

# ARTICLE 1: SPECIFIC TRADE OBLIGATIONS IN MULTILATERAL ENVIRONMENTAL AGREEMENTS AND THEIR RELATIONSHIP WITH THE RULES OF THE MULTILATERAL TRADING SYSTEM – A DEVELOPING COUNTRY PERSPECTIVE

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## Chapter

### A. Introduction

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

### B. Background

#### 1. *The need for international cooperation*

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

Globalization requires new integrated approaches to define effective policies in all the relevant socio-economic dimensions. Many environmental problems, such as transboundary air/water pollution or resource over-exploitation, have international or global dimensions and cannot be successfully addressed through national policies alone. For transboundary problems, international cooperation is required in order to achieve effective policies for pollution abatement or to prevent resource depletion. Such cooperative approaches can also ensure that, from an economic point of view, there is some levelling of the competitiveness playing field for economic agents in countries that are

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Parties to such agreements. An increased number of agreements have been negotiated, signed, ratified and implemented<sup>2</sup> in order to consolidate international cooperation to address environmental problems.

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

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 the special link between poverty and environmental impact.<sup>4</sup> Also, the economic and social costs of environmental disasters and global problems are higher.<sup>5</sup> Furthermore, if the costs of abatement or adjustment measures are borne entirely by the country implementing them, they may be unaffordable for developing countries. Therefore, developing countries have an objective interest in cooperative approaches to address transboundary or global environmental problems within the framework of MEAs since they generally provide financial, technical and other support. Besides this general observation, developing countries can derive a twofold specific advantage from participating in MEAs:

- **Structural:** The implementation of measures that are benign to the environment while fostering local development can induce structural economic and social reforms that will remain as a heritage and act as a motor for further endogenous economic growth, compatible with local socio-ecological conditions.
- **Linked effects:** Developing countries will benefit from supportive measures that contribute to building the necessary institutional, technical and managerial capacities to meet MEA objectives.

## ***2. Trade-related MEAs***

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

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. A key synthesis study on the subject by the Organisation for Economic Co-operation and Development (OECD) concludes that “trade measures can be an appropriate policy measure to use *inter alia* (a) when the international community agrees to collectively tackle and manage international trade as a part of the environmental problem, (b) when trade controls are required to make regulatory systems comprehensive in their coverage, (c) to discourage free-riding, which can often be a barrier to effective international cooperations, and (d) to ensure compliance with the MEA”<sup>8</sup>.

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

- Markets are imperfect and significant information deficiencies or asymmetries exist;
- Policy failures need to be corrected; or
- Leakage or free-riding needs to be discouraged.

Most MEAs address the first issue, for instance CITES or the BC. Some fishery agreements partly attempt to correct policy failures, for instance those caused by fishery subsidies.<sup>9</sup> The MP contains trade measures to discourage leakage or free riding.<sup>10</sup>

Corrective instruments directly linked to the source of the environmental problem are the first-best option.<sup>11</sup> However, the link between particular objectives of MEAs and specific trade measures used in the agreements is not always clear-cut. Several MEAs with trade measures have multiple objectives, to all of which trade measures might not be best suited. The BC, for instance, aims not only at the minimization of transboundary movements of hazardous wastes, but also at waste avoidance and waste reduction at the point of generation. While trade measures might be well suited to the former, they are not the most effective tool for the latter. Similarly, in the context of CITES, there are often several factors that heighten the risk of species extinction. International trade might be one cause, but others, such as domestic trade, loss of natural habitat, introduction of new species, over-exploitation through domestic commercial and subsistence use, pollution and global environmental change, might be equally or even more important. CITES, however, alleviates stress on endangered species arising from one source only, namely demand pressures transmitted through international trade. Although clearly required, in practice it is often difficult to establish a causal relationship or attribute a particular part of the risk of extinction to international trade.

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Trade measures in MEAs take a number of forms, mainly the following:

- Reporting requirements on the extent of trade of a particular product/item;
- Labelling or other identification requirements;
- Requirements related to notification and consent procedures;
- Targeted or general export and/or import bans; and
- “Market transformation measures” such as taxes, charges and other fiscal measures, and non-fiscal measures such as government procurement.<sup>12</sup>

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

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Trade measures are usually part of a package of measures that include non-trade measures (such as production/consumption quotas or information requirements) and supportive measures – often also called positive or compliance assistance measures (such as financial and technical support, training and technology transfer). In the end, it is the effectiveness and also the efficiency of the package, rather than one measure (for instance, the trade measure) that are important. Furthermore, supportive measures are often linked to trade measures to mitigate their implementation and economic adjustment costs in developing countries. Supportive measures recognize the fact that the non-compliance of developing countries is often the result of a lack of compliance capacity (i.e. weak institutional, technical and managerial capacities), rather than lack of political will. Therefore, an unbalanced focus of the debate in the Committee on Trade and Environment (CTE) and elsewhere on trade measures only is not in the interest of most developing countries.<sup>13</sup>

Positive measures<sup>14</sup> include technical assistance and capacity building as well as the provision of financial assistance, *inter alia* to help meet incremental costs in achieving international environmental goals set by 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 that could be used to encourage a dynamic process of continuously improving environmental performance, which might go beyond the obligations in MEAs.<sup>15</sup>

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

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

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

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

- Positive measures can reduce or obviate the need for trade measures by offering alternative policy instruments. Where trade measures are, nevertheless, deemed necessary, positive measures can be used as part of a policy package that takes

account of the different interests of Parties and that, wholly or partly, mitigates some undesirable effects of trade measures.

- Positive measures can be useful for handling the potential conflicts between efforts to promote the transfer of environmentally sound technologies under MEAs and multilateral trade rules on trade-related aspects of intellectual property rights (TRIPS) that might restrict such transfer on favourable terms.

In practice, most positive measures could not yet be used or invoked with the required vigour, mostly because of a lack of funding and the fact that they are not mandatory, although there are some success stories such as the Multilateral Fund of the MP.<sup>16</sup> Inadequate funding hampers the effective implementation of the agreements, including the implementation-related support needed by developing countries and countries in transition. It should be kept in mind that a reciprocity clause included in negotiations of MEAs could help developing countries to link their compliance with the MEA to the compliance of developed countries with specific commitments on positive measures. In fact, strict reciprocity was built into the UNFCCC, the MP and the CBD, making the implementation of agreed obligations by developing countries dependent upon the effective implementation by developed countries of the financial cooperation and transfer of technology provisions (Article 5.5 of the MP, Article 20.4 of the CBD and Article 4.7 of the UNFCCC).<sup>17</sup> However, the MP is the only MEA with trade measures that embodies the reciprocity principle.

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

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

#### *4. Enhanced differentiation among developing countries*

Although trade-related measures or effects of MEAs are not per se discriminatory in nature, their effects and adjustment costs are not uniform but rather depend on the stage of development, technological profiles and trade intensities of countries, as well as on the relative weight of concerned sectors in the economy of an affected country. Distributional issues are at the origin of most conflicts when defining the burden sharing of MEA obligations.<sup>18</sup>

The increasing differentiation among developing countries has a significant bearing on the selection, design and implementation of trade measures in MEAs. In the light of

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the different stages of development and industrialization, developing countries fall into a continuum of interest groups, with different developmental priorities. This needs to be duly reflected by MEAs in shaping instruments, including trade measures that are sufficiently flexible in accommodating different interests. For instance, where there is a severe lack of enforcement, and technical and administrative capacities, stringent trade measures might be best suited for least developed countries (LDCs) or small island developing countries to prevent the import or dumping of hazardous products or substances, whereas a more structured approach might be required for rapidly industrializing countries.

With regard to different levels of industrialization, it also needs to be borne in mind that many rapidly industrializing countries have a profile of “dynamic” sectors that differs very much from the post-industrialization stage of the economy in most developed economies. Several pollution-intensive sectors are among the most “dynamic” in such developing countries, whereas they are “sunset” industries in many developed countries. In recent years, the environmental community in developed countries has targeted the reduction or removal of sources of pollution, including through the creation of MEAs, which are particularly difficult for rapidly industrializing countries to meet, for example in the area of hazardous chemicals management. Although technological leap-frogging by developing countries might attenuate some adverse environmental effects, the structurally different environmental requirements in developed and rapidly industrializing (developing) countries are a potential source of concern that can lead to tensions over the objectives and tools of concerned MEAs.

One might argue that on the basis of effective national policy coordination, developing country Parties should be able to articulate their specific needs or developmental priorities in the context of MEA negotiations. However, such attempts may run the risk of being misinterpreted by some developed country Governments and Northern non-governmental organizations (NGOs) as a derogation from the objectives of the MEAs or as an attempt to create loopholes in the agreements. Like other environmental accords, MEAs with trade measures should adapt their provisions over time to reflect such divergent needs through a combination of (i) revising certain too stringent or inflexible instruments, (ii) allowing more flexibility in existing tools, (iii) creating customized solutions for certain groups of countries, or (iv) enhancing the quantity and/or quality of positive/supportive measures. Lack of dynamics in this regard might lead to tensions with WTO rules.<sup>19</sup> As a rule of thumb one can probably say that the lower the real value of supportive measures for developing country Parties in MEAs with trade measures, the greater the need to allow for more flexibility elements in the accords to accommodate different developmental requirements and priorities.

### **C. Issues arising from the wording of the Doha mandate**

The mandate in paragraph 31(i) of the WTO’s DMD calls for negotiations on “the relationship between existing WTO rules and *specific trade obligations set out in MEAs*. The negotiations shall be limited in scope to the applicability of such existing WTO rules as *among Parties to the MEA* in question. The negotiations shall not prejudice the WTO rights of any Member that is not a Party to the MEA in question”. The text in paragraph 31(i) needs to be read in conjunction with parts of the provisions in paragraph 32, which stipulate that “the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, *shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and*

*Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries”* (emphasis added).<sup>20</sup>

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

From the wording above, it is obvious that the WTO Members did not intend to address under paragraph 31(i) the general relationship between trade measures for environmental purposes in MEAs and existing WTO rules.<sup>21</sup> Rather, negotiators selected the phrase “specific trade obligations”. What does this mean?

Conceptually, the box below, based on the European Commission (EC) submission to the first Special Session of the CTE (CTESS),<sup>22</sup> depicts the various groups of trade measures that have so far been taken and implemented under existing MEAs.

The reference to “*specific trade obligations*” in the Doha mandate seems to limit the negotiating mandate to provisions that are explicitly provided for and mandatory under MEAs, namely the first group in the box below. All non-mandatory trade measures, non-trade obligations (e.g. labelling) and non-STOs in MEAs appear to be excluded.<sup>23</sup> This interpretation seems to acknowledge a distinction between specific trade measures, which are taken within an MEA and are mandatory, on the one hand, and trade measures taken by Parties *pursuant* to the MEA, i.e. consequential to the “obligation de résultat” of the MEA, on the other hand (often also referred to as “discretionary trade measures”). The latter can be, but do not necessarily have to be, shaped by the MEA.

#### **Clusters of trade obligations under MEAs**

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

1. Trade measures explicitly provided for and mandatory under MEAs.
2. Trade measures neither explicitly provided for nor mandatory under the MEA itself, but consequential to the “obligation de résultat” of the MEA. This category covers cases where an MEA identifies a list of potential policies and measures that Parties could implement to meet their obligations.
3. Trade measures not identified in the MEA, which has only an “obligation de résultat”, but that Parties could decide to implement in order to comply with their obligations. In contrast to the previous category, the MEA does not list potential policies and measures, so countries have greater scope regarding the exact nature of the measures they might decide to deploy to reach the objectives of the MEA.
4. Trade measures not required in the MEA, but which Parties can decide to implement if the MEA contains general provisions stating that Parties can adopt stringent measures in accordance with international law. In some cases, the MEA may explicitly recognize the right of Members to apply specific trade measures.

Although this categorization seems to be clear at first glance, some MEAs have STOs that might somewhat blur this line of demarcation. The BC, for instance, stipulates in Article 1.1(a) specific categories and characteristics of waste that make an individual waste hazardous under the Convention, i.e. at the multilateral level. However, Article 1.1(b) adds to this list any waste that is defined as hazardous by the domestic legislation

of the Party of export, import or transit. This inclusion implies that unilateral decisions on the definition of hazardous waste are automatically made part of the multilateral definition and the resulting STOs of the Convention.

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

Also at issue is whether decisions of the Conferences of the Parties (COPs) of MEAs, which may contain STOs or further specify modalities or procedural aspects for the implementation of STOs, should form part of the mandate of the negotiations. Malaysia, in its submission TN/TE/W/29, concurs that the phrase “as set out” is significant in this regard. In Malaysia’s view, only annexes, protocols and amendments to MEAs adopted by Parties, and where they have been ratified by the broader membership, would fall within the mandate of the negotiations. Conversely, decisions and resolutions of COPs that are not set out in MEAs are not an integral part of the MEA itself and, therefore, would fall outside the mandate. Before the Cancun Ministerial Conference, the majority view in the CTESS debate tended to be restrictive. COP decisions would only create STOs if (i) on their own, they create STOs in separate annexes, protocols or amendments, subject to ratification by Parties, and (ii) they qualify modalities or procedural aspects or give interpretative decisions of STOs set out in the body of the MEA.<sup>24</sup>

Finally, WTO Members differ on the specific scope of STOs. The United States, for instance, includes in its definition of STOs all obligations set out in MEAs that had to be fulfilled for trade to take place, whereas India confines STOs to those obligations directly related to the actual trade.<sup>25</sup>

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

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

## ***3. Party — non-Party nexus***

Although conceptually the Party–non-Party nexus between MEAs and the General Agreement on Tariffs and Trade (GATT)/WTO is still valid, from a practical point of view it seems to have lost much of its potential as a source of conflict in recent years in the light of the fact that membership of many MEAs has become nearly universal, often being equal to or even greater than the number of WTO member countries. There is,

however, the important issue of non-membership by the United States in a number of MEAs and the relatively large number of non-Parties in one or the other MEA.<sup>26</sup> Several countries have expressed concern that the proliferation of amendments, protocols or annexes to various MEAs, each being a self-contained legal instrument that requires ratification, not only keeps the Party – non-Party nexus alive, but also might make it more subtle and confusing.

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

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#### **4. Preserving the balance of rights and obligations**

With reference to paragraph 31(i), paragraph 32 of the DMD states that negotiations “shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Sanitary and Phytosanitary (SPS) Agreement, nor alter the balance of these rights and obligations”.

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

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

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

## **D. Results of the CTE discussion on the MEA–WTO relationship**

### **1. Overview**

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

- The importance of increased transparency of trade measures applied pursuant to an MEA was highlighted.
- Governments confirmed their engagement stated in Principle 12 of the Rio Declaration that environmental measures addressing transboundary or global envi-

ronmental problems should, as far as possible, be based on an international consensus.

- It was recognized that trade measures based on provisions explicitly agreed to might be necessary in certain cases to achieve the environmental objectives of an MEA, more particularly when trade is directly linked to the source of the environmental problem.
- It was also noted that when a genuine consensus exists among Parties to an MEA to apply between themselves trade measures expressly prescribed, there should be no dispute among them regarding the use of those measures.

The CTE has also made some recommendations to avoid disputes:

- The coordination of policies between trade and environment officials at the national level should be encouraged;<sup>27</sup>
- Increased cooperation between the WTO and the appropriate bodies of MEAs was considered useful;
- Members of the WTO should attempt to resolve conflicts concerning the use of trade measures for environmental purposes through the dispute settlement mechanisms (DSMs) 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, were stressed.
- Non-compliance by 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 capacity. It was therefore appreciated that the recent evolution of MEAs had placed more emphasis on facilitating and compliance assistance measures, rather than on dispute settlement measures.<sup>28</sup>

From an economic perspective, multilateral measures within an MEA may reduce unnecessary economic and trade effects by harmonizing the basket of instruments, thus preventing a proliferation of different national rules.

UNEP and MEA secretariats, in turn, have emphasized that there is a need for cooperative thinking on the part of the various national-level agencies and departments, as a prerequisite for more coherent international policy-making. The 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 broadening could provide the basis for a more positive and proactive 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.<sup>29</sup> UNEP therefore considers that the mandate in paragraph 31(ii) of the DMD fostering regular information exchange between the CTE and MEAs is very helpful in this regard.

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

### **a. Pre-Doha proposals**

Since the creation of the CTE in 1995, WTO members have tabled a whole range of proposals on how to address the WTO/MEA relationship.<sup>30</sup> Some have argued that the problem was only theoretical, since no single dispute over trade measures in an MEA had actually come to the WTO for settlement and, therefore, there was no need, at that stage, to change WTO rules to accommodate MEAs. According to this position, the current rules already provided countries with sufficient scope to protect the environment. This was defined as the “status quo” approach and it appears that the vast majority of WTO Members, including many developing countries, favour this position.

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

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

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

### **b. Post-Doha proposals**

A good number of proposals were submitted after the Doha Ministerial Conference, dealing with both substantive and procedural aspects of the negotiating mandate in paragraph 31(i).<sup>31</sup> A large number of proposals supported the idea of a “bottom-up” approach, proposed by Australia (TN/TE/W/7), that consisted of three phases: (i) identification of STOs and WTO rules that are relevant to these obligations; (ii) exchange of experience on these provisions, including information exchange with MEA secretariats (in this phase it will be important to identify any real issues/problems encountered in implementing STOs as opposed to discussing theoretical or hypothetical scenarios); and (iii) discussion of matters arising from the work undertaken in phases one and two, and focus on the outcome of the negotiations. On the basis of this approach, some Members proposed for 2003 that STOs in three MEAs<sup>32</sup>— CITES, the MP, and the BC — be reviewed at greater length.

A second group of proposals favoured a “top-down” approach, advocated by the European Union and Switzerland.<sup>33</sup> This would include discussions on (i) issues of scope

and definition of STOs, (ii) the development of certain principles to address the WTO-MEA relationship, (iii) dialogue with MEAs, and (iv) the development of options or solutions. Some delegations suggested that the two approaches were not mutually exclusive and could be pursued in parallel.

Judging by the results of CTE discussions in the pre-Cancún period, it seems that the proposed “bottom-up” approach has garnered more support than the “top-down” one. This support does, however, not rule out that some discussion on general principles on and conceptual/definitional approaches to the relationship between WTO rules and STOs of MEAs will take place in parallel or as a result of the “bottom-up” analysis. However, many countries seem to sympathize with the Indian position suggesting that the outcome of negotiations should be based on an exchange of concrete implementation experience.<sup>34</sup>

### **E. The most important sources of potential conflict**

A number of specific causes of potential conflict can be identified. Some of them were highlighted in UNCTAD’s analytical and capacity-building activities on assisting developing countries in meeting objectives of MEAs with trade measures, without jeopardizing developmental priorities.<sup>35</sup> Others were mentioned in OECD analysis of experience with the use of trade measures in three MEAs (CITES, the MP and the BC) during the period 1996–1999,<sup>36</sup> in which UNCTAD and UNEP actively participated.

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

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

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

Fourth, in adopting specific trade measures, in particular of a drastic nature such as bans, insufficient attention has been paid to understanding the underlying economic and social implications. This lack of understanding is of particular importance in cases where MEAs touch upon economically important resources (such as the MP or BC) and are vital for agreements such as UNFCCC and the Kyoto Protocol, which are widely interpreted to be environmentally motivated economic accords. For instance, some measures might lead to pushing undesirable activities from the formal into the informal sector or

encourage illegal international trade. Although the environmental problem might therefore disappear in the official statistics, in reality it may become more severe.

Lastly, insufficient or poor national policy coordination between trade, industry and environment ministries has been advanced as one key cause of potential conflict between trade measures in MEAs and WTO rules.<sup>37</sup> In this regard, the question arises whether this is a procedural or substantive issue. The latter is basically reflective of the four issues mentioned above. In short, developing countries need to carefully analyse the environmental and developmental implications of proposed STOs in the light of their environmental absorptive capacities, developmental priorities and capacity-building needs. New obligations should be agreed to only if they are clear, have a beneficial effect on sustainable development, and do not siphon away resources from other, much-needed areas.

### **Some general conclusions from the WTO dispute settlement practice related to GATT Article XX<sup>38</sup>**

Article XX contains limited exceptions to 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 first that the inconsistent measure has a provisional justification under one of the explicit exceptions figuring in Article XX, and second that further appraisal of the same is required under the introductory clause of Article XX.

There has been some evolution in the interpretation of the necessity requirement of Article XX (b) – protection of human, animal or plant life or health – and (d) – securing compliance with laws or regulations that are not inconsistent with the provisions of the GATT 1994. The interpretation has evolved from a least-trade-restrictive approach to a less-trade-restrictive one, supplemented by 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.<sup>1</sup> In regard to the arbitrary and unjustifiable discrimination of a measure, panels have accorded special attention to flexibility in the application of the measure concerned. The more rigid and inflexible the application, the higher the likelihood that the measure is regarded as arbitrary and unjustifiable. Regarding 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.

In summing up, one can probably establish the following general rule: the greater the flexibility of a currently used trade measure in an MEA and the more important the supportive measures made available, the less the likelihood of a developing country Party challenging such a measure. In other words, the effectiveness of trade measures and their efficiency in meeting the stated environmental objective of the MEA will significantly depend on (i) the flexibility mechanisms, both enshrined in the accord and further developed by the MEA Parties over the years, and (ii) the provision of effective

supportive measures for developing countries. Both clusters of mechanisms can ensure that divergent environmental, economic and social conditions and the resulting priorities and interests of Parties, notably developing countries, will be taken into account and that trade measures thus do not jeopardize developmental goals. A clear definition of trade measures, together with the use of objective, science-based criteria for their use, is also important for ensuring the effectiveness and efficiency of the trade measures in MEAs and avoiding the risk of such measures being regarded as arbitrary and/or unjustifiably discriminatory or a disguised form of protectionism.

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*The effectiveness of trade measures and their efficiency in meeting the stated environmental objective of the MEA will significantly depend on the flexibility mechanisms and the provision of effective supportive measures for developing countries.*

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## **F. A brief analysis of specific trade obligations, flexibility mechanisms and supportive measures in three MEAs (CITES, the Montreal Protocol and the Basel Convention).**

This part mainly focuses on the STOs, flexibility mechanisms and supportive measures of the BC. To evaluate the results of the analysis, however, it was considered more helpful to put them into context and compare the results for the BC with the picture one can observe in CITES and the MP.<sup>39</sup>

### **1. CITES**

The key objective of the Convention is to ensure that no species of wild fauna or flora becomes or remains subject to unsustainable exploitation because of international trade. CITES is not designed to deal with other pressures on endangered species such as (i) loss of natural habitats (e.g. from 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 international 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 pro- and anti-trade communities within CITES in deciding on the inclusion, transfer or deletion of species in the Appendices to the Convention.

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

- Article II (4) prohibits trade in specimens of species listed in Appendices I, II, and III,<sup>40</sup> except in accordance with the Convention.<sup>41</sup>
- Article III regulates all trade in specimens of species listed in Appendix I.
- Article IV (1) – (6) regulates all trade in specimens of species listed in Appendix II
- Article V regulates all trade in specimens of species listed in Appendix III.
- Article VI (1) – (6) governs permits and certificates related to trade.
- Article VIII (1) (a and b) and (6) require Parties to maintain records of trade and to take appropriate measures to enforce the Convention to prohibit trade in violation thereof.<sup>42</sup>

In addition, as already mentioned above, Article XIV (1) of the Convention stipulates that it “shall in no way affect the right of Parties to adopt (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof, or (b) domestic measures restricting or prohibiting trade, taking, possession or transport of

species not included in Appendix I, II or III". This provision leaves considerable discretion to Parties to go beyond the trade provisions of the Convention.

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

- The transferring of species from Appendix I to Appendix II is based on consensus or a two-thirds-majority vote.
- (Not in the Convention, but recently developed) national export quotas agreed by the COP for a limited amount of trade of Appendix I-listed species (this allows a distinction between national populations that are more sustainably managed than others).
- Limited flexibility for international trade in Appendix I species through an exception, called ranching – CITES-registered farms receive treatment of Appendix II-listed species for international trade (ranching has also led to some general down-listing of species).
- The possibility for a Party to make a reservation to a decision on listing of a particular species. This Party will then be considered as non-Party for this species and can trade with a Party in accordance with Article X of the Convention or with another non-Party.
- Trade with non-Parties is possible if non-Parties (i) have a similar administrative infrastructure, and (ii) issue CITES-comparable permits and certificates.
- The option under Article XIV of CITES to allow importing or exporting Parties to take stricter domestic measures on any species.
- The option of a "zero export quota" adopted by the COP and included in annotations to the Appendices.

Conversely, CITES has limited human and financial resources for providing direct or long-term support to developing countries. Technical assistance and capacity-building efforts are structured to support and enhance ongoing national efforts to implement the Convention. In recent years, about US\$ 2 to 3 million has been made available for training and technical assistance annually. This amount has been supplemented by bilateral technical assistance.

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*With few exceptions, it has been difficult to attribute conservation success to trade measures.*

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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 generates the conservation effects (CITES listing draws attention to problems, raising public awareness and generating broader public and NGO responses), but the total response these actions generate.

Unlike in the case of the BC, some Parties have resisted attempts to list commercially important fish and timber species in Appendix II, because of uncertainty over whether such listing would hamper international trade and lead to trade prohibitions.<sup>43</sup> Recently, many Parties have emphasized that CITES should find solutions to individual problems in specific countries, rather than promote blanket global prohibitions.

A potential area of tension with WTO rules is the practice of using trade measures to ensure compliance with the Convention, for instance, by temporarily suspending commercial trade in CITES-listed species with specific Parties that fail to demonstrate within a certain time period that they have adopted adequate legislation for implementation of the Convention. Although there is no specific article in the Convention on 'compliance' or 'non-compliance',<sup>44</sup> Article XIII on International Measures expressly provides for cooperative procedures and institutional mechanisms for dealing with possible non-compliance. Additional CITES measures to ensure compliance derive from a set of procedures and mechanisms approved by the Parties over a number of years.<sup>45</sup> Decision 11.15

of COP XI in April 2000, for instance, stated that the secretariat brought to the attention of the Parties the fact that four countries (Fiji, Turkey, Viet Nam and Yemen) had high volumes of international trade in CITES-listed species and that their national legislation was believed not to meet the implementation requirements of CITES. It was proposed that these countries should be given till 31 October 2001 to (i) adopt adequate legislation, or (ii) request technical assistance from the secretariat to prepare such legislation, and (iii) should report on related progress to the secretariat no later than 30 April 2001. Decision 11.16 of COP XI asked all Parties to suspend trade in all CITES-listed species with the four countries in question as from 31 October 2001, if, in spite of assistance, these countries would not adopt the required legislation.<sup>46</sup> A number of countries have been identified for attention by the Standing Committee for their failure to enact adequate legislation, to ensure that species are not affected adversely by international trade or to effectively implement the Convention. More than 20 countries have faced general CITES or species-specific recommendations to suspend international trade.<sup>47</sup>

Some argue that there is no credible alternative to such use of compliance measures and that the mere threat of a multilaterally agreed recommendation to suspend trade, coupled with domestic pressure from the trade community impacted by the suspension, often raises the level of political attention and results in a quick governmental response to control trade.<sup>48</sup> Conversely, one can argue that the developing countries concerned hardly ever fail to comply with the Convention because of unwillingness. Rather, a lack of capacity and resources is often the pivotal cause. Therefore, supportive rather than suppressive compliance measures would be more adequate. However, the “armoury” of CITES supportive measures is small, which makes it difficult to achieve a balance of ‘carrots’ and ‘sticks’ in an effective compliance scheme. Moreover, the threat or the use of trade measures against non-complying (developing country) Parties may cause significant direct and indirect adjustment costs that could lead to a crowding out of much-needed resources for social and other purposes of higher developmental priority.

## *2. The Montreal Protocol*

The MP is an international legal instrument of the Vienna Convention for the Protection of the Ozone Layer of 1985. It consists of five separate treaties (the MP, which entered into force in 1989, the London Amendment of 1990, the Copenhagen Amendment of 1992, the Montreal Amendment of 1997 and the Beijing Amendment of 1999). In the MP, trade measures are supplementary to the phasing-out schedules of ozone-depleting substances (ODS). The MP only requires a ban on trade of ODS and ODS-containing products between Parties and non-Parties to the treaty. Although this trade measure is minor compared with measures in other MEAs, it is of major importance for the Protocol and the international ozone regime. There are, however, some other measures that also concern trade among Parties:<sup>49</sup>

- Implicit control of trade between Parties through the formula for calculating ODS consumption: production + import - export (export and import of used/recycled ODS are not included in consumption as recovery obviates the need for new ODS).
- A licensing system for ODS trade among Parties to combat illegal ODS shipments that was agreed upon in 1997.
- A recently adopted export ban on used and recycled ODS for Parties in non-compliance.
- Voluntary notification by a Party of ODS-containing products it does not want to import.
- Decision XIV/7 of the Meeting of the Parties (MoP) 2002 introduced a reporting provision for proven cases of illegal trade.<sup>50</sup>

Like CITES, the MP is equipped with an enforcement mechanism that provides an institutional and legal basis for ordering trade sanctions against violators. For instance, in Annex IV<sup>51</sup> of the MP, entitled “Non-compliance Procedure”, an Implementation Committee was established in order to supervise the national implementation of the Protocol. Paragraph 9 of the Annex provides that the Committee shall report to the MoP of the Protocol, including any recommendations it considers appropriate. Then, on the basis of the report, the Parties may decide upon and call for necessary measures to enforce full compliance with the Protocol. To avoid controversy and restrict the extent and content of the measures the Parties may take, Annex V of the Protocol sets out a list of measures in a straightforward manner. In addition to non-coercive and incentive means, suspension of trade is clearly specified in paragraph C of the Annex. This provision has however not yet been invoked.

The MP has the following flexibility mechanisms:

- A grace period of ten years (or more in some cases) for developing country Parties.
- A reciprocity provision in the core Convention that relates developing countries' capacity for fulfilling obligations to the effective implementation of the provisions on financial cooperation and transfer of technology by developed country Parties (Article 5.5).
- Developed countries can exceed their ODS production limit by 10-15 per cent to meet the basic domestic needs of developing countries during their phase-out period.
- ODS production can be permitted for other “essential or critical uses” (for instance, methyl bromide for pest and disease control and its related use for quarantine and pre-shipment purposes is currently exempted from controls;<sup>52</sup> also, the use of CFCs for propellants for metered-dose inhalers falls under the essential use exemption).
- Trade restrictions do not apply to a non-Party if the MoP 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).
- Until the first control measures took effect,<sup>53</sup> ODS-producing developing countries were exempted from any export restraints in order to ensure adequate and quality supplies of ODS for other developing countries at fair prices, thus avoiding monopolistic market structures.

Regarding supportive measures, a Multilateral Fund was created to meet the “agreed incremental costs” of ODS phase-out in developing countries on the basis of a specific list of categories of incremental costs. The Multilateral Fund covers costs for technology transfer or domestic development of ODS substitutes, equipment needed and its installation costs, and training. It also covers support for institutional strengthening of projects, which has been very important in practice.

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*The Multilateral Fund has disbursed almost US\$ 1 million per country per annum.*

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The Fund has so far disbursed more than US\$ 1 billion to almost 120 developing countries. This investment has supported about 2000 projects to phase out some 60 per cent of ODS consumption in developing countries. The Multilateral Fund therefore disbursed roughly US\$ 9 million per developing country in the 1990s or almost US\$ 1 million per country per annum. By way of comparison, the latter figure is almost equivalent to the total annual technical assistance provided by CITES or the BC to all developing countries.

### 3. The Basel Convention

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

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

The Convention initially confined the regulations of international trade in hazardous waste to a “prior Informed Consent” (PIC) approach. Subsequently, the second and third COPs adopted the so-called Basel Ban Amendment that supplements, on the one hand, and significantly revises, on the other hand, the original PIC approach. According to the Ban Amendment (also known as COP decision III/1), all international shipments of hazardous waste for final disposal and reuse, material recovery or recycling are banned from Annex VII countries (i.e. members of the OECD and EC, and Liechtenstein) to all other countries.

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

- Articles 3(1) and 3(2) require reporting on national definitions of hazardous wastes and requirements concerning transboundary movements;
- Articles 4(1), 4(2)(e), 4(2)(f), 4(2)(g), 4(6), 4(7), 4(8), 4(9) and 4(10) set out specific obligations regarding the transboundary movement of hazardous waste;
- Articles 6(1), 6(2), 6(3), 6(4), 6(5), 6(9) and 6(10) outline the modalities for transboundary movement of hazardous wastes (some of these modalities may not qualify as STO);
- Article 8 governs the duty to reimport;
- Article 9(2) sets out obligations for the repatriation of illegal waste;
- Articles 13(2), 13(3)(a) and 13(4) elaborate on procedures for the transmission of information.<sup>54</sup>

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*The BC has succeeded in significantly reducing waste trafficking from developed countries notably to the less and least developed countries.*

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It is important to note that the BC has succeeded in significantly reducing waste trafficking from developed countries notably to the less and least developed countries. Although precise data in this respect are scarce, reported cases of waste trafficking have recently become very rare. Also, the Convention has pioneered a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal.<sup>55</sup>

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

- The key underpinning of the Convention and the Ban Amendment is the concept of environmentally sound management of hazardous waste (ESM). Existence or lack of ESM in a target country is the lynchpin for allowing or preventing haz-

ardous waste exports to that country. However, the Convention has not yet developed any practical mechanism for implementing ESM, based on clear, science-based criteria.<sup>56</sup> Because the concept of and requirements for ESM are so pervasive in the Convention, it is likely that shipments of Basel wastes to facilities without ESM are a priori illegal. However, the Convention does not specify the manner or the extent to which the State of export must verify ESM. Furthermore, the Convention takes for granted that “all” developing countries will never achieve ESM, although some have already done so.<sup>57</sup>

- The term “hazardous waste” is not clearly defined in the Convention. It concerns categories of waste in Annex I that need to exhibit one of 13 hazardous characteristics in Annex III, without exceeding any threshold or requiring a risk assessment. This shortcoming has partly been overcome by creating Annex VIII, which contains a list of specific wastes that, from a multilateral point of view, are considered hazardous under the Convention. Some ambiguity remains, however. On the one hand, the list in Annex VIII contains a good number of “mirror items” — wastes that are listed in Annex VIII and Annex IX (the latter comprising wastes that are not characterized as hazardous under the Convention), such as electrical and electronic scrap. This inclusion has already led to some ambiguity and disputes. On the other hand, while Annex IX is supposed to list wastes that are considered non-hazardous at multilateral level (i.e. based on Article 1.1(a) of the Convention), Article 1.1(b) gives the discretion to individual Parties to nationally add items to the ones in Annex VIII or redefine items as hazardous or subject to specific treatment in Annex IX. This discretion not only leads to considerable discrepancies between existing lists, but also creates uncertainty for trade flows.
- The BC defines disposal of hazardous waste as including both “final disposal” and “reuse, recovery and recycling” of material contained in the waste. Unlike in the case of CITES, this definition affects a number of commercially important secondary materials in international trade such as lead and zinc scrap as well as precious and non-ferrous metals contained in waste electrical and electronic assemblies.
- The BC implicitly assumes that there is a propensity for developed countries to dump hazardous waste in developing countries (i.e. that transboundary movements would only be supply-induced). The actual demand of developing countries, in particular in rapidly industrializing countries with high material intensity of economic growth, for recoverable material is insufficiently recognized. Article 4.9 (b) of the original Convention allows movements of hazardous waste if required as commodity input. The Ban Amendment, however, overruled this provision. Most of the hazardous waste trade between developed and developing countries as well as among developing countries is destined for material recovery/recycling and is overwhelmingly demand-induced, rather than supply-induced.<sup>58</sup>
- Although the main thrust of the Convention is the minimization of transboundary movements of hazardous waste, over time several stakeholders, in particular some NGOs, have increasingly emphasized waste avoidance and minimization as a prime objective. Although trade restrictions might lead to some internalization of environmental costs and thus encourage waste minimization and avoidance, they are not the most effective and efficient policy instrument, and can only play a supplementary role to in relation to other economic instruments that directly influence efficient use of material/resources.

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

- The Ban Amendment provides for a multilateral ban on the export of hazardous waste from Annex VII to non-Annex VII countries. However, there is an arbi-

trary definition of Annex VII countries, which include members of the OECD and the European Community, and Liechtenstein, and a noticeable absence of any objective criteria (other than becoming a member of the OECD or the European Community<sup>59</sup>) for joining the Annex.

- The status of Article 11 agreements with non-Parties that meet Convention-comparable criteria is unclear under the Ban Amendment.

Although the Ban Amendment is not yet in force,<sup>60</sup> shortly after its adoption the European Community revised its regulation on exports and imports of hazardous waste with a view to implementing the Ban Amendment.<sup>61</sup> Therefore, interested developing countries, such as India, Malaysia, the Philippines or Thailand, have been unable to import hazardous waste destined for recovery operations in accordance with Article 4.9(b) of the Convention.

Supportive measures in the Convention are largely insufficient. The BC does not have a proper financial mechanism or access to the Global Environment Facility (GEF). Technical assistance funds total only about US\$ 1.5 million per annum for all developing countries. The regional and subregional centres for training and technology transfer - created in 13 developing countries - are an interesting concept;<sup>62</sup> the centres are, however, financially weak and mostly focus on training on the rules and regulations of the Convention, rather than on building technical and managerial capacity in ESM.<sup>63</sup> Furthermore, the Ministerial Declaration of COP V in 1999, which was supposed to move the pendulum of the Convention from “regulatory mechanisms” to “capacity building”, has so far had only limited effect.

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

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

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

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

The MP and CITES<sup>64</sup> had consultations with the GATT secretariat on the compatibility of trade measures with the rules of the multilateral trading system. The MP even had a sub-group of legal, technical and trade experts that examined some proposed trade measures in the light of GATT Article XX.<sup>65</sup> Conversely, the BC has never made comparable efforts.

In conclusion, the survey above shows that there is a divergent level of clarity and flexibility in the STOs used in the three MEAs; the same seems to be true for the sup-

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*There is a divergent level of clarity and flexibility in the STOs used in the Basel Convention, CITES, and the Montreal Protocol; the same seems to be true for the supportive measures that exist and are effectively implemented.*

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portive measures that exist and are effectively implemented. As outlined in the box on dispute settlement practice related to Article XX of GATT above, the more rigid and inflexible the application of a trade measure, the greater the likelihood that the measure is regarded arbitrary and unjustifiable under WTO rules.

## **G. Results of previous discussions on enhancing clarity of trade measures and their compatibility with WTO rules**

### *1. Results of previous intergovernmental discussions outside the WTO*

#### **a. Discussions at OECD**

Before exploring the options for a way forward for approaching the mandate in paragraph 31(i) from a developing country point of view, it is worth recalling the results of some previous intergovernmental discussions outside the WTO on enhancing clarity and effectiveness of trade measures in MEAs and ensuring their compatibility with WTO rules. The most thorough discussion took place in the OECD Joint Working Party on Trade and Environment, on the basis of an in-depth analysis of the effectiveness and efficiency of trade measures in CITES, the MP and the BC in the period 1997-1999. The main findings of the three case studies<sup>66</sup> were summarized in a synthesis report (OECD document COM/ENV/ TD(98)127/FINAL of 15 February 1999) that contains a number of criteria recommended for enhancing the clarity and effectiveness of trade measures and their compatibility with WTO rules.

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

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

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

- As with all policy development, prior assessments should be made of the potential environmental and economic ramifications of trade measures, particularly those that are highly restrictive, such as bans.
- Potential difficulties such as illegal trade and inadequate technical and institutional capacity in some countries, in particular developing countries, should be taken into account from the beginning.
- The current dynamics and continuous improvement of MEAs should continue, with policy instruments, including trade measures, being adjusted and made more flexible as appropriate.

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*The use of trade measures should be carefully designed and targeted to the environmental objective.*

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- 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 coordination in national capitals, and the WTO, UNEP and MEA secretariats should continue to develop their dialogue on these issues.

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

*Factors contributing to success*

- Genuine multilateral consensus on shared environmental problems paves the way for effective agreements to address them.
- Comprehensive and balanced packages of policy instruments have more chance of addressing all aspects of an environmental problem than reliance on one form of policy instrument.
- A 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 cooperation 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.
- Additional or extended transition periods for developing countries can help lower adjustment costs.
- Flexibility in trade controls can maximize the environmental and economic benefits, for example ranching and national export quotas in CITES.
- Treatment of a non-Party to an MEA like a Party, if such country is in compliance with the provisions of the MEA.

*Factors limiting success*

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

## **b. Discussions in UNCTAD**

To recall but a few highlights, 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.<sup>67</sup> In 2001, it published a monograph containing various country case studies on the effectiveness and efficiency of trade measures and their developmental effects in CITES, the MP and the BC.<sup>68</sup> Furthermore, UNCTAD conducted capacity-building activities in various countries for implementing the CBD, UNFCCC and the BC. For the latter, UNCTAD explic-

itly analysed the effectiveness and efficiency of trade measures at macro- and micro-economic levels.<sup>69</sup>

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

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

To develop an appropriate response from a developing country perspective to the negotiating mandate in paragraph 31(i), it is also important to appreciate the goals for the negotiations, as identified by the environmental community. Although being the primary proponent of the mandate, it is intriguing that many environmental NGOs find it very difficult to clearly define the objectives of the negotiating mandate. This said, their negotiating objectives could probably be summarized as follows:<sup>70</sup>

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

From a developing country perspective, all but two of the above-mentioned objectives of the negotiations pose little problem; in fact, they are identical with developing countries' interests, as reflected in the DMD itself and in paragraph 98 of the Report of the World Summit on Sustainable Development.<sup>71</sup>

The first exception concerns the clarification of the status of the DSM of MEAs and the WTO. In principle, there is nothing wrong with suggestions by the environmental community that the equal status of both DSMs is specifically clarified from a legal point of view, and a sequencing of litigation be optionally outlined<sup>72</sup>, as long as this does not exclude recourse to the WTO DSM by interested developing countries.

The second exception concerns the most appropriate form of the implementation of the precautionary approach. The widely cited Principle 15 of the Rio Declaration stipulates that “the precautionary approach shall be widely applied”. However, it also states that this should be done “according to [States'] capabilities”. In other words, Rio Principle 15 leaves untouched the specific form of implementation of the precautionary approach. This situation may be conditional, as under Article 5 of the SPS Agreement, or unconditional, as under Article 10.6 of the Biosafety Protocol.<sup>73</sup> Weighing up the pros and cons of the conditional versus the unconditional form of implementation and bearing in mind that the implementation of the precautionary approach has systemic implications beyond the realm of MEAs, including its possible effects on exports of developing countries, the conditional implementation seems to be the more appropriate form for

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*Although being the primary proponent of the mandate, it is intriguing that many environmental NGOs find it very difficult to clearly define the objectives of the negotiating mandate.*

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developing countries. “Conditional” would imply that precautionary measures are taken on the basis of available scientific information (generally accepted scientific criteria adopted by the COP in the case of MEAs), temporarily applied subject to a risk assessment according to defined criteria, and reconsidered as new scientific evidence becomes available. With regard to risk assessment, it is important that developing countries insist that, in the context of MEAs, the costs of the assessment should be borne by the exporters of “environmentally sensitive items” or by a multilateral mechanism.<sup>74</sup>

To complete the picture, some environmental NGO critical views on the MEA-WTO debate should not remain unmentioned. These critics interpret the environmental community’s desire for formal clarification of the relationship between STOs in MEAs and WTO rules as part of a “Safe Trade Strategy”. Such a strategy aims at (i) elaborating MEAs and extending the number of issues covered by them; (ii) developing WTO jurisprudence that will allow the use of trade measures in MEAs (e.g. as in the shrimp-turtle case); (iii) inclusion of the precautionary principle in MEAs, in particular in its unconditional form of application; and (iv) reflecting the use of the precautionary principle in WTO jurisprudence. It is argued that the “Safe Trade Strategy” is advocated by an alliance consisting of some environmental and consumer groups, supplemented by some protectionist industries.<sup>75</sup>

## **H. The way forward – Approaching the negotiating mandate of paragraph 31(i) from a developing countries’ perspective**

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

First, from a developing countries’ perspective, it is advisable that discussions and negotiations on trade measures remain focused on STOs. However, developing countries need to stress that trade measures are generally an integral part of a package of measures and that negotiations and discussions on STOs need to pay full attention to positive/supportive measures. Moreover, there is a certain balance and interplay between the measures of the package. Restrictive trade measures can be accompanied by supportive measures or enhanced flexibility elements that make the whole package acceptable to a developing country Party. If properly used, the balance and interplay between the various measures can also help address the enhanced differentiation among developing country Parties. In short, developing countries should advocate a practical way forward that pays due attention to the development dimension of the package of measures taken by relevant MEAs.<sup>76</sup>

Second, the heterogeneous character and objectives of developing countries are best taken into account by a “bottom-up” analysis of practical experience with STOs in concerned MEAs. This approach will allow the identification of real areas of conflict between both systems, rather than discussing theoretical or hypothetical areas of tension. The “bottom-up” approach will not exclude the possibility of certain systemic issues arising from the analysis, as advocated by the European Union and Switzerland, for instance.

Third, although it is important to clearly define the term “specific trade obligations”, developing countries should avoid the pitfall of a too legalistic debate. It is in the interest of developing countries that STOs in MEAs leave little discretion to Parties for unilateral measures that are taken “pursuant to MEAs”. This would suggest that STOs should

not include those that are discretionary. On the other hand, the UNFCCC and its Kyoto Protocol, which do not provide for STOs, but use trade measures as “obligation de résultat”, would therefore fall outside the mandate of paragraph 31(i), although these accords might have the most important trade implications of all MEAs (e.g. through energy performance criteria/requirements, energy taxes etc.).<sup>77</sup> It is therefore advisable that developing countries advocate the introduction of some discipline for discretionary trade measures taken pursuant to MEAs. This could be achieved by introducing text in the negotiated outcome which would emphasize that “WTO advocates the scope for countries to implement sound environmental measures that are consistent with the objectives of MEAs while adhering to established WTO rules and obligations”. It is likely that such language would ultimately find its way into the appropriate environmental accords.

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

Fifth, it seems logical to focus the next phase of the analysis in the CTE on an in-depth review of the clarity, effectiveness, efficiency and flexibility of the STOs in a small number of concerned MEAs.<sup>78</sup> Such a review could be based on a number of specific criteria, as used by similar previous exercises outlined in section G.1.a.

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

The list of such STOs is likely to be small. On the basis of the above analysis, only the BC has a number of STOs that might be in conflict with WTO rules. Under CITES, only the use of STOs as enforcement mechanisms seems to be an area of tension.

Such an approach is unlikely to be objected to by MEAs because its decisive discussion would remain under the control of MEA constituencies. It can also ensure that the delicate balance between rights and obligations contained in MEAs is maintained.<sup>79</sup> It will require, however, a sincere and open attitude to objectively reviewing the clarity, effectiveness and efficiency as well as the flexibility of the trade measures concerned and to considering 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;<sup>80</sup> (ii) they are a genuine platform for consensus; and (iii) that they have an effective DSM.

The suggested approach has a considerable affinity with the pre-Doha proposal by New Zealand to the CTE on an informal consultative mechanism that enjoyed broad support. The proposal by New Zealand emphasizes that when Parties to an MEA have committed themselves to the MEA, there should be no reason on the grounds of international law why those countries would object to trade measures pursuant to the MEA. In New Zealand's view, potential conflicts between WTO provisions and MEAs are lim-

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*It seems logical to focus the next phase of the analysis in the CTE on an in-depth review of the clarity, effectiveness, efficiency and flexibility of the STOs in a small number of concerned MEAs.*

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ited; they are likely to arise only 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).<sup>81</sup> 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 the use of a “voluntary consultative mechanism” that could be deployed on an ad hoc basis to assess whether the relevant trade measure is the most effective instrument available for addressing the environmental problem at issue. Such voluntary consultative mechanisms 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 by 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.<sup>82</sup> The main elements of the proposal can be summarized as follows:

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

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

- Whether WTO Members want to bring to the attention of the concerned MEAs the fact 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 trade measures concerned and discuss ways of enhancing their flexibility, including through the use of supportive measures; or
- Whether there is indeed (the not very likely situation of) a larger number of STOs with potential tensions in the studied MEAs that cannot be individually addressed by MEAs and for which a generic solution within the WTO context would have to be found.

One has to admit, however, that the above-outlined approach is an *ex-post* attempt at overcoming potential tensions between STOs in existing MEAs and WTO rules. Those demanding the negotiating mandate have stressed that they wish to clarify the relationship in an *ex-ante* way to avoid the “chill factor” resulting from WTO rules. Therefore, if there was sufficient general support, developing country WTO Members could go along with the development of guidelines that draw the lessons from the above-outlined exercise and, in addition, provide guidance on the application of discretionary trade measures taken by Parties pursuant to MEAs.

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Such guidelines should emphasize that STOs in MEAs should be clear, based on scientific environment-related criteria, sufficiently flexible, directly linked to the cause of the environmental problem and accompanied by adequate and effective supportive measures for developing country Parties.<sup>83</sup> In addition, developing countries may wish to advocate the introduction of some discipline for discretionary trade measures taken pursuant to MEAs. This could be achieved by introducing text in the negotiated outcome that would emphasize that “the WTO advocates the scope for countries to implement sound environmental measures, including trade measures taken pursuant to MEAs, which are consistent with the objectives of MEAs while adhering to established WTO rules and obligations”.

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## Notes

- <sup>1</sup> For instance, Abdel Motaal, D., Multilateral Environmental Agreements (MEAs) and WTO rules: Why the “burden of accommodation” should shift to MEAs, *Journal of World Trade*, Vol. 35, No. 6 (December 2001) or Sampson, G.P., Effective Multilateral Environmental Agreements and why the WTO needs them, *The World Economy*, No. 9, Vol. 24 (September 2001).
- <sup>2</sup> See United Nations Treaty Collection, Treaty Reference Guide (1999). It defines all the relevant terminology to be used when dealing with international treaties.
- <sup>3</sup> Rio Declaration on Environment and Development, in: Earth Summit: Agenda 21 – The United Nations Programme of Action from Rio, New York, 1992.
- <sup>4</sup> For more information, see WorldWatch Institute, Global Signs 2003, accessible at [www.worldwatch.org/press/news/2003/05/22](http://www.worldwatch.org/press/news/2003/05/22).
- <sup>5</sup> By way of illustration, premature deaths and illness arising from environmental factors account for about a fifth of all diseases in developing countries, greater than any other preventable factor, including malnutrition. *Economist*, 6 July 2002. Furthermore, between 1985 and 1999, developed countries sustained 57 per cent of the measured economic losses resulting from environmental disasters, representing 2.5 per cent of their combined GDP. Conversely, in developing countries that sustained only 24 per cent of the economic toll of all environmental disasters the loss was the equivalent of 13.5 per cent of their combined GDP. UN Inter-agency Secretariat of the International Strategy for Disaster Reduction (ISDR), *Living with risk*, New York, 2002.
- <sup>6</sup> UNEP, *Register of International Treaties and Other Agreements in the Field of Environment* (1999). WTO, *Matrix on Trade Measures Pursuant to Selected MEAs*, WT/CTE/W/160/Rev.1 (2001), p. 55.
- <sup>7</sup> An in-depth overview of trade measures in several MEAs is contained in WTO document WT/CTE/W/160/Rev.2 of 25 April 2003.
- <sup>8</sup> OECD, Trade measures in Multilateral Environmental Agreements (COM/ENV/TD(98)127/FINAL), Paris 1999, p. 6.
- <sup>9</sup> For instance, the 1982 UN Convention on the Law of the Sea *inter alia* aims at sustainable use of marine living resources and protection of marine environment.
- <sup>10</sup> Applying trade measures as “enforcement instruments” of MEAs is a special way of avoiding or discouraging leakage or free riding. Such measures might be authorized by the dispute settlement or enforcement mechanism of an MEA or may be taken pursuant to decisions by the COP. As will be explained later, they might be one of the sources of potential conflict with WTO rules and may also pose developmental problems for developing countries.

- <sup>11</sup> For more information in this regard, see Abdel Motaal, op. cit.
- <sup>12</sup> Brack, D. and Gray, K, Multilateral Environmental Agreements and the WTO, research paper, presented to the IISD/RIIA Workshop on Trade and Sustainable Development Priorities Post Doha, London, 7-8 April 2003.
- <sup>13</sup> Jha, V. and Hoffmann, U, Achieving objectives of multilateral environmental agreements: A package of trade measures and positive measures, UNCTAD/ITCD/TED/6, Geneva, 2000.
- <sup>14</sup> *Positive measures* is an expression that can lead to some misunderstandings if they are interpreted as being the opposite of negative measures. This is a debate that will not be further developed in this paper, but the interested reader can refer to Vaughan, S. and Delhavi, A., Policy Effectiveness and Multilateral Environmental Agreements, UNEP, Environment and Trade Series, No. 17, Geneva. 1998.
- <sup>15</sup> For more information in this regard, see the report of the UNCTAD Expert Meeting on Positive Measures to Promote Sustainable Development, Particularly in Meeting the Objectives of Multilateral Environmental Agreements, held in Geneva from 3 to 5 November 1997. The report of the Expert Meeting is contained in documents TD/B/COM.1/9 and TD/B/COM.1/EM.3/3 (Geneva, 11 November 1997), which can be downloaded from [www.unctad.org/en/special/c1em3d2.htm](http://www.unctad.org/en/special/c1em3d2.htm).
- <sup>16</sup> The Multilateral Fund has so far disbursed more than US\$ 1 billion to some 120 developing countries, i.e. arithmetically about US\$ 9 million per country or almost US\$ 1 million per country per annum. By way of comparison, the technical assistance trust funds of CITES and the Basel Convention for “all” developing countries have each oscillated around US\$ 1.5 million per annum in recent years (to make the picture even more bleak, a considerable part of these funds has been used to fund participation of developing country delegates in meetings of the subsidiary bodies of the COPs of the two conventions). Even if all direct bilateral funding support for technical assistance and capacity building were added, the total annual budget for supportive measures has not been much more than US\$ 2 million per annum for each of the two Conventions, translating into about US\$ 17,000 per developing country Party.
- <sup>17</sup> 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 2<sup>nd</sup> Workshop of the Project on Strengthening Research and Policy-making Capacity on Trade and Environment in Developing Countries, Los Baños, Philippines, 11-13 November 1999, accessible at [www.unctad.org/trade\\_env/](http://www.unctad.org/trade_env/).
- <sup>18</sup> For more information in this regard, see Castells, N. 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. Nijkamp, P. 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.
- <sup>19</sup> As will be seen later, it is worth noting that several WTO panels have confirmed that it was the application of the trade measure and not the measure itself that needed to be closely examined.
- <sup>20</sup> Ministerial Declaration of the fourth Ministerial Conference of the WTO in Doha, WTO document WT/MIN(01)/DEC/1, 10 November 2001.
- <sup>21</sup> As the general mandate of the CTE was renewed by the DMD, WTO Members can continue to discuss the general relationship under items 1 and 5 of the CTE work programme.
- <sup>22</sup> European Communities, *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda*, submission to the first Special Session of the WTO CTE (TN/TE/W/1), 21 March 2002.
- <sup>23</sup> See, for instance, the interpretation of Argentina, India and the United States in their recent submissions to the CTE (Argentina -TN/TE/W/2 of 23 May 2002; India – TN/TE/W/23 of 20 February 2003; and United States – TN/TE/W/20 of 10 February 2003).
- <sup>24</sup> See WTO document TN/TE/R/6.
- <sup>25</sup> Ibid.
- <sup>26</sup> 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.

- <sup>27</sup> Despite the opposition which developing countries have expressed in the WTO, to the use of trade measures against non-Parties, and their reluctance to provide a blanket WTO waiver to trade measures among Parties in MEAs, many developing countries have been “demandeurs” for such measures in environmental forums. For more information, see Abdel Motaal, *op. cit.*
- <sup>28</sup> 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 help Parties comply with the obligations in a flexible and non-confrontationist manner.
- <sup>29</sup> UNEP, *Enhancing synergies and mutual supportiveness of MEAs and the WTO - A synthesis report*, submission to the CTE (WT/CTE/W/213), 12 June 2002.
- <sup>30</sup> For more information, see: WTO secretariat, *MEAs and WTO rules: Proposals made in the CTE from 1995-2002* (TN/TE/S/1), 23 May 2002.
- <sup>31</sup> For an overview of submissions, see WTO document TN/TE/S/3 as well as the Report by the Chairperson of CTE Special Session in document TN/TE/3 of 2 December 2002. There are also two more recent submissions by Canada (TN/TE/W/22), India (TN/TE/W/23) and the United States (TN/TE/W/20).
- <sup>32</sup> This was proposed by Brazil, New Zealand, the Philippines, and Thailand. Peru and the United States favoured an analysis of six MEAs that would add the Rotterdam Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention), the Cartagena Protocol on Biosafety (Biosafety Protocol) and the Stockholm Convention on Persistent Organic Pollutants (POPs Convention). Summary Report on the 6<sup>th</sup> Session of the CTE Special Session, WTO document TN/TE/R/6. It should be noted in this context that the Biosafety Protocol came into force on 11 September 2003.
- <sup>33</sup> WTO documents TN/TE/W/1, TN/TE/W/4 and TN/TE/W/16.
- <sup>34</sup> See: Summary Report of the 6th Meeting of the CTE SS, WTO document TN/TE/R/6.
- <sup>35</sup> See *inter alia*: Jha, and Hoffmann, *op. cit.*
- <sup>36</sup> 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.
- <sup>37</sup> For more information in this regard, see: Abdel Motaal, *op. cit.*
- <sup>38</sup> Compiled from: WTO document WT/CTE/W/203 of 8 March 2002. The recent shrimp-turtle case, for instance, suggests two conclusions on the extraterritorial application of environmental regulation. First, such application is permissible if it is implemented in the context of an international agreement such as an MEA. Second, such measures need to be applied in a transparent, predictable and uniform way to all WTO Members.
- <sup>39</sup> These three MEAs were selected for further review, because (i) they have a range of specific trade obligations; (ii) are sufficiently old to allow 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.
- <sup>40</sup> Appendix I lists species for which no commercial trade is allowed. Appendix II contains species in which commercial trade is allowed, but subject to strict regulation (e.g. export and import permits and re-export certificates), in order to avoid utilization incompatible with their survival. The Convention also has an Appendix III that includes species that a Party has identified as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of international trade.
- <sup>41</sup> Malaysia, in its submission TN/TE/W/29, considers this provision a principle rather than an operative provision, which in its view does therefore not qualify as a STO.
- <sup>42</sup> Depending on the narrow or broad definition of STOs, Article VIII (3), (4) and (7) could also qualify as STOs.
- <sup>43</sup> The decisions adopted by the 12th meeting of the COP in Santiago in November 2002 to list big leaf mahogany, seahorses and two shark species in Appendix II are unlikely to change this situation significantly.
- <sup>44</sup> Decisions by the Standing Committee of CITES on non-compliance cases have been taken by consensus and pursuant to the Convention (e.g. Articles VIII, XIII and XIV) as well as Resolutions and Decisions of the COP.

- <sup>45</sup> Amendments to the Appendices that are adopted by the COP are legally binding. Conversely, Resolutions and Decisions of the COP are generally considered non-binding. It should be noted, however, that they have significant importance because they are based on the text of the Convention and often adopted by consensus. For more information, see the background document on compliance with the CITES Convention (COP 12, Doc. 26) and Xueman Wang, Specific trade obligations and the Biosafety Protocol, *Bridges*, Vol. 7, No. 4 (May 2003), pp. 16-18.
- <sup>46</sup> The Standing Committee subsequently extended the deadline for legislative enactment to 31 December 2001. One country met this deadline, but the other three countries did not. It was therefore recommended, through Notification Nos. 2002/03, 2002/04 and 2002/05 that Parties suspend commercial trade in CITES-listed species with those three countries. The three affected Parties subsequently enacted adequate legislation, which lead to the withdrawal of the Notifications and the annulment of Decisions 11.15 and 11.16.
- <sup>47</sup> It should be noted that developed countries such as Greece and Italy have also been subject to recommendations to suspend trade. Marceau, G. and González-Calatayud, A., The relationship between the dispute mechanisms of MEAs and those of the WTO, in: Heinrich Böll Foundation/Woodrow Wilson International Centre for Scholars/National Wildlife Federation, Trade and environment, the WTO, and MEAs – Facets of a complex relationship, Conference Proceedings, Washington, DC, 29 March 2001 and Reeve, R., Policing international trade in endangered species: the CITES treaty and compliance, Royal Institute of International Affairs, London, 2002.
- <sup>48</sup> Brack, D. and Gray, K., op. cit. and Vasquez, J.C. and Yeater, M., Demystifying the relationship between CITES and the WTO, *Review of the European Community and International Environmental Law (RECIEL)*, Vol. 10 (2001), pp. 271-276. Generally, the use of trade measures for ensuring compliance should be confined to cases of persistent and/or serious non-compliance that is clearly the result of a lack of political will of a Party. Furthermore, such decisions should be taken by consensus among Parties.
- <sup>49</sup> For an in-depth description of the trade provisions, see: Brack, D., *International trade and the Montreal Protocol*, Royal Institute of International Affairs, London, 1996.
- <sup>50</sup> The same decision also encouraged Parties to use economic incentives to promote ODS substitutes. Such incentives should not impair international trade and should be appropriate and consistent with international trade law.
- <sup>51</sup> According to Article 10, paragraph 1 of the Convention for the Protection of the Ozone Layer, “The annexes to this Convention or to any protocol shall form an integral part of this Convention”.
- <sup>52</sup> Parties are currently agreeing the procedures for critical uses of methyl bromide.
- <sup>53</sup> It needs to be mentioned that the control measures of the Montreal Protocol for Article 5 countries (i.e. developing countries) for a first group of ODS (i.e. CFCs, halos and methyl bromide) became effective in 2002 for the first time. It will therefore have to be seen some time later whether the trade measures pose serious adjustment problems for some of these countries.
- <sup>54</sup> Malaysia, in its submission TN/TE/W/29 does not consider the following provisions as STOs: Articles 3, 4.1(a), 4.2 (a-d), 4.2 (e-f), 4.7(b), 6.4, 6.9 and 6.10.
- <sup>55</sup> This is only the second of its kind and might be the first that has a real chance of entering into force (however, only 14 Parties signed the Protocol and no Party has so far ratified the Protocol; 20 ratifications are required for the Protocol to come into effect).
- <sup>56</sup> Article 4 (8) of the Convention stipulates that “technical guidelines for the environmentally sound management of wastes subject to this Convention shall be decided by the Parties at their first meeting”. This has, however, not ushered in a decision on an operational definition of ESM. Rather, in decision 13 of COP II, Parties adopted a Framework Document on the Preparation of Technical Guidelines for ESM of Wastes Subject to the Convention. This document has, however, only launched a series of Technical Guidelines for ESM of so far about 15 specific waste streams, such as clinical/medical wastes or used lead-acid batteries. Legally, these are “descriptive” guidelines, whose implementation creates no entitlement to receive imported waste from developed countries under the Convention. In other words, the vague legal status of the Guidelines implies that any facility in a developing country, which can provide evidence of fully meeting the Guidelines for a specific hazardous waste, will not be considered ESM-compatible under the Convention and thus is not entitled to receive waste shipments from developed countries. This, however, is contrary to the original intent of Article 4(8), i.e. the import of hazardous waste as commodity. For more information, see Alter, H., *Environmentally sound management of the recycling of haz-*

ardous wastes in the context of the Basel Convention, *Resources, Conservation and Recycling*, Vol. 29 (2000), pp. 111-129.

- <sup>57</sup> For instance, the world's most sophisticated lead recycling facility is in Malaysia, operated by Metal Reclamation Industries. Another lead recycling facility in the Philippines, operated by Philippine Recyclers Inc., is in the very small league of world metal recycling companies that obtained ISO 14001 certification (in this case by SGS in Switzerland).
- <sup>58</sup> A recent review of the Basel Convention Secretariat reveals, for instance, that, in volume terms, shipments of lead, copper and zinc scrap alone accounted for about 70 per cent of global hazardous waste trade (Wielenga, K., *Global trends in generation and transboundary movements of hazardous wastes and other wastes: Analysis of data provided by Parties to the Secretariat of the Basel Convention*, Research Paper of the Basel Convention Secretariat, No. 14, November 2002).
- <sup>59</sup> By virtue of joining the European Union in 2004, some of the 10 Central and Eastern European countries will also become members of Annex VII of the Basel Convention, although the ESM situation of many of their waste management and recovery facilities is inferior or at best equal to comparable facilities in rapidly industrializing countries such as Malaysia.
- <sup>60</sup> Until the end of June 2003, 42 countries (of which 16 are developing countries) had ratified the Ban Amendment. To take effect, the Amendment has to be ratified by 62 Parties.
- <sup>61</sup> Council Regulations 259/93 and 1420/1999 and Commission Regulation 1547/1999.
- <sup>62</sup> They will most likely also be used by the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Convention on Persistent Organic Pollutants.
- <sup>63</sup> One would think that emphasis should be given to firstly promoting re-engineering of industrial processes in ways that minimize or eliminate the generation of hazardous waste at source, and secondly innovation in product design for easy recovery or minimal impact at disposal or recovery.
- <sup>64</sup> The CITES Strategy until 2005 and its Action Plan outline in objective five several measures to improve the relationship with the WTO with a view to ensuring that the trade measures adopted by CITES are appreciated and accepted by the WTO.
- <sup>65</sup> For more information, see Brack, D., *International trade and the Montreal Protocol*, Royal Institute of International Affairs, London, 1996, pp. 67-68.
- <sup>66</sup> OECD, *Experience with the use of trade measures in the Montreal Protocol on Substances that Deplete the Ozone Layer (OECD/GD(97)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.
- <sup>67</sup> The outcome of the meeting is accessible at:  
[www.unctad.org/Templates/meeting.asp?intItemID=1942&lang=1&m=4221](http://www.unctad.org/Templates/meeting.asp?intItemID=1942&lang=1&m=4221)
- <sup>68</sup> Jha and Hoffmann, op. cit.
- <sup>69</sup> Hoffmann, U., *Requirements for environmentally sound and economically viable management of lead as important natural resource and hazardous waste in the wake of trade restrictions on secondary lead by decision III/1 of the Basel Convention: The case of used lead-acid batteries in the Philippines*, accessible at [www.unctad.org/trade\\_env/test1/publications/battery1.pdf](http://www.unctad.org/trade_env/test1/publications/battery1.pdf).
- <sup>70</sup> According to Konrad von Moltke, presentation at the Workshop on Trade and Sustainable Development Priorities Post-Doha, organized by the International Institute for Sustainable Development and the Royal Institute of International Affairs, London, 8 April 2003.
- <sup>71</sup> Paragraph 98 of the WSSD report reads as follows: "Promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments". Accessible at: [www.johannesburgsummit.org](http://www.johannesburgsummit.org).
- <sup>72</sup> According to some proposals, the DSM of the MEA may verify the objectives of STOs against bullets (b) and (g) of Article XX of GATT 1994 – necessity test - whereas WTO panels could evaluate the implementation of STOs against the head note of Article XX – i.e. whether they are applied in an arbitrary or unjustifiable manner or represent a disguised form of protectionism.

- <sup>73</sup> It is often overlooked that the Biosafety Protocol also has a conditional form of implementing the precautionary approach. In accordance with Articles 10.1 and 11.6, a risk assessment is required in accordance with Article 15 and in line with risk assessment criteria outlined in Annex III.
- <sup>74</sup> In accordance with Article 15.3 of the Cartagena Protocol on Biosafety, “the cost of risk assessment shall be borne by the notifier if the Party of import so requires”.
- <sup>75</sup> For more information, see: Morris, J., International Policy Network, accessible at [www.policynetwork.net](http://www.policynetwork.net).
- <sup>76</sup> China made a similar statement in the CTE SS on 1-2 May 2003. See: WTO document TN/TE/R/6.
- <sup>77</sup> In particular rapidly industrializing developing countries have an interest in enhancing transparency and using multilateral disciplines when confronted with such “unilateral” trade measures.
- <sup>78</sup> India proposed in this regard CITES, the Montreal Protocol, the Basel Convention, the Biosafety Protocol, the PIC and the POPs Convention (TN/TE/W/23), whereas Malaysia’s submission (TN/TE/W/29) limits this list to the three MEAs in effect, namely CITES, the Montreal Protocol and the Basel Convention.
- <sup>79</sup> See Xueman Wang, *op. cit.*
- <sup>80</sup> As mentioned in the box above on recent WTO dispute settlement practice related to Article XX of GATT, the interpretation has evolved from a least trade-restrictive approach to a less trade-restrictive one, supplemented with a proportionality test (i.e. a process of weighing and balancing a series of factors).
- <sup>81</sup> The first proposal in this regard was made by New Zealand in 1996 calling for the drafting of an “understanding” covering all WTO agreements to be used by panels (see WTO documents WT/CTE/W20). Besides New Zealand, Japan and Canada have also argued in favour of drafting “guidelines” or an “understanding”, to be used by WTO panels in deciding the consistency of trade measures taken pursuant to MEAs.
- <sup>82</sup> For more information, see Abdel Motaal, *op. cit.*
- <sup>83</sup> A more elaborate version of these criteria was outlined in section VII.1(a) under “factors contributing to success”.