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Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System

Duncan Brack

One of the key issues in the debate over how best to reconcile the two objectives of environmental protection and trade liberalization revolves around the interrelationship between multilateral environmental agreements (MEAs)—environmental treaties—and the multilateral trading system (MTS), the complex of trade agreements centred around the General Agreement on Tariffs and Trade (GATT) and overseen by the World Trade Organization (WTO). This chapter summarizes the key issues at stake, examines various options for the resolution of the debate, and concludes that a new WTO Agreement on MEAs would provide the optimal solution.

1. Multilateral environmental agreements

As Principle 12 of the Rio Declaration states, international agreement is clearly preferable to unilateral action in tackling transboundary or global environmental problems. Nearly 200 MEAs now exist, with memberships varying from a relatively small group to about 170 countries—which means in effect the whole world. The main global MEAs include:

- Three that predate the Rio Earth Summit: the 1973 Convention on International Trade in Endangered Species (CITES), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes.
- The 1992 Rio agreements: the Framework Convention on Climate Change, the Convention on Biological Diversity, and the Convention to Combat Desertification.
- Others agreed recently, but not yet in force, including the 1997 Kyoto Protocol on climate change and the 1998 Rotterdam Convention on hazardous chemicals in international trade; and draft MEAs still under negotiation, including the convention on the control of persistent organic pollutants, and the Biosafety Protocol to the Biodiversity Convention.

Over 20 of these MEAs incorporate restraints on the trade in particular substances or products, either between parties to the treaty and/or between parties and non-parties.[1] These include CITES, the Basel Convention, the Montreal Protocol, the Rotterdam Convention, and the draft Biosafety Protocol; the Kyoto Protocol will also interact with trade, but in more complex ways. Given the continued degradation of the global environment, the negotiation of further MEAs is almost bound to form an increasingly prominent part of the international agenda; and given the inescapable interaction of trade liberalization with environmental protection, and the shortage of policy instruments available with which to enforce MEAs, an increasing number of environmental treaties are likely to contain trade measures.

Trade provisions in MEAs have been designed to realize four major objectives:[2]

1. To control and restrict markets for environmentally hazardous products or goods produced unsustainably.

2. To increase the coverage of the agreement's provisions by encouraging governments to join and/or comply with the MEA.

3. To prevent free-riding (where non-participants enjoy the advantages of the MEA without incurring its costs) by encouraging governments to join and/or comply with the MEA.

4. To ensure the MEA's effectiveness by preventing leakage—the situation where non-participants increase their emissions, or other un-

sustainable behaviour, as a result of the control measures taken by signatories.

The trade measures incorporated in the five MEAs listed above are outlined briefly below.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES was agreed in 1973, and today includes 145 parties.[3] Parties are required to apply controls to trade in species according to the degree to which they are endangered by international trade:

- Species listed in *Appendix I* (600 animal and 170 plant species) are threatened with extinction and are or could be affected by trade.
- Species listed in *Appendix II* (2,700 animal and over 20,000 plant species) are not now threatened with extinction but may become so unless trade is subject to strict regulation; species that *look* like other listed species are also included in order to render the controls more effective.
- Species listed in *Appendix III* (200 animal and 46 plant species) are protected in individual countries that have requested the cooperation of other CITES parties in controlling trade.

Trade is regulated through the granting of permits, which may be issued only by CITES parties. *Export permits* are required for both Appendix I and Appendix II species; these may be granted only if the trade is not detrimental to the survival of the species, if the specimens have not been obtained in contravention of national laws, and if living specimens are shipped under conditions designed to guarantee their well-being. In addition, Appendix I species require *import permits,* and the export permit cannot be granted unless an import permit has already been obtained. Conditions for the grant of an import permit are similar to those for an export permit, but also include the requirement that the specimen must not be used for "primarily commercial purposes," a phrase that has generally been interpreted to prohibit trade in any instance where commercial considerations are present. Trade in Appendix III species requires an export permit from a country that has listed the species, or a

certificate of origin from a country that has not listed it. Exceptions to the trade regulations have been allowed where specimens have been bred in captivity, artificially propagated, or ranched.

Parties may enter a reservation regarding any listing, in which case they are regarded, for purposes of trade in the species concerned, as a non-party. Trade with non-parties is not permitted except where documentation equivalent to CITES permits is provided; this has come to include a requirement for formal identification of competent scientific and management authorities, as required for CITES parties. In addition, trade with non-parties in Appendix I species is limited to special cases that benefit the conservation of the species.

In addition to the requirement for licences, total or partial bans on trade have also been employed as an enforcement mechanism.[4] In a number of cases where countries have been identified as being in persistent non-compliance, the Standing Committee of the CITES conference has recommended all parties to apply Article XIV(1) of the Convention, which allows parties to take stricter domestic measures than those provided by the treaty, including complete prohibitions of trade, collectively (albeit temporarily) against the offending countries. This has included the United Arab Emirates in 1985–1990, Thailand in 1991–1992, and Italy in 1992–1993. The procedure has also been used against states not party to the Convention, after persistent refusal to provide "comparable documents" to CITES licences; in the case of El Salvador (1986–1987) and Equatorial Guinea (1988–1992), the ban was lifted after the countries targeted became parties.

In other cases, countries have come into compliance with, or membership of, CITES after unilateral rather than collective action. Examples include a US ban on wildlife imports from Singapore in September 1986 (Singapore became a party in November 1986) and US unilateral trade sanctions against Taiwan from August 1994 (Taiwan amended its legislation in October 1994 along CITES lines, and the US embargo was lifted in June 1995)—the CITES Standing Committee had recommended stricter domestic measures in September 1993. Similarly, Indonesia's announcement of "voluntary" export quotas for several endangered species in 1994 may be attributed at least in part to a ban by the European Union (EU) on wildlife imports from Indonesia, imposed in 1991 and subsequently lifted in 1995.

Assessing the effectiveness of CITES is difficult, since the survival of a species generally depends on many more factors than the extent of international trade in it or its products. There have been some clear successes, including the spotted cats, the Nile crocodile, and the African elephant (where rapid population decline stabilized on its listing under Appendix I). Other species, however, remain threatened with extinction; the tiger is the classic example, where widespread illegal trade poses a serious problem. Although it is true to say that no species listed under CITES has become extinct since the treaty was signed, it should also be noted that almost three times as many species have been transferred from Appendix II to I (187 taxa, i.e. species, sub-species, and populations) as have been moved in the other direction (67 taxa).

The Montreal Protocol

The Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the 1985 Vienna Convention on the Protection of the Ozone Layer) was negotiated in 1987 to control the production and consumption of ozone-depleting substances (ODS), of which the most common were the family of chlorofluorocarbons (CFCs).[5] Unlike CITES and the Basel and Rotterdam Conventions, the Montreal Protocol employs trade restrictions as one policy instrument among several. The trade aspects of the treaty fall into two categories: trade restrictions between parties, which are not mandated by the Protocol but are consequential on its control schedules; and trade restrictions between parties and non-parties, which are required under the terms of the Protocol.[6]

The Protocol requires parties to control both the consumption and the production of ODS. Since consumption is defined as production plus imports minus exports, parties must exercise control over trade if they are to satisfy their control schedules. A variety of trade restrictions have been employed, including voluntary industry agreements, product labelling requirements, requirements for import licences (sometimes incorporating a tradable permit system), excise taxes, quantitative restrictions on imports, and total or partial import bans. In addition, in response to concern over the growth of illegal trade in CFCs and halons, the Montreal Amendment to the Protocol (agreed in 1997 but not yet in force)

will require parties to introduce a licensing system for all exports and imports of ODS (including used, reclaimed, and recycled substances).

The Protocol also imposes bans on trade between parties and non-parties to the treaty. These trade provisions cover restrictions on both imports from and exports to non-parties of ODS, products containing ODS (e.g. refrigerators), and products made with but not containing ODS (e.g. electronic components)—although to date the parties have decided that the introduction of the last category of trade bans is impracticable owing to difficulties in detection. Non-parties that are nevertheless in compliance with the control measures specified in the Protocol are treated as if they were parties with respect to the trade provisions.

These trade provisions had two aims. One was to maximize participation in the Protocol, by shutting off non-signatories from supplies of CFCs and providing a significant incentive to join. If completely effective this would in practice render the trade provisions redundant, because there would be no non-parties against which to apply them. The other goal, should participation not prove total, was to prevent industries from migrating to non-signatory countries to escape the phase-out schedules. In the absence of trade restrictions, not only could this fatally undermine the control measures, but it would help non-signatory countries to gain a competitive advantage over signatories, as the progressive phase-outs raised industrial production costs. If trade was forbidden, however, not only would non-signatories be unable to export ODS, but they would also be unable to enjoy fully the potential gains from cheaper production because exports of products containing, and eventually made with, ODS would also be restricted. (In fact, because industrial innovation proceeded far more quickly than expected, many of the CFC substitutes proved significantly cheaper than the original ODS—but this was not foreseen in 1987).

All the evidence suggests that the trade provisions achieved their objectives. All CFC-producing countries and all but a handful of consuming nations have adhered to the treaty (a total of 168 countries to date). Although it is difficult to determine states' precise motivations for joining—there are a variety of reasons, including the availability of financial support for developing countries—the trade restrictions do appear to have provided a powerful incentive, and at least some countries

have cited them as the major justification (including China, and Korea, which initially expanded its domestic CFC production but then realized the disadvantages of being shut out of Western markets and acceded). The major CFC producers, mostly located in the United States and Western Europe and therefore subject to the controls from the start, were supporters of the trade restrictions, viewing them as a method of ensuring that the alternatives to CFCs that they produced were not undercut by cheaper competition from non-parties.

Trade restrictions have also played their part in the non-compliance procedures of the Montreal Protocol, which have been applied so far to a number of "transition economies" in central and eastern Europe and to the former Soviet Union, which have found it impossible to meet their phase-out target dates. The procedure is non-confrontational, conciliatory, and cooperative, encouraging and providing assistance to parties to come back into compliance, but the possibility of suspension from the Protocol, the withdrawal of financial assistance, and the application of trade measures (as to a non-party) provides an important underpinning to the procedure. So far, these more drastic measures have not had to be taken, though some non-parties in non-compliance have had trade restrictions imposed on their ability to export the ODS that they should not have been producing.

The Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was negotiated in 1989 in response to concerns over the growth in volumes of hazardous waste and some high-profile cases of toxic waste dumping in developing countries.[7] The aim of the Convention is to protect human health and the environment against the adverse effects of the generation, trans-boundary movement, and management of hazardous waste, through minimizing generation, assisting developing countries in the environmentally sound management of waste, and reducing trans-boundary movements to a minimum consistent with their environmentally sound and efficient management.

The core of the agreement, however, deals with the control of trade. Movements of hazardous wastes across national boundaries can take

place between parties to the Convention only via a "prior notification and consent" procedure involving the states of export, import, and transit; each shipment of waste subject to the Convention must be accompanied by a movement document from point of departure to point of disposal. Notwithstanding this procedure, the Convention also requires exporting states to prohibit shipments of hazardous or other wastes if there is reason to believe that the wastes will not be managed in an environmentally sound manner in the importing country. Any party also has the right to prohibit the import of hazardous wastes into its own territory. No category of wastes may be exported to states not party to the Convention unless the country in question is a signatory to another agreement—bilateral, regional, or multilateral. If the agreement was reached before the Basel Convention entered into force, it must be "compatible" with the aims of the Convention; if reached later, it must be "not less environmentally sound" than Basel.

The Basel Convention entered into force in May 1992 and there are currently 123 parties, the major exception being the United States (which has signed but not yet ratified). As far as can be ascertained, the Convention has had some success: the share of total hazardous waste exports destined for final disposal has declined in recent years and the worst forms of hazardous waste dumping on developing countries have largely ended. The rapid evolution of the regime, however, has outstripped the development of its technical and statistical support. Since basic data on the volumes and hazard characteristics of wastes generated and shipped across borders, and universal definitions of hazardous wastes, do not yet exist, a definitive conclusion is difficult to reach.

Even before the Convention was adopted there was pressure to go further than its provisions. African countries in particular argued for a total ban on the waste trade, and in 1991 agreed the Bamako Convention, which prohibited the import of all hazardous wastes into Africa from non-contracting parties and adopted a notification and consent system for trans-boundary movements within Africa. The Lomé Convention similarly bans all movements of hazardous wastes from the EU to the ACP (African, Caribbean, Pacific) developing countries. In 1995, an amendment to the Basel Convention was agreed requiring Annex VII countries (those in the Organization for Economic Cooperation and Development, the EU, and Liechtenstein) to prohibit the export to

non-Annex VII countries of hazardous wastes for disposal, and, by the end of 1997, to end shipments to non-Annex VII states of hazardous wastes for recovery or recycling. The amendment (which has not yet entered into force) has proved controversial, however, with a number of countries—developing and industrialized—concerned over the potential negative economic impacts of the ban on exports for recycling.[8]

The Kyoto Protocol

The Kyoto Protocol to the United Nations Framework Convention on Climate Change (FCCC) was adopted in December 1997. The Protocol establishes a legally binding obligation on Annex I (developed) countries to reduce emissions of greenhouse gases on average by 5.2 per cent below 1990 levels by the period 2008–2012. These "quantified emission limitation and reduction commitments" are differentiated between countries and, relative to a business-as-usual scenario, imply real reductions of approximately 20–40 per cent.[9] As of July 1999, 84 countries had signed the Protocol and 12 had ratified it. It will enter into force when 55 parties, including Annex I parties accounting for at least 55 per cent of the Annex I carbon dioxide emissions in 1990, have ratified it.

Commitments are to be achieved in a number of ways. Article 2 of the Protocol commits each Annex I party to "implement and/or further elaborate policies and measures in accordance with its national circumstances," and then lists a wide range of potential areas for action, including energy efficiency, renewable energy sources (and advanced technologies in general), removal of market distortions such as subsidies, and transport. Although no further details are specified, it is not impossible that parties could claim justification from the Kyoto Protocol for measures that restrain greenhouse gas emissions from their own territories via methods that protect their own industries at the expense of importers. Although paragraph 3 of Article 2 states the principle of protection of countries from any adverse effects of any of the policies and measures that may be adopted, including effects on international trade, the wording is so general as to be fairly unhelpful for guidance in drawing up specific policies.

In addition to this framework of domestic measures, the Protocol contains a series of "flexibility mechanisms" designed to reduce emis-

sions through international cooperation. These include international emissions trading, the clean development mechanism, and joint implementation, all of which are intended to optimize the cost-effectiveness of emissions-reduction initiatives and to lower the cost of complying with the respective emissions targets assumed under the Protocol. Together they have the potential to create an international market for greenhouse gas (and particularly carbon) emissions abatement, with profound implications for the international economy. This is another potential area for interaction with the MTS, both in the way in which emissions permits are allocated (which may have implications for the WTO Subsidies Agreement) and in the trade in permits themselves.

Several issues were left unresolved at Kyoto, including the details of the flexibility mechanisms and any non-compliance system (which could hypothetically contain Montreal Protocol-type trade measures, though this would be a highly contentious subject). These are to be settled by succeeding conferences of the parties to the FCCC.[10]

The Rotterdam Convention

The Rotterdam Convention on the application of the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade was adopted in September 1998. The agreement has been signed by 61 states, and it will enter into force once 50 states have ratified it. The Convention builds on earlier work and agreements on the prior informed consent (PIC) procedure, including the Food and Agriculture Organization's International Code of Conduct for the Distribution and Use of Pesticides and the UN Environment Programme's London Guidelines for the Exchange of Information on Chemicals in International Trade. Both these instruments included procedures aimed at making information about hazardous chemicals more readily available, thereby permitting countries to assess the risks associated with their use. Both of them in due course came to include a voluntary PIC procedure, to provide a means for formally obtaining and disseminating the decisions of importing countries on whether or not they wished to receive future shipments of such chemicals. The procedure aimed to promote a shared responsibility between exporting and importing countries

in protecting human health and the environment from the harmful effects of hazardous chemicals in international trade.

The Convention codifies the PIC procedure for a list of specified substances: currently 5 industrial chemicals (including PCBs and PBBs) and 22 pesticides (including aldane, chlordane, DDT, and lindane), though it is expected that many more chemicals will be added as its provisions are implemented. For each substance listed, parties are required to inform the Convention Secretariat whether they wish to permit or ban, or permit under particular conditions, its import, to ensure that exports of the substance from their jurisdictions take place in accordance with these decisions on import, and to provide export notifications where the substance is itself banned or severely restricted domestically. The Convention also encourages measures such as national registers and databases of the substances, information exchange on hazards and handling, and technical assistance from more advanced economies to other parties.

MEA trade measures

As can be seen, trade provisions in MEAs have in general been designed and used either to exercise control over trade itself, where this is perceived to be the source of the environmental damage, or as an enforcement mechanism, to ensure that the MEA is not undermined by the behaviour of non-parties. The second function is of particular importance. There are a limited number of means by which countries can affect the actions of other countries: political/diplomatic pressure, provision of financial and technological assistance, trade sanctions, and military force. The first two of these are clearly preferable, but they have obvious limits. One can assume that use of the military option is unlikely to be helpful. Trade measures are therefore likely to continue to play a role as one component of effective environmental agreements.

Can the use of trade measures in this way be regarded as an infringement of national sovereignty? The classical doctrines of sovereignty, originating in the seventeenth century, have little of use to say about relations between states or the "rights" of states to expect other states to engage in international trade with them. It is clear, however, that the

unrestrained output of pollution that is trans-boundary or global in scope *does* constitute an infringement of sovereignty, in that it inflicts direct physical harm on the populations and/or territories of other states. The unrestrained depletion of the global commons—e.g. of non-territorial species—can, though more arguably, be regarded similarly. The responsibility of individual nations for the protection of the global environment and for the promotion of development that is environmentally sustainable has of course been accepted in many international agreements, most notably Agenda 21. Once again, the use of trade measures in MEAs must be contemplated if the global environment is to be protected effectively.

2. Interrelationship of MEAs with the multilateral trading system[11]

Disregarding these more general considerations, and accepting the value of MEA trade measures, can the use of them against WTO members be regarded as an infringement of their rights under the MTS? It seems fairly clear that there is a *potential* for conflict:

- GATT Articles I ("Most Favoured Nation Treatment") and III ("National Treatment") outlaw discrimination in trade: WTO members are not permitted to discriminate between traded "like products" produced by other WTO members, or between domestic and international "like products." Yet all the three major MEAs referred to above (CITES, the Montreal Protocol, and the Basel Convention) discriminate between countries on the basis of their environmental performance, requiring parties to restrict trade to a greater extent with non-parties than they do with parties; indeed, such discrimination is one of the points of these MEAs, since they are aimed to promote sustainable activities while punishing unsustainable behaviour.
- GATT Article XI ("Elimination of Quantitative Restrictions") forbids any restrictions other than duties, taxes, or other charges on imports from and exports to other WTO members; yet each of the three MEAs requires precisely such quantitative restrictions.
- Article III requires imported and domestic like products to be treated identically. The meaning of the term "like product" has become one

of the most difficult issues in the trade/environment arena. Originally incorporated into the GATT in order to prevent discrimination on the grounds of national origin, the term has usually been interpreted more broadly by GATT and WTO dispute panels to prevent discrimination in cases where process methods, rather than product characteristics, have been the distinguishing characteristic of the product and the justification for trade measures—for example, the US embargo on imports of shrimp caused by methods that kill sea turtles (the subject of a WTO dispute in 1998). Yet the Montreal Protocol envisages restrictions on trade in products made with but not containing ODS (originating from non-parties), whereas domestic products produced in this way are not subject to such regulation—although so far this provision has not been put into practice.

It is possible, of course, that an MEA trade measure could be "saved" by the General Exceptions clause of the GATT—Article XX—which states that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . .
>
> (b) necessary to protect human, animal or plant life or health; . . .
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Unlike many MEAs, where terms tend to be defined in the treaty or in subsequent decisions of conferences of the parties, interpretation of the MTS usually proceeds through a case-law-type approach, relying on the findings of dispute panels in particular cases. Since a dispute case involving an MEA trade measure has never been brought before a GATT or WTO panel,[12] it is impossible to say for certain whether it would be found to be incompatible with the MTS.

It is possible, however, to extrapolate from the arguments and findings in a series of trade/environment disputes involving unilaterally imposed trade measures that were brought before panels.[13] In each of these cases, the panel found the environmental measures in question not to be justifiable, because either:

- the measures were not "necessary" (Article XX(b)) to the achievement of the environmental goal, because the panel believed that there were less trade-restrictive or GATT-inconsistent measures also available; or
- the measures were not "relating to the conservation of exhaustible natural resources" (Article XX(g)), because the policies in question were extra-jurisdictional—they attempted to modify the behaviour of other WTO members and could not therefore be considered to be primarily aimed at conserving the natural resources of the country applying the trade measures; or
- the measures represented "arbitrary or unjustifiable discrimination" (Article XX headnote) in that less discriminatory methods were available that could have been employed.

It is of course dangerous to extrapolate from arguments used in cases of trade measures imposed *unilaterally* to those involving the application of trade measures mandated by or in pursuance of the requirements of *multilateral* agreements. In any case, it is difficult, even from an environmental viewpoint, to defend most of the measures taken in the relevant disputes. The way in which the United States applied its embargo on shrimp imports from a number of South and South East Asian countries, for instance, does appear to be "arbitrary and unjustifiable discrimination" when compared with the much more gradual and participatory way in which it applied measures to protect sea turtles in the Caribbean region.

Furthermore, WTO dispute panels and its Appellate Body have become steadily more sophisticated in their arguments and more conscious of the environmental dimension of the arguments. The Appellate Body decision in the *Shrimp-Turtle* dispute, for example, used the reference in the Preamble of the Marrakesh Agreement Establishing the WTO to "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both

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to protect and preserve the environment and to enhance the means for doing so," to dispose of the argument that species protection was not a legitimate objective for trade measures. It also stressed, as have several panels before it, the desirability of multilateral agreement as opposed to unilateral measures (commenting approvingly on the US-inspired Inter-American Convention for the Protection and Conservation of Sea Turtles agreed in 1996).

Unsurprisingly, however, neither the panels nor the Appellate Body have ever speculated as to the acceptability to the MTS of *trade measures* implemented in order to fulfil such multilateral agreements—the point of the Inter-American Convention, for instance, being to avoid the need for recourse to such measures. It is still, therefore, not clear how panels, or the Appellate Body, would rule on MEA-mandated trade measures.

There is an important distinction to be made here between trade measures adopted between parties to an MEA (such as the import and export licences required under CITES) and trade measures adopted between parties and non-parties (such as the ban on trade in ODS, etc., with non-parties to the Montreal Protocol). The reasoning used by the Appellate Body in the *Shrimp-Turtle* decision suggests that the first category of trade measures (between parties) might now be found to be MTS compatible. Because all parties involved would have agreed to the trade restriction, it would be difficult to argue that it represented "arbitrary or unjustifiable discrimination."

In the case of the other main category (trade measures adopted between parties and non-parties), however, the non-parties have by definition not agreed to the measures. In the *Shrimp-Turtle* case, the reasoning used by the panel and Appellate Body suggests that they still might rule against this kind of MEA trade measure:

> In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.[14]

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The panel quoted approvingly from the GATT panel findings in the 1994 *Tuna-Dolphin* case:

> If, however, Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired.[15]
>
> Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO.[16]
>
> However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory.[17]

The entire point of the trade measures directed against non-parties to the Montreal Protocol is to compel them to change their policies, to phase out the production and consumption of ODS in the same way as parties—or, at least, to condition market access to parties on this phase-out policy. It is intentionally discriminatory between parties and non-parties, or, to be more accurate, between countries in compliance with the Protocol (whether formally parties or not) and those not in compliance. It is difficult to believe that the panel and Appellate Body could maintain their lines of reasoning and still find in favour of this kind of trade measure.

Regardless of this distinction, trade measures employed under the three main MEAs cited above are now unlikely to be challenged in the WTO, because of the wide international acceptability they enjoy—though this is less true of the Basel Convention, where the amendment banning trade in waste between Annex VII and non-Annex VII countries (not yet in force) has aroused hostility amongst some of the industries involved. The possible MTS-incompatibility of the amendment has been raised explicitly as an argument against adopting or ratifying it by those opposed to the principle.

This "political chill" argument has also surfaced in other MEAs. Attempts to include trade provisions in the International Convention for the Conservation of Atlantic Tuna and in agreements to control driftnet fishing were shelved because of the fear that they would be inconsistent with GATT rules.[18] The same issue was raised in the 1997 negotiations over the Kyoto Protocol, in discussions in 1998 over the Rotterdam Convention, and in 1999 in the unsuccessful negotiations on the Biosafety Protocol.

The continuation of this potential conflict between the MTS and MEAs is clearly undesirable. The fact that it is not known for certain how a dispute panel would rule on an MEA trade measure creates an unstable and uncertain situation. On the face of it, it does appear absurd that the operation of an important element of international law should be subject to a panel of three individuals deciding what they think 10 lines of printed text (the relevant sections of GATT Article XX) written 50 years ago could mean in a vastly changed international environment. In addition, it creates the spectre of a potential challenge to an existing MEA, bringing the two international regimes of trade liberalization and environmental protection directly into conflict; and it increases the likelihood of conflict over the negotiation of future MEAs with trade measures, potentially weakening their effectiveness—the "political chill" argument. Finally, the perception that the WTO threatens environmental sustainability, already widespread in some quarters, assists neither the growth of the MTS nor the further spread of trade liberalization, even where this would have environmental benefits.

3. Global systems in conflict

How can this clash be resolved? When two systems of law come into conflict, actually or potentially, there are three potential methods of dealing with the situation:

- create some superior balancing mechanism;
- determine that one legal system is superior to another, either wholly or in part;
- modify either or both legal systems to bring them into harmony.

The first option, the creation of a balancing mechanism, would be the most desirable solution in a perfect world. This is in effect the system that operates inside the European Union, where trade liberalization and environmental protection are both objectives of the Treaty of Rome. Any conflict between the two objectives can be resolved by the European Court of Justice, which has the power to rule on the appropriate balance between trade and environmental measures in any particular case. In the well-known *Danish bottles* dispute of 1986, for example, the Court upheld the core of the Danish law requiring a collection system for returnable drinks containers while striking down some of the details of the regulations as unnecessarily trade restrictive given the environmental objective in question.

The creation of an equivalent system at a global level would require substantial reform of the entire system of international institutions, however, and is not a realistic prospect in the short term. Having said that, there have been calls for such a reform, perhaps using the International Court of Justice as the superior body. Proposals for a new World Environmental Organization (for instance by Chancellor Kohl at the UN General Assembly Special Session, "Earth Summit 2," in June 1997) have had the objective of creating a balancing institution to the WTO at least partly in mind, though the interrelationship between such a new WEO and the WTO was not, and has not been, explored in any detail. It is interesting to note that the 1948 Charter for the International Trade Organization (the intended third leg of the Bretton Woods tripod, never adopted because of US opposition) did provide that a member prejudiced by an ITO decision could seek an advisory opinion from the ICJ, whose opinion would then bind the ITO.[19]

The second option, determining that one legal system is superior to the other, is *de facto,* even if not *de jure,* the position as it stands at present. As noted above, the validity of trade measures in MEAs could be challenged under the WTO, and a WTO dispute panel would then rule on their compatibility with the MTS. Although panels have become steadily more aware of and more open to environmental arguments (the decision of the Appellate Body in the *Shrimp-Turtle* case to accept "non-requested information from non-governmental sources" was a positive step forward), they are nevertheless composed of international trade

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experts who reach decisions in accordance with a body of international trade law—indeed, they cannot do otherwise, since this is the function of the WTO. The MTS has been constructed by trade negotiators with relatively little awareness of environmental requirements and policies, and, despite a number of references to environmental objectives in the WTO agreements, it is not well attuned to environmental imperatives even though it cannot avoid interacting with environmental regulation.

It could of course be argued that MEAs are constructed by environmental negotiators with little awareness of trade law and the desirability of liberalized trade. But that would be unfair. Many delegations to MEA negotiations routinely include trade department representatives, and, in a number of instances (including the Montreal Protocol), negotiators have sought advice from the GATT/WTO Secretariat in designing particular features of their treaties. Some MEAs, including the FCCC, borrow text directly from GATT.

More generally, national trade departments tend to wield greater political clout than do environment departments and agencies, environmental objectives are not well integrated into policy across the board, and at the international level the MTS and the WTO (and in particular its dispute settlement system) are considerably more powerful and influential than are MEAs and the various environmental institutions such as UN Environment Programme or the UN Commission on Sustainable Development. The trade implications of particular MEA requirements can in theory be subject to scrutiny by the institutions of the MTS, but there is no provision anywhere for the environmental implications of the MTS to be subjected to scrutiny by environmental institutions.

The existing hierarchy of international law therefore favours, in practice even if not in the letter, the MTS over MEAs. For the reasons rehearsed above, this is an undesirable situation if one accepts that the two objectives of trade liberalization and environmental protection are of equal validity. The conclusion reached, therefore, is that the third option—modification of one or both of the existing systems of international law, for which priority should be given to the modification of the MTS—is required.

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4. Discussions in the WTO

The approach of the WTO Millennium Round, due to begin at the end of 1999, lends urgency to this analysis. Out of the very wide range of issues that could be considered under the "trade/environment" heading, resolution of the MEAs–MTS conflict has always been regarded as one of the most pressing, as evidenced by the concentration given to it by the WTO Committee on Trade and Environment (CTE) in its first two years of existence leading up to the Singapore WTO Ministerial Conference in December 1996. The Committee's discussions in 1995–1996 saw several countries put forward proposals for the resolution of the perceived conflict.[20]

The proposals tended to fall into three groups: "environment-minded," "trade-minded," and "development-minded"—though of course all participants in the debate claimed that they had the interests of trade, development, *and* the environment at heart.

The "environment-minded" group (represented by papers from the EU and Switzerland) broadly accepted the arguments for modification of the MTS, and much of the debate revolved around the EU proposal for an amendment of Article XX of the GATT to add trade measures taken pursuant to MEAs as a new qualifying subparagraph.

The "trade-minded" group (represented by papers from New Zealand, Japan, Korea, Hong Kong, and the Association of South East Asian Nations (ASEAN)) saw trade liberalization as the overriding aim of the WTO, and, although accepting the case for trade measures in MEAs, aimed to ensure that they were as tightly restricted as possible. Proponents of this standpoint often argued that no change to the MTS was necessary, an *ex post* waiver option (see further below) being all that was necessary to resolve any dispute; or perhaps some kind of "understanding" might be helpful to guide MEA negotiators in drawing up acceptable trade measures. Any amendment of Article XX was to be opposed as widening the scope for trade-restrictive measures and or disguised protectionism, and detracting from the rights of WTO members who were MEA non-parties. This group also frequently pointed out that only a small proportion of MEAs contained trade measures, and that there had never been a GATT or WTO dispute involving an MEA, thus questioning whether the discussion was really necessary.

The "development-minded" group (represented by papers from Egypt, India, and ASEAN, supported in debate by Nigeria and Mexico) regarded the concentration of debate on the use and definition of trade measures as at best unbalanced and at worst actively unhelpful. Trade measures should be seen in context as one component of, or one option for, a policy package also incorporating "positive measures" and improved market access (elimination of subsidies, reduction of tariffs and technical barriers to trade). Opinions differed on whether trade measures would be helpful in this context or whether they were straightforwardly undesirable, with other measures being able to achieve their objectives in a way that did not distort trade. The definition of an MEA was another much-stressed point, with the underlying concern being to avoid dealing with MEAs (and accompanying trade measures) that had been negotiated between a small group of countries without the participation of most, or all, developing countries.

The "environment-minded" group found itself more and more on the defensive, as the proposals put forward by other WTO members in response became more and more restrictive. Increasingly they aimed to limit the scope for trade measures in existing and future MEAs by specifying particular requirements for the trade measures under scrutiny. Any or all of "necessity," "effectiveness," "least trade-restrictiveness," "proportionality," or "sound scientific basis" were suggested as criteria that trade measures would have to fulfil, and that WTO panels would judge whether they satisfied. In practice this would have reinforced the existing international hierarchy, rendering MEAs more subject to WTO scrutiny and tilting the balance further towards the MTS and away from MEAs.

5. Options for resolution

It is to be hoped that any discussions in the Millennium Round will avoid a repeat of the CTE's long-drawn-out and ultimately inconclusive debate. Any solution to the conflict needs to satisfy the following criteria:

- There should be certainty about the MTS-compatibility of trade measures under existing MEAs, both those specifically mandated by

the MEA in question ("specific measures") and those not specifically required by the MEA but taken in pursuance of its aims ("non-specific measures").[21]

- There should be certainty over the MTS-compatibility of trade measures that might be incorporated in future MEAs or those currently under negotiation.
- There should be flexibility for MEA negotiators to incorporate trade measures in future MEAs where they consider them necessary to the fulfilment of their objectives.
- If trade measures are required by MEA negotiators, they should be applied in as non-discriminatory a way as possible; i.e. they should employ only such trade discrimination as is required to fulfil the aims of the MEA, and should not provide an opportunity for trade protectionism unrelated to environmental objectives.
- If disputes arise, it should be clear in which forum they can be resolved.

There are three main possible routes to resolving the issue:

1. A waiver from the obligations of the existing MTS.
2. Modification of the MTS to create an "agreement-specific" exemption from MTS provisions.
3. Modification of the MTS to create a "criteria-specific" exemption from MTS provisions; this could be achieved either (a) through amendment of GATT itself and/or (b) through a new WTO Agreement on MEAs.

Waivers

The use of waivers has been referred to as the "*ex post*" approach. Article XXV of GATT provides for the granting of a waiver from other GATT obligations "in exceptional circumstances"; Article IX of the WTO Agreement extends this to the MTS as a whole. Such waivers, however, are usually time limited, can be considered only on a case-by-case basis, and require a three-quarters majority of WTO members. Once again, they reinforce the existing hierarchy, firmly placing the WTO in judgement over MEAs, cannot contribute to certainty about the relationship

between MEAs and the MTS, and do not fulfil any of the criteria set out above.

The so-called "*ex ante*" approach, in contrast, implies modification of the MTS in some way.

"Agreement-specific" exemptions

One possible method is a "listing" of particular MEAs whose the provisions are deemed to be compatible with the MTS. This is similar to the approach taken by the North American Free Trade Agreement (NAFTA), which provides that, in the event of conflict between itself and CITES, the Montreal Protocol, or the Basel Convention (or other MEAs where all NAFTA parties agree), the provisions of the MEA should take precedence over the MTS—though it also adds that parties must use the means least inconsistent with the NAFTA in implementing the MEAs. Although more attractive than the waiver approach, this nevertheless involves the WTO reaching a decision over which MEAs it considers acceptable and which it does not; it still does not create any certainty over the relationship with MEAs in general.

"Criteria-specific" exemptions

A broader solution is preferred, dealing with MEAs as a category rather than one by one. This implies a "criteria-specific" modification of the MTS.

Amendment of GATT

The clearest political message would be to achieve modification of the MTS via amendment of GATT. The EU proposal in the CTE, for example, was for a new subparagraph of Article XX, covering measures "taken pursuant to specific provisions of an MEA complying with the 'Understanding on the relationship between measures taken pursuant to MEAs and the WTO rules'." The proposed Understanding included a simple definition of an MEA and stated that measures taken pursuant to the specific provisions of the MEA should be presumed to be "necessary" for the achievement of its environmental objectives, though they still remained subject to the requirements of the headnote to Article XX.

This particular approach now looks a little dated. Since the EU proposal was put together, a number of WTO panels have found trade measures in unilateral trade/environment cases to be justified under either para. (b) or para. (g) of Article XX, but then failed them under the headnote. If it is accepted that MEA trade measures would be likely to be treated similarly, then there is little point in adding a new paragraph; what would be required is amendment of the headnote itself. Since this would have implications for every category of exceptions to GATT, and for unilateral as well as multilateral trade measures, it would be exceptionally difficult—to put it mildly—to negotiate. In addition, the procedures for amendment of GATT are themselves quite stringent and time consuming.

A new WTO Agreement on MEAs

The alternative, and distinctly preferable, route for "criteria-specific" modification of the MTS is through a new WTO side agreement, similar in status to other WTO agreements such as those on Subsidies and Countervailing Measures, on Technical Barriers to Trade, or on Agriculture. The advantage of this approach is that: it avoids attempting to amend existing rules, with probable implications for a wide range of topics; it creates a very clear set of rules that would apply only to MEAs (i.e. that would not encourage further unilateral actions); and it is probably easier to negotiate.

What would the new Agreement need to cover? An outline of topics is provided here; further work would of course be necessary to develop detailed proposals:

- The definition of an "MEA," including criteria for its subject matter (possibilities include the promotion of sustainable development, the conservation of natural resources, the avoidance of trans-boundary pollution, and/or the protection of human, animal, or plant life or health) and for its openness to participation by all parties affected and concerned.
- The definition of trade measures and the treatment of different categories of measures. It would seem logical that specific measures—for example, the bans on trade with non-parties mandated by the Montreal Protocol, or the import and export licences required by

CITES—should fall within the scope of the Agreement and thereby be exempted completely from the other requirements of the MTS.

- Non-specific measures, on the other hand, such as the controls on trade with parties implemented by Montreal Protocol parties (including measures such as taxation, labelling requirements, and total or partial import bans) could be covered by the headnote to Article XX, as there seems little reason to think that they would need to be discriminatory to achieve their objectives. Conversely, if discriminatory measures *are* required, it seems reasonable to insist that they should be specific, i.e. included in the text of the MEA. What is decided here therefore has implications for the design of future MEAs.
- Linkage of burdens and offsets. Developing countries have tended, as a whole, to be most strongly opposed to any modification of the MTS for environmental purposes, including in the context of the MEA debate. Given the record of Western protectionism against developing country exports still enshrined in parts of the MTS, such as the Agreement on Textiles and Clothing, one can hardly blame them. It is important that trade measures are not used to force countries into implementing an agreement that unfairly retards their development—bearing in mind, of course, that in many cases the environmental harm at which the MEA is aimed may well retard their development anyway if it proceeds unchecked. The presence of trade measures *as one component* of a range of implementing measures in a particular MEA (including, for example, provisions for finance and technology transfer) is therefore an important feature of MEA design. To what extent this should be specified in a WTO Agreement is questionable, however; one would wish to avoid a situation in which a WTO panel found against the use of trade measures because the MEA's financial provisions were not working well.
- Dispute settlement. The Agreement would need to be clear about where disputes over the application of MEA trade measures should be resolved. In line with earlier CTE discussions, it seems logical for disputes between MEA parties to be resolved by the MEA, and for disputes between an MEA party and a non-party that is a WTO member to be resolved by the WTO. (This in turn has implications for WTO dispute settlement procedures and their ability adequately to consider environmental issues). There also needs to be some agreed

procedure for cases where it is not completely clear whether a trade measure is MEA related or not; the US actions in the *Shrimp-Turtle* case, for example, could arguably be considered to be justified by a range of MEAs, including CITES, the Biodiversity Convention, and the Bonn Convention on the Conservation of Migratory Species of Wild Animals.

6. Conclusion

The WTO Millennium Round offers an opportunity for the resolution of the potential conflict between the MTS and MEAs with trade provisions. It creates the wider political and negotiating environment—notably lacking within the CTE discussions—within which trade-offs can be reached and all participants in the debate end up with perceived gains to offset perceived losses. It is the conclusion of this chapter that the opportunity should be taken to open negotiations on a new WTO Agreement on MEAs with Trade Provisions.

The biggest danger in this debate is that no political impetus will be given to it and nothing will in the end be resolved. It is entirely possible to argue, for example, that most MEAs do not contain trade provisions, that there has never been a WTO dispute involving an MEA, and that recent panel and Appellate Body findings have shown that the WTO is sensitive to the environmental imperative; therefore, no action is required. This would be a profound mistake. MEAs are growing in number, in scope, and in importance, matching the growing evidence of global environmental degradation. In some cases they will need to impact international trade if they are to be implemented effectively. There have already been too many instances of MTS-incompatibility arguments being used as weapons in MEA negotiations to retard their development.

Trade liberalization and environmental protection are both desirable objectives. But the legal regimes that govern them are developing largely in isolation. A failure to resolve the *potential* conflict between them can lead only to actual conflict, undermining both. The time to act is now.

Notes

1. The number is usually given as 17, following the GATT Secretariat's 1992 report on trade and environment (*International Trade 1990–91,* Geneva: GATT Secretariat, 1992), but some MEAs were omitted by this analysis (see Steve Charnovitz, "Multilateral Environmental Agreements and Trade Rules," *Environmental Policy and Law* 26(4), 1996, 164).
2. For a fuller consideration, see Steve Charnovitz, "The Role of Trade Measures in Treaties," in Agata Fijalkowski and James Cameron, eds., *Trade and the Environment: Bridging the Gap,* London: Cameron May, 1998.
3. For a good overview of CITES and its development, see Wilhelm Wijnstekers, *The Evolution of CITES,* Geneva: IUCN, 1995, 4th edition.
4. See Peter H. Sand, "Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment," *European Journal of International Law* 8, 1997, 29–58.
5. For a general overview of the Montreal Protocol and its evolution, see Richard Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet,* Cambridge, MA: Harvard University Press, 1998 (enlarged edition).
6. For full descriptions of the evolution and operation of the trade provisions, see Duncan Brack, *International Trade and the Montreal Protocol,* London: Royal Institute of International Affairs, 1996.
7. For an overview of the hazardous wastes problem and the Basel Convention, see the Secretariat of the Basel Convention on the Transboundary Movements of Hazardous Wastes, *The Basel Convention: A Global Solution for Controlling Hazardous Wastes,* New York/Geneva: UN, 1997.
8. For a full analysis of the Basel Convention's interaction with trade, see Jonathan Krueger, *International Trade and the Basel Convention,* London: Royal Institute of International Affairs, 1999.
9. For an overview of the international climate change regime and the Kyoto Protocol, see Michael Grubb, Christiaan Vrolijk, and Duncan Brack, *The Kyoto Protocol: A Guide and Assessment,* London: Royal Institute of International Affairs, 1999.
10. For a discussion of the implications for trade of climate change policies in general, and the Kyoto Protocol in particular, see Duncan Brack, Michael Grubb, and Craig Windram, *International Trade and Climate Change Policies,* London: Royal Institute of International Affairs, 1999.
11. For a more detailed (but now rather dated) discussion of the interrelationship of MEAs with various parts of the MTS, see Robert Housman, Donald Goldberg, Brennan van Dyke, and Durwood Zaelke, eds., *The Use of Trade Measures in Select MEAs,* Geneva: UNEP, 1995.
12. In January 1997, Zimbabwe applied to the WTO for compensation for the loss of international ivory markets consequent upon the listing of the African elephant under Appendix I of CITES, but the case became irrelevant after the CITES Conference in June of that year decided to permit limited trade in ivory stockpiles.
13. Six dispute panel findings are generally considered to be the main trade/environment cases, though others are also relevant: *US–Restrictions on Imports of Tuna*

(1991); *US–Restrictions on Imports of Tuna* (1994); *US–Taxes on Automobiles* (1994); *US–Standards for Reformulated and Conventional Gasoline* (1996); *EC–Measures Concerning Meat and Meat Products (Hormones)* (1998); and *US–Import Prohibition of Certain Shrimp and Shrimp Products* (1998). The first three were GATT panel findings that were not adopted by the GATT Council; although the panel reports therefore have no legal status, they do tend to provide precedents. The others were WTO panel findings, which in each case were referred to the Appellate Body.

14. *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* Report of Panel, WT/DS58/R, 15 May 1998, para. 7.4.

15. Ibid., para. 7.45, quoting *United States–Restrictions on Imports of Tuna,* GATT Doc. DS29/R, 16 June 1994 (unadopted), para 5.26. Reprinted in 1994, 33 ILM (International Legal Materials) 842.

16. *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 161.

17. Ibid., para. 164.

18. See Steve Charnovitz, "GATT and the Environment: Examining the Issues," *International Environmental Affairs* 4(3), summer 1992, 216; and Grant Hewison, "Multilateral Efforts to Protect the Environment and International Trade: The Case of Driftnet Fishing," paper presented to the GATT symposium on trade, environment, and sustainable development, Geneva, July 1994.

19. See Steve Charnovitz, "Restraining the Use of Trade Measures in Multilateral Agreements: An Outline of the Issues," in T. M. C. Asser Instituut, Report of the Round Table Conference, "The Relationship between the Multilateral Trading System and the Use of Trade Measures in MEAs: Synergy or Friction?" 22–23 January 1996, The Hague.

20. For a summary and analysis of the discussions, see Duncan Brack, "Reconciling the GATT and MEAs with Trade Provisions: The Latest Debate," *Review of EC and International Environmental Law* 6(2), July 1997.

21. See the discussion above on the Montreal Protocol for the difference between the two. The Kyoto Protocol also seems likely to lead to a wide variety of non-specific measures.