MULTILATERAL ENVIRONMENTAL AGREEMENTS AND THE WTO

Report

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1 Introduction

One of the key issues in the debate over how best to reconcile the two objectives of environmental protection and trade liberalisation revolves around the inter-relationship between multilateral environmental agreements (MEAs) and the multilateral trading system.

1.1 Multilateral environmental agreements

As Principle 12 of the Rio Declaration states, international agreement is clearly preferable to unilateral action in tackling transboundary or global environmental problems. Well over 200 MEAs now exist, with memberships varying from a relatively small group to over 180 countries – which means effectively the whole world. The main global MEAs include:

- Those covering biodiversity and wildlife, including the 1946 International Convention for the Regulation of Whaling; the 1971 Ramsar Convention on Wetlands of International Importance; the 1973 Convention on International Trade in Endangered Species (CITES); the 1979 Bonn Convention on the Conservation of Migratory Species; the 1992 UN Convention on Biological Diversity and its protocol, the 2000 Cartagena Protocol on biosafety;[1] and the 1994 International Tropical Timber Agreement.

- Those designed to protect the atmosphere, including the 1979 UN Economic Commission for Europe (UNECE) Convention on Long-Range Transboundary Air Pollution (together with five protocols on particular pollutants: nitrogen oxides, volatile organic compounds, sulphur, heavy metals and persistent organic pollutants); the 1985 Vienna Convention for the Protection of the Ozone Layer, and its protocol, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; and the 1992 UN Framework Convention on Climate Change, and its protocol, the 1997 Kyoto Protocol (agreed but not yet in force).

- Those dealing with the marine environment, including the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter; the 1973 Convention for the Prevention of Pollution from Ships, and its protocol, the 1978 Marpol Protocol; and the 1982 UN Convention on the Law of the Sea, together with an implementing agreement, the 1995 Agreement on Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (agreed but not yet in force).

- Those regulating the use of chemicals, including the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the 2001 Stockholm Convention on Persistent Organic Pollutants (both agreed but not yet in force). The Montreal Protocol could be considered under this category, since it regulates the production and consumption of ozone-depleting chemicals.

- Those dealing with waste, including the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (see also under marine environment).

[1] Due to enter into force on 11 September 2003.

- Others, including the 1991 Espoo Convention on Environmental Impact Assessment, the 1992 UN Convention to Combat Desertification, and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

In addition, of course, there are important regional agreements, such as the 1966 International Convention for the Conservation of Atlantic Tunas, the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats, the 1982 Convention on the Conservation of Antarctic Marine Living Resources, and the 1992 Ospar Convention for the Protection of the Marine Environment of the North East Atlantic. Together these global and regional MEAs provide an extensive framework for the protection of the global environment – though some subjects are more effectively covered than others. Perhaps the weakest area is forestry; a global forests convention was hoped to be negotiated at the Earth Summit at Rio in 1992, but in the end only a fairly weak set of 'forest principles' could be agreed.

In general the last two decades have seen the extension of MEAs from agreements covering the protection of particular species of endangered wildlife (many of the earlier MEAs dealt with individual populations, such as Arctic polar bears) to ever wider areas of economic activity. Appendix 1 shows rough estimates of the value of the economic activity regulated in some way by selected MEAs (for the agreements which interface most with international trade) compared with global production and trade figures. The Kyoto Protocol on climate change, when it comes into force, will, of course, affect a far greater share of global economic activity than all the other MEAs put together; though others, like the Basel Convention or the Cartagena Protocol, affect not-insignificant volumes of activity.

1.2 Trade measures in MEAs

Almost thirty of these MEAs[2] incorporate trade measures, regulating or restraining the trade in particular substances or products, either between parties to the treaty and/or between parties and non-parties. The first part of this paper (Sections 2–3) examines why these trade measures have been incorporated into MEAs, whether they have been effective in achieving their objectives, whether there are any realistic alternatives to them, and what impact they have had.

What do we mean when we talk about 'trade measures'? The term tends to be used fairly loosely, and is often taken to mean restrictions on trade in the forms of bans or embargoes. In fact there is a very wide variety of policies and measures included in MEAs that may impact international trade. These are explored in more depth in the next section, but briefly they include:[3]

- Reporting requirement: the extent of trade in a particular product must be monitored and reported.

- Labelling or other identification requirement: products in trade must be identified in some way, depending on their product and/or process characteristics.

[2] The WTO Secretariat lists 31 MEAs containing potential trade measures, though some of these are regional rather than global agreements, and protocols are included along with their parent conventions under single headings – though for most purposes it makes more sense to treat them as different agreements (See *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements,* WT/CTE/W/160.Rev.2, TN/TE/S/5, 25 April 2003).

[3] See OECD, *Trade Measures in MEAs* (Paris: OECD, 1999), p. 180, for a slightly different typology.

- Requirement for movement documents / notification and consent: the import and/or export of particular products cannot proceed without the presence of some combination of permits or licenses or other documents indicating the consent of the states involved in the trade to the movement of the products.

- Export and/or import bans (targeted): trade in specified products with particular states (generally, non-complying parties or non-parties) is not permitted.

- Export and/or import bans (general): trade in specified products with any state is not permitted. In general this accompanies production and consumption bans within the state applying the trade measure; there may also be specified exemptions.

- 'Market transformation' measures: taxes, charges, subsidies or other forms of fiscal measures, and non-fiscal measures such as government procurement, may be applied to products (whether domestic or imported) as a means of growing market share for desired products, and reducing it for non-desired products, with the aim of complying with the requirements of the MEA.

These trade measures are often set out in the texts of the MEAs themselves. In some cases, however, they derive from decisions of the parties after the MEAs enter into force and are not described explicitly in the agreement. In other cases, aspects of the ways in which trade measures are applied may be affected by decisions of the parties.

Specific and non-specific measures

A further distinction may be made between *specific* and *non-specific* trade measures. The former are explicitly described in the MEA or in subsequent decisions of its parties and in general are mandatory obligations that must be applied by all parties. In some cases, a specific measure may not be mandatory but may form part of a series of options available to the party to satisfy MEA requirements.[4]

Non-specific measures are not explicitly described, but may be applied by parties, probably alongside other measures, as a means of complying with their obligations or fulfilling MEA objectives. Different measures may be applied by different countries. For example, the Montreal Protocol contains specific trade measures in the form of requirements for a ban on trade (in the products controlled by the Protocol) with non-parties, and for a system of export and import licences. Many parties have also applied non-specific trade measures, including labelling requirements, excise taxes and import bans, in order to meet their obligations for phasing out consumption (defined as production + imports – exports) of ozone-depleting substances.

1.3 MEA trade measures and the WTO

The second part of this paper deals with the inter-relationships between MEA trade measures and WTO rules. The WTO agreements themselves contain measures allowing for environmental

[4] For instance, in Article 2.1(a) of the Kyoto Protocol parties are to implement or further elaborate policies and measures from a list provided in the Protocol. The US has stated, however, at the WTO Committee on Trade and Environment, that it believes that nothing in the Protocol would qualify as a 'specific trade obligation' under the Doha mandate; see TN/TE/W/11.

considerations. The Agreement establishing the WTO recognises that trade should be conducted 'while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so …'.[5]. This was reaffirmed in the Doha Declaration in 2001: 'We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.'[6]

The Doha negotiating agenda deals explicitly with the topic of MEAs in paragraph 31, which agrees to negotiations on 'the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements' (see Appendix 2).

In theory, this could be one of the less difficult of the items on the trade and environment agenda to resolve. MEAs are, like the WTO agreements, multilateral in scope – they do not involve unilateral measures (trade-related or otherwise) and therefore tend to avoid the kind of arbitrary and discriminatory behaviour that most WTO agreements are designed to reduce. In practice, however, the debate has not been an easy one. The WTO Committee on Trade and Environment (CTE) has been examining the relationship since 1995, yet has failed to reach any real conclusion.[7] The second part of this paper (Sections 4–5) looks at the history of the interaction of MEA trade measures with the WTO, and possible outcomes for the current debate.

2 Why do MEAs contain trade measures?

There are three broad sets of reasons why trade restrictions have been incorporated in MEAs:[8]

- To provide a means of monitoring and controlling trade in products where the uncontrolled trade would lead to or contribute to environmental damage. This may extend to a complete exclusion of particular products from international trade.

- To provide a means of complying with the MEA's requirements.

- To provide a means of enforcing the MEA, by forbidding trade with non-parties or non-complying parties.

This section examines each of these in turn.

[5] Marrakesh Agreement Establishing the World Trade Organization, preamble, para 2.
[6] WTO Doha Ministerial Declaration, 14 November 2001, para 6.
[7] See WTO, *Report of the General Council to the Ministerial Conference of Singapore,* 12 November 1996, for a summary of the first two years' discussions.
[8] For a fuller consideration, see Steve Charnovitz, 'The Role of Trade Measures in Treaties', in Agata Fijalkowski and James Cameron (eds), *Trade and the Environment: Bridging the Gap* (London: Cameron May, 1998).

2.1 Monitoring and controlling trade

A wide range of MEAs incorporate this kind of trade measure. Reporting and labelling requirements, and the need for movement documents or notification and consent arrangements are the most common types of trade measures used, though sometimes general trade bans may be applied (often with specified exemptions).

At the core of *CITES* is a requirement for export permits for trade in all endangered species listed under the agreement's appendices, and additionally for import licenses for Appendix I species (the most endangered). Trade is forbidden in the absence of properly issued permits. Similarly, the heart of the *Basel Convention* is a prior notification and consent procedure for shipments of hazardous waste involving the states of import, export and transit; each shipment of waste subject to the Convention must be accompanied by a movement document. (Unlike many MEAs, much of the pressure for the adoption of controls on hazardous waste movements came from developing countries, who, with some exceptions, lacked the capability to dispose safely of hazardous waste imports.) The 1995 'ban amendment', not yet in force, goes much further and places an outright ban on exports of waste from developed to developing countries, initially for disposal and eventually for recycling and reuse. The Basel Convention also imposes packaging and labelling requirements.

The *Rotterdam Convention* similarly contains a prior informed consent procedure for an initial list of five industrial chemicals and twenty-two pesticides (including most of the chemicals listed in the Stockholm Convention); each party is required to decide whether to ban or restrict imports of the substances, to export only in line with the parties of imports' decisions, and to provide prior notification where a substance which is domestically controlled is exported. The *Cartagena Protocol* contains an advanced informed agreement procedure requiring exporters of 'living modified organisms' (LMOs) to notify the importing country in advance. The importing country must either approve the import according to its own regulatory system or follow the Protocol's decision procedure, which requires a risk assessment before a final decision. LMOs intended for direct use as food, feed or processing are subject to a less strict procedure, but shipments of commodities that contain such LMOs must be identified and labelled as such. As with the Basel Convention, most of the pressure for the advanced informed agreement procedure came from the developing world, concerned about the need to protect countries without adequate regulatory or institutional capacity to handle imports effectively.

The growing problem of 'international environmental crime' – the deliberate evasion of environmental laws and regulations by individuals and companies in the pursuit of personal financial benefit, and involving movements across national boundaries – also creates incentives for the wider use of trade measures. There is a wide range of policy options governments and international institutions can adopt to try and counter this problem, but many of them revolve around the closer regulation of trade, and enhanced tracking and verification policies and technologies.

For example, there is growing interest, world-wide, in the control of illegal logging and of imports of illegally logged timber into consumer markets such as the EU. The European Commission's action plan on the issue, published in May 2003,[9] includes a proposal for the establishment of a new licensing system requiring imports of timber from participating countries to be accompanied by a license proving legal production and processing in the country of origin. It also encourages EU member states to adopt government procurement policies sourcing only legal timber; the UK is already following this

[9] Available at http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0251en01.pdf

approach. None of this is governed by an MEA, but the intention is that bilateral agreements will be reached between the EU and major producer states[10] which may eventually result in a world-wide agreement.

The parties to the *Montreal Protocol* have paid more attention in recent years to the control of illegal shipments of ozone-depleting substances (ODS). The Protocol itself was amended (through the 1997 Montreal Amendment) to introduce a requirement for export and import licenses for most categories of ODS. Entering into force in November 1999, this permit system was introduced primarily as a means of controlling illegal trade, and would probably have been written into the treaty from the beginning if such illegal activities had been anticipated.[11] Decision XIV/7 of the 2002 meeting of the parties included the introduction of a reporting provision for proved cases of illegal trade, support for the greater use of portable analysis equipment at border crossing points, encouragement for the extension of customs codes to cover all the most commonly traded ODS, and encouragement for economic incentives ('that do not impair international trade but which are appropriate and consistent with international trade law'), to promote ODS substitutes.

In 2000, the *Convention on the Conservation of Antarctic Marine Living Resources* (CCAMLR) introduced a Catch Documentation Scheme for the Patagonian toothfish, a heavily (and frequently illegally) fished deep-sea species. The Scheme is designed to track the landings and trade flows of toothfish caught in the Convention area and, where possible, adjacent waters. CCAMLR members are required to ensure that all of their flagged vessels fishing for toothfish are specifically authorised to do so, and complete catch document forms[12] for all catches landed or trans-shipped; document forms are not to be issued to non-authorised ships. All landings or trans-shipments of toothfish catches at CCAMLR members' ports are only permitted if they are accompanied by a valid form, and any export or re-export of toothfish must also be accompanied by the form countersigned by a responsible government official.

2.2 Complying with MEA requirements

Here the controls on trade are required in order to achieve other objectives of the MEA. A wide variety of measures may be used, mostly falling under the categories of labelling requirements and market transformation measures identified above. General export and import bans may also be applied.

The *Montreal Protocol* requires parties to control both consumption and production of ODS. Since the Protocol defines consumption as 'production plus imports minus exports', parties must exercise control over trade if they are to satisfy their control schedules. A variety of trade restrictions have been employed, including voluntary industry agreements, product labelling requirements, requirements for import licences (sometimes incorporating a tradable permit system), excise taxes, quantitative restrictions on imports and total or partial import bans.

[10] Similar in principle to the UK–Indonesia *Memorandum of Understanding on cooperation to improve forest law enforcement and governance and to combat illegal logging and the international trade in illegally logged timber and wood products* agreed in April 2002; see http://www.illegal-logging.info/Documents/Indonesia-UK MoU.pdf

[11] See UNEP (Ozone Secretariat), *Study on Monitoring of International Trade and Prevention of Illegal Trade in Ozone-Depleting Substances, Mixtures and Products Containing Ozone-Depleting Substances* (July 2002), available at http://www.unep.org/ozone/oewg/22oewg/22oewg-4.e.pdf.

[12] The catch document includes details of the issuing authority and vessel, the weight of each toothfish species landed or trans-shipped, the areas and dates of the catch, and details of the landing or trans-shipment and the recipients of the catch.

The *Kyoto Protocol* potentially might lead to similar policy measures affecting trade. Article 2 of the Protocol commits each Annex I party (essentially, industrialised countries) to 'implement and/or further elaborate policies and measures in accordance with its national circumstances', and then lists a wide range of potential areas for action, including energy efficiency, renewable energy sources (and advanced technologies in general), removal of market distortions such as subsidies, and transport. Although no further details are specified, it is not impossible that parties could claim justification from the Kyoto Protocol for measures that restrain greenhouse gas emissions from their own territories via methods that protect their own industries at the expense of importers – for example via border tax adjustments where energy or carbon taxes are introduced to reduce emissions.[13]

By their nature, this kind of trade measure is often of the 'non-specific' type (see Section 1.2 above) and therefore tends to fall outside the scope of the current WTO debate, which deals only with the 'specific trade obligations' of MEAs. Nevertheless, this is likely to be an increasingly important part of the general debate about MEA trade measures, particularly if and when the Kyoto Protocol enters into force.

2.3 Enforcing the MEA

This category represents the most drastic interference with international trade. The basic assumption underlying these trade measures is that compliance with the MEA is likely to bear a cost, which some countries (non-parties or non-complying parties) will try to avoid. The aim of the trade restrictions are therefore to prevent these countries enjoying their competitive advantage in trade with other states controlled by the MEA. The type of trade measure employed is exclusively the targeted trade ban.

In *CITES,* for example, trade with non-parties is not permitted (except where documentation equivalent to CITES permits is provided). In a number of cases where countries have been identified as being in persistent non-compliance, the Standing Committee of the CITES Conference of the Parties has recommended all parties to apply Article XIV(1) of the Convention, which allows parties to take stricter domestic measures than those provided by the treaty, including complete prohibitions of trade, against the offending countries. Trade bans have been threatened on many occasions, and have actually been employed in several, of which the main cases are Bolivia, Paraguay, United Arab Emirates, Thailand, Italy and Greece. The procedure has also been used against states not party to the Convention, after persistent refusal to provide 'comparable documents' to CITES licenses; cases include Singapore, Grenada, El Salvador and Equatorial Guinea. A total of thirty-seven countries have been subject to the process, which starts with warnings; seventeen have been subject to general CITES or species-specific trade bans,[14] and in almost every case the country has come back into compliance or acceded to the Convention.

The *International Convention for the Conservation of Atlantic Tunas* (ICCAT) does not contain trade measures in its text, but a number of resolutions of the parties have contained trade obligations that are to be implemented domestically. Parties have decided to ban imports of bluefin tuna, Atlantic

[13] For a discussion of the implications for trade of climate change policies in general, and the Kyoto Protocol in particular, see Duncan Brack, Michael Grubb and Craig Windram, *International Trade and Climate Change Policies* (London: Royal Institute of International Affairs, 1999).

[14] As at late 2000; personal communication, Rob Hepworth, UNEP. For a more detailed description of these cases, see Rosalind Reeve, *Policing International Trade in Endangered Species: the CITES Treaty and Compliance* (London: Royal Institute of International Affairs, 2002).

swordfish and products from three non-parties (Belize, Honduras and Panama) and from one non-complying party (Equatorial Guinea); a number of warnings have been issued to other countries. As a result, Panama has become a party and implemented appropriate regulations; however, many vessels registered with Belize, Honduras and Panama, and considered to be fishing illegally, have now registered with other countries – an example of the 'flag of convenience' problem.[15] Similarly, the *Convention on the Conservation of Antarctic Marine Living Resources* (CCAMLR) does not contain trade measures, but parties have agreed to adopt some, notably a prohibition on parties allowing landing or transhipment of fish from the vessel of a non-party sighted fishing in CCAMLR-protected areas (as well as the Catch Documentation Scheme – see above).

The *Montreal Protocol* requires bans on trade between parties and non-parties to the treaty in ODS, products containing ODS (e.g. refrigeration or air-conditioning systems) and products made with but not containing ODS (e.g. electronic components) – although to date the parties have decided that the introduction of the last category of trade bans is impracticable due to difficulties in detection. These trade provisions had two aims. One was to maximise participation in the Protocol, by shutting off non-signatories from supplies of ODS, which always originated from a relatively small number of countries. The other goal, should participation not prove total, was to prevent industries from migrating to non-signatory countries to escape the phase-out schedules and then exporting back into signatory countries. (In fact, as industrial innovation proceeded far more quickly than expected, many of the substitutes proved significantly cheaper than the original ODS – but this was not foreseen in 1987.) In practice, the trade restrictions have not often been applied, largely because every major producer and consumer is now a party to the Protocol. Trade restrictions have been applied in a minor way in a number of cases of non-compliance, for example against Russia, though complete suspension from the Protocol, which could lead to treatment, in terms of trade, as a non-party, has not so far had to be employed.[16]

The *Basel Convention* requires that no category of wastes may be exported to states not party to the Convention unless the country in question is a signatory to another agreement – bilateral, regional or multilateral. If the agreement was reached before the Basel Convention entered into force, it must be 'compatible' with the aims of the Convention; if reached later, it must be 'not less environmentally sound' than Basel.

Finally, the *Kyoto Protocol* contains neither trade restrictions, nor any non-compliance mechanism, though it is scheduled to develop one after its entry into force. However, if the agreement's 'flexibility mechanisms' – emissions trading, joint implementation and the clean development mechanism – are to operate effectively, they must necessarily be restricted to parties to the Protocol. Non-parties will therefore be subject to trade restrictions in the sense of being barred access to, e.g., markets in emissions permits.[17] Similarly, parties in non-compliance cannot be permitted to undermine international emissions markets by trading in permits which do not represent genuine reductions in emissions, so some form of exclusion will have to be developed. Given President Bush's declaration of US withdrawal from the Kyoto Protocol in March 2001, the issue of how the climate regime deals

[15] Also known as 'open register' – where ownership and control of the ship lies in one state but registration lies in another (the flag state). The phenomenon makes the application of regulations frequently very difficult.

[16] For full descriptions of the evolution and operation of the trade provisions, see Duncan Brack, *International Trade and the Montreal Protocol* (London: Royal Institute of International Affairs, 1996).

[17] Though whether these could be regarded as trade restrictions depends on whether emissions reductions units are themselves regarded as good or services under the WTO. Most commentators argue that they are more like financial instruments, and do not fall under the WTO agreements at all.

with non-parties – and, furthermore, with one large and economically powerful non-party – has become a live one.

3 Effectiveness, necessity and impact of MEA trade measures

If one accepts – as most (though not all) participants in the trade-environment debate do – that trade liberalisation and environmental protection are both desirable, welfare-enhancing goals, then the restrictions in trade involved in implementing these MEAs are obviously undesirable in isolation. But can they be justified by the environmental gains involved? In other words, have these trade measures proved effective, have they been necessary, and what have been their impacts?

3.1 Effectiveness

It is virtually impossible to gauge the impact of trade measures' contribution to the effectiveness of MEAs, particularly when, as in CITES, for example, the success of the overarching objective of the agreement – the protection of endangered species – does not depend only on the control of trade. None of the MEAs examined here, even those primarily aimed at controlling trade, such as CITES and the Basel Convention, rely solely on trade measures to achieve their aims. However, several observers have commented on the importance of trade measures in making MEAs effective.[18]

In the case of *CITES*, no species listed in the appendices to the treaty have become extinct since their listing, and a few – notably, the African elephant – have moved further away from extinction. An IUCN assessment of the effectiveness of CITES trade measures published in 2000 concluded that its trade measures were 'most responsive to trade in species which are associated with high demand elasticities', and that a combination of trade measures with demand management strategies (e.g. public education) was likely to be most effective.[19]

Since the *Basel Convention* entered into force, the worst forms of hazardous waste dumping on developing countries have largely ended. In the case of the *Montreal Protocol*, there is direct evidence from some countries that the trade provisions were an important factor in persuading them to accede to the treaty; a good example is the Republic of Korea, which initially expanded its domestic CFC production, but then realised the disadvantages of being shut out of western markets and became a party.[20] In general the Protocol has proved to be a highly effective MEA, with its aim, the recovery of the stratospheric ozone layer to its pre-industrial state, expected to be achieved by the middle of the century.

[18] See, for example, J. T. Lang, 'Commentary – Some Implications of the Montreal Protocol to the Ozone Convention', in W. Lang, H. Neuhodl and K. Zemanek, (eds.), *Environmental Protection and International Law* (London: Graham and Trotman/Martinus Nijhoff, 1991), p. 179.

[19] See IUCN, *Trade Measures in Multilateral Environmental Agreements: A report by IUCN on the effectiveness of trade measures contained in CITES* (prepared for UNEP, 2000).

[20] See Brack, *International Trade and the Montreal Protocol*, pp. 54–58, for other examples.

3.2 Necessity

Are there alternative provisions that could achieve the same environmental objectives in less trade-restrictive ways? Would purely domestic measures meet the objectives without the need to control imports and exports? What environmental impacts might result from not applying the trade measures? The categories identified above in Section 2 are considered in turn.

Monitoring and controlling trade

Effectively this category of trade measures represents a re-regulation of international trade, in a world where deregulation is the norm. At the least intrusive level, it is simply an additional means of tracking a particular category of traded products, where existing systems – e.g. the World Customs Organisation's harmonised system of commodity codes – fail to provide sufficient information. It may also be the easiest way to distinguish between legal and illegal products. MEA notification procedures (Basel Convention, Montreal Protocol) have been submitted to various WTO committees, including the TBT Committee, providing an avenue for greater coordination between the WTO and MEAs. In the majority of cases, this kind of monitoring represents very little, or no, disruption to trade and has low administrative requirements; there appears to be no non-trade restricting effective alternative. (An exception to this general conclusion arises where the products that need to be distinguished cannot be easily separated at source – e.g. in some countries, GM and non-GM products. In this case, costs are much higher.)

This category of trade measures can also, be used, however, to permit countries to ban or restrict trade in products which are not granted consent for import or export, for example in CITES or the Basel Convention. This is particularly important for countries which lack the regulatory and institutional capacity to control the products in question domestically – for example, developing countries in the cases of hazardous waste or LMOs. Effectively this represents a cooption of developed-country institutional capacity for developing country purposes – using trade controls at the point of export to exclude undesirable products from import. In an ideal world, this would be unnecessary, and less trade-restrictive options would be available.

In addition, it is possible that some of the trade measures in question – for example, the blanket ban on North–South movements of hazardous wastes for recycling – are drawn too widely, and more sophisticated procedures might be preferable: for example, something like the advanced informed agreement process under the Cartagena Protocol. A number of MEAs have indeed demonstrated some flexibility in the application of trade measures – for example, the one-off sales of elephant ivory permitted under CITES, or allowing trade to be undertaken for farmed or ranched species. Accepting that we do not live in an ideal world, these kind of trade restrictions – which, after all, are adopted between consenting countries, i.e. parties to the agreement – seem to be justifiable.

Complying with MEA requirements

The only real experience here is with the *Montreal Protocol,* where the variety of trade restrictions applied by parties to ensure they meet their consumption targets (which requires control of imports) does not appear to have led to any evidence of discrimination in trade. In principle, since domestic industry is being controlled at the same time as imports and exports, there is no need or environmental justification for discrimination – though the design of policy instruments needs to reflect this. If the aim of the MEA itself is accepted as valid, then the control of trade of the products in question, alongside the control of domestic production and consumption, should be uncontroversial.

As noted above, however, the entry into force of the *Kyoto Protocol* is likely to bring these somewhat abstract arguments sharply to the fore. Many measures that seem likely to be adopted (or, in some cases, are already being adopted) to restrict greenhouse gas emissions, including energy or carbon taxes and fuel excise duties, emissions trading schemes, subsidies for renewable energy and energy efficiency investments and the removal of subsidies for fossil fuels, may affect international competitiveness. Even if they do not, the common perception amongst businessmen and politicians is that they will,[21] and a variety of offsetting measures, including exemptions, revenue recycling and border tax adjustments[22] are likely to be argued for. Many of these could have direct impacts on international trade.

Enforcing the MEA

This is probably the most controversial category of trade measures, usually implying restrictions on trade imposed on countries that have not agreed to become a party to the MEA. Are these trade measures justifiable, or should they be regarded as an infringement of national sovereignty? The classical doctrines of sovereignty, originating in the seventeenth century, speak little to relations between states, or of the 'rights' of states to expect other states to engage in international trade with them.

It is clear, however, that the unrestrained output of pollution which is transboundary or global in scope *does* constitute an infringement of sovereignty, in that it inflicts direct physical harm on the populations and/or territories of other states.[23] The unrestrained depletion of the global commons – e.g. of non-territorial species – can, though more arguably, be regarded similarly. The responsibility of individual nations for the protection of the global environment, and the promotion of development which is environmentally sustainable, has of course been accepted in many international agreements, most notably Agenda 21.

Are there alternatives? In the case of the Montreal Protocol, alternatives to the trade bans with non-parties have been suggested at various times.[24] First, the application of controls on consumption through economic instruments such as taxes, which would still permit the users to buy from any source, domestic or foreign; the taxes would have to be applied at the border for imports from non-parties. Quite apart from the political difficulties involved in negotiating internationally-mandated taxes, however, taxes imposed on imports would not necessarily discourage the use of ODS in exporting non-parties, particularly where the bulk of ODS production there was intended for domestic consumption.

The second alternative suggested was an outright ban on imports from any country, which would be non-discriminatory (and therefore less WTO-inconsistent) as between parties and non-parties to the Protocol. But the number of ODS producers was so limited that a complete import ban would have cut off the majority of ODS consumers from their sources of supply. This would if anything create a powerful incentive for non-producers to stay outside the Protocol and either import from other non-

[21] See the reaction from UK businesses to the introduction of the UK climate change levy in April 2001. This is offset partially by a reduction in employment taxes, but has proved deeply unpopular.
[22] This is covered in more detail in Brack, Grubb and Windram, *International Trade and Climate Change Policies*. See also F. Biermann and R. Brohm, *Implementing the Kyoto Protocol without the United States: The Strategic Role of Energy Tax Adjustments at the Border* (Global Governance Working Paper No. 5, 2003), available at www.glogov.org.
[23] See *Trail Smelter Arbitration* (1941) 35 *American Journal of International Law* 684.
[24] See Brack, *International Trade and the Montreal Protocol,* pp. 75–77.

parties or set up their own domestic production facilities. It would also have increased the likelihood of ODS-producing industries migrating to non-parties, and help undermine the competitive position of parties.

In the case of CITES, the use of trade restrictions against non-parties or non-complying parties is an obvious enforcement mechanism for a treaty designed to control trade – indeed, it is similar to the WTO's own enforcement mechanism, where a WTO member found against in a particular dispute can have tariffs imposed on its exports. No credible alternative enforcement measures have ever been put forward – and, with an almost 100% success rate, even in developing countries (the vast majority of countries against whom CITES trade bans have been applied), there seems little reason to.[25]

The use of trade measures as an enforcement mechanism is rarely an ideal solution. But there are a limited number of routes by which countries can affect the actions of other countries: political/diplomatic pressure, provision of financial and technological assistance, trade sanctions, dispute settlement and military force. While the first two of these are clearly preferable, from the point of view of restricting international tension, they have obvious limits – as has the use of military force, though rather different ones. There is little practical alternative, therefore, in light of the environmental objectives in question, to trade restrictions. It should also be remembered that MEAs contain an array of instruments, including financial support, capacity-building assistance and technology transfer, alongside the trade measures, so compliance with the agreement is achieved through much more than simple compulsion through trade. And if the trade measures work as an incentive to join, they are not in practice applied – which is indeed the case for most MEAs.

3.3 Impact of MEA trade measures

The final issue to be addressed is the impact of trade measures, in terms both of the costs of implementing the measures themselves, and of the trade foregone as a result. Clearly this will be different for states complying with the MEA in question and for states against whom trade measures have been applied (because they are non-parties or non-complying parties). The cost of trade measures should of course be set against the environmental and other benefits of the MEA in assessing the overall achievements of the agreement.

There have been almost no studies of this nature undertaken to date. As noted above, it is usually impossible to disentangle the impact of trade measures from the impact of the MEA's other provisions on the outcome of the agreement. Nevertheless, it is possible to reach some tentative conclusions with regard to the three categories examined in this paper.

Monitoring and controlling trade

The costs here stem most immediately from the burdens of running the permit or license schemes or from operating systems for prior notification and consent – mainly in terms of the administrative costs

[25] M. Yeater and J. Vasquez, in 'Demystifying the Relationship Between CITES and the WTO' (*Review of EC and International Environmental Law,* Vol. 10, 2000, p. 274), note that the mere threat of a multilaterally agreed recommendation to suspend trade, coupled with the domestic pressure from the trade community impacted by the suspension, often raises the level of political attention and results in a quick legislative or other governmental response to control the trade. See also IUCN, *Trade Measures in Multilateral Environmental Agreements,* for a positive assessment of the CITES trade measures.

of the necessary bureaucracy. As far as we are aware, no study has looked at the costs of establishing and operating these systems, but they can be expected not to be very high. This will vary with the MEA, of course; for example, the risk assessments required as part of the Cartagena Protocol advanced informed agreement procedure will represent some financial burden (which is why the party of import may request the notifier of the shipment to carry out the risk assessment).

Some MEAs contain financial mechanisms which provide assistance with setting up and operating these systems; for example, the Montreal Protocol Multilateral Fund, which has supported the establishment of import and export licensing systems for ODS. The Cartagena Protocol also provides for assistance with import/export administration. The potential bilateral agreements between the EU and timber producer states designed to exclude illegal timber are likely to contain an element of capacity-building assistance to establish the legality verification system, though here the costs derive from the chain of custody monitoring and tracking systems rather than from the issuance of the licences themselves.

As noted above, in some cases these trade measures have been adopted as a way of providing the regulatory capacity to control products which developing countries, for example, may lack. From the point of the view of these countries, which might otherwise be importers of hazardous waste, for example, or LMOs, the trade measures may be a more cost-effective means of providing regulation than building domestic capacity.

There may also be direct paybacks from the use of some of these types of trade measures. CCAMLR's Catch Documentation Scheme has had a clear impact on the price of toothfish, with a 20–30% price differential developing between illegal and legitimately caught fish.[26] In other words, legal operations are benefiting from a higher rate of return. The point of the proposed timber legality verification scheme is to exclude illegal timber from consumer markets and ensure both that producers operating legally are not undercut by illegal operators, and that the governments involved are able to collect the tax revenue otherwise evaded.[27]

Complying with MEA requirements

Clearly this category of trade measures is designed directly to help parties comply with the MEA in question, so from those countries' point of view, these costs are not possible to disentangle from an overall assessment of the costs of complying with the MEA. However, in some cases countries will have a choice of measures to adopt, and may choose more or less trade-disruptive options. In turn this focuses attention on the extent to which they may impact on other countries, who may find their exports disadvantaged in, or even excluded from, international markets as a result.

For example, policies and measures adopted under the Kyoto Protocol may have the result of reducing imports of fossil fuels or of energy-intensive products. This possibility is recognised in the text both of the Protocol and its parent agreement, the UN Framework Convention on Climate Change (FCCC), which both contain references to protecting countries from any adverse effects of policies and measures on international trade; the FCCC lists developing countries highly dependent on fossil fuels

[26] David Agnew, 'The Drivers Behind Black Markets: Illegal and Unregulated Fishing', paper to RIIA workshop on International Environmental Crime, May 2002.

[27] Estimates suggest that the Indonesian government loses between $1–2 billion a year as a result of illegal logging in foregone tax revenue, etc. Indonesia has been one of the producer countries pressing most strongly for action in this area.

(import, export and processing) as one category of countries particularly at risk. Studies suggest[28] that oil- and coal-exporting countries are those most likely to be negatively effected (though most developing countries, as oil importers, would benefit from lower oil prices), though also that the magnitude of any changes is likely to be far lower than the general growth in trade and incomes. Neither agreement provides any guidance as to what these statements actually mean in practice, and the trade and competitiveness impacts of the Kyoto Protocol are likely to become increasingly debated topics.

Enforcing the MEA

The use of trade measures against non-complying parties or non-parties is the instance where the costs of trade measures can be most clearly seen. As usual it is difficult to quantify, but the relative success of such trade measures, in CITES and the Montreal Protocol, in enforcing compliance, suggests that their perceived cost is high enough to help persuade countries to comply (though there are other costs of non-compliance, such as loss of reputation or denial of access to capacity-building assistance).

Evidence from some countries targeted for trade measures supports this conclusion. Estimates of the value of wildlife trade in non-CITES-compliant parties generally reaches into the tens of millions of dollars.[29] In 1999 the representative of Thailand at a UNEP workshop on compliance and enforcement suggested that the CITES trade ban on his country, applied in 1991 and lifted in 1992, 'resulted in billions of baht lost'.[30]

The fact that these trade measures bear a cost, of course, is the point; if they did not, they would be ineffective as enforcement instruments. As above, they can be seen as equivalent in many ways to the trade sanctions authorised under the WTO against a losing party in a dispute case which does not modify its offending policies.

These costs can disproportionately impact developing countries, however, which must elevate MEA compliance objectives in their list of country priorities, diverting resources away from other developmental goals. This underlines the need for financial and capacity-building assistance to be made available to developing countries to meet MEA objectives. It does not prove, however, that enforcement should *only* proceed through the provision of assistance, without the underpinning of trade measures – in the vast majority of cases of trade measures taken under CITES, for instance, it was a lack of political will in the non-complying party that appeared to be the underlying problem, not poverty and shortage of resources.[31]

3.4 Conclusions

A careful analysis of trade measures in CITES, the Montreal Protocol and the Basel Convention published by the OECD in 1999 concluded that 'in general, 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

[28] See Brack, Grubb and Windram, *International Trade and Climate Change Policies*, Chapter 2.
[29] See Reeve, *Policing International Trade in Endangered Species,* Chapter 5.
[30] Somnuk Rubthong, 'Implementation of CITES in Thailand', in *Enforcement of and Compliance with MEAs* (Nairobi: UNEP, 1999), Vol. I, p. 118. 1 billion baht currently equals about €22 million.
[31] See Reeve, *Policing International Trade in Endangered Species,* Chapters 5–6.

required to make regulatory systems comprehensive in their coverage; (c) to discourage free-riding, which can often be a barrier to effective international co-operation; and (d) to ensure compliance with the MEA'. The study also identified factors both contributing to and limiting the success of trade measures: the provision of funding, the existence of comprehensive and balanced packages of policy instruments, avoiding over-reliance on one type of control, and policies based on understanding the underlying economics of the situation all featured as factors underpinning success.[32]

To sum up, the discussion in Sections 2 and 3 suggest that:

- Trade measures in MEAs have become more common, and seem likely to continue to be so, as a logical reaction to the transboundary nature of environmental issues and patterns of economic activity. The increasing attention being paid to the problem of illegal trade provides another reason for employing trade measures.

- In many instances, trade measures are the only realistic enforcement measure available to MEAs. They can bear a real cost (particularly where trade bans are used against non-parties or non-complying parties), and should not in general be adopted in isolation from other compliance instruments, such as financial and capacity-building assistance. Nevertheless, trade measures in MEAs can be an effective tool and should always be considered when the MEA is designed.

4 Interaction of MEA trade measures with the WTO

The interaction of MEA trade measures with the multilateral trading system centred around the GATT and overseen by the WTO has remained one of the key issues of the trade and environment debate almost since its beginnings in the early 1990s. This section considers why there could – in theory, at least – be a conflict between MEA trade measures and the WTO, looks at the MEA trade measures themselves in some detail, and analyses the issues which would be relevant if such a dispute ever came before the WTO.

4.1 Possible grounds for conflict

What constitutes a 'conflict' would be a matter of interpretation of the MEA and the various agreements under the WTO. A general conflict does not exist unless one treaty requires a particular course of action that is either prohibited in the other instrument, or the latter instrument requires the opposite course of action. The incompatibility emerges where a party to both treaties cannot comply with the obligations under both treaties simultaneously.[33]

The basic WTO rules require WTO members not to discriminate between other WTO members' 'like products', or between domestic and international production. MEA-based measures could potentially run foul of these requirements where imports are treated less favourably than domestic goods in the market – which, as seen above in Section 2 and explored in more detail below, may sometimes be the case, particularly where enforcement measures are being taken against non-complying parties or non-

[32] See OECD, *Trade Measures in Multilateral Environmental Agreement,* pp. 198–200.
[33] See W Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401, p. 426.

parties. The exceptions to WTO requirements listed in GATT Article XX make no reference to MEAs (not surprisingly, since very few MEAs existed when the GATT was first written). However, the exceptions for the protection of animals, human and public health (para (b)), and the conservation of exhaustible natural resources (para (g)) may be applicable; some of these exceptions have been used in various environment-related cases at the WTO, though to date none of these have involved measures taken under MEAs.

The absence of any specific challenge to an MEA trade measure does not mean, however, that they have escaped criticism. Some have attributed the lack of any dispute over the MEAs in question to the fact that only a small volume of international trade is affected (see Appendix 1).[34] The *threat* of a WTO challenge, however, has arisen in a number of discussions within CITES, and may become more common as CITES listings increasingly cover economically important sectors such as fish and timber.[35] Some commercial entities in the industrial waste shipment industry have expressed concerns over the proposed overall ban on trade between industrialised and developing countries under the Basel Convention, and queried whether a distinction based on the state of import or export, rather than the actual capacity of states to engage in environmentally sound recycling, can be justified.[36]

Similarly, the threat of a conflict with WTO rules has been raised in almost all recent MEA negotiations, generally by those opposed to the principle of the MEA and/or its effective enforcement, and there have been various attempts to write 'savings clauses' into the agreements, ensuring that they remain subordinate to WTO disciplines (see further below). In some cases, e.g. the UN Straddling Stocks Agreement, trade measures were not included in order to obtain wider political support.

In recent years, matters of WTO-consistency have also arisen in discussions within many MEAs themselves, and also in wider forums, such as the World Summit on Sustainable Development in autumn 2002. The lack of clarity on the issue, and the uncertainty about the outcome of any WTO dispute, has thus led many to call for some kind of resolution of the potential conflict.

Against this background, it is worth examining the details of the relationship between a number of key MEAs and the WTO agreements. The first three considered here – CITES, the Montreal Protocol and the Basel Convention – were all negotiated before the WTO came into existence, and do not contain any WTO-consistency language, thereby arguably creating a special system of trade rules (*lex specialis*) that exist outside the scope of WTO rules.[37] Negotiations on later MEAs saw much greater awareness of the potential conflicts, often seeing specific language incorporated into the MEAs in an attempt to deal with the issue – the so-called 'savings clauses' (see further below).

CITES

Out of all the MEAs considered here, CITES is the one under which far and away the greatest number of enforcement-related trade measures, directed against non-complying parties and non-parties, has

[34] W. A. Kerr, 'Who Should Make the Rules of Trade? – The Complex Issue of Multilateral Environmental Agreements', 3:2 *The Estey Centre Journal of International Law and Trade Policy,* 2002, p. 6

[35] Duncan Brack, 'Environmental Treaties and Trade', in G. Sampson & B. Chambers, *Trade, Environment and the Millennium* (UN University, 2nd ed., 2001), p. 14.

[36] See J. Crawford and P. Sands, 'The Availability of Article 11 Agreements in the Context of the Basel Convention's Recyclable Ban Amendment' (Ottawa: ICME, 1997).

[37] V. Yu, 'Discussion Paper on the World Trade Organisation and Multilateral Environmental Agreements' (Geneva: Friends of the Earth, 2002), p. 7.

been taken. The agreement's Secretariat has aimed, however, to build mutual supportiveness with the WTO into its operations, adopting a five-year strategic plan that includes the goal of ensuring the continuing recognition and acceptance of CITES measures by the WTO and ensuring the mutual supportiveness of decision-making processes between CITES and the WTO.

The treaty contains language that could ensure mutual supportiveness with WTO requirements. Article XIV(2) stipulates that: 'the provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the customs, public health, veterinary or plant quarantine fields'. The WTO Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement) might possibly apply, and be used to assess the WTO-compatibility of the basic CITES trade measures, the requirements for import and export licenses.

Montreal Protocol

The issue of the Montreal Protocol's relationship with the GATT was raised during the original negotiations in 1985–87.[38] A sub-group provisionally concluded that the proposed trade measures against non-parties could be justifiable under Article XX(b), and possibly XX(g), of the GATT. They had in mind the precedent of CITES, whose trade measures had never been objected to, and were also confident that because the proposed trade measures were to be applied pursuant to a multilateral agreement, and not on a unilateral, *ad hoc*, basis, there would be no problem with the GATT.

Consultations were held with a legal expert from the GATT Secretariat in April and September 1987. No definite opinion was given; the expert provided advice as to whether particular language was relatively closer to or further away from traditional interpretations of the GATT. The GATT lawyer stressed that 'the judgement as to whether a proposed action to implement the trade restrictions satisfied Article XX lay with GATT Contracting Parties normally in the context of a complaint by one GATT Party against another'.[39] The GATT Secretariat was presented with an advance copy of the proposed trade provisions, but did not respond.[40] The lack of any formal objection from the GATT Secretariat, however qualified its advice, was seen as a green light for further negotiations, helping the US to convince the EU of the value of the proposed trade measures. It should be remembered, however, that in 1987 the 'trade and environment' issue had hardly surfaced.

The Protocol's trade measures against non-parties are probably inconsistent with the GATT principles of most-favoured nation, national treatment, and the elimination of quantitative restrictions. In 1999 the Ozone Secretariat issued a communication to the WTO Committee on Trade and Environment[41] noting that the measures could be 'saved' under Article XX since the ozone layer is an exhaustible natural resource and its depletion adversely affects human, animal and plant life and health; there would not be any arbitrary or unjustifiable discrimination since the Montreal Protocol is a multilateral instrument based on an international consensus relating to the scientific assessment of what is

[38] See Brack, *International Trade and the Montreal Protocol,* section 4.2.
[39] Report of the Ad Hoc Working Group on the Work of its Third Session – cited in Rosalind Twum-Barima and Laura B. Campbell, *Protecting the Ozone Layer through Trade Measures: Reconciling the Trade Provisions of the Montreal Protocol and the Rules of the GATT* (Geneva: UNEP, 1994), p.63.
[40] Ibid., p. 63, n113.
[41] WT/CTE/W/115.

necessary to protect the ozone layer. Moreover, it contains provisions that exempt non-parties from trade restrictions if they comply with the control measures under the Protocol – hence there is no arbitrary and justifiable discrimination between countries where the same conditions prevail.

There has never, of course, been a GATT or WTO challenge to the Protocol's trade measures, but – as discussed above in Section 3.2, less trade-restricting alternatives have been suggested, though none would appear to be as effective. In 1996, the then Director of the WTO Trade and Environment Division questioned both the necessity and efficacy of the trade provisions, suggesting that – at least in his view – they would not be saved by Article XX.[42]

Basel Convention

As with the Montreal Protocol and CITES, there is no explicit GATT-compatibility language in the Basel Convention. As a result, there is no specific requirement that WTO obligations are to be taken into consideration when adopting or implementing any trade measures relating to hazardous wastes, suggesting that the parties intended to keep hazardous waste a distinct and separate class of products, not subject to international trade obligations.[43] One can refer, however, to the case of S.D. Myers Inc. v. Canada,[44] which held that where a NAFTA party had a choice among equally effective and reasonably available alternatives for complying with the Basel Convention, they should choose the alternative least inconsistent with NAFTA.

Kyoto Protocol

As discussed above, only parties to the Kyoto Protocol can participate in the Kyoto mechanisms: emissions trading, joint implementation and the Clean Development Mechanism. As a result, markets in emission permits or the CDM's 'certified emission reductions' (CERs) would be barred to non-parties (at least, in the sense of being able to earn credits for greenhouse gas emissions). However, most commentators have held that licenses or permits provided by the parties to the Kyoto Protocol are a form of government regulatory activity, and would not be equivalent to either a good or a service under WTO disciplines.[45]

This view is not universally shared, however, and the application of CDM criteria to determine whether credits can be obtained under the Protocol could potentially be considered to be burdensome, not transparent or generally incompatible with the requirements of the General Agreement on Trade in Services (GATS). Although the GATS is limited in its scope, some aspects of the Kyoto mechanisms

[42] See House of Commons Environment Committee, *Inquiry into World Trade and the Environment,* evidence session of 14 February 1996. See also A. Rutgeerts, 'Trade and Environment: Reconciling the Montreal Protocol and the GATT', 33(4) *JWT* 61-86 (1999), p. 76.

[43] Yu, Discussion Paper on the World Trade Organisation and Multilateral Environmental Agreements', p. 9.

[44] *S.D. Myers* v. *Government of Canada* (2001) 40 *International Legal Materials* 1408.

[45] G. Wiser, 'Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services' (CIEL: Washington DC, 2001), p. 5, argues that CERs would neither be a good nor a service, but a licence instilling a future right to pollute and therefore not subject to WTO scrutiny. See also, S. Charnovitz, 'Improving Synergies in International Trade and Climate Policy', (2003); A. Appleton, 'The World Trade Organisation's View: Emissions Reductions in a Free Trade World' (Paper for Swiss RE Centre for Global Dialogue in Rüschlikon, Switzerland, 2001); J. Werksman, 'Greenhouse Gas Emissions Trading and the WTO', 8 *RECIEL* 251 (1999); and T. L. Brewer, 'The Kyoto Protocol and the WTO: Institutional Evolution and Adaptation' (Centre for European Policy Studies: CEPS Policy Brief No. 28, 2002).

could entail 'services or service-related functions' such as brokerage or consulting services.[46] The allocation of permits could also be seen as a violation of the subsidies agreement, but this will depend more on how the allocation process is designed rather than being a subsidy in principle. In addition to the CERs, it could include the services employed in the development and management of CDM projects as well as the financial services related to trade in CERs.[47]

More likely areas for WTO conflicts may arise under other policy measures affecting trade. As pointed out above in Section 2, parties with emission reduction targets will have to implement a wide variety of policies and measures to curb greenhouse gas emissions; Article 2 of the Protocol lists a wide range of potential areas for action, including energy efficiency, renewable energy sources (and advanced technologies in general), removal of market distortions such as subsidies, and transport. It is virtually inevitable that some of these measures – for example, carbon or energy taxes – will affect, or be perceived to affect, the prices and competitiveness of a wide range of products, particularly those manufactured though energy-intensive processes. It is quite possible, then, that parties could claim justification from the Kyoto Protocol for measures that then compensate their own industries, for example via border tax adjustments on imports and exports.

Convention on Biological Diversity

No specific trade measures are authorised under the Convention on Biological Diversity (CBD), although several of the issues it covers may impact trade: access and benefit-sharing arrangements; alien species; incentive measures for the conservation and sustainable use of components of biological diversity; provisions concerning knowledge, innovations and practices of indigenous and local communities; impact assessment, liability and redress; sustainable use; agricultural biodiversity; and the relationship between intellectual property rights (IPRs) and the relevant provisions of the CBD and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Probably because it does not contain specific trade obligations, the CBD also contains no language addressing its relationship with the GATT or the other WTO agreements. Article 22 specifies that the CBD is not to affect the rights and obligations deriving from existing international agreements, unless those rights and obligations would cause serious damage or threat to biological diversity. As the Convention entered into force in December 1993, it predated the WTO agreements that came into force at the end of the Uruguay Round, rendering this 'savings clause' inapplicable, and leaving any potential conflict to be resolved under the customary international legal rules of treaty interpretation (see further below).[48] The CBD does not predate the GATT itself, however, so arguably the WTO dispute settlement bodies could end up interpreting what constitutes 'serious damage or threat to biodiversity' in the case of a challenge under the WTO.

It has long been recognised that the CBD, with its emphasis on state sovereignty over genetic resources, and the TRIPS Agreement's protection of private property rights, may lead to an 'intrinsic

[46] See Wiser, 'Frontiers in Trade', p. 3; J. Werksman, 'Greenhouse Gas Emissions Trading and the WTO'. The US has proposed in the GATS Committee that services activities in support of the protection of ambient air and climate, such as services to reduce exhaust emissions and other emissions to improve air quality, be included as an environmental service.
[47] Wiser, 'Frontiers in Trade', p. 5.
[48] The TRIPS Agreement does not address the TRIPS-CBD interface, although Article 2(2) of the TRIPS Agreement states that nothing in Parts I to IV can derogate from existing obligations that the WTO member may have under a variety of specific intellectual property treaties. Arguably, the CBD would not be a 'specific intellectual property treaty'.

conflict of objectives' between the two agreements;[49] Paragraph 19 of the Doha Declaration calls for a specific examination of their relationship. Measures under Article 15 of the CBD, which permits states to limit or place conditions on access to genetic resources, could in theory be WTO-inconsistent, though it would depend on their design, and whether they treated foreign companies (for example by charging for resource use) differently to domestic enterprises.[50]

There may also be conflicts between the CBD and the TRIPS Agreement under Article 27.2 of the latter, which allows WTO members to exclude from patentability inventions for the purpose of protecting *ordre public* or morality, including to protect human, animal and plant life or health or to avoid serious prejudice to the environment. Article 27.3(b) allows members to exclude plants and animals from being patented but prohibits members from excluding micro-organisms, non-biological and microbiological processes from patenting. WTO members may still exclude certain life-forms from patentability where it might interfere with a country's ability to preserve genetic resources or traditional knowledge. However, the area of potential conflict is whether WTO members would be obliged to provide intellectual property protection to plant parts such as cells or genes conferred in other jurisdictions by countries that have allowed for such patentability, which would then have implications for access and benefit-sharing regimes.

Cartagena Protocol

The Cartagena Protocol regulates the transboundary movement of LMOs, thereby directly affecting trade, and debates around the relationship between the Protocol and the WTO were a major feature of the long-drawn-out negotiations on this MEA.[51] The agreement's preamble states that the Protocol and the WTO agreements are to be mutually supportive, that the Protocol cannot be interpreted as implying a change in the rights and obligations of a party under any existing international agreements, and that such statements are not intended to subordinate the Protocol to other international agreements. Parties are also entitled to take stricter measures than those prescribed under the Protocol, although such action is required to be consistent with the objectives of the Protocol and be in accordance with other international law obligations, which would include WTO commitments.

These could include obligations under the GATT, GATS, SPS and TBT Agreements, but the most relevant is the SPS Agreement, which allows WTO members to take SPS measures necessary for the protection of human, animal or plant life or health. Its applicability will depend on the characterisation of the measure, its purported objective, and whether food safety or human, plant or animal health is the primary goal. Trade restrictions for socio-economic or cultural considerations, or labelling schemes for the purpose of providing information to the consumer, would fall under the requirements of the TBT Agreement. Under the Protocol, the parties can take into account socio-economic considerations in the risk assessment process, but this is subject to a savings clause requiring the parties to act consistently with their international obligations.[52]

[49] IISD/CIEL, *The State of Trade Law and the Environment: Key Issues for the Next Decade – Working Paper* (Geneva: IISD/CIEL, 2003), p. 46.
[50] T. Schoenbaum, 'International Trade and Environmental Protection', in P. Birnie & A. Boyle, *International Law and the Environment* (OUP).
[51] For more detail, see Christoph Bail, Robert Falkner and Helen Marquard (eds), *The Cartagena Protocol on Biosafety: Reconciling trade in biotechnology with environment and development?* (London: Royal Institute of International Affairs, 2002), chapters 49 and 50.
[52] Article 26.

The Protocol's labelling requirement for products containing LMOs might be challenged under either the SPS or TBT Agreements.[53] Under the former, mandatory labels for a food safety measure are required to be based on 'scientific principles' and 'sufficient scientific evidence'. A dispute in this area could call into question the compatibility of all labelling systems with WTO disciplines; the application of the WTO agreements to mandatory or voluntary ecolabelling initiatives is currently unclear and disputed by parties.[54]

Under the Protocol's advanced informed agreement (AIA) procedure, a party can decide to prohibit or restrict imports so long as the decision is based on a scientifically sound risk assessment. Where scientific certainty is lacking due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects, countries can also regulate or prohibit imports of LMOs, as a precautionary measure. Precautionary measures under the SPS Agreement (as interpreted by the Appellate Body in the beef hormones dispute[55]), however, are to be based on a lack of a *scientific consensus,* opening up another possible ground for dispute.

Some have expressed concern with the treatment of the precautionary principle under the Protocol, which may allow for differing interpretations.[56] Furthermore, there is some discrepancy between the interim nature of an SPS measure that is provisionally WTO-consistent (under Article 5(7)) and measures to prohibit LMO imports taken pursuant to the Protocol, which do not require subsequent risk assessments and scientific justification. It should be noted that the precautionary principle is not explicitly mentioned in the SPS Agreement, although the Appellate Body has noted that the principle 'finds reflection in Article 5(7),[57] which requires a proper risk assessment and more scientific study to support the measure. Given that the Protocol's preamble calls for mutual supportiveness, it could be concluded that the statement on precaution in Article 11.8 supplements the risk assessment requirements under the SPS Agreement, though this might conflict with the parameters set out for provisional measures in the beef hormones dispute. The SPS and TBT Agreements contain a more limited scope for risk assessment than the Protocol, and have no provisions regarding risk management.[58]

SPS measures based on international standards, guidelines or recommendations are deemed to be in conformity with the SPS Agreement; this include matters covered by, among other bodies, the Codex Alimentarius Commission. The Codex Committee is currently working on standards for risk assessment in relation to the imports, exports and labelling of GMOs, which – depending on what it

[53] Where the measure aims to ensure food safety, it would be subject to the SPS Agreement. If the objective is for the purposes of consumer protection or environmental protection, it would fall under TBT Agreement disciplines. What becomes problematic is when the measure is based on a multiplicity of objectives, such as seen with the proposed EU Regulation of GMOs. COM (2002) 559 final (October 2002).

[54] See D. French, 'The International Regulation of Genetically Modified Organisms: Synergies and Tensions in World Trade', 3 *Env Liability* 127-139 (2001), p. 132; M. Stilwell and R. Tarasofsky, 'Towards Coherent Environmental and Economic Governance: Legal and Practical Approaches to MEA-WTO Linkages' (Geneva: WWF/CIEL, 2001), p. 9.

[55] *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R, WT/DS48/AB.

[56] See D. Katz, 'The Mismatch Between the Biosafety Protocol and the Precautionary Principle', 13 *Georgetown International Environmental Law Review* (2001), 949). Its impact on trade and sustainability may be overstated since environmental impacts of trade depends more on what is being traded rather than what is not; see K. von Moltke, 'The Dilemma of the Precautionary Principle in International Trade', 3:6 *BRIDGES Between Trade and Sustainable Development* (July-August 1999) p. 3.

[57] WTO AB 16 January 1998, *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS48/AB/R and WT/DS26/AB/R (AB-1997-4), para. 124.

[58] See A. H. Qureshi, 'The Cartagena Protocol on Biosafety and the WTO – Co-existence or Incoherence?' 49 *ICLQ* (2000) 835-866.

concludes – may help to resolve the potential conflict (though parties are allowed to take measures that deviate from international standards). Other relevant international standards may also be applicable, however, and it is open to the SPS Committee to identify the Cartagena Protocol meeting of the parties as a relevant international organisation to set standards.

Stockholm and Rotterdam Conventions

As with the Cartagena Protocol, the two chemicals conventions were negotiated against a background of increasing awareness of the trade–environment interaction. The preamble to the Stockholm Convention recognises that the Convention and other international agreements in the field of trade and the environment are mutually supportive. Similarly, the preamble to the Rotterdam Convention reinforces the mutual supportiveness of trade and environment, stating that the Convention does not change the rights and obligations of the parties under any existing international agreement to chemicals in international trade or to environmental protection, and affirms that there is to be no hierarchy between the Convention and other international agreements. Interestingly, there is no provision stipulating that the Rotterdam Convention is not subordinate to other international agreements, as is stated in the Cartagena Protocol.

Some commentators have argued that restrictions or total bans under the Convention would be permitted under WTO law because they would easily fall under the exception to protect human, animal, plant life or health,[59] and that probably also applies to the Stockholm Convention. How the two MEAs treat non-complying parties or non-parties, however, is not clear and will not be resolved until after they have both entered into force.

4.2 How might a dispute be resolved?

Since there has not yet been a dispute involving an MEA trade measure pitted against WTO commitments, any discussion on how such a conflict might be resolved by either the WTO dispute settlement body, and/or by the MEA's own procedures, is of course speculative. Nevertheless, the possibility that a dispute may arise in the future makes it worthwhile.

International law governs the WTO agreements and their interaction with MEAs. Under Article 3.2 of the WTO Dispute Settlement Understanding, the WTO agreements are treaties to be interpreted in accordance with 'customary rules of interpretation of public international law'. MEAs are international treaties, and therefore form part of international law; furthermore, as the Appellate Body concluded in the reformulated gasoline case, the WTO agreements are not to be viewed in clinical isolation from other rules of international law, including treaties.[60] There appears to be, therefore, considerable scope for a panel or the Appellate Body to consider MEAs in its interpretation of the WTO agreements, including the exceptions listed in GATT Article XX. This is limited, however, by the fact that they are not authorised to interpret the WTO agreements in a way that adds to or diminishes WTO rights.[61] In practice this may not be a real issue, since Article XX allows for

[59] Schoenbaum 'International Trade and Environmental Protection', p. 726.
[60] See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, DSR 1996:I, p. 18.
[61] Article 3:2, Dispute Settlement Understanding. See G. Marceau, 'Dispute Settlement and Human Rights', 13:4 *European Journal of International Law* 753–814 (2002). Paulewyn argues that a non-WTO measure that conflicts with WTO requirements may not be adding or diminishing the WTO covered agreements, which Art. 3.2 and 19 of the DSU require,

exceptions to WTO rules; but panels and the Appellate Body may possibly be sensitive to charges that by permitting MEA trade measures under WTO rules, they are in effect setting aside WTO provisions.

As mentioned above, GATT Article XX provides exceptions to certain obligations under the GATT, including for the purposes of measures 'necessary to protect animal, plant, or human life or health' (para (b)), or 'relating to the conservation of exhaustible natural resources' (para (g)). Although the word 'environment' is not mentioned specifically – hardly surprising, as the GATT was drafted many years before the term passed into common use – the Appellate Body decided in 1998 that the interpretation of Article XX is to be read in light of the 'contemporary concerns of the community of nations about the protection and conservation of the environment'.[62] Successive GATT and WTO dispute cases have addressed questions relating to the 'necessity' of a trade measure, and of it being the least trade-restrictive option available. (The role of MEAs in determining these questions could, therefore, be relevant to the WTO.) The headnote to Article XX requires that any measures qualifying under any of the exceptions shall not represent 'arbitrary or unjustifiable discrimination' between countries.

Panels and the Appellate Body are under a general obligation, pursuant to Article 3(2) of the Dispute Settlement Understanding, to presume there is no conflict with other WTO provisions when interpreting Article XX of the GATT.[63] It seems likely, therefore, that there would be a concerted attempt to find coherence between MEAs and WTO obligations and determine whether MEAs and the WTO agreements could be interpreted in a manner that avoids a reading that one agreement requires what another prohibits.[64] This would preclude the legal and political implications of ruling that one agreement is in conflict with another, and should focus the analysis on the particular measure taken by the WTO member, rather than the treaty on which it is based.

If a conflict is unavoidable, however, the measure taken pursuant to an MEA could be deemed to be a justified measure necessary for the purposes listed in GATT Article XX (b) or (g). The existence of the MEA, or the negotiations leading to up to an agreement, could help to prove the 'necessity' of the exception claimed under Article XX (b), whether the measure is 'related to' the objective sought in the trade measure under Article XX(g), and – as a demonstration of good faith to find a multilateral solution – that it is not 'arbitrary' under the headnote to Article XX.

Given the general preference for multilateral instead of unilateral action underlying the WTO agreements, the acceptance of a unilateral trade-related environmental measure in the shrimp-turtle dispute suggests that a measure taken under a wider, multilateral agreement could well survive a WTO challenge.[65] In fact, MEAs may be the *preferred* context for trade measures. Although the US shrimp

since the parties may have agreed to the legal validity of a measure that violates WTO obligations (J. Paulewyn, 'The Role of Public International Law in the WTO: How Far Can We Go' 95:3 *American Journal of International Law* 535–578 (2001).

[62] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R.

[63] A. Gonzalez-Calatayud and G. Marceau, 'The Relationship Between the Dispute-Settlement Mechanisms of MEAs and those of the WTO', 11:3 *RECIEL* 275–87 (2002), p. 275.

[64] See submission by Argentina to the Committee on Trade and Environment, TN/TE/W/2 (May 23, 2002). Complementary would mean that concurrent obligations in two different, but complementary, international agreements, if not mutually exclusive, should be complied with at the same time. The Appellate Body has applied this principle in the context of reading together various WTO agreements although this has not been extended to agreements that are outside the WTO system. *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/R/USA); *Canada – Certain Measures Concerning Periodicals* (WT/DS31/AB/R).

[65] *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia,* AB-2001-4, Report of the Appellate Body (shrimp-turtle II).

embargo was not required under any international agreement, both the panel and the Appellate Body noted the good-faith efforts of the US to attempt to negotiate an MEA with several parties, including the claimant state (Malaysia).[66] Arguably, this may be a legal requirement at least to attempt to negotiate[67] – though the fact that the US has already reached an agreement with Caribbean nations, but had not initially attempted to reach one with south-east Asian countries (i.e. it was treating WTO members differently) was probably a more important determinant of the Appellate Body's findings in this case.[68]

It can be argued that MEAs might form a *lex specialis,* recognising their specific nature – 'A later law, general in character, does not repeal an earlier law which is special in character',[69] which might be relevant for MEAs agreed prior to the establishment of the WTO. The status of *lex specialis* is supported by some commentators who perceive MEAs to be more specific treaties, since they contain specific measures applied to specific categories of products.[70] Under this principle, no conflict would arise, since the MEA provisions would override general international trade obligations under the WTO agreements. However, it is uncertain that the WTO Dispute Settlement Body would respect the *lex specialis* of MEAs – in particular, it may not apply where the general rule is expressed in an agreement where there is some form of savings clause giving the treaty supremacy.

In the event of conflict, the rules of treaty interpretation would apply to resolve any conflicts between MEAs and WTO requirements. The law of treaties, set out under the Vienna Convention on the Law of Treaties, provides rules on treaty interpretation where there appears to be a conflict with other treaties. When the treaties deal with the same subject matter, the later treaty is to prevail between parties to both agreements.[71] Where there is a conflict between two treaties, and one party is not a party to both instruments, the agreement that both parties have ratified will prevail. Article 30(2) of the Convention states that where a treaty specifies that it is not to be considered as incompatible with an earlier or later treaty, the provisions of the other treaty are to prevail. The earlier treaty would apply only to the extent that its provisions are incompatible with the later treaty.

Some commentators have noted the difficulty of applying this test so easily to MEAs and the WTO agreements, since both are complex and long-standing regimes, with a number of subsequent instruments, amendments and new treaties.[72] For instance, would a decision taken by a conference of the parties of an MEA to apply a trade measure in order to induce compliance be considered to be a 'treaty'? Such decisions may be seen as constituting internal measures to govern the treaty regime rather than having any substantive impact amending the MEA itself

[66] Gonzalez-Calatayud and Marceau, 'The Relationship Between the Dispute-Settlement Mechanisms of MEAs and those of the WTO', p. 283, note that a refusal to exhaust MEA dispute settlement mechanism can be a violation of the MEA and also be a consideration for a WTO body when assessing the good-faith obligations taken by a WTO party.
[67] IISD/CIEL, *The State of Trade Law and the Environment: Key Issues for the Next Decade,* p. 23.
[68] See Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' *Columbia Journal of Environmental Law* 27:2 (2002), pp. 489–519.
[69] The principle of *lex specialis* does not appear in the Vienna Convention on the Law of Treaties although it has been recognised as a principle of treaty interpretation by the Permanent International Court of Justice. See *Upper Silesia Minorities,* 1928 PCIJ Ser A, No. 15 (1928). See also the discussion by Gaetan Verhoosel on the Gabcikovo-Nagymaros case, 'Gabcikovo – Nagymaros: The Evidentiary Regime on Environmental Degradation and the World Court', *EELR*, 1997, p.252.
[70] Stilwell & Tarasofsky, 'Towards Coherent Environmental and Economic Governance'; Yu, 'Discussion Paper on the World Trade Organisation and Multilateral Environmental Agreements'.
[71] Article 30(4).
[72] D. Caldwell, *Multilateral Environmental Agreements and the GATT/WTO Regime* (Washington, DC: US National Wildlife Federation, 1998); Kerr, 'Who Should Make the Rules of Trade?'

In practice, however, the Vienna Convention seems likely only to have limited applicability. Potential conflicts are likely to be rare, as there are only a limited range of situations in which an MEA would mandate some action in direct violation of a WTO requirement. Moreover, where savings clauses exist, they would predetermine which treaty would prevail in a conflict. There is also the possibility of the WTO and MEA dispute settlement bodies reaching a decision that is mutually supportive.

Dispute settlement and the possibility of 'forum shopping'

Both MEAs and the WTO possess dispute settlement mechanisms.[73] The WTO offers a relatively strong mechanism, whose decisions are binding on all WTO members; where there is a trade consequence of a particular measure, it is at least arguable that WTO members have agreed to give priority to the Dispute Settlement Understanding (DSU) over other mechanisms.[74] Since WTO dispute settlement is compulsory, it is often perceived to be more effective than MEAs' equivalent mechanisms, and therefore countries may prefer to use WTO dispute settlement in trade disputes involving an MEA.

Recent dispute cases suggest that the Appellate Body is developing a greater understanding of the complexities of the trade-environment relationship; this may lead to further decisions upholding trade related environmental measures.[75] The Appellate Body's two decisions on the shrimp-turtle case, in particular, have led to a major reassessment of how the WTO treats environmental issues – including their reference, in the first case, to the inclusion of sustainable development in the preamble to the agreement establishing the WTO, as adding 'colour, texture and shading' to the interpretation of the WTO agreements, and the final decision that the US embargo on shrimp imports could be justified under GATT Article XX.[76]

MEAs provide a variety of methods to resolve disputes, though the context of an MEA is quite different to that of the WTO agreements. Most MEAs impose requirements on their parties, and the key question is that of compliance or non-compliance with these obligations, rather than the WTO-style bilateral dispute between individual parties over the interpretation of a treaty's text. A number of MEAs have accordingly developed effective non-compliance mechanisms, covering both incentives, or 'carrots', in the form of financial and technical assistance, backed up by disincentives, or 'sticks', in the form of withdrawal of financial assistance and trade measures (see above, Section 2).[77] Under the Montreal Protocol, for instance, there is an indicative list of measures that can be taken in cases of non-compliance, including appropriate assistance (technical/financial); issuing cautions; suspension of the operation of treaty or specific rights and privileges; and trade measures. The range of options and flexibility of addressing non-compliance has been received favourably by both parties and the academic community.[78]

[73] See Duncan Brack, *International Environmental Disputes: International forums for non-compliance and dispute settlement in environment-related cases* (RIIA, 2001; available from www.riia.org/sustainabledevelopment).
[74] Gonzalez-Calatayud and Marceau, p. 283.
[75] See K. Ravi Srinivas, 'Turtles, Trade and Unilateral Measures: Reframing the Debate', *Economic and Political Weekly* (2003).
[76] Shrimp-Turtle I, para 153.
[77] J. Werksman, 'Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime', *Yearbook of International Environmental Law* 1998, 49–101, p. 57.
[78] For comments on the non-compliance procedures, see Werksman, 'Compliance and the Kyoto Protocol', M. Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol', 3 *Yearbook of International Environmental Law* 1992, p. 123; D. Victor, 'The Operation and Effectiveness of the Montreal Protocol

Although MEAs also contain dispute settlement provisions – including negotiation, good offices, mediation, conciliation, and arbitration (often by the International Court of Justice) – there is no instance in which they have ever been used (unless one counts the UN Convention on the Law of the Sea, which possesses its own tribunal for dispute resolution, as an MEA). As mentioned above, unlike the WTO, it is difficult to conceive of bilateral disputes arising within most MEAs. If such a dispute did arise, however, over a trade measure, it does seem likely that parties may prefer to refer it to the WTO's relatively tougher dispute resolution system.

Decision-making mechanisms under MEAs could play a significant role in resolving WTO disputes. For instance, panels and the Appellate Body could exercise their prerogative under Article 13 of the Dispute Settlement Understandingto request information from a MEA secretariat on relevant matters, and could also interpret a decision taken by an MEA body as evidence of a justification of a measure under Article XX. Other potential ways to better integrate dispute settlement mechanisms include increasing contact between the secretariat staff responsible for dispute settlement; increasing information flow between MEA secretariats and the WTO Secretariat; and promoting expert participation in the WTO process for alternative dispute settlement, which include good offices, conciliation and mediation.[79] All of these could help to broaden the information available to the WTO dispute settlement mechanism and break down its institutional isolation from non-trade concerns.

The potential problem of 'forum shopping' arises where parties may initiate a dispute both under a MEA and the WTO where it arises from the same factual situation. This problem almost surfaced in the swordfish dispute between Chile and the EU in 2000, concerning border measures enacted to enforce conservation measures for Chile's fishing operations on the high seas. Chile appealed to the International Tribunal on the Law of the Sea (operating under the UN Convention on the Law of the Sea), while the EU threatened to raise the issue through the WTO.

This might have invited a WTO panel to resolve questions requiring the interpretation of UNCLOS, a non-WTO agreement. As mentioned above, WTO panels can look to other rules of international law under the customary international legal rules of interpretation when interpreting the WTO agreements, though it does not appear that they can apply other treaties, in the sense of determining a claim under another treaty.[80] In the end the swordfish dispute was resolved between Chile and the EU before it went to either mechanism.

The prospect of forum shopping appears to be more theoretical than real. Each mechanism may address similar issues but they are within the jurisdiction of different regimes. Moreover, forum shopping can be precluded by compulsory jurisdiction over disputes by particular mechanisms so that parallel proceedings emerge that do not overlap. In the swordfish dispute, the complaints revolved around violations of the respective agreements – failure to enforce fisheries regulations (UNCLOS) and market access (WTO). However, such a possibility can lead to consequences inimical to the goal

Implementation Committee', in D.G. Victor, K. Raustiala and E. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998).

[79] See Stilwell & Tarasofsky, 'Towards Coherent Environmental and Economic Governance'.

[80] J. Trachtman notes that dispute settlement panels are constrained in their ability to interpret non-WTO agreements, since they can only look to international rules to assist in their function of interpreting and clarifying the WTO agreements. See J. Trachtman, 'The Domain of WTO Dispute Resolution', 40:2 *Harvard Int L J* 333–77 (1999). For opposing views, see Paulewyn, 'The Role of Public International Law in the WTO'. See also presentation by Alan Boyle at RIIA/IISD workshop on 'Trade and Environment Priorities post-Doha', April 2003.

of mutual supportiveness. In order to prevent forum shopping altogether, it may be possible to avoid disputes by having clarifying language in MEAs.[81]

Savings clauses

A MEA 'savings clause' may provide greater clarity on how MEAs that allow for trade-restrictive measures should be treated at the WTO. Savings clauses have been added to MEAs in order to ensure that the agreement's provisions do not override existing obligations of the parties under other international agreements, such as the WTO agreements. Such clauses are to be interpreted under the customary international legal rules of interpretation under Article 30(2) of the Vienna Convention on the Law of Treaties, which holds that where a treaty expresses that it is subject to, or not to be considered as incompatible with, an earlier or later treaty, the provisions of the other treaties prevail. For MEAs negotiated after 1995, this would include the WTO agreements, so that WTO rules would be applicable to the parties to the MEA regarding any conflict between a measure taken pursuant to an MEA and WTO obligations.

Although savings clauses may be drafted for the purpose of clarifying the relationship between MEAs and WTO requirements, they potentially reinforce the uncertainty inherent in a mutually supportive relationship. Their applicability is restricted only to where there is indeed a conflict, requiring a state to meet an obligation under one agreement while not complying with another obligation. By design, a savings clause aims to establish a hierarchy between agreements. However, current practice in recent MEAs indicates that savings clauses do not do this but provide the opposite outcome. They may provide for contradictory provisions, such as those seen in the preamble to the Cartagena Protocol, which notes that the Protocol does not imply a change in the rights and obligations under any existing agreement and also that the Protocol is not subordinate to other international agreements. In some cases, they may even create a fictitious perspective, discounting any conflicts that quite possibly exist. The clauses may be less a tool to determine the substantive relationship between the parties than a guide for interpreters to ensure that the treaties are not viewed in isolation from each other.[82]

The recognition of mutual supportiveness may reflect parties' intentions not to terminate previous obligations when signing new agreements. Mutual supportiveness implies compatibility, but can mask underlying tensions between two regimes. This ambiguity may be intentional, partly out of political expediency and the need to finalise the agreement, anticipating that any inconsistencies can be worked out later.[83] Alternatively, it can be argued that mutual supportiveness reflects the growing maturity of the trade–environment agenda, moving away from a focus on conflict.[84] As a result, text similar to that seen in the preamble to the Cartagena Protocol may be repeated in subsequent MEAs, possibly leading to unpredictable results when such clauses are interpreted by WTO dispute settlement bodies.

[81] See UNEP-WTO, 'Compliance and Dispute Settlement Provision in the WTO and Multilateral Environmental Agreements', (WT/CTE/W/199, 2001), para. 116.
[82] See M. Afonso, 'The Relationship with other International Agreements: an EU Perspective', in Bail, Falkner and Marquard, *The Cartagena Protocol on Biosafety,* p. 425.
[83] See R. Falkner, 'Genetic Seeds of Discord: The Transatlantic GMO Trade Conflict After the Cartagena Protocol on Biosafety' in P.W.B. Phillips and R. Wolde (eds.),*Governing Food – Science, Safety and Trade* (Montreal: McGill-Queens Univ. Press, 2001).
[84] See IISD/CIEL, *The State of Trade Law and the Environment,* p. 6.

Non-parties

The Doha Declaration (see Appendix 2) explicitly excludes the MEA non-party issue from the negotiating agenda. This is consistent with the practice of GATT panels which, for instance, excluded CITES from consideration in a number of dispute cases (e.g. tuna-dolphin II, Canada herring) because GATT members were not all party to the MEA.[85] Moreover, this is consistent with public international law which specifies that a treaty cannot create obligations for third states without its consent.[86] WTO cases, however, have seen a different approach; in the shrimp-turtle case, MEAs, including CITES and the CBD, were taken into consideration when deciding how to interpret the GATT Article XX exceptions.[87]

As mentioned above, this case also touched directly on the non-party issue, when in the second dispute, in June 2001, the panel found that the US was entitled to maintain its embargo, even though it was a unilaterally applied measure, as long as it was engaged in 'serious good-faith efforts to negotiate an international agreement, taking into account the situations of the other negotiating countries'.[88] It did not accept Malaysia's contention that the agreement had to be concluded *before* a trade restriction could be enforced. In addition, the panel believed that the US trade measures would 'be accepted under Article XX if they were allowed under an international agreement', but in the absence of such agreement, such measures are 'more to be seen, for the purposes of Article XX, as the possibility to adopt a *provisional* measure allowed for emergency reasons than as a definitive "right" to take a permanent measure'.[89]

The Appellate Body came to a somewhat different conclusion, arguing that there was no absolute requirement that countries had to offer to engage in multilateral negotiations before they were allowed to apply trade measures.[90] In the first shrimp-turtle case, it was the fact that the US had negotiated an agreement with Caribbean nations but had not tried to do so (at least initially) with south-east Asian shrimp-exporting countries that had led to the conclusion of 'arbitrary and unjustifiable treatment' – underlining the WTO obligation of non-discrimination between WTO members. So the non-party issue may no longer be as important as it was once thought to be: it appears that a WTO member may adopt a trade-restrictive measure independently of any MEA obligation.

The non-party issue is relevant in international law since a party can only be subject to obligations under the treaties it has entered into, subject to any overriding obligations in customary international law. No obligations or rights are created from a treaty to which a state has not given its consent.[91] The treaty that governs the mutual rights and obligations of the parties is to prevail.[92] However, it is not entirely clear whether MEA trade measures taken against non-parties actually impose obligations on

[85] In the Canada herring dispute, the GATT panel went so far as to confirming that a state should not be obliged to cooperate with other states for the purpose of fisheries conservation. The panel did not agree that UNCLOS was applicable to the dispute although it did use its provisions to assist in interpreting the GATT provisions.
[86] Art. 34, VCLT.
[87] See shrimp turtle I, Appellate Body.
[88] *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia,* Report of the Panel, 15 June 2001 (WT/DS58/RW), para 5.73.
[89] The Implementation Panel in shrimp-turtle II, para 5.71, went so far as to identify a regional MEA as the 'benchmark of what can be achieved through multilateral negotiations in the field of conservation and protection'. The Appellate Body questioned the use of the word 'benchmark', although it did assert that the use of the MEA as an 'example' was appropriate.
[90] See Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case', pp. 502–09.
[91] Article 34, *VCLT.*
[92] Art. 30(4)(b), *VCLT*.

the non-parties, or simply condition access to domestic markets (i.e. of the MEA parties) on compliance with MEA obligations – essentially the question considered in the shrimp-turtle case. The existence of the MEA could help to emphasise that the measure is not arbitrary or discriminatory, is the least trade-restrictive available and does not represent a disguised restriction on trade.

It can be expected that the non-party issue will become more common as MEA regimes develop – the entry into force of the Cartagena Protocol in September 2003, and the likely entry into force of the Kyoto Protocol, Rotterdam and Stockholm Conventions in the following few months or years will create at least short-term situations where several countries may not be party to one or more of these MEAs. Non-parties are dealt with differently in each MEA regime. For instance, the Rotterdam Convention prohibits imports from non-parties but not specifically exports to non-parties, while the Stockholm Convention prohibits exports to non-parties and not imports from non-parties. With the creation of subsequent instruments, annexes, amendments and protocols to the original MEAs, there may be situations where parties to an MEA may not be parties to future instruments. And recent US practice, by far the largest global trading partner, to disengage from MEAs and maintain its non-party status, elevates the potential for conflict; for instance, the US may benefit either from subsidising environmentally unsustainable activity that defeats MEA objectives, or from free-riding, enjoying the benefits of the MEA without incurring any of the costs.[93] All of this highlights the importance at least of considering the issue.

4.3 The Doha mandate

Appendix 2 reproduces paragraphs 31 and 32 of the Doha Declaration adopted in November 2001. Paragraph 31 covers the MEA–WTO relationship explicitly, while paragraph 32 adds some relevant general principles, and a timetable for work. Any negotiations under paragraph 31 – along with all the other negotiations specified in the Doha agenda – are to be concluded by 1 January 2005.

The Doha mandate on MEAs and the WTO, dealing only with specific trade measures, and only with relationships between MEA parties, constrains the WTO–MEA discussion to a narrow subset of the wider debate. Certainly for the MEAs now in force, including the Montreal Protocol, Basel Convention, CITES, ICCAT and CCAMLR, it is difficult to conceive of any issue within this remit that would be likely to be taken to the WTO – even if there were disputes, it is quite likely that they would be dealt with within the framework of the MEA. As indicated above, rather more uncertainty exists over non-specific trade measures, and over the party–non-party relationship, but these are excluded from the Doha mandate.

Following the Doha ministerial conference in November 2001, the MEA–WTO relationship was revisited at the World Summit on Sustainable Development in Johannesburg in August/September 2002. The call for the enhancement of mutual supportiveness between trade and environment was renewed, though only after many delegations had expressed their concern with the draft text proposed by Australia and the US, which aimed to ensure the WTO-compatibility of any trade or trade-related activities, implying a hierarchical relationship, with environment subordinate to trade. The final wording in the WSSD Plan of Implementation reinforced the mutually supportive language between trade, environment and development, with the promotion of mutual supportiveness between the multilateral trading system and environmental agreements, consistent with sustainable development

[93] See *Safe Trade in the 21st Century,* www.greenpeace.org/politics/wto/doha_report.PDF.

goals, in support of the WTO work programme.[94] By agreeing to avoid deviating from the agreed language in the Doha Ministerial Declaration, the parties may have missed an opportunity to operationalise mutual supportiveness[95] – though possibly this was never realistically possible.

4.4 Discussions at the Committee on Trade and Environment

The relationship between the WTO and MEA trade measures was included as an item for debate on the CTE's agenda when it was established in 1995. Prior to Doha, proposals at the CTE involving MEAs and WTO obligations broadly fell into three categories: 'environment-minded', 'trade-minded' and 'development-minded'.[96] The 'environment-minded' proposals revolved around amending Article XX of the GATT, adding measures taken in pursuance of an MEA to the list of exceptions to GATT rules. The 'trade-minded' group accepted that trade restrictions under MEAs could be acceptable but argued that they should be restricted as tightly as possible; an amendment to Article XX was opposed as widening the scope for more trade restrictions, limits to market access and disguised protectionism. The 'development-minded' group urged a broader policy package that would guarantee improved market access, and expressed general opposition to MEAs being used a base for trade measures, since MEAs were often negotiated with very little participation by developing countries.

Since the Doha Declaration, discussions at the CTE on para. 31(i) have focused on three areas:
- Examination of individual MEAs;
- Identification of specific trade obligations in those MEAs; and
- Identification of relevant WTO rules.

Many WTO members agree with this phased approach, although the EU and Switzerland have advocated starting by looking at conceptual and definitional issues. There have also been some discussion on which MEAs should be included, and on the definition of a 'multilateral environmental agreement', with concerns being raised about the number of parties needed before an 'agreement' becomes an 'MEA' and the type of provisions necessary for it to be considered an MEA for WTO purposes.

The definition of 'specific trade obligation' is a pivotal issue, since it may reflect how a measure is to be interpreted in light of a claimed Article XX exception. According to the EU, where the specific trade obligation is at issue the general obligations of *lex specialis* should lead to the conclusion that MEA dispute settlement instruments should be used for dispute resolution. Furthermore, specific trade obligations should carry an assumption of WTO conformity, since the international community has deemed them necessary to achieve the environmental objective set out in the MEA. The EU has also expressed concern about trying to prescribe specific trade obligations too closely, considering that they should be seen in a dynamic context, evolving over time with the effectiveness of initial trade measures and other provisions of the MEA.

CTE discussions have identified four types of trade measures:[97]

[94] Johannesburg Plan of Implementation, Art. 92.
[95] Kevin R. Gray, 'World Summit on Sustainable Development: Accomplishments and New Directions?', 52:1 *International and Comparative Law Quarterly* (2003).
[96] See Brack, 'Environmental Treaties and Trade', p. 343.
[97] TN/TE/W/10.

a) Trade measures explicitly provided for and mandatory under MEAs (e.g. trade bans with non-parties);

b) Trade measures not explicitly provided for nor mandatory under the MEA but consequential of the *obligation de resultant* (obligation to achieve results) of the MEA (where the MEA lists possible measures and policies to undertake in order to comply);

c) Trade measures not identified in the MEA which has only an *obligation de resultant* but that parties may decide to implement in order to comply;

d) Trade measures not required in the MEA, but parties may implement them if the MEA contains a general provision stating parties can adopt more stringent measures in accordance with international law (e.g. CITES, Rotterdam Convention).

Where these measures are mandatory and explicitly provided for under MEAs, it has been argued by both Japan and Switzerland that there should be a presumption of conformity with WTO rules, presuming MEAs to be necessary for the protection of the environment. However, some concern has been raised that when negotiating an MEA, the parties should ensure that trade measures are not unnecessary, arbitrary, protectionist or unjustifiably discriminatory. This suggests that this type of WTO-compatible language in a MEA may reinforce the presumption of conformity. Where this language does not exist, there could be a test against the headnote of Article XX.

No conclusion has been reached on any of these questions. The report of the CTE Special Session of 10 July 2003 simply summarised the discussions and concluded that 'it seems clear that the various components of the mandate discussed to date, some of which may merit further discussion, will need to be drawn together at some stage'. [98]

5 Possible outcomes

The MEA–WTO debate has been in existence since the establishment of the WTO, without much sign of progress. The inclusion of para 31 in the Doha agenda, though it limits the scope of the debate, was hoped to give it new impetus, though there is little sign of any conclusions emerging as yet. This section examines a range of possible outcomes to the discussion, both within and outside the WTO. We recognise that some of the solutions suggested below, at least in Section 5.1, fall outside the relatively narrow Doha mandate, but we believe nevertheless that they could usefully be borne in mind during discussions.

[98] Report by the Chairperson of the Special Session of the Committee on Trade and Environment to the Trade Negotiations Committee: Trade and Environment Negotiations: State of Play (TN/TE/7, 10 July 2003), para 8.

5.1 Defining or rewriting the rules: interpretations, waivers and new agreements

Interpretations

The discussion above in Section 4 suggested that, following the shrimp-turtle dispute case, there are many reasons for thinking that MEA trade measures could survive a WTO challenge. Nevertheless, there is still a lack of clarity over the issue, and therefore one possible option within the WTO negotiations is to agree an interpretative decision on the relationship between MEAs and the WTO. Such non-binding recommendations have become more common within the WTO in recent years.

Such a decision would define the areas of competence for both MEAs and the WTO and clarify mutual supportiveness, levels of deference and hierarchy. Competences could be divided so that, for example, the WTO could have the power to assess whether a trade measure is arbitrarily discriminatory or protectionist, while an MEA would have jurisdiction to determine the legitimacy of the environmental objective and the proportionality and necessity of any trade measure.[99] A similar, though less detailed, option would be to agree a political statement that the WTO and MEAs are equal bodies of law, with a legally operative presumption that measures carried out in pursuance of MEAs would be presumed to be WTO-compatible unless shown otherwise.

Waivers

A second option is to obtain a waiver from WTO obligations for MEAs (as was granted in February 2003 for the Kimberley Process on conflict diamonds – though the application for a waiver was itself controversial amongst the states participating in the Process[100]). Waivers taken under Article XXV of the GATT are only permitted in exceptional circumstances. Similarly, Article IX of the Agreement establishing the WTO permits waivers, although these are time-limited, do not constitute a revision of the rules, can only be considered on a case-by-case basis and require a three-quarters majority of WTO members. None of these conditions make this a particularly attractive route to follow; and in any event, a waiver reinforces a hierarchy of the WTO agreements over MEAs.

Amendment of Article XX

Moving on to more radical solutions, GATT Article XX could be amended so that measures pursuant to a MEA could be deemed a justifiable restriction on trade – the EU's original proposal before the first WTO ministerial conference in Singapore in 1996. (A similar provision has been written into NAFTA, where in cases of conflict between itself and CITES, the Montreal Protocol or the Basel Convention, the MEA provision is to take precedence, subject to the parties using the means least inconsistent with NAFTA when implementing the MEA.[101]) Measures taken pursuant to the MEA would then be 'necessary' considering their objectives – though it would still be up to a panel or the Appellate Body to determine this and therefore in effect interpret the relevant MEA. In addition, any

[99] See the proposal by Switzerland at the WTO Committee on Trade and Environment, WT/CTE/W/139.
[100] Most Kimberley Process signatories did not support the move, implying as it does that the Process is subordinate to WTO rule-making. It was also argued that a waiver was unnecessary because of the text of GATT Article XXI(c), which exempts from GATT requirements a WTO member taking 'any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security'.
[101] Art. 104

MEA trade measure would still have to satisfy the additional requirements under the headnote of Article XX.

MEAs benefiting from this presumption would need to be identified in some way. One option would be to list specific MEAs. In turn, the WTO dispute settlement system could defer consideration of any dispute to the MEA mechanism, creating separate but equal regimes. This would work most effectively where the MEA specifically deals with trade in a particular good or service (e.g. CITES, Montreal Protocol, Basel Convention, Cartagena Protocol).[102] By selecting particular MEAs, however, there may be concern about the impracticality of having to amend Article XX – or even simply agree an amendment to the list – every time a new MEA comes into force. And by creating an exception, some would argue that MEAs would then always be subordinate to WTO obligations. A similar approach could be to exclude specified lists of products, such as hazardous waste, or wildlife, from WTO coverage.

Another option for identifying MEAs was contained in the EU's proposal before Singapore. The new Article XX exception could cover measures taken pursuant to the specific provisions of an MEA complying with an 'understanding on the relationship between measures under MEAs and WTO rules' MEAs would be generally defined, but there would be a presumption that MEA-directed provision was necessary for the achievement of its environmental objectives.

A new WTO agreement on MEAs

An alternative option to an amendment of Article XX would be a new WTO agreement on MEAs, similar in status to other WTO agreements.[103] The advantage of this approach is that it avoids attempting to amend existing rules, with probable implications for a wide range of topics, and it creates a very clear set of rules which would apply only to MEA trade measures (i.e. which would not encourage further unilateral actions). It may also be easier to negotiate than a specific amendment. The new agreement would need to cover, *inter alia:*

- The definition of an 'MEA', including criteria for its subject matter (possibilities include the promotion of sustainable development, the conservation of natural resources, the avoidance of transboundary pollution, and/or the protection of human, animal plant life or health) and for its openness to participation by all parties affected and concerned.

- The definition of trade measures, and the treatment of different categories of measures. It would seem logical that specific measures should fall within the scope of the Agreement and thereby be exempted completely from the other requirements of the multilateral trading system.

- Non-specific measures, on the other hand could be consistent with the requirements under the headnote to Article XX, as there seems little reason to think that they would need to be discriminatory to achieve their objectives (this depends on what precisely is meant by 'non-specific' measures, of course – see Section 1.2 above). Conversely, if discriminatory measures *are* required, it seems reasonable to insist that they should be specific, i.e. included in the text of the MEA.

[102] Yu, 'Discussion Paper on the World Trade Organisation and Multilateral Environmental Agreements'.
[103] As argued for by, among others, Duncan Brack, in 'Environmental Treaties and Trade', pp. 347–349.

- Linkage of burdens and offsets. It is important that trade measures are not used to force countries into implementing an agreement which unfairly retards their development – bearing in mind, of course, that in many cases the environmental harm at which the MEA is aimed may well impact their development anyway if it proceeds unchecked. The presence of trade measures *as one component* of a range of implementing measures in a particular MEA (including, for example, provisions for finance and technology transfer) is therefore an important feature of MEA design.

- Dispute settlement. The Agreement would need to be clear about where disputes over the application of MEA trade measures should be resolved. It seems logical for disputes between MEA parties to be resolved by the MEA, and for disputes between an MEA party and a non-party which is a WTO member to be resolved by the WTO.

5.2 Cooperation and policy coherence

Given the lack of progress on this issue, not just in the negotiations started at Doha but since the WTO and CTE were established, it has to be recognised that none of the options identified above in Section 5.1 are likely outcomes. Probably a more important way to take the agenda forward, therefore, is to ensure greater coordination and cooperation between the institutions involved.

MEA–WTO cooperation

It has been argued both that matters concerning trade are not always adequately addressed in MEA negotiations, and that MEA issues are not given proper understanding in the WTO, despite the attendance of MEA secretariats and UNEP representatives at CTE meetings. Observer status is given on an ad hoc basis, although the CITES Secretariat has been an observer at the WTO since 1997.[104] There is still opposition to allowing MEA secretariats to be present in other WTO committees that directly impact their respective agreement's implementation; for instance, the CBD's request for observer status in both the Committees on Agriculture and the TRIPS Council has been rejected. There have also been moves by parties to MEAs to circumscribe the participation of MEA secretariats in the WTO by requiring them to consult with the parties to the MEA before providing information in response to any WTO request for information on trade provisions.[105]

The issue of information exchange with, and observer status for, MEA secretariats, is included in paragraph 31(ii) of the Doha Declaration, and ought to be a top priority for resolution, if possible at the WTO ministerial at Cancun. Failing to agree such a basic step can only give only negative signals to the outside world about the WTO's willingness to engage with the environmental debate.

There is also a strong argument for going beyond simple information exchange and exploring mechanisms for giving advice, in both directions. After all, the design and implementation of both MEAs and WTO agreements can only benefit from a full understanding of each other's design and

[104] Without prejudice to the larger observership question, which remains unresolved at the Trade Negotiations Committee/General Council level, and is therefore decided on an ad hoc basis, WTO members have agreed that existing CTE regular session observers and those with pending requests for observership at the special sessions could qualify to attend. Under these criteria, UNEP and six MEAs were authorised, namely the Basel Convention, CITES, CBD, Montreal Protocol, UNFCCC, and the International Tropical Timber Organisation.

[105] Decision VI/30, Basel Convention Conference of the Parties (2002); Decision XIV/11, Montreal Protocol Meeting of the Parties (2002).

operations, yet at present there is no obvious route through which an MEA, for example, could request advice from the WTO about appropriate ways to design trade measures. As noted above, secretariats tend to be constrained by their agreements' parties from operating too freely, but usually there is no other obvious body that could provide advice and suggestions.

National policy coherence

MEA secretariat representation does not compensate for the lack of national government environmental policy-maker input to the WTO.[106] It is a commonplace to argue that better coordination and cooperation is needed at the national level of decision-making. Trade and environmental policy-makers do not usually work in the same government ministries and agencies. Synergy at the national level can impact on government policy and regulatory processes and also better inform national positions at both WTO and MEA negotiations. In order to achieve greater coherence and coordination of environmental with trade policies, there is an implicit need for additional budgetary resources within the relevant ministries.[107]

WTO dispute settlement

As touched on above in Section 4, there are a number of ways in which WTO panels and the Appellate Body can make use of the expertise of MEA secretariats and experts. This includes the provision of environmental expertise in relevant dispute cases, and also advice on the 'necessity' of trade measures in the context of MEAs, and matters of whether they are the least trade-restrictive option available. MEA 'standards', for example, the processes for operationalising the precautionary principle in the Cartagena Protocol, could also be treated by WTO dispute settlement bodies as international standards, of particular relevance to the SPS and TBT Agreements.

Other aspects of the Doha agenda

Other aspects of the Doha agenda which can indirectly lead to greater synergy between MEAs and WTO obligations include ensuring greater liberalisation in markets for environmental goods and services as well as the use of market-based instruments, which are already appearing in MEAs as incentives to facilitate compliance. Greater trade liberalisation can encourage the transfer of technology, as required in most MEAs. The Basel Convention, for example, contains provisions calling on parties to cooperate actively in the transfer of technology and management systems related to environmentally sound management of hazardous wastes and other wastes. At the Convention's fifth conference, the parties reaffirmed that technology transfer is still a fundamental aim and recognised its importance for developing countries and countries with economies in transition. Similarly, the Multilateral Fund for the implementation of the Montreal Protocol was established in part to finance technology transfer.

There may also be environmental goods that can contribute to sustainable development objectives and are still consistent with WTO and MEA obligations. For instance, the BIOTRADE initiative encourages trade in the products and derivatives of wildlife species as a way to stimulate trade and

[106] UNEP has tried to maximise developing countries participation in the MEA-WTO process, by scheduling meeting back-to-back in addition to the provision of financial support for participation (UNEP, 'Compliance and Dispute Settlement Provision in the WTO and Multilateral Environmental Agreements').
[107] Ibid., p. 6.

investment in biological resources and create sustainable trade incentives. This might result in the diversion of current illegal incentives for over-exploitation into legal and sustainable commercial processes that benefit the species concerned.

There also needs to be further research on the relationship between MEAs and GATS requirements. Most of the debate thus far has focused on the incompatibility with the GATT, but the scope of the GATS is expected to widen and may therefore have implications for MEAs.[108] Attention should be directed towards the issue of whether there would be differing terms of reference when identifying the parameters in the relationship between MEAs and services liberalisation obligations.

5.3 Action by MEAs

Greater clarity over the relationship between MEAs and the WTO agreements can be sought by MEA secretariats themselves, and/or MEA parties. It has been suggested that MEAs examine their effectiveness, review their operations to incorporate WTO principles, identify the least trade-restrictive practices, and bolster their compulsory and binding dispute settlement mechanisms.[109] MEA parties can assist in drawing up criteria for WTO-compatibility, including a determination of whether the MEA is the most effective mechanism for dealing with the environmental problem; whether it allows for equivalent treatment of members and non-members; whether it is truly a platform for international consensus; and whether it has an effective dispute settlement mechanism.[110] Due to some sensitivity over whether a trade-restrictive measure uncovers an inequitable situation between WTO members due to high environmental standards, how an MEA accounts for differential responsibilities and technological and financial assistance for the purpose of compliance may be countenanced. The Appellate Body has implicitly shown such concern in both the shrimp-turtle I and reformulated gasoline disputes. Overall, MEAs can bring forward ideas on how to actualise mutual supportiveness, as has been seen from the CBD Secretariat.[111]

It has also been argued that introducing stronger provisions relating to WTO obligations, as well as firmer dispute settlement mechanisms, can support greater MEA effectiveness. With a more robust regime, dispute settlement panels at the WTO may be more inclined to cooperate with such mechanisms and even defer to decisions made within the scope of MEA expertise. MEA secretariats can be an obvious source of expert advice when panels seek information and technical advice, even if a disputant is not a party to the particular MEA. For instance, the CITES Secretariat has informed WTO members about the role of trade-facilitating and trade-restricting regulations in achieving CITES objectives, the structure of compliance and dispute settlement mechanisms, technical assistance and capacity-building, and how to improve information exchange and enhance cooperation between CITES and the WTO.[112]

[108] Stilwell and Tarasofsky, 'Towards Coherent Environmental and Economic Governance', p. 8.
[109] J. Hutton, 'Sustainable Use of Natural Resources, the WTO and MEAs' *BRIDGES* 19–22 (2002).
[110] Ibid, p. 20.
[111] See *Intellectual Property Rights,* Decision II-12 (Jakarta, Indonesia, 1995), where the need to liase with the WTO to clarify tensions and increase synergies was declared.
[112] CITES, 12 COP Doc. 18, Santiago, Chile (Nov. 2002).

5.4 Developing countries

Developing countries often express the strongest resistance to any codification of the MEA relationship in the WTO agreements. Developing countries tend to argue that trade-related measures, even if carried out pursuant to a MEA, will have a negative economic impact through restricting market access, and that the costs of compliance can be significantly outweighed by any perceived environmental and developmental benefits. It should be noted, however, that this is probably more a perception than a reality, and (in common with other countries) developing countries' environment negotiators often hold very different views from their trade counterparts.

MEAs can, however, address developing country concerns by offering facilities through which parties are given financial assistance, technology transfer and other incentives to ease the difficulty of implementation. Moreover, market access can improve for some products directly regulated by the MEA. Effective attention to development issues will render it easier for WTO members to integrate MEAs into their international trade strategies.[113] Efforts by UNEP, UNCTAD and the WTO to improve capacity-building in this area can lead to better awareness of the MEA-WTO relationship and therefore greater coordination in developing countries.

5.5 Conclusions

Overall there needs to be greater clarity over the purpose and impacts of MEAs, in order to assist WTO members who may be wary of the legal and political consequences of adopting trade measures pursuant to MEAs, or ones that are even permissibly stricter. Better understanding can undermine the chilling effect seen in some MEA negotiations, where some parties have been unwilling to embrace any language that might conflict with WTO requirements.

The question of how to define, contextualise and actualise a mutually supportive relationship should receive greater focus. The debate within the WTO to date has focused on a narrow set of legal issues, primarily addressing potential conflicts and not synergies, as well emphasising theoretical rather than practical linkages.[114] The mutually supportive relationship should involve the design of institutions and procedures that assures this status. This should involve greater cooperation between MEA secretariats and the WTO in both negotiations and dispute settlement procedures. If this could be an outcome of the talks currently under way following the Doha Declaration, it would prove more useful than any potential resolution of the very narrow issues actually specified in paragraph 31.

Conversely, if the Doha negotiations fail to address the MEA–WTO relationship in an effective manner – which seems entirely possible – or if they come up with a proposed formula that would excessively narrow the scope for MEA trade measures, then the whole trade–environment debate will be set back, and the somewhat inaccurate image of the WTO as an institution that has no interest in environmental issues will be reinforced. That cannot be helpful either to the international environmental or trade debates, which should increasingly work together.

Given the difficulties with the negotiations, it may well be that the next stage in the MEA–WTO debate will be an actual dispute under the WTO, involving MEA trade measures. The potential for

[113] S. E. Gaines, 'International Trade, Environmental Protection and Development as a Sustainable Development Triangle', 11:3 *RECIEL* 259-274 (2002).
[114] Stilwell & Tarasofsky, 'Towards Coherent Environmental and Economic Governance'.

MEA-sanctioned measures to meet WTO obligations, and the interpretation of GATT exceptions have been expanded by both the shrimp-turtle and the asbestos disputes.[115] The latter has revised the necessity tests under GATT Article XX(b) so that the necessity of the measure is measured against the significance of the objective. Internationally recognised policy objectives expressed in MEAs now have scope for compatibility with WTO obligations. Clarifying these objectives and the necessity of taking trade measures to fulfil them could further improve the dialogue between trade and sustainable development. In its absence, the uncertainty and unpredictability inherent in dispute settlement will place mutual supportiveness on a precarious footing.

It is true that the Appellate Body has attempted to fully integrate matters of sustainable development into its interpretation of the WTO agreements, perhaps much further than an instrument negotiated at the WTO could accomplish. It can be expected that more disputes will arise that will touch upon the MEA-WTO relationship. However, clarifying the overall relationship would fall outside the specific mandate of dispute settlement, which is to resolve a legal dispute between WTO members. A principled and prescriptive approach to governing mutual supportiveness provides a starting point to contextualise the MEA-WTO relationship, forging the requisite practical linkages and setting the foundation for sound rulings at the Dispute Settlement Body.

[115] *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products.*

Appendix 1: Relevance of MEA-regulated products to the world economy

Sector/MEA	Production ($b)	Trade ($b)	Year	Notes
World economy	48,443	7,838	2002	
Endangered species/CITES	n/a	20	current	
ODS/Montreal Protocol	2.2	??	1987	1997 prices
Hazardous waste/Basel Convention	n/a	30	current	Recyclable/reusable
FCCC/Kyoto Protocol Manufactured products exports (% produced with fossil fuels)		 4,477 3,895	 2001	
Hazardous chemicals + pesticides/Rotterdam Convention	??	??		
GM crops/Cartagena Protocol	3.8 4.2 5 25		2001 2002 2005 (projection) 2010 (projection)	

Note: most of these figures are very rough estimates; very little of the relevant data is known with any degree of certainty.

Source: table originally published in Duncan Brack, *The Use of Trade Measures in Multilateral Environmental Agreements* (paper produced for RIIA Conference, *Sustainability, Trade and Investment: which way now for the WTO?,* March 2000) and updated where possible. Figures derived from MEAs' and WTO's web site and from personal communications.

Appendix 2: The Doha Declaration, paras 31–32

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (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;

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as 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.