the clarification of the relationship between international trading rules and MEAs is an issue of foremost priority on the Doha Agenda. The Doha Declaration calls for negotiations on information-sharing and observer status between WTO committees and MEA secretariats, and on the relationship between existing WTO rules and MEAs. However, the negotiations appear limited in scope, as they are required to neither "prejudice the WTO rights of any member that is not a party to the MEA in question" nor "add to or diminish the rights and obligations of members under existing WTO agreements". So far, it remains unclear what the results of these negotiations will be.

Ultimately, international trade and the MEA regimes can only be mutually supportive in enhancing sustainable development governance if both bodies of law and policy do not undermine one another, and if the relevant institutions co-operate effectively during the entire processes of policy- and decision-making, implementation, monitoring and dispute settlement. Civil society plays a key role as a partner in these processes at the global, European and national levels.

The following paper provides an overview about the underlying potential conflict between international trading rules and international environmental conventions. Moreover, it briefly touches upon proposed alleys to achieve more mutual supportive international regimes.

2 Multilateral Environmental Agreements

Today there are well over 200 multilateral environmental agreements (MEAs), with memberships varying from a relatively small group to over 180 countries.¹ Some of these MEAs are geographically limited, while others are global in scope. Given the transboundary character of most environmental issues, multilateral agreements are considered the most appropriate instruments with which to address these problems. Indeed, the work of the GATT and the WTO on trade and the environment has continually expressed a preference for multilateral solutions over unilateral action.²

2.1 Trade-Restricting Measures

The rules established by MEAs and the World Trade Organization (WTO) intersect in a range of areas, and their relationship has thus remained one of the key issues in the debate over trade and the environment. At the centre of this discussion are trade-restricting measures incorporated in MEAs that regulate or restrict the trade in particular substances or products, either between parties to the treaty and/or between parties and non-parties. Currently, only a fraction of MEAs contain trade-restricting measures, although the number is increasing.³

Trade-related measures in MEAs take a variety of forms, and include requirements for reporting, labelling, identification and notification; export and import bans; and taxes, charges, subsidies and other fiscal measures.⁴ As the ongoing negotiations in the WTO address only specific trade measures in MEAs, it is important to distinguish between specific and non-specific trade measures. In most cases, specific trade measures are explicitly described in the MEA or in subsequent decisions of its parties, and in general are mandatory obligations that must be applied by all parties. Non-specific measures are not explicitly described, but may be applied by parties, mostly alongside other measures, as a means of complying with their obligations or fulfilling MEA objectives.

The Montreal Protocol is an example that contains both specific and non-specific trade measures. It includes requirements for a ban on trade with non-parties in the products controlled by the Protocol. However, many parties have also applied non-specific trade measures, including labelling requirements and taxes, in order to meet their obligations for phasing out the use of ozone-depleting substances.⁵

2.2 Objectives of Trade Measures in MEAs

Broadly speaking, trade-related measures in MEAs have three different objectives:

¹ For an intensive analysis of MEAs, please consult: UNEP/IGM/3/INF/3, online available at: http://www.unep.org/IEG/docs/working%20documents/MEA_full/INF3_MEA_Add.doc.

² See Report by Hukawa, Chairman of the Group on Environmental Measures and International Trade (1999), here from: Condon (2002), p. 563.

³ For example, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade entered into force in February 2004. The Stockholm Convention on Persistent Organic Pollutants (POPs convention) was agreed and enter into force 17 May 2004.

⁴ WTO: Note by the Secretariat: Matrix on Trade Measures Pursuant to selected Multilateral Agreements, WT/CTE/W160/Rev. 2/TN/TE/S/5, 25 April 2003.

⁵ Brack and Gray (2003), p. 6.

- First, trade measures, such as reporting and labelling requirements or notification and consent arrangements, provide a means of monitoring and controlling trade in products where the uncontrolled trade itself would create environmental damage. For example, the Rotterdam Convention contains a prior informed consent procedure for a number of specified chemicals and pesticides. Another example is CITES' requirement for export permits for trade in all endangered species listed in the agreement's appendices.
- Second, trade measures can be applied to achieve the objectives of the MEA itself, such as the control of consumption and production of ozone-depleting substances under the Montreal Protocol. Here, a variety of trade restrictions, such as import licences, partial import bans, excise taxes and labelling requirements, have been employed.
- The third aim of trade measures is to prevent non-parties to MEAs from enjoying a competitive advantage in trade with other states controlled by the MEA. Accordingly, the Basel Convention stipulates that no category of wastes be exported to non-parties, unless these countries are signatories to another agreement that is at least compatible with the aims of the Convention. Under the International Convention for the Conservation of Atlantic Tunas (ICCAT), parties decided to ban imports of certain fish products from some non-parties and non-complying parties, while warnings have been issued to others.⁶

While it is difficult to gauge the degree of success of trade measures in MEAs, their contribution to compliance to MEAs is generally accepted. From an environmental perspective there is a general consensus that trade-related measures should be used when they are the most or the only effective means to achieve a necessary, MEA-mandated objective. However, it is also accepted that trade measures should not be adopted in isolation from other compliance instruments, such as financial and capacity building assistance.⁷

⁶ Brack and Gray (2003), p. 8ff.

⁷ Neumayer (2002); Qiu and Yu (2001); Hoffmann (2002), p. 5.

3 The Relationship between MEAs and WTO Rules

Trade-restrictive measures taken pursuant to MEAs potentially run against basic WTO rules, namely not to discriminate between other WTO members' "like products", or between domestic and international production. In particular, enforcement measures may cause imports to be treated less favourably than domestic goods in the market.⁸ Other rules adopted in the other WTO treaties also have the potential to create conflicts. For example, the Biosafety Protocol provides a framework to ensure that its parties can adopt precautionary measures to control the transboundary movement of living modified organisms, while the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) places constraints on the measures that WTO members may take to do so.⁹ Also, the WTO agreements on intellectual property rights (TRIPS) and on trade in services (GATS) may have important impacts on the implementation of MEAs.¹⁰

Nevertheless, a number of issues suggest that the relationship between MEAs and international trading rules is not primarily characterised by conflict, but by mutual recognition and even support. Several documents from the WTO Committee on Trade and Environment (CTE)¹¹ and the Rio Declaration¹² confirm this assumption. Also, many proponents point to the broad scope for applying trade measures in a manner consistent with WTO rules¹³, the small number of MEAs that include trade-restricting measures, and the wide overlap of constituencies of regimes¹⁴. In addition, win-win situations, such as increased trade in environmental goods and services, technology transfer and the harmonisation of standards, are often mentioned as positive features of the MEA-WTO relationship.¹⁵

So far, all environmental measures challenged in the WTO have been unilaterally imposed rather than required under an MEA. However, it seems that the potential for conflict is not only real, but threatens to be aggravated as the use of trade restrictions in MEAs becomes more prevalent and trade rules more stringent. In addition, some states did not sign or ratify recent environmental instruments, such as the Convention on Biological Diversity, the Biosafety Protocol and the Kyoto Protocol.¹⁶ Yet, even without a formal conflict, the consequences and costs of uncertainty are significant. For example, concerns about legality have already hampered recent negotiations, including those on genetically modified organisms and persistent organic pollutants.¹⁷

⁸ See also: Charnovitz (2002)

⁹ Stewart and Johanson (2003); Safrin (2002); Mann and Porter (2003), pp.27 and pp. 37.

¹⁰ Stilwell and Tarasofsky (2001), p. 11.

¹¹ Report of the WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

¹² United Nations Conference on Environment and Development, Agenda 21, Chapter 2.

¹³ Report of the WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

¹⁴ A number of MEAs, such as CITES, the Montreal Protocol or the Basel Convention, have more members than the WTO. Cosbey (2000), p. 2; Krist (2001), p. 2.

¹⁵ See for example: UNDP (1998).

¹⁶ Stilwell and Tarasofsky (2001), p. 10.

¹⁷ See Stilwell & Tuerk (1999); Krajewski (2001).

3.1 The Vienna Convention on the Law of Treaties

In case of inconsistency between WTO rules and an MEA, the question arises as to which international regime prevails. Article 30 of the Vienna Convention on the Law of Treaties states that in cases in which both entities in the conflict are parties to both regimes, the later treaty prevails. This could invalidate MEAs (or parts of them) that became binding before 1994. However, other norms, such as *lex specialis*, are also relevant to resolving conflicts.¹⁸ Additionally, Article 31 of the Vienna Convention, which provides general rules for the interpretation of international treaties, may also be useful in allowing two treaties to be interpreted in a manner that avoids conflict, e.g. applying GATT Article XX in a way that permits trade measures taken in compliance with MEAs. However, it seems that the Vienna Convention does not suffice to clarify the relationship. As a result, there have been a number of proposals to reform the WTO or create a better relationship between MEAs and the WTO.

3.2 Reform of the WTO

With regard to environmental reform of the WTO, proposals from states and experts can be mainly grouped into three categories, namely status quo; ex post or waivers; and ex ante or environmental window, which are to be explained in more detail:

Proponents of the **status quo** frequently point to the exceptions provided by GATT Article XX, the incorporation of the aim of sustainable development into the WTO's preamble, and the acknowledgement that WTO rules should not be interpreted in "clinical isolation"¹⁹. Moreover, the rulings of the Appellate Body have become more environmentally friendly, as evidenced in particular by the findings of the so-called shrimp-turtle case.²⁰ However, scepticism exists as to whether the Appellate Body is capable of taking environmental concerns sufficiently into account, and whether it is able to constitute a general rule for the relationship between MEAs and WTO rules.²¹ Based on the system currently in place, the EU proposed to reverse the burden of proof in Article XX, thus strengthening the position of parties invoking Article XX on environmental bases.²² Another recommendation stems from the Committee on Trade and Environment (CTE) report, adopted by the Ministerial Conference in Singapore in 1996. It states that WTO members that are also parties to MEAs should resolve disputes over the use of trade measures applied between themselves pursuant to the MEA through the dispute settlement mechanism available under the environmental treaty.²³

Another method suggested to accommodate the relationship inside the WTO is to issue **waivers**. The WTO agreement allows parties to waive GATT obligations in exceptional

¹⁸ Voon (2000), pp. 78.

¹⁹ Appellate Body in *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996.

²⁰ Haverkamp (2001), p. 7; e.g. the Shrimp/Turtle appellate decision strengthened the right of the state to adopt conservation measures by a liberal interpretation of GATT Art. XX (g) exhaustible natural resources. Moreover the AB acknowledged the relevance of the preamble including the aim of sustainable development in interpreting article XX of the GATT. See United States: Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4. 129-31, 152-55, WTO/DS58/AB/R, 12 October 1998. See also: Appellate Body in Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/RW, 22 October 2001; see also: Mann and Porter (2003), p. 21-23.

²¹ Submission by Switzerland, TN/TE/4, 6 June 2002.

²² Submission by European Communities, WT/CTE/W/170, 19 October 2000.

²³ Report of the WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

circumstances. Consequently, several countries, such as Egypt, Hong Kong and ASEAN members, submitted proposals for granting waivers to trade measures in MEAs that meet certain criteria, such as necessity, proportionality, least-trade restrictiveness, effectiveness, broad multilateral support and/or scientific evidence.²⁴ Critics, however, emphasise the requirement of exceptional circumstances for waivers, their time limit, and the fact that the status of MEAs, which often take years to negotiate, would be dubious until it receives the ex post blessing of a waiver.²⁵

Conversely, **ex ante approaches** suggest spelling out criteria under which MEAs would be compatible with WTO rules, either by an expansion of Article XX general exceptions or by the adoption of a collective interpretation of Article XX that would validate existing MEAs and spell out under what specific conditions the WTO would accept the use of trade measures taken pursuant to MEAs. An amendment could be based on: the NAFTA approach, which accepts certain MEAs while leaving the status of future MEAs open; a newly added paragraph to Article XX referring to the relationship between trade measures taken pursuant to MEAs²⁶; or a newly created agreement on trade related environmental measures (TREM)s²⁷. However, as amendments require a two-thirds majority and the acceptance of each party's legislature before it binds that party, any amendment of WTO rules is not likely in the near future. An interpretive understanding, guidelines, or a “principles and criteria approach” could avoid the requirements of an amendment, and support negotiators in designing future MEAs in a way consistent with WTO rules. Switzerland proposed an interpretive understanding that would ensure that MEAs are entitled to determine the objective, proportionality and necessity of trade measures, while the WTO would have the authority to assess whether the trade measure is applied in an arbitrary, discriminatory or protectionist manner.²⁸ Canada promotes a “principle and criteria approach”, where principles determine MEAs and specific trade measures, and criteria assess how the trade measures are applied.²⁹

Currently, Paragraph 31 (i) of the Doha Development Agenda (DDA) calls for negotiations on the relationship between existing WTO rules and specific trade obligations set out in MEAs. However, the mandate is limited, as negotiations shall “not add to or diminish the rights and obligations of Members under existing WTO agreements... nor alter the balance of these rights and obligations”. Moreover, this mandate is limited, as it addresses only specifically enumerated measures between MEA parties, ignoring the difficult issues of non-specific trade measures or measures applied against non-parties to an MEA.³⁰ Up to now, negotiations have dealt mainly with procedural issues and questions about how to define MEAs, specific trade measures and MEA members. For example, the European Union

²⁴ non-Papers from Egypt, 18 June 1996 and Hong-Kong, 22, July 1996; here from TN/TE/S/1, 23 May 2002; Submission by ASEAN, WT/CTE/W/39, 24 July 1996.

²⁵ Winter (2000), p. 248.

²⁶ non-Paper from the EC, 19, February 1996; here from TN/TE/S/1, 23 May 2002.

²⁷ Cosby (2000), p. 11.

²⁸ Submission by Switzerland, WT/CTE/W/139, 8 June 2000.

²⁹ Submission by Canada, WT/CTE/M/10, 12 July 1996.

³⁰ Stilwell (2002), p. 1.

attempted to spell out criteria for MEAs in order to include future MEAs³¹, while other states claim that the DDA mandate is limited to MEAs currently in force³². Regarding specific trade measures, Switzerland proposed analysis along four different categories in order to clarify under what conditions specific trade obligations are automatically in conformity with WTO rules.³³ Argentina and the US limit specific trade obligations to a single one that is mandatory and specific in character.³⁴ Canada added a conceptual approach, stating that examining MEAs with mandatory and specific trade obligations could provide significant insights, emphasising the important concept of the level of "discretion" left to a party in choosing from a range of measures.³⁵ While a number of observers hope that the ongoing negotiations might help to clarify the relationship between MEAs and WTO rules, others point to the risk that the outcome might be less supportive of a mutually integrative approach to trade and environment than what is now seen in practice.³⁶

3.3 Enhancing Synergies between MEAs and WTO Rules

Another approach to accommodating the relationship between MEAs and the international trading system is to examine mechanisms that attempt to enhance synergies and increase mutual supportiveness between trade and environment. Most proposals aim to make them work together better by improving the exchange of information and strengthening co-ordination. Suggestions range from holding back-to-back meetings to exchanging information between MEAs and the WTO if new trade questions arise³⁷, to enhancing communication and co-operation between compliance, enforcement and dispute settlement mechanisms³⁸. Also, DDA paragraph 31 (ii) calls for negotiations on the procedures for regular information exchange and criteria for the granting of observer status.³⁹ Regarding this, the EU suggested that information exchange sessions and observership to both regular and special sessions should become a formal feature in the WTO⁴⁰; and indeed, UNEP and a number of MEAs' secretariats were recently allowed to attend the CTE negotiations. However, several countries emphasise that attendance and participation by these bodies is on an ad hoc basis, leaving the larger observership question still open.⁴¹ Moreover, it is recognised that greater co-ordination and co-operation between international institutions must be underpinned by greater co-ordination between trade and environment ministries at the national level.⁴²

³¹ Submission by the European Union, TN/TE/W/1, 2002.

³² Submission by Australia, TN/TE/W/2, 2002; Submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, TN/TE/W/11, 3 October 2002.

³³ Submission by Switzerland, TN/TE/W/4, 6 June 2002.

³⁴ Submission by Argentina, TN/TE/W/2, 23 May 2002; Submission by the United States, TN/TE/W/20, 10 February 2003.

³⁵ Submission by Canada, TN/TE/W/22, 10 February 2003.

³⁶ Mann and Porter (2003), p. 25.

³⁷ Submission by European Communities, TN/TE/W/1, 21 March 2002.

³⁸ Stilwell (2002), p.2.

³⁹ For an extensive analysis see: von Moltke (2003).

⁴⁰ Submission by the European Communities, TN/TE/W/15, 17 October 2002

⁴¹ Bridges Weekly, Vol. 7, No. 6, 2003.

⁴² UNEP (2002).

3.4 Reform of MEAs

Yet another approach to MEAs and WTO rules is to focus on the environmental regimes. Generally, greater membership in and compliance with MEAs will help to avoid conflicts between environmental and trading rules, as conflicts are most likely between parties and non-parties. Therefore, it has been proposed that future MEAs be designed for a larger constituency and in a more self-enforcing fashion.⁴³ Further calls are being made to strengthen the dispute settlement system within MEAs⁴⁴, to support the WTO's attempts to define MEAs by establishing general criteria, and to include provisions in MEAs that establish a hierarchy between the treaty and other international laws that shifts depending on context-specific laws and facts. It is generally accepted that trade-restricting measures should only be the means of last resort. It is also suggested that trade-related measures should not be unnecessary, arbitrary, protectionist or unjustifiably discriminatory.⁴⁵ An institutional proposal is to cluster all MEAs that are of concern for the trade regime.⁴⁶ However, it is difficult to predict in which environmental regimes economic factors will develop into specifically trade-related issues, and it is also not yet clear how a grouping would help MEAs and WTO rules support each other.⁴⁷

To sum up, the fundamental roles that MEAs and the WTO each play in global governance are widely accepted. Unfortunately, so is the potential for conflict between them. Despite extensive negotiations and a large number of proposals on how to clarify the relationship between both regimes during the last decade, no solution has been found or is in sight yet. The Doha Development Round and its limited mandate will most likely not resolve the complex relationship between MEAs and WTO rules. However, the ongoing negotiation process may contribute to its clarification, which in turn could help generate consensus on how a mutually supportive relationship could be achieved. While a case in front of the WTO dispute settlement body would certainly shed more light on the relationship, greater clarity about MEAs could also assist in reconciling the relationship between both regimes.

⁴³ See Barrett (2003).

⁴⁴ Submission by New Zealand, WT/CTE/W/180, 9 January 2001.

⁴⁵ Contribution by Switzerland, TN/TE/W/21, 10 February 2003.

⁴⁶ Esty (1994), p. 154.

⁴⁷ von Moltke (2000), p. 9.

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