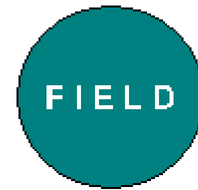

Sub-Regional Brainstorming Workshop on the Trade and Environment Issues Contained in Paragraphs 31 and 32 of the WTO Doha Ministerial Declaration

Project on Building Capacity for Improved Policy Making and Negotiation on Key Trade and Environment Issues

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Background Paper

Specific Trade Obligations in Multilateral Environmental Agreements and Their Relationship with the Rules of the Multilateral Trading System – A Developing Country Perspective

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CONTENTS

I. INTRODUCTION 4

II. BACKGROUND 4

III. ISSUES ARISING FROM THE WORDING OF THE DOHA MANDATE 9

IV. RESULTS OF THE CTE DISCUSSION ON THE MEA – WTO RELATIONSHIP 12

V. THE MOST IMPORTANT SOURCES OF POTENTIAL CONFLICT 14

VI. A BRIEF ANALYSIS OF SPECIFIC TRADE OBLIGATIONS, FLEXIBILITY MECHANISMS AND SUPPORTIVE MEASURES IN THREE MEAS (CITES, THE MONTREAL PROTOCOL AND THE BASEL CONVENTION), WITH PARTICULAR EMPHASIS ON THE BASEL CONVENTION 16

VII. RESULTS OF PREVIOUS DISCUSSIONS ON ENHANCING CLARITY OF TRADE MEASURES AND THEIR COMPATIBILITY WITH WTO RULES 22

VIII. THE WAY FORWARD – APPROACHING THE NEGOTIATING MANDATE OF PARAGRAPH 31(I) FROM A DEVELOPING COUNTRIES' PERSPECTIVE 26

I. INTRODUCTION

This paper intends to facilitate the discussion on approaching, from a developing country perspective, the negotiating mandate contained in paragraph 31 (i) of the WTO's Doha Ministerial Declaration aimed at clarifying the relationship between specific trade obligations in Multilateral Environmental Agreements (MEAs) and WTO rules. Several studies[1] have already explored hypothetical legal tension or conflict between these agreements. This paper places the focus on (i) delineating the specific objectives of developing countries in these negotiations and discussions; and (ii) conducting a comparative analysis of three MEAs with specific trade obligations (i.e. the Montreal Protocol, CITES and the Basel Convention), with a view to reviewing the clarity, effectiveness and efficiency of specific trade obligations they contain and to identifying areas, where their compatibility with WTO rules may need to be clarified. In conclusion, the paper makes a few specific suggestions for developing countries on how to proceed in the discussion on a methodological and systematic basis that may help to accomplish the mandate under paragraph 31 (i).

II. BACKGROUND

1. The need for international co-operation

Transboundary and global environmental problems are of international concern, and it is increasingly recognized that they can effectively be addressed through international co-operation within the framework of MEAs. Although international environmental degradation is not a new phenomenon, awareness of the problem and attempts of building international co-operative frameworks to deal with it are recent.

Globalization requires new integrated approaches to define effective policies in all the relevant socio-economic dimensions. Many environmental problems, such as transboundary air/water pollution or resource over-exploitation, have international or global dimensions and cannot successfully be addressed through national policies alone. For transboundary problems, international co-operation is required to achieve effective policies for pollution abatement or to prevent resource depletion. Such co-operative approaches can also assure that, from an economic point of view, there is some levelling of the competitiveness playing field for economic agents in countries that are parties to such agreements. An increased number of agreements have been negotiated, signed, ratified and implemented[2] in order to consolidate international co-operation to address environmental problems.

MEAs are instrumental in addressing environmental concerns at the global level, such as ozone depletion, climate change, endangered species of wild fauna and flora, or the trafficking of hazardous wastes or chemicals. In 1992, the Rio Declaration stated in its Principle 7 "*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States* ***have common but differentiated responsibilities****. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*"[3]

The economic and social effects of most global and transboundary environmental problems tend to be more direct and severe in developing countries in the light of limited abatement or adjustment capacities, the special link between poverty and environmental impact[4], and also due to the high opportunity costs related to

[1] For instance: Abdel Motaal, D., Multilateral Environmental Agreements (MEAs) and WTO rules; why the "burden of accommodation" should shift to MEAs, Journal of World Trade, Vol. 35, No. 6 (December 2001) or Sampson, G.P., Effective Multilateral Environmental Agreements and why the WTO needs them, The World Economy, No. 9, Vol. 24 (September 2001.

[2] See United Nations Treaty Collection. Treaty Reference Guide (1999). It defines all the relevant terminology to be used when dealing with international treaties.

[3] Rio Declaration on Environment and Development, in: Earth Summit: Agenda 21 – The United Nations Programme of Action from Rio, New York, 1992.

[4] For more information, see: WorldWatch Institute, Global Signs 2003, accessible at: www.worldwatch.org/press/news/2003/05/22.

achieving other, more basic social welfare objectives.[5] Furthermore, if the costs of abatement or adjustment measures are borne entirely by the country implementing them, they may be unaffordable for developing countries. Therefore, developing countries have an objective interest in co-operative approaches to address transboundary or global environmental problems within the framework of MEAs since they generally provide financial, technical and other support. Besides this general observation, developing countries can derive a twofold specific advantage from participating in MEAs:

Structural: The implementation of measures that are benign to the environment while fostering local development can induce structural economic and social reforms that will remain as a heritage and act as a motor for further endogenous economic growth, compatible with local socio-ecological conditions.

Linked-effects: Developing countries will benefit from supportive measures that contribute to build the necessary institutional, technical and managerial capacities to meet MEA objectives.

2. Trade-related MEAs

According to recent UNEP and WTO surveys[6], of the 238 current "International Treaties and Other Agreements in the Field of the Environment" only 38 (i.e. 13 per cent) contain trade-related measures or in which trade provisions have subsequently been adopted by Parties in furtherance of the objectives of the agreements. Selected examples of global accords are the Montreal Protocol (MP), the Basel Convention (BC), the Convention on International Trade in Endangered Species (CITES), the Persistent Organic Pollutants (POPs) and Prior Informed Consent (PIC) Conventions, as well as the Bio-safety Protocol of the Convention on Biological Diversity (CBD). Conceptually, the above-mentioned MEAs use trade measures, as appropriate, to help attain their objectives. These should however not be confused with MEAs that may have significant trade effects, without employing trade measures in themselves. The latter concerns, for example, the UNFCCC and its Kyoto Protocol that may have significant trade implications in areas such as trade in energy-intensive plant and equipment, consumer products, fossil fuels, and energy efficiency services, and internationally tradeable greenhouse gases' emission reductions.[7]

From an environmental perspective, trade-related measures should be used when they are the most or the only effective means to achieve a necessary, and MEA-mandated, objective. From a trade perspective, those measures should be proportional, least trade restrictive, not a disguised form of protectionism and supported by a large majority of MEA Parties.

It is also important to analyse the key reasons for resorting to trade measures in MEAs. This will facilitate the task of determining whether the employment of trade measures is indeed the most effective and efficient policy instrument to deal with the cause at issue. Trade measures in MEAs are normally used in situations, in which

- markets are imperfect and significant information deficiencies or asymmetries exist;
- policy failures need to be corrected; or
- leakage or free riding needs to be discouraged.

5 By way of illustration, premature deaths and illness arising from environmental factors account for about a fifth of all diseases in developing countries, bigger than any other preventable factor, including malnutrition. Economist, 6 July 2002. Furthermore, between 1985 and 1999, developed countries sustained 57 percent of the measured economic losses resulting from environmental disasters, representing 2.5 percent of their combined GDP. Conversely, in developing countries that endured only 24 percent of the economic toll of all environmental disasters the loss was the equivalent of 13.5 percent of their combined GDP. UN Inter-agency Secretariat of the International Strategy for Disaster Reduction (ISDR), *Living with risk*, New York, 2002.

6 UNEP, *Register of International Treaties and Other Agreements in the Field of Environment* (1999). WTO, *Matrix on Trade Measures Pursuatn to Selected MEA*s, WT/CTE/W/160/Rev.1 (2001), p. 55.

7 An in-depth overview of trade measures in several MEAs is contained in WTO document WT/CTE/W/160/Rev.2 of 25 April 2003.

Most MEAs address the first issue, for instance CITES or BC. Some fishery agreements partly attempt to correct policy failures, for instance caused by fishery subsidies.[8] The MP contains trade measures to discourage leakage or free riding.[9]

Corrective instruments directly linked to the source of the environmental problem are the first-best option.[10] The link between particular objectives of MEAs and specific trade measures used in the agreements is however not always clear-cut. Several MEAs with trade measures have multiple objectives, for all of which trade measures might not be best suited. The BC, for instance, aims not only at the minimization of transboundary movements of hazardous wastes, but also at waste avoidance and waste reduction at the point of generation. While trade measures might be well suited for the former, they are not the most effective tool for the latter. Similarly, in the context of CITES, there are often several factors that heighten the risk of species extinction. International trade might be one cause, but others, such as domestic trade, loss of natural habitat, introduction of new species, over-exploitation through domestic commercial and subsistence use, pollution and global environmental change, might be equally or even more important. CITES, however, alleviates stress on endangered species arising from one source only, namely demand pressures transmitted through international trade. Although clearly required, in practice it is often difficult to establish a causal relationship or attribute a particular part of the risk of extinction to international trade.

Trade measures in MEAs take several forms. These mainly comprise:

- reporting requirements on the extent of trade of a particular product/item;
- labelling or other identification requirements;
- requirements related to notification and consent procedures;
- targeted or general export and/or import bans;
- "market transformation measures" such as taxes, charges and other fiscal measures, and non-fiscal measures such as government procurement.[11]

3. Packages of measures and the particular role of supportive measures in MEAs

Trade measures are usually part of a package of measures that include non-trade measures (such as production/consumption quotas or information requirements) and supportive measures – often also called positive or compliance assistance measures – (like financial and technical support, training and technology transfer). In the end, it is the effectiveness and also the efficiency of the package, not only one measure (for instance, the trade measure) that is important. Furthermore, supportive measures are often linked to trade measures to mitigate their implementation and economic adjustment costs in developing countries. Supportive measures are recognition of the fact that non-compliance of developing countries is often the result of lack of compliance capacity (i.e. weak institutional, technical and managerial capacities), rather than lack of political will. Therefore, an unbalanced focus of the debate in the CTE and elsewhere on trade measures only is not in the interest of most developing countries.[12]

Positive measures[13] include technical assistance and capacity building as well as the provision of financial assistance, *inter alia* to help meet incremental costs in achieving international environmental goals set by

[8] For instance, the 1982 UN Convention on the Law of the Sea inter alia aims at sustainable use of marine living resources and protection of marine environment.

[9] Applying trade measures as "enforcement instruments" of MEAs is a special form of avoiding or discouraging leakage or free riding. Such measures might be authorized by the dispute settlement or enforcement mechanism of an MEA or may be taken pursuant to decisions by the COP. As will be explained later, they might be one of the sources of potential conflict with WTO rules and may also pose developmental problems for developing countries.

[10] For more information in this regard, see: Abdel Motaal, D., op.cit.

[11] Brack, D. and K. Gray, Multilateral Environmental Agreements and the WTO, research paper, presented to the IISD/RIIA Workshop on Trade and Sustainable Development Priorities Post Doha, London, 7-8 April 2003.

[12] Jha, V. and U. Hoffmann, Achieving objectives of multilateral environmental agreements: a package of trade measures and positive measures, UNCTAD/ITCD/TED/6, Geneva, 2000.

[13] Positive measures is a terminology that can lead to some misunderstandings as interpreting them as being the opposite of negative measures. This is a debate that will not be further developed in this paper, but the interested reader can refer to Vaughan, S. and Delhavi, A., Policy Effectiveness and Multilateral Environmental Agreements, UNEP, Environment and Trade Series, No. 17, Geneva. 1998.

MEAs. The term positive measures has been extensively used in post-UNCED analyses and intergovernmental deliberations in UNCTAD, WTO and the UN Commission on Sustainable Development. Positive measures include not only mechanisms to promote full participation and compliance on the part of all parties to MEAs, but also measures, which could be used to encourage a dynamic process of continuously improving environmental performance that might go beyond the obligations in MEAs.[14]

Positive measures have become an increasingly common feature of MEAs for several reasons. Whilst the environmental objectives of MEAs have received broad public support, it has been increasingly recognized that MEAs involve important economic and developmental issues, and that compliance costs may differ widely across developed and developing country parties, thus raising issues related to burden-sharing and equity. In this context, by attempting to give full consideration to principles such as equity and common but differentiated responsibilities, positive measures promote the participation and international cooperation needed for the implementation of MEAs.

There are several reasons for designing a package of positive/supportive measures that complements trade-related measures in MEAs:

- Divergent levels of development, technological profiles, market composition and trade intensities among developing countries.
- Lack of information on the underlying economics behind the use of trade measures.
- Lack of financial resources for investment in environmentally sound technologies and insufficient incentives for encouraging such investment.
- Overwhelming presence of the informal sector in developing countries with little technological and financial capacity.
- Trade measures might imperfectly address the root cause of the environmental problem in developing countries.

In discussions in the CTE, the issue of positive measures has emerged from two different perspectives:

- Positive measures can reduce or obviate the need for trade measures, by offering alternative policy instruments. Where trade measures are nevertheless deemed necessary, positive measures can be used as part of a policy package that takes account of the different interests of parties and that, wholly or partly, mitigates some undesirable effects of trade measures.
- Positive measures can be useful to handle the potential conflicts between efforts to promote the transfer of environmentally sound technologies under MEAs and multilateral trade rules on trade-related intellectual property rights (TRIPS) that might restrict such transfer on favourable terms.

In practice, most positive measures could not yet be used or invoked with the required vigour, mostly because of a lack of funding and the fact that they are not mandatory, although there are some success stories like the Multilateral Fund of the Montreal Protocol.[15] Inadequate funding hampers the effective implementation of the agreements, including the implementation-related support needed by developing countries and countries in transition. It should be kept in mind that a clause of reciprocity included in negotiations of MEAs could help developing countries to link their compliance with the MEA to the compliance of developed countries with specific commitments on positive measures. In fact, strict reciprocity was built into the UNFCCC, the MP and CBD, making the implementation of agreed obligations

[14] For more information in this regard, see the report of the UNCTAD Expert Meeting on Positive Measures to Promote Sustainable Development, Particularly in Meeting the Objectives of Multilateral Environmental Agreements, held in Geneva from 3 to 5 November 1997. The report of the Expert Meeting is contained in documents TD/B/COM.1/9 and TD/B/COM.1/EM.3/3 (Geneva, 11 November 1997), which can be downloaded from www.unctad.org/en/special/ c1em3d2.htm).

[15] The Multilateral Fund has so far disbursed more than US $ 1 billion to some 120 developing countries, i.e. arithmetically about US $ 9 million per country or almost US $ 1 million per country per annum. By way of comparison, the technical assistance trust funds of CITES and the Basel Convention for "all" developing countries have each oscillated around US $ 1.5 million per annum in recent years (to make the picture even more bleak, a considerable part of these funds has been used to fund participation of developing country delegates in meetings of the subsidiary bodies of the COPs of the two conventions). Even if all direct bilateral funding support for technical assistance and capacity building were added, the total annual budget for supportive measures has not been much bigger than US $ 2 million per annum for each of the two Conventions, translating into about US$ 17,000 per developing country party.

by developing countries dependent upon the effective implementation by developed countries of the financial co-operation and transfer of technology provisions (Art. 5.5. of MP, Art. 20.4. of CBD, and Art. 4.7. of UNFCCC).[16] However, the MP is the only MEA with trade measures that embeds the reciprocity principal.

In general, provisions on positive measures and their effective implementation could be a quid pro quo for entering into new commitments by developing countries. Whilst positive measures have not always been effectively implemented, innovative approaches to positive measures may be politically attractive in the light of their potential to reduce the costs of achieving the environmental objectives of an MEA. Innovative approaches focus on instruments or mechanisms that address specific interests and concerns of parties or stakeholders, make creative use of market-based policy tools and harness new sources of financing for positive measures. Innovative approaches include such mechanisms as partnership arrangements for funding and technology transfer, multi-stakeholder and integrated approaches, or tradable emission permits to promote the involvement of the private sector and civil society in achieving the objectives of MEAs.

Several MEAs with trade measures recognize that there may be compliance problems and costs, in particular for developing country parties. Various positive/supportive measures have therefore been incorporated to reduce such costs. It is thus very important for developing countries to be aware of their own needs and capacities in order to negotiate the conditions, including on positive measures, under which they will fully participate in MEAs and agree to the use of trade measures.

4. Enhanced differentiation among developing countries

Although trade-related measures or effects of MEAs are not per se discriminatory in nature, their effects and adjustment costs are not uniform but rather depend on the stage of development, technological profiles, trade intensities of countries as well as the relative weight of concerned sectors in the economy of an affected country. Distributional issues are at the origin of most conflicts when defining the burden-sharing of MEA obligations.[17]

The increasing differentiation among developing countries has a significant bearing on the selection, design and implementation of trade measures in MEAs. In the light of the different stages of development and industrialization, developing countries fall into a continuum of interest groups, with different developmental priorities. This needs to be duly reflected by MEAs in shaping instruments, including trade measures that are sufficiently flexible in accommodating different interests. For instance, faced with a severe lack of enforcement, technical and administrative capacities, stringent trade measures might be best suited for LDCs or small island developing countries to prevent the import or dumping of hazardous products or substances, whereas a more structured approach might be required for rapidly industrializing countries.

As regards different levels of industrialization, it also needs to be borne in mind that many rapidly industrializing countries have a profile of 'dynamic' sectors that differs very much from the post-industrialization stage of the economy in most developed economies. Several pollution-intensive sectors are among the most 'dynamic' in such developing countries, whereas they are 'sun-set' industries in many developed countries. In recent years, the environmental community in developed countries has targeted the reduction or removal of sources of pollution, including through the creation of MEAs, that are particularly problematic to meet by rapidly industrializing countries, such as in the areas of hazardous chemicals management. Although technological leap-frogging by developing countries might attenuate some adverse environmental effects, the structurally-different environmental requirements in developed and rapidly

16 For more information, see: Hoffmann, U., An analysis of effective operationalization of provisions on transfer of environmentally sound technologies to developing countries in Multilateral Environmental Agreements pursuant to Agenda 21, paper presented at the 2nd Workshop of the Project on Strengthening Research and Policy-making Capacity on Trade and Environment in Developing Countries, Los Banos, Philippines, 11-13 November 1999, accessible at www.unctad.org/trade_env/.

17 For more information in this regard, see: N. Castells and Ravetz, J., Science and policy in international environmental agreements – lessons from the European experience on transboundary air pollution, International Environmental Agreements: Politics, Law and Economics, Vol. 1 (2001), pp. 405-425. P. Nijkamp and Castells, N. Transboundary environmental problems in the European Union: lessons from air pollution, Journal of Environmental Law and Policy, Vol. 4 (2001) pp. 501-517.

industrializing (developing) countries are a potential source of concern that can lead to tensions over the objectives and tools of concerned MEAs.

One might argue that on the basis of effective national policy co-ordination, developing country parties should be able to articulate their specific needs or developmental priorities in the context of MEA negotiations. However, such attempts may run the risk of being misinterpreted by some developed country governments and Northern NGOs as derogation from the objectives of the MEAs or an attempt of creating loopholes in the agreements. Like other environmental accords, MEAs with trade measures should adapt their provisions over time to reflect such divergent needs through a combination of (i) revising certain too stringent or inflexible instruments; (ii) allowing more flexibility in existing tools; (iii) creating customized solutions for certain groups of countries; or by (iv) enhancing the quantity and/or quality of positive/supportive measures. Lack of dynamics in this regard might lead to tensions with WTO rules.[18] As a rule of thumb one can probably say that the lower the real value of supportive measures for developing country parties in MEAs with trade measures, the higher the need to allow for more flexibility elements in the accords to accommodate different developmental requirements and priorities.

III. ISSUES ARISING FROM THE WORDING OF THE DOHA MANDATE

The mandate in paragraph 31(i) of the WTO Doha Ministerial Declaration calls for negotiations on "the relationship between existing WTO rules and ***specific trade obligations set out in MEAs***. The negotiations shall be limited in scope to the applicability of such existing WTO rules as ***among parties to the MEA*** in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question". The text in paragraph 31(i) needs to be read in conjunction with parts of the provisions in paragraph 32, which stipulate that "the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, ***shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures***, ***nor alter the balance of these rights and obligations***, and ***will take into account the needs of developing and least-developed countries***" (emphasis added).[19]

1. The meaning of specific trade obligations set out in MEAs

From the wording above, it is obvious that the WTO Members did not have the intention to address under paragraph 31(i) the general relationship between trade measures for environmental purposes in MEAs and existing WTO rules.[20] Rather, negotiators selected the phrase "specific trade obligations". What does this mean?

Conceptionally, the box below, based on the EC submission to the first special session of the CTE[21], depicts the various groups of trade measures that have so far been taken and implemented under existing MEAs.

The reference to "*specific trade obligations*" in the Doha mandate seems to limit the negotiating mandate to provisions that are explicitly provided for and mandatory under MEAs, i.e. group one in the box above. All non-mandatory trade measures, non-trade obligations (e.g. labelling) and non-specific trade obligations in MEAs appear to be excluded.[22] This interpretation seems to acknowledge a distinction between specific trade

[18] As will be seen later, it is worth highlighting that several WTO panels have confirmed that it was the application of the trade measure and not the measure itself that needed to be closely examined.

[19] Ministerial Declaration of the 4th Ministerial Conference of WTO in Doha, WTO document WT/MIN(01)/DEC/1, 10 November 2001.

[20] As the general mandate of the CTE was renewed by the Doha MD, WTO Members can continue to discuss the general relationship under items 1 and 5 of the CTE work programme.

[21] European Communities, *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda*, submission to the first Special Session of the WTO CTE (TN/TE/W/1), 21 March 2002.

[22] See, for instance, the interpretation of Argentina, India, and the United States in their recent submission to the CTE (Argentina - TN/TE/W/2 of 23 May 2002; India – TN/TE/W/23 of 20 February 2003, and United States – TN/TE/W/20 of 10 February 2003.

measures, which are taken within an MEA and are mandatory, on the one hand, and trade measures taken by Parties *pursuant* to the MEA, i.e. consequential to the "obligation de résultat" of the MEA, on the other hand (often also referred to as "discretionary trade measures"). The latter can be, but do not necessarily have to be shaped by the MEA.

Clusters of Trade Obligations under MEAs

According to the European Communities, there are four clusters of trade obligations under MEAs:

1. Trade measures explicitly provided for and mandatory under MEAs.
2. Trade measures not explicitly provided for nor mandatory under the MEA itself, but consequential of the "obligation de résultat" of the MEA. This category covers cases, where an MEA identifies a list of potential policies and measures that Parties could implement to meet their obligations.
3. Trade measures not identified in the MEA, which has only an "obligation de résultat", but that Parties could decide to implement in order to comply with their obligations. In contrast to the previous category, the MEA does not list potential policies and measures so countries have greater scope as regards the exact nature of the measures they might decide to deploy to reach the objectives of the MEA.
4. Trade measures not required in the MEA, but which Parties can decide to implement if the MEA contains general provisions stating that Parties can adopt stringent measures in accordance with international law. In some cases, the MEA may explicitly recognize the right of Members to apply specific trade measures.

Although this categorization seems to be clear at first glance, some MEAs have STOs that might somewhat blur this line of demarcation. The Basel Convention, for instance, stipulates in Article 1.1.(a) specific categories and characteristics of waste that make an individual waste hazardous under the Convention, i.e. at multilateral level. However, Article 1.1.(b) adds to this list any waste that is defined as hazardous by the domestic legislation of the Party of export, import or transit. This implies that unilateral decisions on the definition of hazardous waste are automatically made part of the multilateral definition and the resulting STOs of the Convention at large.

Similarly, pursuant to Article XIV (1) of CITES, the Convention shall in no way affect the right of Parties to adopt (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.

Also at issue is whether decisions of the COPs of MEAs, which may contain STOs or further specify modalities or procedural aspects for the implementation of STOs, should form part of the mandate of the negotiations. Malaysia, in its submission TN/TE/W/29 concurs that the phrase "as set out" is significant in this regard. In Malaysia's view, only Annexes, Protocols and Amendments to MEAs adopted by parties and where they have been ratified by the broader membership would fall within the mandate of the negotiations. Conversely, decisions and resolutions of COPs that are not set out in MEAs are not an integral part of the MEA itself and therefore would fall outside the mandate. As of May 2003, the majority view in the CTE SS debate tends to be restrictive. COP decisions would only create STOs if (i) on their own, they create STOs in separate Annexes, Protocols or Amendments, subject to ratification by parties; and (ii) qualify modalities or procedural aspects or give interpretative decisions of STOs set out in the body of the MEA.[23]

Finally, WTO members differ on the specific scope of STOs. The US, for instance, includes in its definition of STOs all obligations set out in MEAs that had to be fulfilled for trade to take place, whereas India confines STOs to those obligations directly related to the actual trade.[24]

[23] See: WTO document TN/TE/R/6.
[24] Ibid.

2. Definition of MEAs covered under paragraph 31(i)

A number of WTO members, including several developing countries, have highlighted the need for defining the MEAs that fall under the mandate in paragraph 31(i), whereas some other countries argued that the definition of such MEAs was not required because the negotiating mandate was confined to relations among parties to MEAs, thus making the MEA-non-MEA relationship irrelevant. In the light of the large number of regional environmental accords, however, it does not seem illogical to define the MEAs falling under the negotiating mandate. India, Malaysia, Indonesia and Pakistan, for instances, suggested that such MEAs should (i) be negotiated under UN auspices; and (ii) have near universal participation, reflecting the diversity of UN and WTO membership in terms of geographical spread and stages of economic and social development (see WTO document TN/TE/R/6).

3. Party – non-Party nexus

Although conceptually the Party – non-Party nexus between MEAs and GATT/WTO is still valid, from a practical point of view, it seems to have lost much of its potential for a source of conflict in recent years in the light of the fact that membership of many MEAs has become nearly universal, often being equal or even higher than the number of WTO member countries. There is, however, the important issue of non-membership by the United States in a number of MEAs and the relatively high number of non-parties in one or the other MEA.[25] Several countries have articulated concern that the proliferation of Amendments, Protocols or Annexes to various MEAs, each of which being a self-contained legal instrument that requires ratification, not only keeps the Party – non-Party nexus alive, but might even make it more subtle and confusing.

The Doha negotiating mandate in paragraph 31(i) is clearly confined to the applicability of existing WTO rules as among parties to MEAs. Although in several MEAs, such as the Montreal Protocol, membership to Amendments, Protocols and Annexes is fragmented, this might not pose any legal problem for post-Doha negotiations. In fact, some countries might not wish to become Parties to specific provisions of an MEA, either temporarily or permanently, if these run counter to their interests and/or are too costly to implement.

4. Preserving the balance of rights and obligations

With reference to paragraph 31(i), paragraph 32 of the Doha Ministerial Declaration highlights that negotiations "shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the SPS Agreement, nor alter the balance of these rights and obligations".

This phrase, introduced mostly at the request of the United States into the Doha Declaration, implies that a number of principles for the use of trade measures for environmental/health purposes, specifically under the SPS Agreement, remain unchanged, irrespective of the outcome of the negotiations on paragraph 31(i). This primarily concerns some criteria explicitly mentioned in Article 5 of the SPS Agreement. They include:

- The evaluation of risk based on risk assessment techniques developed by relevant international organizations;
- Assessment of risk should be based on scientific evidence;
- Risk assessment should take into account relevant economic factors to assure cost-effectiveness;
- Measures should be not more trade-restrictive than required to achieve the appropriate level of environmental/health protection;
- Provisional adoption of a measure in cases where relevant scientific evidence is insufficient. This procedure is however subject to seeking additional information for more objective assessment of the risk and subsequent review of the measure within a reasonable period of time.

The importance of these issues for developing countries is further elaborated on in section VII. 2. below.

[25] Apart from some recent MEAs, there are also some older environmental accords, to which a good number of WTO members are non-Parties. For instance, more than 20 WTO members are currently non-Parties to the Basel Convention.

IV. RESULTS OF THE CTE DISCUSSION ON THE MEA – WTO RELATIONSHIP

1. Overview

Discussions in the CTE in recent years have clarified a number of points:

- The importance of increased transparency of trade measures applied pursuant to an MEA was highlighted.
- Governments confirmed their engagement stated in Principle 12 of the Rio Declaration that environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.
- It was recognised that trade measures based on provisions explicitly agreed to might be necessary in certain cases to achieve the environmental objectives of an MEA, more particularly when trade is directly linked to the source of the environmental problem.
- It was also noted that when a genuine consensus exists among Parties to an MEA to apply between themselves trade measures expressly prescribed, there should be no dispute among them regarding the use of those measures.

The CTE has also made some recommendations to avoid disputes:

- The coordination of policies between trade and environment officials at the national level should be encouraged;[26]
- Increased cooperation between the WTO and the appropriate bodies of MEAs was considered useful;
- Members of the WTO should attempt to resolve conflicts concerning the use of trade measures for environmental purposes through the dispute settlement mechanisms provided by the MEAs. The improvement of compliance and dispute settlement provisions in MEAs would encourage the settlement of these disputes in the context of the MEAs;
- With respect to the implementation of MEAs by developing countries, the role and importance of compliance assistance mechanisms (also known as facilitating, supportive or positive measures), in conformity with the principle of common but differentiated responsibility, was stressed.
- Non-conformity of a developing country party with MEA obligations was rarely due to a deliberate policy of such party, but rather the consequence of a lack of national administrative, economic and technical capacities. It was therefore appreciated that the recent evolution of MEAs had placed more emphasis on facilitating and compliance assistance measures, rather than on dispute settlement measures.[27]
- From an economic perspective, multilateral measures within an MEA may reduce unnecessary economic and trade effects by harmonizing the basket of instruments, thus preventing a proliferation of different national rules.

UNEP and MEA secretariats, in turn, have emphasized that there is a need for cooperative thinking on the part of the various national-level agencies and departments, as a prerequisite for more coherent international policy making. UNEP and MEA secretariats have also identified the need to broaden the debate to explore the numerous available synergies, believing that a more practical approach focusing in greater detail on concrete examples is desirable. This could provide the basis for a more positive and pro-active engagement among the trade and environment communities, particularly in relation to the crafting and use of supportive measures such as technical assistance and capacity building.[28] UNEP hopes that the mandate in paragraph 31(ii) of the Doha MD fostering regular information exchange between the CTE and MEAs will be very helpful in this regard.

[26] Despite the opposition in WTO, which developing countries have expressed to the use of trade measures against non-parties, and their reluctance to provide a blanket WTO waiver to trade measures among parties in MEAs, many developing countries have been "demandeurs" for such measures in environmental forums. For more information, see: Abdel Motaal, D., op.cit.

[27] Several information sessions organized by the CTE with the secretariats of the MEAs have recently noted that the focus should be on developing mechanisms to assist parties to comply with the obligations in a flexible and non-confrontationist manner.

[28] UNEP, *Enhancing synergies and mutual supportiveness of MEAs and the WTO - A synthesis report*, submission to the CTE (WT/CTE/W/213), 12 June 2002.

2. Proposals made in the CTE on clarifying the relationship between trade measures in MEAs and WTO rules

2.1. Pre Doha proposals

Since the creation of the CTE in 1995, WTO members have tabled a whole range of proposals on how to address the WTO/MEA relationship.[29] Some have argued that the problem was only theoretical, since no single dispute over trade measures in an MEA had actually come to the WTO for settlement and, therefore, there was no need, at that stage, to change WTO rules to accommodate MEAs. According to this position, the current rules already provided countries with sufficient scope to protect the environment. This was defined as the "status quo" approach and it appears that the vast majority of WTO members, including many developing countries, favour this position.

Another group of countries supported what was called a "soft accommodation" approach aimed at increasing the compatibility of environmental agreements with WTO rules. According to this position, there is no need to amend WTO rules to take MEAs into account, but cases of conflict can be addressed by, for instance, waiving, on a case-by-case basis, WTO obligations in order to cover specific trade measures taken pursuant to an MEA, or by developing guidelines for WTO dispute settlement bodies or for MEA negotiators to assist them in the selection of WTO-consistent trade measures to be included in the agreement.

A small group of countries, namely the European Community and Switzerland, supported a "full scale accommodation" approach, whereby WTO rules should be changed to explicitly allow for the use of trade measures by members pursuant to MEAs, so as to give environmental policy makers the certainty and predictability that their regimes would not be overturned in the WTO.

Finally, according to a fourth approach, the burden of accommodation should shift to the MEAs themselves. MEA provisions should be modified on the basis of certain citeria with a view to enhancing clarity and making sure that trade measures are not more trade-restrictive than required to achieve MEA objectives and thus be WTO compatible. This position was advocated by Canada and New Zealand, and also enjoyed considerable support among developing countries.

2.2. Post Doha proposals

A good number of proposals have been submitted after the DMC, dealing with both substantive and procedural aspects of the negotiating mandate in paragraph 31(i).[30] A large number of proposals supported the idea of a "bottom-up" approach, proposed by Australia (TN/TE/W/7), that consisted of three phases: (i) identification of specific trade obligations and WTO rules that are relevant to these obligations; (ii) exchange of experience on these provisions, including information exchange with MEA secretariats (in this phase it will be important to identify any real issues/problems encountered in implementing specific trade obligations as opposed to discussing theoretical or hypothetical scenarios); and (iii) discussion of matters arising from the work undertaken in phases one and two, and focus on the outcome of the negotiations. Based on this approach, it was proposed for 2003 to review at more length specific trade obligations in three MEAs:[31] the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal

[29] For more information, see: WTO secretariat, MEAs and WTO rules: Proposals made in the CTE from 1995-2002 (TN/TE/S/1), 23 May 2002.

[30] For an overview of submissions, see WTO document TN/TE/S/3 as well as the Report by the Chairperson of CTE Special Session in document TN/TE/3 of 2 December 2002. There are also two more recent submissions by Canada (TN/TE/W/22), India (TN/TE/W/23) and the United States (TN/TE/W/20).

[31] This was proposed by Brazil, New Zealand, Peru, Thailand and the Philippines. Peru and the US favoured an analysis of six MEAs that would add the Rotterdam Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention), the Cartagena Protocol on Biosafety (Biosafety Protocol), and the Stockholm Convention on Persistent Organic Pollutants (POPs Convention). Summary Report on the 6th Session of the CTE Special Session, WTO document TN/TE/R/6. It should be noted in this context that the Biosafety Protocol has meanwhile been ratified by 50 countries and will enter into force on 11 September 2003.

Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), and the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes (Basel Convention).

A second group of proposals favoured a "top-down" approach, advocated by the EU and Switzerland.[32] This would include discussions on (i) issues of scope and definition of specific trade obligations; (ii) the development of certain principles to address the WTO-MEA relationship; (iii) dialogue with MEAs; and (iv) the development of options or solutions. Some delegations suggested that the two approaches were not mutually exclusive and could be pursued in parallel.

Judging on the results of CTE discussions as of May 2003, it seems that the proposed "bottom-up" approach has garnered more support than the "top-down" one and will therefore be implemented in 2003. This does however not rule out that some discussion on general principles on and conceptual/definitional approaches to the relationship between WTO rules and STOs of MEAs will take place in parallel or as a result of the "bottom-up" analysis. Many countries seem to sympathize with the Indian position, however, suggesting that the outcome of negotiations should be based on an exchange of concrete implementation experience.[33]

V. THE MOST IMPORTANT SOURCES OF POTENTIAL CONFLICT

Based on UNCTAD's analytical and capacity-building activities on assisting developing countries in meeting objectives of MEAs with trade measures without jeopardizing developmental priorities[34] and an elaborate OECD analysis of experience with the use of trade measures in three MEAs (CITES, the Montreal Protocol and the Basel Convention) during the period 1996 – 1999[35], in which UNCTAD and UNEP actively participated, the following causes for potential conflict can be identified:

First, some of the trade measures in MEAs seem to lack clarity and therefore may introduce ambiguity that could be interpreted as an unjustifiable situation under WTO rules. Clear definitions and technical benchmarks, based on appropriate scientific information are therefore very important. This of course also raises the issue of the relationship between a precautionary approach and risk assessment and any reconciliation of these by other approaches than the one contained in Article 5 of the SPS Agreement as outlined above.

Second, in the light of the increasing differentiation among developing countries, “one-size-fits-all” trade measures in some MEAs are no longer up-to-date. Such weakness can either be addressed by reshaping the concerned trade measure or by introducing more flexibility when it is used in its current form.

Third, even if a specific trade measure were regarded by a developing country party to an MEA to be inappropriate, the effect of such measure could be countered by sufficient supportive measures. However, as mentioned in section II.3. above, unlike trade measures, with very few exceptions, supportive measures are not mandatory in MEAs. Also, there is only limited reciprocity between compliance of developing countries with MEA obligations and compliance of developed countries with commitments on supportive measures. Furthermore, the volume and effectiveness of supportive measures in most MEAs are insufficient.

Fourth, in adopting specific trade measures, in particular of a drastic nature such as bans, insufficient attention has been placed on understanding the underlying economic and social implications. This is of particular importance in cases, where MEAs touch upon economically important resources (such as the Montreal Protocol or Basel Convention) and vital for agreements, such as UNFCCC and the Kyoto Protocol, which are widely interpreted to be environmentally-motivated economic accords. For instance, some measures might lead to pushing undesirable activities from the formal into the informal sector or encourage illegal international trade. Although the environmental problem might therefore disappear in the official statistics, in reality it may become more severe.

32 WTO documents TN/TE/W/1, TN/TE/W/4 and TN/TE/W/16.
33 See: Summary Report of the 6th Meeting of the CTE SS, WTO document TN/TE/R/6.
34 Inter alia see: Jha, V. and U. Hoffmann, op.cit.
35 OECD, *Trade measures in Multilateral Environmental Agreements: Synthesis report of three case studies (Basel Convention, Montreal Protocol and CITES*), COM/ENV/TD(98) 127/FINAL, Paris 1999.

Lastly, insufficient or poor national policy coordination between trade, industry and environment ministries has been advanced as one key cause for potential conflict between trade measures in MEAs and WTO rules.[36] In this regard, the question arises, however, whether this is a procedural or substantive issue. The latter is basically reflective of the four issues mentioned above. In short, developing countries need to carefully analyse the environmental and developmental implications of proposed specific trade obligations in the light of their environmental absorptive capacities, developmental priorities and capacity-building needs. New obligations should only be agreed to if they are clear, have a beneficial effect on sustainable development, and do not siphon away resources from other, much needed areas.

In summing up, one can probably establish the following general rule: The higher the flexibility of a currently used trade measure in an MEA and the more important the supportive measures made available, the less the likelihood that a developing country party challenges such trade measure. In other words, the effectiveness of trade measures and their efficiency in meeting the stated environmental objective of the MEA will significantly depend on (i) the flexibility mechanisms, both enshrined in the accord and further developed by the MEA parties over the years, and (ii) the provision of effective supportive measures for developing countries. Both clusters of mechanism can assure that divergent environmental, economic and social conditions and resulting priorities and interests of Parties, notably developing countries, will be taken into account and that trade measures thus do not jeopardize developmental goals. A clear definition of trade measures alongside the use of objective, science-based criteria for their use are also important to assure effectiveness and efficiency of the trade measures in MEAs and avoid the risk that such measures are regarded as arbitrary and/or unjustifiably discrimination or a disguised form of protectionism.

SOME GENERAL CONCLUSIONS FROM THE WTO DISPUTE SETTLEMENT PRACTICE

Related to GATT Article XX

Article XX contains limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. Therefore, a party invoking an exception under Article XX has to prove that, first, the inconsistent measure has a provisional justification under one of the explicit exceptions figuring in Article XX; and second that further appraisal of the same is required under the introductory clause of Article XX.

There has been some evolution in the interpretation of the necessity requirement of Article XX (b) – protection of human, animal or plant life or health – and (d) – securing compliance with laws or regulations that are not inconsistent with the provisions of the GATT 1994. The interpretation has evolved from a least trade-restrictive approach to a less trade-restrictive one, supplemented with a proportionality test (i.e. a process of weighing and balancing a series of factors).

The chapeau of Article XX contains three standards to be tested: (i) arbitrary discrimination; (ii) unjustifiable discrimination; and (iii) a disguised restriction on international trade. Several panels confirmed that it was the application of the measure and not the measure itself that needed to be examined.[1] As regards the arbitrary and unjustifiable discrimination of a measure, panels have accorded special attention to the flexibility in the application of the concerned measure. The more rigid and inflexible the application, the higher the likelihood that the measure is regarded arbitrary and unjustifiable. As regards a disguised restriction of a measure, three criteria have been progressively introduced by panels and the Appellate Body in order to determine whether a measure is a disguised restriction on trade: (i) the publicity test; (ii) the consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination, and (iii) the examination of the design and architecture of the measure at issue.

Compiled from: WTO document WT/CTE/W/203 of 8 March 2002.

1) The recent shrimp-turtle case, for instance, suggests two conclusions on the extraterritorial application of environmental regulation. First, such application is permissible if it is implemented in the context of an international agreement such as an MEA. Second, such measures need to be applied in a transparent, predictable and uniform way to all WTO members.

[36] For more information in this regard, see: Abdel Motaal, D., op.cit.

VI. A BRIEF ANALYSIS OF SPECIFIC TRADE OBLIGATIONS, FLEXIBILITY MECHANISMS AND SUPPORTIVE MEASURES IN THREE MEAS (CITES, THE MONTREAL PROTOCOL AND THE BASEL CONVENTION), WITH PARTICULAR EMPHASIS ON THE BASEL CONVENTION

This part mainly focuses on the STOs, flexibility mechanisms and supportive measures of the Basel Convention. To evaluate the results of the analysis, however, it was felt more helpful to put them into context and compare the results for the Basel Convention with the picture one can observe in CITES and the Montreal Protocol.[37]

1. CITES

The key objective of the Convention is to alleviate stress on endangered species arising from one source, namely demand pressures transmitted through international trade. CITES is not supposed to deal with other pressures on endangering species such as (i) loss of natural habitats (from e.g. land conversion); (ii) introduction of new species; (iii) over-exploitation of species caused by domestic commercial and subsistence use; and (iv) pollution and global environmental change.

A significant problem for CITES is that generally the direct role of trade in species extinction is less pronounced than the other factors, particularly habitat loss and domestic commercial as well as subsistence use. Therefore, it is often difficult to establish a direct causal link between species extinction and international trade. This results in real or potential conflicts between the environment and trade communities of CITES in deciding on the listing and/or down-listing of species in the Convention.

CITES has a number of trade measures that could qualify as STOs:

- Art. II (4) prohibits trade in specimens of species listed in Appendices I, II, and III, [38] except in accordance with the Convention.[39]
- Art. III regulates all trade in specimens of species listed in Appendix I.
- Art. IV (1) – (6) regulate all trade in specimens of species listed in Appendix II.
- Art. V regulates all trade in specimens of species listed in Appendix III.
- Art. VI (1) – (6) governs permits and certificates related to trade.
- Art. VIII (1) (a and b) and (6) that contain measures to enforce the Convention to prohibit trade.[40]

In addition, as already mentioned above, Article XIV (1) of the Convention stipulates that it "shall in no way affect the right of Parties to adopt (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III. This provision leaves considerable discretion to Parties in implementing the trade provisions of the Convention.

CITES has a number of flexibility elements that can be applied to enhance the effectiveness and efficiency of trade measures:

[37] These three MEAs were selected for further review, because (i) they have a range of specific trade obligations; (ii) are sufficiently old for allowing analysis for a reasonable period of time; and (iii) have further developed trade and supportive measures over the years in response to national and international requirements.

[38] Appendix I lists species, for which no commercial trade is allowed. Appendix II contains species, for which commercial trade is allowed, but under close scrutiny, e.g. subject to export, import, and re-export permits. The Convention also has an Appendix III that lists species, which are threatened by international trade in some countries only.

[39] Malaysian, in its submission TN/TE/W/29, does consider this provision as a principle rather than an operative provision, which in its view does therefore not qualify as STO.

[40] Depending on the narrow or wide definition of STOs, Art. VIII (3), (4) and (7) could also qualify as STOs.

- The down-listing of species from Appendix I to Appendix II is based on consensus or a two-third majority vote.
- (Not in the Convention, but recently developed) national export quotas for a limited amount of trade of Appendix I-listed species (this allows a distinction between national populations that are more sustainably managed than others).
- Limited flexibility for international trade in Appendix I species through an exception, called ranching – CITES-registered farms receive treatment of Appendix II-listed species for international trade (ranching has also led to some general down-listing of species).
- The possibility for a party to make a reservation to a decision on listing of a particular species. The party will then be considered as non-party for this species, but can trade with other non-parties or parties that also made a reservation (for instance, between Thailand and Japan for the Clouded Monitor lizard).
- Treatment of non-parties as parties and therefore lifting of trade restrictions if non-Parties have (i) a similar administrative infrastructure, and (ii) require a CITES comparable permit and certification system.
- The option under Art. 14 of CITES to allow importing or exporting parties to take stricter domestic measures on any species.
- The option of a "zero export quota" for species recently down-listed from Appendix I to Appendix II.

Conversely, CITES has very few supportive measures, mostly training and technical assistance. Relative to the needs of customs authorities in developing countries, the Convention generally provides insufficient, unreliable and sporadic financial and technical support. In recent years, the CITES secretariat only had about US$ 1 million available for training and technical assistance annually.

With few exceptions, it has been difficult to attribute conservation success to trade measures. Many examples show that it is not just the banning or restriction of international trade per se that generate the conservation effects (CITES listing draws attention to problems, raising public awareness and generating broader public and NGO responses), but the total response these actions generate.

Unlike the Basel Convention, a significant number of Parties have resisted attempts of listing commercially important fish and timber species in Appendix II, because of the higher risk of trade friction and uncertainty over whether such listing would hamper international trade.[41] Recently, many parties have emphasised that CITES should find solutions to individual problems in specific countries, rather than promote blanket global prohibitions.

A potential area of tension with WTO rules is the practice to use trade measures against non-complying Parties as enforcement instrument by, for instance, temporarily suspending all trade in CITES-listed species of specific parties that fail to demonstrate within a certain time period that they adopted all necessary measures to adequately implement the Convention. Although there is no specific Article in the Convention on compliance or non-compliance[42], CITES measures to ensure compliance derive from a set of procedures and mechanisms approved by the parties.[43] Decision 11.15 of COP XI in April 2000, for instance, stated that the secretariat brought to the attention of parties that four countries (Fiji, Turkey, Viet Nam and Yemen) had high volumes of international trade in CITES-listed species and that their national legislation was believed not to meet the implementation requirements of CITES. It was proposed that these countries should be given till 31 October 2001 to (i) adopt adequate legislation; or (ii) request technical assistance from the secretariat to prepare such legislation; and (iii) should report on related progress to the secretariat no later than 30 April 2001. Decision 11.16 of COP XI asked all parties to suspend trade in all CITES-listed species with the four countries in question as from 31 October 2001, if, in spite of assistance, these countries would not adopt the

[41] The recently adopted decision to list Bigleaf Mahogany in Appendix II is unlikely to change this situation significantly.

[42] Decisions by the Standing Committee of CITES on non-compliance cases have usually been taken pursuant to Art. VIII and IV.3.

[43] It should be noted that COP decisions are usually not mandatory and the COP is not expressly authorised to impose legally binding obligations on Parties through decisions; exceptions, however, exist, such as the adoption of annexes (or amendments to annexes). For more information, see: Xueman Wang, Specific trade obligations and the Biosafety Protocol, Bridges, Vol. 7, No. 4 (May 2003), pp. 16-18.

required legislation.[44] A total of 37 countries have been subject to such approach and 17 countries have faced general CITES or species-specific trade bans. The most prominent cases among developing country parties concerned Bolivia, Paraguay, UAE and Thailand.[45]

Some argue that there is no credible alternative to such use of enforcement measures and that the mere threat of a multilaterally agreed recommendation to suspend trade, coupled with domestic pressure from the trade community impacted by the suspension, often raises the level of political attention and results in a quick governmental response to control trade.[46] Conversely, one can argue that concerned developing countries are hardly ever failing to comply with the Convention because of unwillingness. Rather, lacking capacity and resources are often the pivotal cause. Against this background, supportive rather than suppressive measures would be more adequate. However, the "armoury" of supportive measures of CITES is small, which makes difficult the balancing of burdens and offsets. Moreover, the threat or the use of trade measures against non-complying (developing country) Parties causes significant direct and indirect adjustment costs that may lead to a crowding out of much needed resources for social and other purposes of higher developmental priority.

2. The Montreal Protocol

The Montreal Protocol is an international legal instrument of the Vienna Convention for the Protection of the Ozone Layer of 1985. It consists of five separate treaties (the Montreal Protocol, that entered into force in 1988, the London Amendment of 1992, the Copenhagen Amendment of 1994, the Montreal Amendment of 1999 and the Beijing Amendment of 2002). In the Montreal Protocol, trade measures are supplementary to the phase-out schedules of ozone-depleting substances (ODS).

The Vienna Convention and the Montreal Protocol only explicitly require bans on trade of ODS and ODS-containing products between parties and non-parties to the treaties. There are however some other measures that also concern trade among parties:[47]

- Implicit control of trade between parties through the formula for calculating ODS consumption: production + import - export (export and import of used/ recycled ODS are not included in consumption as recovery obviates the need for new ODS).
- A recently agreed licensing system for ODS trade among parties to combat illegal ODS shipments.
- A recently adopted export ban on used and recycled ODS for parties in non-compliance.
- Voluntary notification by a Party of ODS-containing products it does not want to import.
- Decision XIV/7 of MoP 2002 introduced a reporting provision for proven cases of illegal trade.[48]

Similar to CITES, the Montreal Protocol is equipped with an enforcement mechanism that provides an institutional and legal basis to order trade sanctions against violators. For instance, in Annex IV[49] of the Montreal Protocol, entitled “Non-compliance Procedure”, an Implementation Committee was established in order to supervise the national implementation of the Protocol. According to paragraph 9 of the Annex, the Committee shall report to the MOP of the Protocol, including any recommendations it considers appropriate. Then, based upon the report, the Parties may decide upon and call for necessary measures to enforce full compliance with the Protocol. To avoid controversy and confine the extent and content of the measures the

44 Decisions on-line accessible at www.cites.org/eng/decis/11/15-12.shtml.

45 Marceau, G. and A. González-Calatayud, The relationship between the dispute mechanisms of MEAs and those of the WTO, in: Heinrich Böll Foundation/Woodrow Wilson International Center for Scholars/National Wildlife Federation, Trade and environment, the WTO, and MEAs – Facets of a complex relationship, Conference Proceedings, Washington, DC, 29 March 2001 and Reeve, R., Policing international trade in endangered species: the CITES treaty and compliance, Royal Institute of International Affairs, London, 2002.

46 Brack, D. and K. Gray, op.cit. and Vasquez, J. and M. Yeater, Demystifying the relationship between CITES and the WTO, Review of the European Community and International Environmental Law (RECIEL), Vol. 10 (2001), pp. 271-276 274.

47 For an in-depth description of the trade provisions, see: Brack, D., International trade and the Montreal Protocol, Royal Institute of International Affairs, London, 1996.

48 The same decision also encouraged Parties to use economic incentives to promote ODS substitutes. Such incentives should not impair international trade and be appropriate and consistent with international trade law.

49 According to Article 10, paragraph 1 of Convention for the Protection of the Ozone Layer, “The annexes to this Convention or to any protocol shall form an integral part of this Convention, … ”.

Parties may take, Annex V of the Protocol sets up a list of measures in a straightforward manner. Apart from non-coercive and incentive means, in paragraph C of the Annex, suspension of trade is clearly specified. This provision has however not yet been invoked.

The Montreal Protocol has the following flexibility mechanisms:

- A grace period of ten years (or more in some cases) for developing country parties.
- A reciprocity provision in the core Convention that relates developing countries' capacity for fulfilling obligations to the effective implementation of the provisions on financial co-operation and transfer of technology by developed country Parties (Art. 5.5.).
- Developed countries can exceed their ODS production limit by 10-15 per cent to meet the basic domestic needs of developing countries during their phase-out period.
- ODS production can be permitted for other "essential or critical uses" (for instance, methyl bromide for pest and disease control and its related use for quarantine and pre-shipment purposes is currently exempted from controls).
- Trade restrictions do not apply to a non-party if the Meeting of the Parties determines that the non-party is in full compliance with the control measures and has provided data to this effect (this is very important for the Protocol in light of the number of separate agreements it covers and their separate ratification requirements).
- Until the first control measures took effect,[50] ODS producing developing countries were exempted from any export restraints to assure adequate and quality supplies of ODS for other developing countries at fair prices, avoiding monopolistic market structures.

Regarding supportive measures, a "Multilateral Fund" was created to meet the "agreed incremental costs" of ODS phase-out in developing countries on the basis of a specific list of categories of incremental costs. The Multilateral Fund covers costs for technology transfer or domestic development of ODS substitutes; equipment needed and its installation costs; and training. The fund has so far disbursed more than US $ 1 billion to almost 120 developing countries. This investment has supported about 2000 projects to phase out some 60 per cent of ODS consumption in developing countries. The Multilateral Fund has therefore roughly disbursed some US$ 9 million per developing country in the 1990s or almost US$ 1 million per country per annum. By way of comparison, the latter figure is almost equivalent to the total annual technical assistance provided by CITES or the Basel Convention to developing countries.

3. The Basel Convention

The Basel Convention regulates international trade in hazardous waste. The Convention aims at (i) reducing the generation and transboundary movement of hazardous wastes in terms of their volume and hazardousness; (ii) disposing hazardous wastes as close as possible to their source of generation; (iii) preventing illegal traffic; and (iv) prohibiting shipments of hazardous wastes to countries that lack the legal, administrative and technical capacity to manage them in an environmentally sound manner.

One of the key challenges for the Convention is the fact that while many hazardous wastes represent an undesirable fallout of industrial production and other human activity that needs to be safely disposed of, there are also some wastes that are or can become valuable secondary material through recovery operations and are thus in demand as commodities. For reasons of energy, resource or process efficiency, the use of such secondary material (lead scrap being a prominent example) is generally more cost-efficient than the use of primary material and thus in high demand, including from developing countries.

The Convention initially confined the regulations of international trade in hazardous waste to a "Prior Information and Consent" (PIC) approach. Subsequently, the second and third COPs adopted the so-called Basel Ban Amendment that supplements, on the one hand, and significantly revises, on the other hand, the original PIC approach. According to the Ban Amendment (also known as COP decision III/1), all

[50] It needs to be mentioned that the control measures of the Montreal Protocol for Article 5 countries (i.e. developing countries) for a first group of ODS (i.e. CFCs, halons and methyl bromide) became effective in 2002 for the first time. It will therefore have to be seen some time later whether the trade measures pose serious adjustment problems for some of these countries.

international shipments of hazardous waste for final disposal and re-use, material recovery or recycling are banned from Annex VII countries (i.e. members of OECD, EC and Liechtenstein) to all other countries.

The original Convention contains the following trade measure that might eventually be considered STOs:

- Arts. 3(1) and 3(2) require reporting on national definitions of hazardous wastes and requirements concerning transboundary movements;
- Arts. 4(1), 4(2)(e), 4(2)(f), 4(2)(g), 4(6), 4(7), 4(8), 4(9) and 4(10) set out specific obligations regarding the transboundary movement of hazardous waste;
- Arts. 6(1), 6(2), 6(3), 6(4), 6(5), 6(9) and 6(10) outline the modalities for transboundary movement of hazardous wastes (some of these modalities may not qualify as STO);
- Art. 8 governs the duty to reimport;
- Art. 9(2) sets out obligations for the repatriation of illegal waste;
- Arts. 13(2), 13(3)(a) and 13(4) elaborate on procedures for the transmission of information.[51]

It is important to note that the Basel Convention has succeeded in significantly reducing waste trafficking from developed countries notably to the less and least developed countries. Although precise data in this respect is scarce, reported cases of waste trafficking have recently become very rare. Also, the Convention has pioneered a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal.[52]

The Convention, however, has also a number of conceptual and definitional deficiencies:

- The key underpinning of the Convention and the Ban Amendment is the concept of Environmentally Sound Management of Hazardous Waste (ESM). Existence or lack of ESM in a target country is the lynchpin for allowing or preventing hazardous waste exports to this country. However, the Convention has not yet developed any practical mechanism for implementing ESM, based on clear, science-based criteria.[53] Because the concept of and requirements for ESM are so pervasive in the Convention, it is likely that shipments of Basel wastes to facilities without ESM are a priori illegal. However, the Convention does not specify the manner or the extent to which the state of export must verify ESM. Furthermore, the Convention takes for granted that "all" developing countries will never achieve ESM although today some have already done so.[54]
- The term hazardous waste is not clearly defined in the Convention. It concerns categories of waste in Annex I that need to exhibit one of 13 hazardous characteristics in Annex III, without surpassing any threshold or requiring a risk assessment. This shortcoming has partly been overcome by creating Annex VIII, which contains a list of specific wastes that, from a multilateral point of view, are considered hazardous under the Convention. Some ambiguity however remains. On the one hand, the

[51] Malaysia, in its submission TN/TE/W/29 does not consider the following provisions as STOs: Art. 3, 4.1(a), 4.2 (a-d), 4.2 (a-d), 4.2 (e-f), 4.7(b), 6.4, 6.9, and 6.10.

[52] This is only the second of its kind and might be the first that has a real chance of entering into force (however, only 13 Parties signed the Protocol and no Party has so far ratified the Protocol; 20 ratifications are required for the Protocol to come into effect).

[53] Article 4 (8) of the Convention stipulates that "technical guidelines for the environmentally sound management of wastes subject to this Convention shall be decided by the Parties at their first meeting". This has however not ushered into a decision on an operational definition of ESM. Rather, in decision 13 of COP II, Parties adopted a Framework Document on the Preparation of Technical Guidelines for ESM of Wastes Subject to the Convention. This document has however only launched a series of Technical Guidelines for ESM of so far about 15 specific waste streams, such as clinical/medical wastes or used lead-acid batteries. Legally, these are "descriptive" guidelines, which create no entitlement to receive imported waste from developed countries under the Convention. In other words, the vague legal status of the Guidelines implies that any facility in a developing country, which can provide evidence of fully meeting the Guidelines for a specific hazardous waste, will not be considered ESM compatible under the Convention and thus is not entitled to receive waste shipments from developed countries. This, however, is contrary to the original intent of Article 4(8). For more information, see: Alter, H., Environmentally sound management of the recycling of hazardous wastes in the context of the Basel Convention, Resources, Conservation and Recycling, Vol. 29 (2000), pp. 111-129.

[54] For instance, the world's most sophisticated lead recycling facility is in Malaysia, operated by Metal Reclamation Industries. Another lead recycling facility in the Philippines, operated by Philippine Recyclers Inc., is in the very small league of world metal recycling companies that obtained ISO 14001 certification (in this case by SGS in Switzerland).

list in Annex VIII contains a good number of so-called "mirror items", i.e. wastes that are listed in Annex VIII and Annex IX (the latter comprising wastes that are not characterized as hazardous under the Convention), such as electrical and electronic scrap. This has already led to some ambiguity and disputes. On the other hand, while Annex IX is supposed to list wastes that are considered non-hazardous at multilateral level (i.e. based on Article 1.1.(a) of the Convention), Article 1.1.(b) gives the discretion to individual Parties to nationally add items to the ones in Annex VIII or redefine items as hazardous or subject to specific treatment in Annex IX. This not only leads to considerable discrepancies between existing lists, but also creates uncertainty for trade flows.

- The BC defines disposal of hazardous waste as including both "final disposal" and "re-use, recovery and recycling" of material contained in the waste. Unlike CITES, this affects a number of commercially important secondary materials in international trade such as lead and zinc scrap as well as precious and non-ferrous metals contained in waste electrical and electronic assemblies.
- The BC implicitly assumes that there is a propensity for developed countries to dump hazardous waste in developing countries (i.e. that transboundary movements would only be supply-induced). The actual demand of developing countries, in particular in rapidly industrializing countries with high material intensity of economic growth, for recoverable material is insufficiently recognized. Art. 4.9.(b) of the original Convention allows movements of hazardous waste if required as commodity input. The Ban Amendment, however, overruled this provision. Most of the hazardous waste trade between developed and developing countries as well as among developing countries is destined for material recovery/recycling and is overwhelmingly demand-, rather than supply-induced.[55]
- Although the main thrust of the Convention is the minimization of transboundary movements of hazardous waste, over time, several stakeholders, in particular some NGOs, have increasingly emphasized waste avoidance and miminization as a prime objective. Although trade restrictions might lead to some internalization of environmental costs and thus encourage waste minimization and avoidance, they are not the most effective and efficient policy instrument, and can only play a supplementary role to other economic instruments that directly influence efficient use of material/resources.

In addition to shortcomings in the core Convention, the Ban Amendment has added a number of other provisions that lack clarity:

- The Ban Amendment provides for a multilateral export ban of hazardous waste from Annex VII to non-Annex VII countries. However, there is an arbitrary definition of Annex VII countries, which include members of OECD, EC and Liechtenstein, and a noticeable absence of any objective criteria (other than becoming a member of OECD or EC[56]) for joining the Annex.
- The status of Art. 11 agreements with non-Parties that meet Convention-comparable criteria is unclear under the Ban Amendment.

Although the Ban Amendment is not yet in force,[57] shortly after its adoption, the European Community has revised its regulation on exports and imports of hazardous waste with a view to implementing the Ban Amendment.[58] Therefore, interested developing countries, such as India, Malaysia, the Philippines or Thailand, have been unable to import hazardous waste destined for recovery operations in accordance with Article 4.9(b) of the Convention.

Supportive measures in the Convention are largely insufficient. The BC does not have a proper financial mechanism or access to the Global Environment Facility. Technical assistance funds total only about US $ 1.5 million per annum for all developing countries. The regional and sub-regional centres for training and

55 A recent review of the Basel Convention Secretariat reveals, for instance, that, in volume terms, shipments of lead, copper and zinc scrap alone accounted for about 70 per cent of global hazardous waste trade. Wielenga, K., Global trends in generation and transboundary movements of hazardous wastes and other wastes: analysis of data provided by Parties to the Secretariat of the Basel Convention, Research Paper of the Basel Convention Secretariat, No. 14, November 2002.

56 By virtue of joining the EU in 2004, some of the ten Central and Eastern European countries will also become members of Annex VII of the Basel Convention, although the ESM situation of many of their waste management and recovery facilities are inferior or at best equal to comparable facilities in rapidly industrializing countries such as Malaysia.

57 As of June 2003, 37 countries (of which 14 are developing countries) have ratified the Ban Amendment. To take effect, the Amendment has to be ratified by 62 Parties.

58 Council Regulations 259/93 and 1420/1999 and Commission Regulation 1547/1999.

technology transfer - meanwhile created in 13 developing countries - are an interesting concept[59]; the centres are however financially weak and mostly focus on training on the rules and regulations of the Convention, rather than building technical and managerial capacity in ESM.[60] Furthermore, the Ministerial Declaration of COP V in 1999, which was supposed to turn the pendulum of the Convention from "regulatory mechanisms" to "capacity building", has so far had only limited effect.

4. Some general conclusions of the review of the three MEAs

CITES and the MP have a much higher number and level of sophistication of flexibility elements than the BC.

With the exception of the use of trade measures against non-complying Parties as enforcement instrument the trade measures in CITES and the MP are clear and their adoption and modification are subject to unambiguous rules. Conversely, some of the key trade measures in the Basel Convention lack clarity.

With the Multilateral Fund, the MP not only has its own, but also a very big and effective financial mechanism, which not only covers many incremental costs of switching to technologies that outphase production and consumption of ozone-depleting substances, but also funds policy-coordinating "ozone offices" in developing countries. Conversely, CITES and the BC have no financial mechanisms of their own and also do not have access to GEF funding. Consequently, funds for technical assistance and capacity building are largely insufficient. Although the regional and sub-regional centres of the BC are a promising approach, their financial base remains very weak.

The MP and CITES[61] had consultations with the GATT secretariat on the compatibility of trade measures with the rules of the multilateral trading system. The MP even had a sub-group of legal, technical and trade experts that examined some proposed trade measures in the light of GATT Art. XX.[62] Conversely, the BC has never made comparable efforts.

In conclusion, the survey above shows that there is a divergent level of clarity and flexibility in the specific trade obligations used in the three MEAs; the same seems to be true for the supportive measures that exist and are effectively implemented. As outlined in the box on Dispute Settlement Practice Related to Article XX of GATT above, the more rigid and inflexible the application of a trade measure, the higher the likelihood that the measure is regarded arbitrary and unjustifiable under WTO rules.

VII. RESULTS OF PREVIOUS DISCUSSIONS ON ENHANCING CLARITY OF TRADE MEASURES AND THEIR COMPATIBILITY WITH WTO RULES

1. Results of previous intergovernmental discussions outside the WTO

a) Discussions at OECD

Before exploring the options for a way forward for approaching the mandate in paragraph 319i) from a developing country point of view, it is worth recalling the results of some previous intergovernmental

[59] They will most likely also be used by the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Convention on Persistent Organic Pollutants.

[60] One would think that emphasis should be given to firstly promoting re-engineering of industrial processes in ways that minimize or eliminate the generation of hazardous waste at source, and secondly innovation in product desing for easy recovery or minimal impact at disposal or recovery.

[61] The CITES Strategy till 2005 and its Action Plan outline in objective 5 several measures to improve the relationship with WTO with a view to assuring that the trade measures adopted by CITES are appreciated and accepted by the WTO.

[62] For more information, see: Brack, D., International trade and the Montreal Protocol, Royal Institute of International Affairs, London, 1996, pp. 67-68.

discussions outside the WTO on enhancing clarity and effectiveness of trade measures in MEAs and assuring their compatibility with WTO rules. The most thorough discussion took place in the OECD Joint Working Party on Trade and Environment, based on an in-depth analysis of the effectiveness and efficiency of trade measures in CITES, the Montreal Protocol and the Basel Convention in the period 1997-1999. The main findings of the three case studies[63] were summarized in a synthesis report (OECD document COM/ENV/TD(98)127/FINAL of 15 February 1999) that contains a number of criteria recommended for enhancing clarity and effectiveness of trade measures and their compatibility with WTO rules.

The concerned MEA secretariats, UNEP and UNCTAD actively participated in both the preparation of the OECD cases studies and the discussion of the synthesis paper. Outreach forums for NGOs were held in a "sandwiched" way to seek their feedback on the discussions in the Joint Working Party. This means that all protagonists of the negotiating mandate of paragraph 31(i) actively participated in the OECD discussions.

Although merely intended as analytical exercise, it soon surfaced that both the case studies and the synthesis report became politicized issues. Notably the case studies on CITES and the Basel Convention had to be significantly revised on various occasions in the light of the factual and political comments made by the concerned MEA secretariats and various OECD delegations, most prominently from Nordic countries in the European Union. The synthesis paper, and in particular its summary, turned out to be a 'de facto' negotiated document. Despite being watered down here and there, the evaluation criteria are sufficiently clear and - politically very important - have the seal of approval of the EU countries. In the further WTO negotiations on the subject, it might be important to revisit some of the conclusions drawn by the OECD Joint Working Party.

According to the OECD Joint Working Party, the use of trade measures should be carefully designed and targeted to the environmental objective. This has the following implications:

- As with all policy development, prior assessments should be made of the potential environmental and economic ramifications of trade measures, particularly those that are highly restrictive such as bans.
- Potential difficulties such as illegal trade and inadequate technical and institutional capacity in some countries, in particular developing countries, should be taken into account from the beginning.
- The current dynamics and continuous improvement of MEAs should continue, with policy instruments, including trade measures, being adjusted and made more flexible as appropriate.
- Trade measures, which treat classes of countries in different ways, should be based on clear and scientific environment-related criteria.
- Trade and environment policy officials should work in close co-ordination in national capitals, and the WTO, UNEP and MEA secretariats should continue to develop their dialogue on these issues.

In the light of above, the OECD Working Party identified a number of specific criteria, which may contribute to, or limit the success of trade measures in MEAs:

Factors contributing to success

- Genuine multilateral consensus on shared environmental problems paves the way for effective agreements to address them.
- Comprehensive and balanced packages of policy instruments have more chance of addressing all aspects of an environmental problem than reliance on one form of policy instrument.
- Strong scientific basis for policy action increases credibility and acceptance; at the same time, the absence of full scientific certainty should not prevent action in cases of threats of serious or irreversible damage.
- Policy based on an understanding of the underlying economics will be more effective than attempting to cut across economic factors.

[63] OECD, Experience with the use of trade measures in the Montreal Protocol on Substances that Deplete the Ozone Layer (OECD/GD997)230), Paris, 1997; OECD, Trade measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (COM/ENV/TD(97)41 FINAL), Paris, 1997; OECD, Experience with the use of trade measures in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (OECD/GD(97)106, Paris, 1997.

- Funding, technical co-operation and information exchange to establish the technical and administrative capacity to implement treaty obligations may be essential, particularly for developing countries.
- Strong market signals about an end-point, combined with realistic transition periods, will provide a commercial context conducive to innovation and allow cost-effective ways of meeting targets to emerge.
- Additional or extended transition periods for developing countries can help lower adjustment costs.
- Flexibility in trade controls can maximise the environmental and economic benefits, e.g. ranching and national export quotas in CITES.
- Treatment of a non-Party to an MEA like a Party if such country is in compliance with the provisions of the MEA.

Factors limiting success

- Lack of funds for implementation and enforcement capacity, both multilaterally and nationally.
- Illegal trade (whose causes and driving forces need to be carefully understood).
- Over-reliance on one type of control, such as a trade ban, in cases where the underlying environmental, economic and social context is very complex.
- Inadequate recognition of the underlying economic context and driving forces.
- Ambiguity and complexity in definition and implementation of MEA trade measures, for example difficulties in determining whether particular shipments are covered by the relevant Agreement.
- Inadequate reporting of information by Parties.
- Insufficient incentives for participation and compliance.

b) Discussions in UNCTAD

To recall but a few hallmarks, in 1997, UNCTAD organized an Expert Meeting on the Role of Positive Measures in Promoting Sustainable Development, in Particular in Meeting the Objectives of Multilateral Environmental Agreements.[64] In 2001, UNCTAD published a monograph containing various country case studies on the effectiveness and efficiency of trade measures and their developmental effects in CITES, the Montreal Protocol and the Basel Convention.[65] Furthermore, UNCTAD conducted capacity-building activities in various countries for implementing the CBD, UNFCCC, and the Basel Convention. For the latter, UNCTAD explicitly analysed the effectiveness and efficiency of trade measures at macro- and micro-economic level. [66]

Without pre-empting the outcome of the discussions and negotiations on the mandate in paragraph 31(i) of the DMD, UNCTAD would be ready to assist developing countries and the CTE in the further "bottom up" analysis of SPOs as outlined later in the paper drawing on the expertise gathered on the subject in recent years. UNCTAD would also be prepared to organize special briefings for interested developing country negotiators to analyse and clarify the approach outlined below, including briefings on STOs in particular MEAs. Some of these briefings could be held as an activity of the UNEP-UNCTAD Capacity-building Task Force on Trade, Environment and Development (CBTF), which would allow an in-depth dialogue with concerned UNEP and MEA secretariat staff.

2. Previous discussions on the negotiating objectives within the environmental community

To develop an appropriate response from a developing country perspective to the negotiating mandate in paragraph 31(i), it is also important to appreciate the goals for the negotiations, as identified by the environmental community. Although being the prime proponent of the mandate, it seems intriguing to say

64 The outcome of the meeting is accessible at www.unctad.org/en/special/c1em3ag.htm.

65 Jha V. and U. Hoffmann, op.cit.

66 U. Hoffmann, Requirements for environmentally sound and economically viable management of lead as important natural resource and hazardous waste in the wake of trade restrictions on secondary lead by decision III/1 of the Basel Convention: The case of used lead-acid batteries in the Philippines, accessible at www.unctad.org/trade_env/test1/publications/battery1.pdf

that many environmental NGOs find it very difficult to clearly define the objectives of the negotiating mandate. This said, their negotiating objectives could probably be summarized as follows:[67]

- Confirming the mutual supportiveness of the MEA and WTO regimes;
- Clarifying the relationship between TRIPS and CBD;
- Clarifying the status of the dispute settlement mechanisms of MEAs and WTO;
- Introducing safeguards against the use of litigation mechanisms in bilateral or plurilateral investment agreements to undermine STOs in MEAs; and
- Clarifying the use of the precautionary principle.

From a developing country perspective, all but two of the above-mentioned objectives of the negotiations pose little problem; in fact, they are identical with developing countries' interests, as reflected in the DMD itself and paragraph 98 of the Report of the World Summit on Sustainable Development.[68]

The first exception concerns the clarification of the status of the dispute settlement mechanisms (DSM) of MEAs and WTO. In principle, there is nothing wrong with suggestions of the environmental community to specifically clarify, from a legal point of view, the equal status of both DSMs and optionally outline a sequencing of litigation[69], as long as these clarification attempts do not exclude recourse to the WTO DSM by interested developing countries.

The second exception concerns the most appropriate form of the implementation of the precautionary approach. The widely cited Principle 15 of the Rio Declaration stipulates that "the precautionary approach shall be widely applied". However, it also qualifies that this should be done "according to (States) capabilities". In other words, Rio Principle 15 leaves untouched the specific form of implementation of the precautionary approach. This may be conditional, as under Article 5 of the SPS Agreement, or unconditional, as under Article 10.6 of the Biosafety Protocol.[70]

Weighing up the pros and cons of the conditional versus the unconditional form of implementation and bearing in mind that the implementation of the precautionary approach has systemic implications beyond the realm of MEAs, including its possible effects on exports of developing countries, the conditional implementation seems to be the more appropriate form for developing countries. Conditional would imply that precautionary measures are taken on the basis of available scientific information (generally accepted scientific criteria adopted by the COP in the case of MEAs); temporarily applied subject to a risk assessment according to defined criteria; and reconsidered as new scientific evidence becomes available. As regards risk assessment, it is important that developing countries insist that, in the context of MEAs, the costs for the assessment should be borne by either the exporters of "environmentally sensitive items" or a multilateral mechanism.[71]

To complete the picture, some environmental NGO critical views on the MEA-WTO debate should not remain unmentioned. These critics interpret the environmental community's desire for formal clarification of the relationship between STOs in MEAs and WTO rules as part of a "Safe Trade Strategy". Such strategy aims at (i) elaborating MEAs and extending the number of issues covered by them; (ii) developing WTO

[67] According to Konrad von Moltke, presentation at the Workshop on Trade and Sustainable Development Priorities Post-Doha, organized by the International Institute for Sustainable Development and the Royal Institute of International Affairs, London, 8 April 2003.

[68] Paragraph 98 of the WSSD report reads as follows: "Promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments." Accessible at: www.johannesburgsummit.org.

[69] According to some proposals, the DSM of the MEA may verify the objectives of STOs against bullets (b) and (g) of Article XX of GATT 1994 – necessity test -, whereas WTO panels could evaluate the implementation of STOs against the headnote of Article XX – i.e. whether they are applied in an arbitrary or unjustifiable manner or represent a disguised form of protectionism -).

[70] It is often overlooked that the Biosafety Protocol also has a conditional form of implementing the precautionary approach. In accordance with Article 10.1 and 11.6, a risk assessment is required in accordance with Article 15 and in line with risk assessment criteria outlined in Annex III.

[71] In accordance with Article 15.3. of the Cartagena Protocol on Biosafety, "the cost of risk assessment shall be borne by the notifier if the Party of import so requires".

jurisprudence that will allow the use of trade measures in MEAs (e.g. as in the shrimp-turtle case); (iii) inclusion of the precautionary principle in MEAs, in particular in its unconditional form of application; and (iv) reflecting the use of precautionary principle in WTO jurisprudence. It is argued that the "Safe Trade Strategy" is advocated by an alliance consisting of some environmental and consumer groups, supplemented by some protectionist industries.[72]

VIII. THE WAY FORWARD – APPROACHING THE NEGOTIATING MANDATE OF PARAGRAPH 31(I) FROM A DEVELOPING COUNTRIES' PERSPECTIVE

Given the very heterogeneous nature of developing countries, the following general recommendations and conclusions have their natural limitations. Even so, the recommendations attempt to reflect the different interests were they matter most.

First, from a developing countries' perspective, it is inadvisable that discussions and negotiations remain narrowly focused on STOs., rather than on STOs and positive/supportive measures. Developing countries need to stress that trade measures generally are an integral part of a package of measures. Moreover, there is a certain balance and interplay between the measures of the package. Restrictive trade measures can be accompanied by supportive measures or enhanced flexibility elements that make the whole package acceptable to a developing country party. If properly used, the balance and interplay between the various measures can also help address the enhanced differentiation among developing country parties. In short, developing countries should advocate a practical way forward that pays due attention to the development dimension of the package of measures taken by relevant MEAs.[73]

Second, the heterogeneous character and objectives of developing countries are best taken into account by a "bottom-up" analysis of practical experience with specific trade obligations in concerned MEAs. This will allow the identification of real areas of conflict between both systems, rather than discussing theoretical or hypothetical areas of tension. The "bottom-up" approach will not rule out that certain systemic issues might arise from the analysis, as advocated by the EU and Switzerland, for instance.

Third, although it is important to clearly define the term "specific trade obligations", developing countries should avoid the pitfall of a too legalistic debate. It is in the interest of developing countries that STOs in MEAs leave little discretion to parties for unilateral measures that are taken "pursuant to MEAs". This would suggest that STO's should not include those that are discretionary. On the other hand, the UNFCCC and its Kyoto Protocol, which do not provide for STOs, but use trade measures as "obligation de résultat", would therefore fall outside the mandate of paragraph 31(i), although these accords might have the most important trade implications of all MEAs (e.g. through energy performance criteria/requirements, energy taxes etc.).[74] It is therefore advisable that developing countries advocate the introduction of some discipline for discretionary trade measures taken pursuant to MEAs. This could be achieved by introducing text in the negotiated outcome that would emphasize that "WTO advocates the scope for countries to implement sound environmental measures, which are consistent with the objectives of MEAs while adhering to established WTO rules and obligations." It is likely that such language would ultimately find its way into the appropriate environmental accords.

Fourth, in MEAs, developing countries should insist on clear definitions of STOs alongside the use of objective, science-based criteria for their use. This will be important for assuring effectiveness and efficiency of the STOs in MEAs and avoiding the risk that such measures are regarded as being arbitrary and/or unjustifiably discriminatory or a disguised form of protectionism.

72 For more information, see: J. Morris, International Policy Network, accessible at: www. policynetwork.net.
73 China made a similar statement in the CTE SS on 1-2 May. See: WTO document TN/TE/R/6.
74 Notably rapidly industrializing developing countries have an interest in enhancing transparency and using multilateral disciplines when being confronted with such "unilateral" trade measures.

Fifth, it seems logical to focus the next phase of the analysis in the CTE on an in-depth review of the clarity, effectiveness, efficiency and flexibility of the STOs in a small number of concerned MEAs.[75] Such review could be based on a number of specific criteria, as used by similar previous exercises outlined in section VII. 1.

Such analysis should aim at identifying those STOs in MEAs that lack clarity, are inflexible, ineffective and/or highly inefficient and thus might not be compatible with WTO rules. Once such list was established by the CTE, it could be brought to the attention of MEA Parties. These should be encouraged to form a working group of environment and trade experts under the aegis of the respective MEA, which studies the list of STOs that might give rise to tension and makes recommendations on their improvement and/or the introduction of supportive measures or flexibility elements.

The list of such STOs is likely to be small. Based on the above-conducted analysis, only the Basel Convention has a number of STOs that might be in conflict with WTO rules. Under CITES, only the use of STOs as enforcement mechanism seems to be an area of tension.

Such approach is unlikely to be objected to by MEAs, because it's decisive discussion would remain under the control of MEA constituencies. It can also safeguard that the delicate balance between rights and obligations contained in MEAs is maintained.[76] It will require, however, a sincere and open attitude to objectively reviewing the clarity, effectiveness and efficiency as well as flexibility of the concerned trade measures and to consider WTO principles such as least trade restrictive practices. It is important in this regard that individual MEAs can demonstrate that (i) they are effectively dealing with the relevant environmental threat, using trade measures that are the least restrictive to achieve the policy objective;[77] (ii) they are a genuine platform for consensus; and (iii) that they have an effective dispute settlement mechanism.

The suggested approach has much affinity with the pre-Doha proposal of New Zealand to the CTE on an informal consultative mechanism that enjoyed broad support. The proposal by New Zealand emphasizes that when Parties to an MEA have committed themselves to the MEA, there should be no reason on the grounds of international law that those countries would object to the trade measures pursuant to the MEA. In New Zealand's view, potential conflicts between WTO provisions and MEAs are limited; they are only likely to arise where the provisions of an MEA are unclear as to the action they mandate, even among Parties to it, or in situations, where the Parties to an MEA are applying trade measures against a non-Party (see WTO documents WT/CTE/W/162 and WT/CTE/W/180).[78] According to New Zealand, the likelihood of difficulties between the WTO Agreements and MEAs is not to be exaggerated. If difficulties arise, however, New Zealand proposes to use a "voluntary consultative mechanism" that could be deployed on an *ad hoc* basis to assess whether the concerned trade measure is the most effective instrument available to address the environmental problem at issue. Such voluntary consultative mechanism may facilitate an improved understanding of different points of view; allow for the identification of a range of different policy options; maximize the potential for an agreed solution; minimize conflicts between Parties on trade and environment related policies, while avoiding inefficient environmental and economic outcomes at the same time (see WTO document WT/CTE/W/180).

[75] India proposed in this regard CITES, the Montreal Protocol, the Basel Convention, the Biosafety Protocol, the PIC and the POPs Convention (TN/TE/W/23), whereas Malaysia's submission (TN/TE/W/29) limits this list to the three MEAs in effect, i.e. CITES, the Montreal Protocol and the Basel Convention.

[76] See: Xueman Wang, op.cit.

[77] As mentioned in the box above on recent WTO dispute settlement practice related to Article XX of GATT, the interpretation has evolved from a least trade-restrictive approach to a less trade-restrictive one, supplemented with a proportionality test (i.e. a process of weighing and balancing a series of factors).

[78] The first proposal in this regard was made by New Zealand in 1996 calling for the drafting of an "understanding" covering all WTO agreements to be used by panels (see WTO documents WT/CTE/W20). Besides New Zealand, Japan and Canada have also argued in favour of drafting "guidelines" or an "understanding", to be used by WTO panels in deciding the consistency of trade measures taken pursuant to MEAs.

While the proposal of New Zealand is still not fully elaborated, before the Doha Ministerial Meeting it had quickly gained ground in the CTE because of its simplicity and the fact that it does not involve a change to WTO rules.[79] The main elements of the proposal can be summarized as follows:

- Ensuring consultation between countries prior to the imposition of a trade measure to achieve the objective of an MEA. The first-best policy options should be pursued, these will always be the least trade-distortive options that deal with the source of the problem.
- Creating an informal voluntary consultative mechanism that parties to MEAs enter into. MEA negotiators may consider building such mechanisms into new MEAs.
- Eventually involving "significant non-parties" into these consultations.

From a procedural point of view, the approach proposed in this paper does not aim at another comprehensive analytical exercise, rather the CTE could commission short papers on the Basel Convention, CITES, and the Montreal Protocol, and if judged opportune, also on the Biosafety Protocol, the PIC and POPs Conventions. These three or six short reports would then form the basis for a debate in the CTE that identifies those STOs that may become or already are a source of tension with WTO rules. Having identified these STOs will allow a very pointed discussion in the CTE probably leading to two options:

- Whether WTO members want to bring to the attention of the concerned MEAs that a specific trade measure might generate trade tensions and that the proper MEA bodies may wish to hold consultations, including key stakeholders and trade experts, on the concerned trade measures and discuss ways of enhancing their flexibility, including through the use of supportive measures; or
- Whether there is indeed (the not very likely situation of) a larger number of STOs with potential tensions in the studied MEAs that cannot be individually addressed by MEAs and for which a generic solution within the WTO context would have to be found.

Finally, although not required for the further negotiations on the subject, the discussion above outlines the urgent need for developing countries to improve policy co-ordination and coherence at national level regarding the need, shape and attached criteria for STOs and other trade measures in MEAs. Environment and trade ministries, in consultation with national stakeholders, need to develop a consistent agenda on the subject that reflects the developmental priorities and discusses WTO-compatibility issues as an integral part.

[79] For more information, see: Abdel Motaal, D. , op.cit.