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Clear and Effective Trade Measures in Multilateral Environmental Agreements and Their Compatibility with the Rules of the Multilateral Trading System

A Discussion Paper

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1. Introduction

This paper is intended to facilitate the discussion on approaching the negotiating mandate contained in paragraph 31 (i) of the Doha Ministerial Declaration aimed at clarifying the relationship between specific trade measures in Multilateral Environmental Agreements (MEAs) and WTO rules. The paper takes stock of the debate on the subject in the CTE and other forums, such as the OECD Joint Working Party on Trade and Environment; touches upon a number of conceptual issues for evaluating effectiveness and efficiency of trade measures in MEAs; describes the link between supportive measures and trade measures in MEAs; and highlights the need for flexibility of MEA policy packages in addressing divergent developmental situations and needs of developing country parties. In its analysis, the paper pays special attention to three MEAs with trade measures (the Montreal Protocol, CITES and the Basel Convention) – conventions that have various specific trade measures and have been operational for a relatively long period of time. Finally, the paper makes a practical proposal on approaching the mandate in paragraph 31(i) and highlights the role UNCTAD could play in enhancing developing countries negotiating capacity.

2. Need for international co-operation

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

The globalization of our world 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 only. International co-operation is required to achieve effective abatement policies of pollution 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 companies in the countries parties to such agreements. An increased number of agreements have been negotiated, signed, ratified and implemented¹ in order to consolidate international co-operation.

MEAs are instrumental to address serious environmental concerns at the international level, such as ozone depletion, climate change, endangered species of wild fauna and flora, and the trafficking of hazardous wastes or chemicals, among others. 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*

¹ See United Nations Treaty Collection. Treaty Reference Guide (1999). It defines all the relevant terminology to be used when dealing with international treaties.

sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.»²

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, and also due to the measurement of opportunity costs and the lower monetary value estimated in these countries by the standard econometric measurement. Furthermore, if the costs of any abatement or adjustment measures have to be borne entirely by the party implementing them, they may be unaffordable. Therefore, developing countries have an objective interest in co-operative approaches to address transboundary or global environmental problems within the framework of MEAs. 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 balanced economic growth, compatible with local socio-ecological constraints;

Linked-effects: A package of supportive or positive measures in MEAs can facilitate the implementation of the trade-measures pursuant MEAs; this means that while adapting their productive and export sector to eventually respect their commitments, developing countries will benefit from supportive measures that build the necessary institutional, technical and managerial capacities to meet the MEA objectives.

3. Trade-related MEAs

According to recent UNEP and WTO documents (UNEP 1999, WTO WT/CTE/W/160/Rev.1, p. 55), of the 238 current “International Treaties and Other Agreements in the Field of the Environment” 38 (i.e. 13 per cent) contain trade-related measures, or their Parties have adopted trade provisions in decisions of the Conference of the Parties in furtherance of the objectives of the agreements. Selected examples are the Montreal Protocol, the Basel Convention, the Convention on International Trade in Endangered Species (CITES), the Persistent Organic Pollutants (POPs) and Prior Informed Consent (PIC) Conventions, as well as the Biosafety Protocol of the Convention on Biological Diversity (CBD). Conceptually, the above-mentioned MEAs fall into agreements that use trade measures to attain their objectives and accords, which have or may have significant trade effects, without employing trade measures themselves. The latter concerns, for example, the UNFCCC and its Kyoto Protocol that may have significant trade implications in areas such as fossil fuels, energy-intensive investment and consumer products, energy efficiency services as well as the creation of an international market for greenhouse gases’ emission reductions.³

The debate in the WTO’s Committee on Trade and Environment (CTE) on the interrelationship between trade measures pursuant to MEAs and the rules of the

² Rio Declaration on Environment and Development, in: Earth Summit: Agenda 21 – The United Nations Programme of Action from Rio, New York, 1992.

³ An in-depth overview of trade measures in several MEAs is contained in WTO document WT/CTE/W/160/Rev.1 of 14 June 2001.

Multilateral Trading System (MTS) has focused on determining under which circumstances the use of trade measures is appropriate to effectively meet specific MEA objectives (i.e. whether such measures are necessary to protect human, animal or plant life or health and that those measures do not constitute an arbitrary or disguised form of protectionism) and whether it is necessary to modify the provisions of the MTS in order to ensure the compatibility of those measures with the WTO rules. This issue is one of the ten subjects addressed by the CTE in the context of its work programme.

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.

Certain WTO Members have articulated concern in the CTE and other fora that trade-related measures unilaterally taken by some countries pursuant to trade measures in one or the other MEA might pose a conflict with WTO rules. Concerns have also been voiced regarding MEAs with a fragmented membership in the light of numerous annexes and amendments, in which specific trade measures were mandated or allowed or Amendments of MEAs that have become operational, but have not been ratified by a large number of Parties (for instance the Montreal and Beijing Amendments of the Montreal Protocol). It also concerns cases, where a country might not be a Party to such MEA, but is a Member of WTO. In all such cases, it is desirable to address potential conflicts in a pro-active way, preferably within the MEA framework, perhaps including through the involvement of trade experts in such discussions and the establishment of efficient dispute settlement mechanisms.⁴

Another issue that is of importance in this regard is the wide or universal membership of such MEAs. If a MEA containing trade measures has a wide membership and the trade measures enjoy broad-based or universal support, the risk that such trade measures may be regarded to conflict with WTO rules is not very high.

Several developing countries have expressed concern on an adequate definition of MEAs in the debate in the CTE in recent years. When clarifying the relationship between MEAs and WTO rules, these countries seek assurance that MEAs are intergovernmental agreements that meet certain criteria. As far as substantive criteria are concerned, it was emphasized that MEAs should effectively deal with the targeted environmental problem and truly form a platform for consensus. In addition, MEAs should meet certain procedural criteria. They should be open to all countries; be based on broad international participation; and have adequate representation of all country groups.⁵

⁴ In this context, also see the recommendations on item 1 and 5 contained in the Report of the CTE to the first WTO Ministerial Conference in Singapore in December 1996, WTO/PRESS/TE014, 18 November 1996.

⁵ Conversely, in its recent submission to the first special session of the CTE on MEAs (document TN/TE/W/1 of 21 March 2002), the European Union proposed a definition, according to which an MEA is a legally binding instrument between at least three parties and which is open to all countries concerned. The EU explicitly includes regional agreements, such as fisheries organizations, in such definition. It would clash with the criteria of "broad international

Finally, it should be mentioned that status-wise trade measures in several MEAs fall into two clusters: (i) trade measures in the MEA that are multilateral in nature; and (ii) trade measures that can be unilaterally taken by MEA Parties “pursuant” to some MEA provisions (e.g. stricter import measures in some developed countries under CITES or the national designation of specific hazardous wastes, based on Basel Convention Article 1.1.(b)). The latter trade measures run a higher risk of being regarded disproportionate or not least trade-restrictive by other MEA or WTO Parties.

4. 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 conflict potential in recent years in the light of the fact that membership of many MEAs has become universal, often being equal or even higher than the number of WTO member countries.⁶ However, several countries have articulated concern that the proliferation of Amendments, Protocols or Annexes to various MEAs, each of which being a self-contained legal instruments that requires ratification, not only keeps the Party – non-Party nexus alive, but might even make it more subtle.

The principle of *common but differentiated responsibilities* has also been invoked by several developing countries in the discussions of the CTE on the subject. Some countries have expressed the view that discriminatory trade measures applied to non-Parties to an MEA were not appropriate means to reach international environmental objectives. The report of the CTE to the WTO Ministerial Meeting in Singapore in 1996 stated that opinions were divergent regarding the necessity to modify the MTS. It concluded that the issue needed further consideration.

5. Results of CTE discussions on MEA – WTO relationship

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 reach 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 existed between 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.

participation” and “adequate representation of all country groups”. Furthermore, it is highly unlikely that a developing country would join a regional MEA, which is of little relevance to its particular region, for the mere sake of avoiding undesirable trade restrictions, unless there is a reasonable balance, including costs, between rights and obligations arising from such MEA.

⁶ 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.

The CTE has also made some recommendations to avoid disputes:

- The coordination of policies between official trade and environment representatives at the national level should be encouraged;⁷
- Increased cooperation between the WTO and the appropriate body of the MEAs was considered useful;
- It was also recommended that 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.
- It was also pointed out that 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 and more emphasis on facilitating and compliance assistance measures, rather than on dispute settlement measures.⁸
- 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 was a need for joined-up 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.⁹

⁷ 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. The lack of effective national policy co-ordination has therefore, at least in part, been behind their opposition to the accommodation of MEAs in WTO rules. For more information, see: 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).

⁸ 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.

⁹ UNEP, *Enhancing synergies and mutual supportiveness of Multilateral Environmental Agreements and the World Trade Organization – A synthesis report*, Geneva, January 2002.

6. Criteria for evaluating the effectiveness and efficiency of trade measures

Before elaborating on the criteria for evaluating the effectiveness and efficiency of specific trade measures, it is important to analyse the key reasons for resorting to trade measures in MEAs. Later, this will facilitate the task of determining whether the employment of trade measures is indeed the most effective policy instrument to deal with the cause at issue.

Trade measures in MEAs are normally used in situations, in which

- markets are imperfect or
- there are information deficiencies or asymmetries or
- government failure needs to be corrected.

Most MEAs address the first two issues, for instance the Montreal Protocol for the Protection of the Ozone Layer or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes. Some fishery agreements and, partly, the Kyoto Protocol of the UN Framework Convention on Climate Change attempt to correct government failure, for instance caused by fishery and energy subsidies.

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 under the introductory clause of Article XX is required.

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. 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.

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 Basel Convention, 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 definitely not the most effective measure for the latter.

As regards the general evaluation of the effectiveness and efficiency of trade measures in MEAs, an investigation by the OECD's Joint Session of Trade and Environment Experts¹¹ has led to the following results:

Trade measures can be appropriate policy-measures in MEAs inter alia:

- When the international community agrees to tackle and manage collectively international trade as part of the environmental problem.
- When trade controls are required to make regulatory systems comprehensive in their coverage.
- To discourage free riding, which can often be a barrier to effective international cooperation.
- To ensure compliance with the MEA.

Trade measures may have a specific role in achieving MEA objectives:

- Trade measures in environmental agreements can induce participation in the agreements (by excluding from international trade those countries non respecting MEAs provisions).
- Trade measures can support the phase out of products/substances or specific production methods.
- Trade measures can also contribute to the internalization of environmental costs in prices of environmentally risky products.
- Trade measures in MEAs are to be used when they are found to be the most effective means, with no better alternative to reach the environmental goal.

According to the OECD, 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.

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

¹¹ 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.

- 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, summarizing the findings of a comparative analysis of CITES, the Montreal Protocol and the Basel Convention, the OECD identifies 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.
- 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.

Crafting clear trade measures in MEAs that are effective and efficient is one thing, avoiding equity problems in their design and implementation is another.

7. Equity of trade-measures

Although trade-related measures or effects of MEAs are not per se discriminatory in nature, their effects are not uniform depending on the divergent stages 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 the obligations derived from the implementation of the agreements.¹²

The enhanced differentiation among developing countries and the thus resulting divergence of interests and developmental priorities increasingly represents a complicating factor for the selection of appropriate trade measures and their implementation. Through regular review of the effectiveness and efficiency of the applied trade measures and the use of supportive/enabling measures, MEAs will have to reflect and accommodate these different situations and interests. As a rule of thumb one can probably say in this regard 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.

8. The role of positive/supportive/enabling measures

Positive measures are pivotal for addressing lacking or weak institutional, technical and managerial capacities in developing countries to implement MEAs. Positive measures help countries by improving their access to and transfer of technology, capacity building and providing finance, reflecting the enhanced differentiation of developing countries in their stage of development, technological capacity and trade intensities. It is usually an integrated package of both trade measures and supportive measures that takes countries closer to the goals of the MEA's and thereby environmentally sustainable development.¹³

Positive measures¹⁴ include technical assistance and capacity building as well as the provision of financial assistance, inter alia to help meet incremental costs in achieving

¹² 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.

¹³ 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.

¹⁴ Positive measures is a terminology that can lead to some misunderstandings as interpreting them as being the opposite from negative measures. This is a debate that we will not develop within this document but the interested reader can refer to Vaughan, S. and Delhavi, A. (1998) *Policy Effectiveness and Multilateral Environmental Agreements*, UNEP, Environment and Trade, 17.

international environmental goals set by 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. In this sense, positive measures include transfer of finance and technology, incentives in the areas of building institutional, personnel and managerial capacities, information management, and dynamic economic (i.e. market-based) mechanisms.¹⁵

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 equity. In this context, by attempting to give full consideration to principles such as equity and common but differentiated responsibilities, positive measures promote participation and effective international cooperation in the implementation of the provisions of MEAs.

Positive measures have been considered necessary because compliance control and enforcement regimes are often insufficient for the effective implementation of MEAs' provisions in developing countries. There are several reasons for designing a package of positive/supportive/ enabling measures that complements trade-related measures in MEAs. These reasons are due *inter alia* to:

- Divergent levels of development, technological profiles, market composition and trade intensities.
- Lack of information on the underlying economics behind the use of trade measures, in particular in encouraging access to and effective use of environmentally sound technologies.
- Overwhelming presence of the informal sector in developing countries with little technological and financial capacity.
- Trade measures might not necessarily 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

¹⁵ An UNCTAD Expert Meeting on Positive Measures to Promote Sustainable Development, Particularly in Meeting the Objectives of Multilateral Environmental Agreements was 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.

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 emerging from the relationship between transfer of environmentally sound technologies and products and the multilateral trade rules concerning trade-related intellectual property rights (TRIPS).

9. Effectiveness of positive measures

One typical example of positive measures is the transfer of environmental sound technologies (EST). These are defined in Agenda 21 as follows: “Environmentally sound technologies are not just individual technologies, but total systems, which include know-how, procedures, goods and services, and equipment as well as organizational and managerial procedures. This implies that when discussing transfer of technologies, the human resource development and local capacity-building aspects of technology choices, including gender-relevant aspects, should also be addressed. Environmentally sound technologies should be compatible with nationally determined socio-economic, cultural and environmental priorities.”¹⁶

Effective use of transferred ESTs also requires conducive macro-economic, in particular incentive-based, policies in developing countries. This encourages two very important things: on the one hand, conducive macro-economic incentives stimulate full use of acquired ESTs. On the other hand, they encourage the private sector in developing countries to seek industry partnerships with companies or industry associations in developed countries to get access to new ESTs and to further improve thus acquired ESTs, based on innovative abilities in developing countries.

In practice, most positive measures could not yet be used or invoked with the required vigour mostly because of 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.¹⁷ Inadequate funding hampers the effective implementation of the agreements, including the required support needed by developing countries and countries in transition. It should be kept in mind that a clause of reciprocity included in the 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 Montreal Protocol and CBD, making the implementation of agreed obligations by developing countries dependent upon the effective implementation by developed countries of the financial co-operation and transfer of technology provisions (Art. 5.5.

¹⁶ Agenda 21 - The United Nations Programme of Action from Rio, New York, 1992, p. 252.

¹⁷ One of the MEAs, in which positive measures have been successfully and widely used, is the Montreal Protocol, where its 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 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 oscillated around US \$ 1.5 million per annum in recent years (to make the picture even more bleak, a considerable part of these funds have been used to fund participation of developing country delegates in meetings of the subsidiary bodies of the Conference of the Parties 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 Convention.

of the Montreal Protocol, Art. 20.4. of CBD, and Art. 4.7. of UNFCCC).¹⁸ However, the Montreal Protocol 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. Whilst positive measures have not always been easy to implement, innovative approaches to positive measures may be politically attractive in the light of existing budget constraints and 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 finance 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 and promote the involvement of the private sector and civil society in achieving the objectives of MEAs.

Several MEAs containing trade measures recognize that there may be compliance problems and costs, in particular for developing country Parties. Various positive or facilitating measures have therefore been incorporated to reduce such costs. In this light, it is very important for developing countries to be aware of their own needs and capacities in order to negotiate the conditions in which they will participate in MEAs and agree to the use of trade measures.

10. Clarifying the relationship between specific trade measures in MEAs and existing WTO rules

The Ministerial Declaration, adopted at the 4th Ministerial Meeting of WTO in Doha in November 2001, agreed upon a work programme that might usher into negotiations on a new round of global trade liberalisation. In Paragraph 31(i) of the Declaration, WTO members agreed to “negotiations, without prejudging their outcome, on the relationship between **existing** WTO rules and **specific** trade obligations set out in MEAs”. This negotiating mandate is however limited in scope: (i) it shall be limited to the applicability of such existing WTO rules as among parties to the MEA in question; (ii) negotiations shall not prejudice the WTO rights of any WTO member that is not a party to the MEA in question; and (iii) it shall not add to or diminish the rights and obligations of WTO 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 should take into account the needs of developing and least-developed countries.¹⁹

¹⁸ 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/.

¹⁹ WTO, Ministerial Declaration, 4th Ministerial Conference of WTO, Doha, 9-14 November 2001, WT/MIN(01)/DEC/W/1.

The selected language above is important. “Specific” trade obligations apparently relate to those trade measures, explicitly agreed upon at multilateral level. As already mentioned in section two above, these trade measures are to be distinguished from unilateral trade measures taken at national level by individual parties “pursuant” to an MEA. Although such trade measures are authorized by several MEAs²⁰, the specific form of the measure and its level of rigidity are not specifically provided for in the MEA. This may carry the risk of being regarded as too harsh or disproportionate by other parties and thus lead to trade tensions.

The explicit reference in the Doha negotiating mandate to the SPS agreement as well as the clarification that any negotiations on the subject “shall not add to or diminish the rights and obligations of WTO members under existing WTO agreements” has apparently been woven into the text by those WTO members, who want to be sure that the Precautionary Principle is not pushed into the negotiations by travelling on the back of some of the negotiating issues, including the MEA issue. If the Precautionary Principle were applied to some of the new negotiating issues, then it seems to be the wish of these Parties that it should be confined to its present application under Article 5.7. of the SPS agreement, i.e. as provisional measure, subject to a risk assessment based on scientific criteria and periodic review.

In the light of the above, it seems unnecessary to recapitulate all proposals, including the generic ones, made in the CTE discussions in recent years aimed at generally clarifying the relationship between trade measures in MEAs and WTO rules.²¹ Rather, at this juncture it seems worthwhile to recall some views expressed by various developing countries in recent CTE debates and the proposal made by New Zealand, which seem to be of particular usefulness in the light of the Doha negotiating mandate.

Several developing countries have highlighted the fact that, as yet, there has been no challenge under the WTO against trade measures taken pursuant to MEAs.²² Furthermore, it was stressed that the likelihood of such challenge was now much lower than in the past. Several developing countries, such as Brazil and India, therefore see no need for a specific clarification of the relationship. They however

²⁰ For instance, Article 1.1.(b) of the Basel Convention allows countries to designate wastes as hazardous over and above those listed by the Convention as hazardous and thereby make them subject to the trade measures and restrictions of the Convention. Article 14 of CITES gives the option to exporting and importing parties to take stricter trade measures on any species.

²¹ For more information in this regard, see: UNCTAD, TrainForTrade Training Module 5, Multilateral Environmental Agreements, accessible at www.unctad.org/trade_env/ or Hutton, J., Sustainable use of resources, the WTO and MEAs, in BRIDGES between Trade and Sustainable Development, No. 8, Year 5 (October 2001), accessible at www.ictsd.org.

²² It should be mentioned though that the recently concluded amicable arrangement between Chile and the EU on the prohibited port entry of EU vessels into Chilean ports carrying swordfish has been considered by some legal scholars as a dispute initiated in the WTO and an MEA (in this case the International Tribunal of the Law of the Seas in Hamburg, Germany- ITLOS). The EU raised the case before the WTO against provisions in Chilean Fisheries Law, whereas Chile filed another case in the special Chamber of the ITLOS. In the light of an amicable arrangement between the two parties, the ITLOS special Chamber has suspended proceedings in the case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean until 1 January 2004. For more information, see: Gehring, M., Sustainable development angles to the swordfish dispute, Bridges, No. 7, Vol. 5 (September 2001), pp. 13-14).

argued that if any clarification was sought by some WTO Parties, a careful definition of the meaning and coverage of MEAs would be required to assure that trade measures taken therein would not constitute arbitrary and unjustifiable trade discrimination as well as be least trade-restrictive.

A number of developing countries have also underscored that MEAs themselves might take steps to avoid conflict by examining their effectiveness, reviewing their operations to incorporate WTO principles (such as least trade restrictive practices) and creating their own compulsory and binding dispute settlement mechanism.

Several observers of the CTE debate have also argued that some resource-rich or rapidly industrializing developing countries apparently feel that the WTO should keep a say, in particular in cases where trade measures are unilaterally taken pursuant to an MEA. Such countries may feel unfairly disadvantaged by MEA regulations²³ and therefore wish to retain the possibility of appeal to the WTO dispute settlement process as a last resort. These countries argue that the move to exempt MEAs from WTO rules assumes that each MEA (i) is dealing effectively with the relevant environmental threat; (ii) is truly a platform for consensus; and (iii) has an effective dispute settlement mechanism. Where any of these things is in question, developing countries are surely justified in asking if it is appropriate to deny the WTO a say.²⁴

Some developing countries also emphasized that the use of trade measures over other policy instruments could further discourage the search for positive or supportive measures.²⁵

Below is a short summary of positions from Brazil, India, Mexico and Venezuela taken in recent CTE debate on the subject that are illustrative of the main lines of argument put forward by developing countries:

Brazil questioned the need to continue discussion on this issue, which in its view is impossible to resolve. The country encourages continued information exchange with UNEP and MEAs. Brazil supports New Zealand's ideas of (a) drafting trade measures in MEAs very precisely, and (b) creating a consultative mechanism. Brazil however raised the question of how an informal mechanism for broader dialogue would work in practice.

In **India's** view, existing WTO provisions are adequate to deal with trade measures pursuant to MEAs. Trade measures pursuant to MEAs should be formulated with WTO obligations in mind. The DSU is adequate to deal with MEA-related disputes. At the same time, India would like to resolve the "incompatibility" between the CBD and TRIPS. India supports New Zealand's proposal.

²³ For instance, an article attempting to analyse the implications of the Doha Ministerial Declaration for India points out that "modifications of the WTO trade rules to accommodate the trade provisions in MEAs, if approved, are of concern to countries such as our on account of the following aspects. First, changes in the WTO rules could have a damaging effect on the trade promotion opportunities of developing countries as most of them export natural resource-based products." M. K. Mehra, S. Banerjee, R. Bajaj and Fernandex, C., India at the Doha ministerial meeting: an analysis, *International Journal of Regulation and Governance*, No. 1, Vol. 2, p. 200.

²⁴ Hutton, J., op.cit.

²⁵ M. K. Mehra, S. Banerjee, R. Bajaj and Fernandex, C., op.cit. p. 200.

According to **Mexico**, there is no conflict between WTO rules and MEAs. Designing criteria and principles should be the sovereign right of each country, rather than the role of WTO.

Venezuela appreciates greater dialogue between WTO, UNEP and MEAs. In its view, the EC proposals for the reversal of the burden of proof, and a Code of Conduct are unacceptable.

A recent (pre-Doha) 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).²⁶ 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).

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.²⁷

New Zealand's position is summarized in the Box below:

²⁶ 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/W/20). 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.

²⁷ For more information, see: Abdel Motaal, D. , op.cit.

Consultative Mechanism:

Ensuring consultation between countries prior to the imposition of a trade measure to achieve the objective of an MEA. First-best policy options should be pursued, these will always be the least trade-distortive options that deal with the source of the problem.

The mechanism is to be an informal voluntary mechanism that parties to MEAs enter into. MEA negotiators may consider building such mechanisms into new MEAs.

Such consultations could eventually be entered into with "significant non-parties" as well.

The CTE may wish to recommend such a mechanism in its proceedings.

Informal Mechanism for Broad Dialogue:

Dialogue between WTO, MEAs, UNEP, NGOs and industry should be encouraged.

Drafting of Trade Measures:

When drafting trade measures, MEAs should be encouraged to draw up very specific ones.

Understanding:

An Understanding that would cover the entire WTO Agreement to accommodate trade-measures under MEAs, if these measures comply with:

- Procedural Criteria: MEA is open to everyone, includes broad participation, and adequate representation of consumer and producer nations.
- Substantive Criteria: Trade measure is specifically prescribed by MEA, is necessary, effective, proportional, etc.

Understanding would also apply to measures taken against non-Parties, but criteria above would have to be met.

It would not cover unilateral measures.

At the first special session of the CTE in mid-March 2002, the EC tabled document TN/TE/W/1 on the implementation of the Doha development agenda regarding MEAs. The main components of this new proposal are:

- The paper provides a definition for MEAs. The purpose of this definition is to seek within the WTO an agreed definition of an MEA to subsequently clarify the circumstances under which specific trade obligations set out in an MEA should be given explicit recognition under WTO rules.
- Against this background, the EU considers that an MEA is a legally binding instrument between at least three parties, the main aim of which is to protect the environment and which is open to all countries concerned from the moment negotiations begin. In the context of the WTO, an MEA should also be relevant to the aims set out in sub-paragraphs (b) or (g) and the headnote of GATT Article XX. Relevant regional agreements, such as fisheries organizations, should also be covered, provided that countries concerned outside the region are not prevented from participating. It is further qualified that an MEA should have been negotiated under the aegis of the UN or one of its agencies or programmes, or under procedures for negotiation open for participation by all WTO members.
- The EU clarifies that when governments develop positions for MEA negotiations, they should also give consideration to relevant WTO rules so as to ensure a mutually supportive relationship. In the view of the EU, MEAs and WTO are equal bodies of international law. WTO rules should therefore not be interpreted in clinical isolation from other bodies of international law.
- The EU recommends that WTO members should agree on principles that should govern the relationship between WTO rules and MEAs and consider the extent to which specific trade obligations should be considered to be automatically in conformity with the WTO.

11. A brief account of the clarity of trade measures, flexibility mechanisms and supportive measures in three MEAs with trade measures: CITES, the Montreal Protocol and the Basel Convention

It was already mentioned in sections 6 and 8 that 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 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 the thus resulting priorities and interests of Parties, notably developing countries, will be taken into account and that trade measures do thus not jeopardize developmental goals. Simplistically put, the more important and effective the supportive measures, the less the required degree of flexibility in MEAs to accommodate divergent developmental interests, because supportive measures may well address most or all of the compliance problems of developing country Parties.

Clear definition of trade measures and 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 arbitrary and unjustifiable discriminating or a disguised form of protectionism.

A brief survey on the above for CITES, the Montreal Protocol and the Basel Convention provides the following picture:²⁸

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 good number of flexibility elements that can be applied to further the effectiveness and efficiency of trade measures:

- The down-listing of species from Annex I to Annex II²⁹ is based on consensus or a two-third majority vote.

²⁸ These three MEAs were selected for further review, because (i) they have a range of specific trade measures; (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.

²⁹ Annex I lists species, for which no commercial trade is allowed. Annex II contains species, for

- (Not in the Convention, but recently developed) National export quotas for a limited amount of trade of Annex I-listed species (this allows a distinction between national populations that are more sustainably managed than others).
- Limited flexibility for international trade in Annex I species through an exception, called ranching – CITES-registered farms receive treatment of Annex 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.
- 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 Annex I to Annex II.

Conversely, CITES only has very few supportive measures, mostly training and technical assistance. There is generally insufficient, unreliable and sporadic financial and technical support, in particular for customs authorities in developing countries. In recent years, the CITES secretariat only had about US \$ 1 million 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 they generated.

A significant number of Parties have resisted attempts of listing commercial fish and timber species in Annex II, because of the higher risk of trade friction and uncertainty whether such listing would hamper international trade. Recently, many parties have emphasised that CITES should find solutions to individual problems in specific countries, rather than blanket global prohibitions.

A potential area of tension with WTO rules is the practice to suspend 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. Such decisions have been taken by the Standing Committee on the basis of a vote requiring a two-thirds majority of those Parties present. This has been practiced *vis-à-vis* about a dozen of Parties, most of them developing countries (*inter alia* Bolivia, Paraguay, and China;³⁰ most recently the CITES Standing Committee

which commercial trade is allowed, but under close scrutiny, e.g. subject to export, import, and re-export permits.

³⁰ 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.

debated the suspension of all CITES-related trade for Fiji, Viet Nam and Yemen, but failed to take any specific decision³¹).

The Montreal Protocol

In the Protocol, which is an international legal instrument of five separate Protocols (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) trade measures are supplementary to the phase-out schedules of ozone-depleting substances (ODS). Trade measures concern:

- 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).
- An import ban from non-Parties of ODS and ODS-containing products as well as an export ban of 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.
- A voluntary notification by a Party of ODS-containing products it does not want to import.

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 for developing countries between the capacity for fulfilling obligations and the effective implementation of the provisions on financial co-operation and transfer of technology (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” (methyl bromide for pest and disease control e.g. 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 the light of the number of separate agreements it covers and their separate ratification requirements).
- Till the first control measures took effect, 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.

³¹ CITES secretariat, Suspension of trade with Fiji, Viet Nam and Yemen recommended, News & Highlights, www.cites.org/eng/news/sundry/fiji_vn_ym_suspension.shtml.

As regards supportive measures, a multilateral fund was created that meets 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.³²

The Basel Convention

The original Convention confined the regulatory body of international trade in hazardous waste to a “Prior Information and Consent” approach. The second and third COP 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, all 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 objectives of the Convention are to (i) reduce transboundary movements of hazardous waste to a minimum; (ii) dispose of hazardous wastes as close as possible to their source of generation; (iii) minimize the generation of hazardous wastes in terms of quantity and hazardousness; (iv) prevent illegal traffic; and (v) to prohibit shipments of hazardous wastes to countries that lack the legal, administrative and technical capacity to manage such waste in an environmentally sound manner.

The Basel Convention has a number of conceptual and definitional deficiencies. They concern:

- The key underpinning of the Convention is the concept of environmentally sound management of hazardous waste (ESM). So far, however, the Convention has not yet elaborated on any mechanism for implementing ESM, based on clear, science-based criteria. Furthermore, the Convention takes for granted that “all” developing countries will not meet ESM indefinitely, which is already hard to believe at present.
- The term hazardous waste is also 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.
- The Basel Convention 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.

³² 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 disbursements of technical assistance to developing countries by the CITES and Basel Convention.

- The BC also implicitly assumes that there is a propensity in 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 only lukewarmly recognized. Art. 4.9.(b) of the original Convention allowed 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 before the Ban Amendment decision was destined for material recovery/recycling and was thus demand-, not supply-induced.

In addition to the deficiencies of the core Convention, the Ban Amendment has added a number of other provisions whose clarity is wanting:

- There is an inappropriate definition of Annex VII (members of OECD and EC) and non-existing criteria for joining the Annex.
- The status of Art. 11 agreements with non-Parties that meet Convention-comparable criteria is unclear under the Ban Amendment.
- There is a double listing of a number of hazardous wastes in Annexes VIII and IX (so-called mirror items) that may or may not be subject to the trade restrictions.
- The Ban Amendment has only to be ratified by about 40 per cent of all Basel Parties to take effect.

The supportive measures in the Convention are largely insufficient. Technical assistance funds total only about US \$ 1.5 million per annum for all developing countries. The regional and sub-regional centers for training and technology transfer meanwhile created in about 10 developing countries are an interesting concept; the centers are however financially weak and presently mostly paper tigers. Furthermore, the Ministerial Declaration of COP V at the end of 1999, which was supposed to turn the pendulum of the Convention from “regulatory mechanisms” to “capacity building” has so far had only little effect.

Despite the weaknesses outlined above, it is important to note that the Basel Convention has succeeded in outphasing waste trafficking from developed countries notably to the less and least developed countries.

Summary of the three MEAs

CITES and the Montreal Protocol have a much higher number and level of sophistication of flexibility elements than the Basel Convention.

With few exceptions in CITES, the trade measures in CITES and the Montreal Protocol are clear and their adoption and modification are subject to unambiguous rules. Conversely, some of the key trade measures in the Basel Convention are unclear.

The Montreal Protocol has by far the most important financial support mechanism. Funds for technical assistance and capacity building of CITES and the Basel

Convention are largely insufficient. The regional and sub-regional centers of the Basel Convention are however a promising approach, although their financial base remains very weak.

The Montreal Protocol and CITES³³ had consultations with the GATT secretariat on compatibility of trade measures with the rules of the multilateral trading system. The Montreal Protocol even had a sub-group of legal, technical and trade experts that examined some proposed trade measures in the light of GATT Art. XX.³⁴ Conversely, the Basel Convention has never made comparable efforts.

12. The way forward – a practical proposal for approaching the negotiating mandate of paragraph 31(i) in the Doha Ministerial Declaration

Two conclusions seem to emerge from the survey in the previous section: first, there appears to be a divergent level of clarity and flexibility in the trade measures used in the three MEAs; the same seems to be true for the supportive measures that exist and are effectively implemented. Second, before focusing on the need for and the forms of modifying concerned WTO rules, it appears to be more pertinent to study on a comparative basis clarity, effectiveness and efficiency of trade measures in MEAs and related compliance assistance measures with a view to identifying those MEAs and trade measures that seem to be unclear and those effectiveness and efficiency are wanting. Such approach will assure that the general discussion on the relationship between specific trade measures in MEAs and WTO rules will quickly be narrowed to those trade measures in MEAs that might be or are a source of tension. Both the number of such specific trade measures and the MEAs they contain will be very small and will therefore allow a very specific discussion.

How could such comparative analysis be conducted?

The CTE could review the concerned MEAs using generic criteria that were referred to in section 6 above. These criteria were developed by the OECD Joint Session of Trade and Environment experts in document COM/ENV/TD(98)127/FINAL in 1999, 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 studies³⁵ were summarized in a synthesis report that contains the criteria.

The concerned MEA secretariats and UNEP's Economics and Trade Unit actively participated in both the preparation of the OECD cases studies and the discussion of

³³ 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.

³⁴ For more information, see: Brack, D., *International trade and the Montreal Protocol*, Royal Institute of International Affairs, London, 1996, pp. 67-68.

³⁵ 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.

the synthesis paper. Although merely intended as analytical exercise, it soon surfaced that both the three 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.

Based on such initial analysis of the clarity, effectiveness and efficiency of trade measures using the OECD-developed criteria, the CTE could encourage the concerned MEAs 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.

What are the political merits of such approach?

The proposed approach would avoid some of the pitfalls of the recent debate on the issue in the CTE. This concerns (i) the too general nature of the discussion in the CTE; (ii) the fact that the annual consultations between CTE and MEA secretariats have been formal information exchanges, mostly skirting the areas of potential conflict; and (iii) the fact that MEAs which appear to have the most problematic trade provisions have not sought consultation with or advice from trade experts.

The approach would have much affinity with the proposal of New Zealand to the CTE on an informal consultative mechanism, as outlined above. This proposal has been warmly received by a good number of developing and developed countries.

The proposed review of the clarity, effectiveness, and efficiency of the trade measures in MEAs and the availability of supportive measures will be based on quasi “negotiated” criteria by a joint group of trade and environment experts in the OECD, bearing the seal of approval of the EU.

The criteria developed by the OECD Joint Working Group of Trade and Environment Experts were based on an analysis that paid due attention to the adjustment problems of various groups of developing countries in implementing MEA trade provisions. Developmental implications and social effects as well as the role and effectiveness of supportive measures were an integral part of the analysis. This makes the criteria particularly interesting for developing countries.

The suggested approach would also identify “real” areas of tension, rather than perceived or mere hypothetical ones.

Finally, such approach is unlikely to be objected to by MEAs, because it would remain under the control of MEA constituencies.³⁶ It will require, however, a sincere

³⁶ Contrary to such approach, Gary Sampson is proposing to use the good offices of the Director-General of the WTO for preventive resolution of potential conflicts. For more information, see: Sampson, G.P., *Effective Multilateral Environmental Agreements and why the WTO needs*

and open attitude to objectively reviewing the effectiveness and efficiency 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; (ii) they are a genuine platform for consensus; and (iii) that they have an effective dispute settlement mechanism.

From a procedural point of view, the proposal outlined in this paper does not aim at another comprehensive analytical exercise, rather the CTE could commission short summaries of the three analytical papers already prepared by OECD on the Basel Convention, CITES and the Montreal Protocol, but focusing such analysis on the findings related to the specific criteria listed in section 6 above. The CTE may also wish to commission similar brief reviews on the Biosafety Protocol of the CBD, the PIC and POPs Conventions. These six short reports would then form the basis for a debate in the CTE identifying those specific trade measures in the accords that may become or already are a source of tension with WTO rules. Having identified such very specific trade measures 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 specific trade measures with potential tensions in the studied MEAs that cannot be individually addressed by MEAs and for which a generic solution, most likely within the WTO context, would have to be found.

Without pre-empting the outcome of the discussions and negotiations, UNCTAD would be ready to assist developing countries and the CTE in the above-outlined analysis drawing on the expertise gathered on the subject in recent years.³⁷ UNCTAD would also be prepared to organize special briefings for interested developing country negotiators to analyze and clarify the above-outlined approach, including briefings on trade measures in particular MEAs. If desired, 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.

them, *The World Economy*, No. 9, Vol. 24 (September 2001), pp. 1109-1134.

³⁷ 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 (all documentation is accessible at www.unctad.org/en/special/c1em3ag.htm). In 2001, UNCTAD published a monograph containing various country case studies on CITES, the Montreal Protocol and the Basel Convention (see, Jha V. and U. Hoffmann, *op.cit.*). UNCTAD also actively participated in the above-mentioned work of the Joint Working Group of Trade and Environment Experts of OECD analysing the effectiveness and efficiency of trade measures in three MEAs. Furthermore, UNCTAD conducted capacity-building activities in various countries for implementing the UNFCCC, Basel Convention and the CBD.