

***Trade measures in multilateral environmental agreements  
and WTO rules:***

***Potential for conflict, scope for reconciliation***

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Trade measures play several important functions in multilateral environmental agreements (MEAs). However, because they restrict the free flow of goods between countries, these measures also potentially conflict with trade rules contained in the WTO Agreements. This paper demonstrates how the most important MEAs employ trade measures to further their objectives and how this might clash with WTO rules. It is shown that a potential for conflict clearly exists even though no country has ever challenged a measure purportedly undertaken in pursuance of a MEA before the WTO. Several policy options for reconciliation are examined and an amendment of GATT rules to introduce a MEA savings clause, possibly combined with a certification of specific measures by MEA secretariats, is found to be the preferred option.

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## **1 Introduction**

Trade measures in multilateral environmental agreements (MEAs) fulfil four functions: First, they can be used to deter non-compliance by members to the agreement (deter internal free-riding). Second, they can be used to encourage, persuade or push countries into becoming members to the agreement (deter external free-riding). Third, they can mitigate problems with so-called emission leakage, which describes the phenomenon that a decrease in emissions by the participants to an agreement is counter-acted by an increase of emissions by non-members. Finally, they can be used to directly further the objectives of a MEA in restricting trade in specified substances or species. This will always then be the case when trade itself is considered as endangering the preservation of species and biodiversity or endangering human life and health.

No matter what function trade measures contained in MEAs fulfil, the (potential) problem is that they might clash with trade rules contained in the WTO Agreements. This article examines how trade measures are actually used in the most important MEAs (section 2) and whether these measures conflict with WTO rules (section 3). Several options for a reconciliation between trade measures in MEAs and WTO rules are assessed (section 4). Section 5 concludes with a recommendation to follow the blueprint set by the North American Free Trade Agreement (NAFTA) in introducing a MEA savings clause into WTO rules, possibly accompanied with certification of specific trade measures by MEA secretariats.

## **2 Trade measures in MEAs**

Given that trade measures can foster MEAs in deterring internal and external free-riding, mitigating emission leakage and are sometimes the very objective of a MEA, it might come as a surprise that the vast majority of MEAs does not contain any trade measures. A 1994 survey revealed that while many of the then 180 international treaties

and other agreements on environmental matters contained trade-related aspects, only 18 actually employed trade measures (WTO 1994). However, in five of the most important MEAs, which we will look at now, trade measures play a prominent role and those measures are bound to play a major role in the potentially soon to be concluded Agreement on Persistent Organic Pollutants (POPs Agreement) and in future amendments to the Kyoto Protocol for the reduction of greenhouse gas emissions.

## **2.1 The Montreal Protocol**

The Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol aim to phase out ozone depleting substances (ODS): substances responsible for the thinning of the ozone layer in the stratosphere, which filters out ultraviolet radiation. The major ODS covered by the Protocol - so-called controlled substances - are chlorofluorocarbons (CFCs) and Halons. At the time of writing 168 countries have ratified the Montreal Protocol, which gives it almost universal support. Only five countries were WTO members, but not parties to the Protocol.

The Protocol's major trade provisions are contained in its Art. 4. It bans imports (Art. 4.1) and exports (Art. 4.2) of controlled substances between parties and non-parties of the Protocol, unless non-parties can demonstrate that in spite of not being formally a party to the Protocol they nevertheless comply with its obligations (Art. 4.8). Art. 4.3 also bans the import of products containing controlled substances from non-parties. In principle, Art. 4.4 of the Protocol even provides the possibility to ban or restrict the import from non-parties of products made with, but not containing, controlled substances. However, such restrictions were soon be deemed infeasible by the parties to the Protocol. These provisions were therefore never made operational and it must be

regarded as highly unlikely that they would ever become operationalised. So far there have been no cases of non-compliance with these trade provisions (WTO 1999, p. 7).<sup>1</sup>

Have these trade provisions been effective in bringing about multilateral environmental cooperation? As an answer to this question depends on counter-factual evidence, there cannot be an unambiguous answer as we cannot know what would have happened if the trade provisions had not existed. Furthermore, it is next to impossible to separate the effects that the threat of trade measures (sticks) from the effects that the promise of financial assistance for developing countries (carrots) contained in Art. 10 of the Protocol had on encouraging participation from the developing world. Many experts agree, however, that the threat of trade restrictions against non-parties has been important in bringing about almost universal participation (see, for example, Brack 1996, p. 55; Barrett 1997, p. 346; OECD 1999, p. 4).

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

CITES is not a MEA with trade amongst many other provisions. Rather, its very aim is to restrict international trade in endangered species. At the time of writing the convention has been ratified by 138 countries. Only 10 countries were WTO members, but not parties to the Convention.

CITES' major trade provisions are as follows: Appendix I contains species (around 600 animals and 300 plant species), which are threatened with extinction and whose

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1 In addition to these explicit trade measures addressed at non-parties, parties to the Montreal Protocol might enact a number of measures in compliance with the Protocol, which can have relevant effects on the trade with other parties. These include, for example, licensing for ODS trade, quantitative restrictions on imports of and excise taxes on ODS, restrictions on imports of ODS technologies.

trade for commercial purposes is generally prohibited with few exceptions (Art. III). Appendix II contains a further 4000 animals and 25,000 plants species, which might become threatened with extinction if their trade was not regulated. Their export is only allowed if the exporter has acquired an export permit from the state of export, testifying that the export will not be detrimental to the survival of that species, that the specimen were not obtained in contravention of protection laws of the exporting state and that any living specimen will be so prepared for transport that risk of injury, damage to health or cruel treatment is minimised (Art. IV). Similar to the Montreal Protocol, trade in appendix II and, in rare circumstances, even in appendix I species is possible with non-parties if these countries can demonstrate that they fully comply with the convention (Art. X). If a party fails to comply with the convention obligations it can lose its right to be treated as a party and can essentially be treated as a non-party.

Experts' assessment on the effectiveness of CITES and therefore on the trade provisions contained therein are mixed (OECD 1999, p. 22). Crocodilians and elephants are the cases where CITES might have significantly helped to improve their conservation. It has been less effective with respect to, for example, rhino and tiger species and has been indifferent with respect to the conservation status of some other species (ibid.). Martin (2000, p. 30) comes to the rather sobering conclusion that 'if the convention is benefiting species then, even after careful study, it has not been demonstrated'. Unlike the Montreal Protocol, CITES does not contain substantial financial assistance to help developing countries comply with the convention, which has been regarded as one of the major reasons for poor implementation of species trade control systems in these countries and consequently substantial illegal poaching and trafficking (OECD 1999, p. 26). Another shortcoming is that CITES is unbalanced in regarding international trade in wildlife all too often as a threat to preservation rather than as a means to raise the preservation value of endangered species if properly regulated (Martin 2000; 't Sas-Rolfes

2000). Complete trade bans often merely raise the value of illegal trafficking and render stringent controls more difficult.

### **2.3 The Basel Convention**

Similar to CITES, restrictions of trade are at the heart of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. It aims to 'ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal' (preamble). At the time of writing the Convention has been ratified by 134 countries, but not by the United States, which has signed, but not ratified the Convention. 28 countries were WTO members, but not parties of the Convention.

Its major trade provisions are as follows: Trade in hazardous waste is subjected to a comprehensive control system, which is based on the principle of prior informed consent. This means that a country can only export these materials to another country if it has gained the prior written consent from the importing country and all transit countries (Art. 6). Trade in these materials with non-parties is prohibited (Art. 4:5) unless agreements with these non-parties have been concluded, which 'do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention' (Art. 11:1). A party has the right to ban the entry or disposal of foreign hazardous waste in its territory (Art. 4:1). Furthermore, an amendment to the Convention generally bans trade in these materials between so-called Annex VII (OECD-countries) and non-Annex VII countries. However, at the time of writing, this amendment had only been ratified by 20 countries and it is unclear whether it will reach the necessary ratifications to enter into force (cf. Krueger 1999, pp. 106-108).

Similar to CITES, the Basel Convention does not contain any substantial provisions for financial assistance to developing countries to assist them in implementing their obligations. This has been regarded as one of the major reasons for poor implementation of hazardous waste trade control systems in these countries and consequently substantial illegal trading, which will become exacerbated once the amendment to the Convention banning trade between OECD- and non-OECD-countries comes into force (ibid., pp. 27f).

In terms of effectiveness, Krueger (1999, p. 62) suggests that 'in as far as the goal was to eliminate the worst forms of hazardous waste dumping on developing countries, the trade restrictions of the Convention can generally be deemed a success'. However, it is unclear to what extent the trade measures were necessary to achieve this effect, for as Krueger (ibid.) continues suggesting: 'By publicizing and condemning the practice of exporting hazardous wastes for final disposal to poor countries, the Basel Convention arguably put a great deal of political pressure on exporting countries to stop this practice. In this way, the creation of a Convention that changed the norms of international practice was perhaps as effective as the actual trade measures themselves.' Furthermore, it is unclear what the effect of the Basel Convention has been on the overall amount of transboundary hazardous waste movements as reliable data are practically non-existent (OECD 1999, p. 24). It could well be that the Convention has also deterred some transboundary movements, which would have actually been in the environmental interest - for example, movements to environmentally preferable recycling or waste disposal facilities (ibid.). The notification requirements could lead to a more environmentally sound management of transboundary movements of hazardous waste, but much depends on how effectively it will be administered.

## **2.4 The Rotterdam Convention**



The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) was adopted and opened for signature in Rotterdam in September 1998. It is a MEA in pursuance of chapter 19 of the Agenda 21 on 'Environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products'.<sup>2</sup> Its objective is 'to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use' (Art. 1). It needs to be ratified by 50 countries and is not in force yet.

Annex III of the Convention specifies the chemicals which are subject to the Prior Informed Consent (PIC) procedure (initially, Annex III encompasses 30 chemicals). This means, that a country may only export one of these chemicals to another country if it has sought and received the PIC of the importing country. Furthermore, the exporting country has the duty to provide for 'labelling requirements that ensure adequate availability of information with regard to risks and/or hazards to human health or the environment, taking into account relevant international standards' (Art. 13:2). This applies to all chemicals listed in Annex III, all chemicals banned or severely restricted in the exporting country's territory (Art. 13:2) as well as to all chemicals subject to environmental or health labelling requirements (Art. 13:3). Exports of chemicals, the use of which is banned or severely restricted in the exporting country's territory, are subject to laborious information requirements for export notification as laid down in Annex V of the Convention.

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<sup>2</sup> Agenda 21 was concluded at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992.

Countries need not give their consent to import Annex III chemicals. According to Art. 10 of the Convention, each party has the right not to consent to import or merely consent to import subject to specified conditions any of the chemicals contained in Annex III. However, if a country decides to ban imports or consent to import only under specified conditions, then according to Art. 10:9 it has to 'simultaneously prohibit or make subject to the same conditions' the import of the chemical from any other country and the domestic production of the chemical for domestic use. In other words, a country cannot ban or severely restrict imports of a chemical from one country, but not another, or ban or severely restrict imports of a chemical, but not domestic production.

## **2.5 A possible Agreement on Persistent Organic Pollutants**

At the time of writing, around 115 countries were negotiating the details of an international Agreement on Persistent Organic Pollutants (POPs Agreement). The agreement is supposed to become concluded at the fifth round of negotiations in December 2000 in Johannesburg and signed at a meeting in Sweden in 2001, but could be delayed if disagreements cannot be resolved until then. The objective of the agreement is the eventual elimination of ten POPs - aldrin, chlordane, DDT, dieldrin, endrin, heptachlor, hexachlorobenzene, mirex, polychlorinated biphenyls (PCBs), and toxaphene - with limited exceptions for DDT for use against malaria and for existing uses of PCBs. POPs are considered of special danger to human health and the environment as they are persistent and can accumulate in the environment and therefore passed on from one generation to the next. A POPs Agreement, if successfully concluded, might include a provision, which bans not only the domestic use and production of these in the territory of parties to the agreement, but also their export and import with all other countries, parties and non-parties to the agreement, except maybe for the purpose of environmentally sound destruction or disposal of POPs (see the draft negotiation text in UNEP 2000).

## **2.6 The Convention on Biological Diversity**

The Convention on Biological Diversity (CBD), which was one of the few tangible results of the United Nations Conference on Trade and the Environment (UNCED) in Rio de Janeiro in 1992, has as its objectives ‘the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources’ (Art. 1). At the time of writing it had 175 parties, that is practically universal membership with the notable exception of the US, which has signed, but not ratified the Convention. Only three countries are WTO members, but not parties to the Convention.

The CBD does not explicitly provide for trade measures, but it can have important trade implications in restricting access to genetic resources: ‘Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation’ (Art. 15:1). However, parties ‘shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention’ (Art. 15:2). Access should be ‘on mutually agreed terms’ (Art. 15:4) and ‘subject to prior informed consent of the Contracting Party providing such resources’ (Art. 15:5).

## **2.7 The Kyoto Protocol and potential follow up conventions**

In its current form the Kyoto Protocol, which sets up obligations for so-called Annex 1 countries (OECD-countries, the economies in transition in Eastern Europe and the Russian Federation) to reduce emissions of greenhouse gases, does not contain substantial trade provisions. In the words of Brack, Grubb and Windram (2000, p. 127): ‘It is almost an exaggeration to say that the non-compliance provisions of the climate change

regime are in their infancy - they are not really yet developed that far.' However, it will be almost inevitable that future amendments to the Protocol will introduce trade measures in the form of trade bans with non-parties and non-complying parties.

### **3 Trade measures in MEAs and WTO rules: Do they conflict?**

No WTO member has ever challenged any trade measure another WTO member had purportedly undertaken in compliance with an MEA. Hence no relevant WTO case law exists and no binding interpretation exists - as of yet. Nevertheless one can examine whether trade provisions in MEAs appear to clash with WTO rules. The answer is, as we will show now, that they might do, as the potential for conflict clearly exists.

Most MEAs with explicitly mandated or allowed for trade provisions restrict trade between parties and non-parties or even trade between parties. These restrictions certainly violate the general most favoured nation treatment obligation in GATT Art. I. If these restrictions take the form of import or export bans, export certificates or access restrictions rather than duties, taxes or other charges then they might violate the general elimination of quantitative restrictions obligation in GATT Art. XI. If countries in alleged pursuance to or compliance with MEAs applied regulations or taxes differently to imported than to domestic companies, then they might also violate their national treatment obligation contained in GATT Art. III. If they applied product standards or sanitary or phytosanitary measures that affected domestic and foreign producers differently they might violate their obligations under the Agreement on Technical Barriers to Trade (TBT Agreement) or the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). However, the trade provisions contained in MEAs, which appear to violate one or the other GATT obligations, can still be considered WTO consistent if they are covered by the general exceptions of GATT Art. XX or similar provisions in one of the other WTO agreements. Art. XX reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

In the following examination whether trade measures are covered by one of the exceptions in GATT Art. XX, we will only look at the Montreal Protocol, CITES, the Basel Convention and the CBD, the most relevant MEAs here in force.

The ozone layer as well as endangered species and biodiversity (genetic resources) constitute an exhaustible natural resource in the meaning of Art. XX(g). The article further demands that trade measures ‘are made effective in conjunction with restrictions on domestic production or consumption’, which is true for the Montreal Protocol, the CBD and the Basel Convention. However, problems could arise with respect to CITES as its provisions for the regulation of domestic wildlife use contrary to its provisions for the regulation of international wildlife trade are rather rudimentary. Trade measures must also ‘relate to’ the conservation of an exhaustible natural resource, which has been interpreted by GATT/WTO dispute settlement as ‘primarily aimed at’ such conservation (see Neumayer 2000). All three MEAs should pass this test as their very aim is the conservation of an exhaustible natural resource. However, a problem could arise if a WTO panel interprets the objective of trade measures, especially in the Montreal Protocol and the CBD, narrowly as merely broadening the participation of countries in deterring free-

riding, rather than directly protecting an exhaustible resource. Could these trade measures then still be considered ‘primarily aimed at’ conservation?

All four MEAs furthermore purport to protect either human, animal or plant life or health in the meaning of Art. XX(b). The article requires further that trade measures are ‘necessary’ for such protection, which has been interpreted by GATT/WTO dispute settlement as requiring that ‘no alternative measures either consistent or less inconsistent’ with WTO rules exist (ibid.). This requirement could potentially pose an insurmountable hurdle for all four MEAs. Could taxes or transferable emission permits have phased out ODS as effectively and rapidly as the trade restrictions contained in the Montreal Protocol? Could direct harvest and wildlife management regulations prevent extinction of endangered species similarly to the trade restrictions contained in CITES? Are trade restrictions really necessary to prevent environmental and health damage from transborder shipments of hazardous waste? Given the ‘limited capabilities of the developing countries to manage hazardous wastes and other wastes’ (preamble of Basel Convention), is a complete ban of trade in hazardous waste between OECD- and non-OECD countries really necessary? Are there really no less GATT inconsistent measures for the preservation of biodiversity than restrictions on access to genetic resources? Would less GATT inconsistent measures need to be equally effective as the trade restrictions to be considered alternatives?<sup>3</sup> It would be beyond the scope of this article to attempt to an-

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<sup>3</sup> A GATT panel in the case ‘Thailand - restrictions on importation of and internal cigarettes’ (GATT 1990) ruled that a measure is to be considered as necessary in the sense of Art. XX(b) ‘only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it’, which a GATT contracting party can ‘reasonably be expected to employ’ to achieve its policy objectives. This important ruling was unclear about one important point: Are other measures, which are GATT consistent or less inconsistent, considered as alternatives only if they are equally or similarly effective? Or are they already considered as alternatives if somehow they further the policy objective,

swer these questions. Suffice it to say here that it is open to debate at least whether the trade measures contained in the four MEAs could pass the ‘necessity’ test of Art. XX(b).

If trade measures in MEAs are covered by one of the exceptions in Art. XX(b) or XX(g), they must still pass the requirements as set by the preamble of the article. This seems to be rather easy with respect to the requirement that these measures are not applied in a manner which would constitute ‘a disguised restriction on international trade’, as the four MEAs are explicit and rather transparent in their provision for trade restrictions (least so the CBD, however). It is more doubtful, but still arguable, that they are ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’. This clause is usually interpreted by GATT/WTO panels as the requirement to carefully balance the environmental objectives of the trade measures with the trade rights of negatively affected WTO members. As all four MEAs have very widespread multilateral support one can argue that the international community of nation states has given their blessing to the objectives contained in the MEAs and to the trade measures they employ. Furthermore, the Montreal Protocol, CITES and the Basel Convention do not discriminate against non-parties as such as these can still enjoy all the trade benefits of parties if, in spite of remaining non-parties, they comply with the substantial obligations of the agreement. The CBD does not have such a provision for non-parties. However, its al-

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even if they are much less effective than the disputed measures? From an environmental point of view the latter interpretation is to be rejected. A second measure cannot really be considered an alternative if it is far inferior in its environmental (or health protection) effect. Unfortunately, other GATT/WTO panels, which have interpreted the term ‘necessary’ in Art. XX(b), have similarly failed to be clear on this point (see WTO 1998c, pp. 13f.).

most universal membership means that the number of non-parties is very small indeed. From this perspective, one could argue that the trade measures in all four MEAs would have a good chance to pass the preambular test of Art. XX.

However, things are somewhat different with respect to the amendment to the Basel convention banning trade in hazardous waste between OECD- (Annex VII) and non-OECD-countries (non-Annex VII). This amendment bans trade between countries on the rather arbitrary criterion of whether or not they are members of an international organisation (the OECD) and encountered substantial opposition by some members of the Basel Convention. Israel, Slovenia and Monaco wanted to join the Annex VII countries, but, as non-OECD members, were not allowed to do so (Krueger 1999, p. 75) Should this amendment ever come into force, it could therefore be the most likely candidate for a future trade dispute involving trade provisions of MEAs.

So far we have focussed on trade measures between parties and either non-parties or non-complying parties as specifically mandated or explicitly allowed by the MEAs. We have seen that while the potential for WTO inconsistency clearly exists, it is far from clear that these measures actually are WTO inconsistent. Things are different with respect to measures a MEA party might undertake without specific mandate or permission contained in a MEA. Such a country could still argue that while these measures are not specifically mandated or allowed for by a MEA they are nevertheless undertaken in pursuance and compliance of mandated MEA obligations. Whether these would pass scrutiny for WTO consistency is much less clear and cannot be answered in general as the answer very much depends on the concrete measure undertaken and the manner in which it was applied.

#### **4 Reconciling trade measures in MEAs and WTO rules**



Given that the potential for conflict between the trade provisions in MEAs and WTO rules exists, it is pertinent to examine different options for dealing with this potential.

#### **4.1 Wait and see**

The perhaps easiest way to deal with the potential for conflict is to do nothing for the time being and to only embark on policy reform if it turned out to be necessary in the future.

*Assessment:* No trade provision contained in MEAs has ever been challenged before GATT/WTO. Even if it was, a panel or the appellate body might, as argued above, still uphold the provisions. The most likely potential future dispute will not be about mandated or specifically allowed trade provisions, however, but about measures, not demanded or specifically allowed, but undertaken by a country in alleged pursuance to and compliance of a MEA. But even in this case it might be best to wait and see how a WTO panel and the appellate body would rule. If it turned out that in either case these came to a conclusion that is unsatisfactory from an environmental perspective, one could still have recourse to one of the other options analysed below. This wait and see approach is therefore very much influenced by the idea that something that is not obviously broken does not need fixing.

Wait and see is the preferred option of the vast majority of developing countries (WTO 1996), but is regarded as inadequate by most developed countries (for example, Canada 1999, European Communities 1999, Norway 1999), with the possible exception of the US (BNA 2000). Always suspicious towards the developed countries' inclination to protect themselves against cheaper imports from poorer countries and to negotiate multilateral investment and trade rules in their favour (see Neumayer 1999a), they see the more far-reaching options discussed below as potentially biased against their trading rights in their de facto effects, if not in their design. On the other hand, many observers

have spoken out against the wait and see approach. WWF (1996, p. 10), for example, suggests that the wait and see approach ‘calls for political reinforcement of the current uncertainties and trade biases of the WTO and thus of their potential “chill” effect on the use of environmentally effective trade measures in MEAs’.

I would concede that the ‘wait and see’ approach does not solve the conflict. On the other hand, the conflict so far exists merely potentially and wait and see is the best way to find out whether the conflict will actually materialise. In as far as a dispute between parties and non-parties to a MEA is more likely to arise before the WTO than a dispute between parties to a MEA (where countries can use the consultation and, if existent, the dispute settlement facilities of the MEA), then the likelihood of a WTO challenge is very small indeed. As noted above, with the exception of the Basel Convention there is only a handful of countries which are not parties to these arguably most important MEAs, but members of the WTO. Furthermore, for many countries non-ratification has other reasons than an opposition to the MEA and might still come about as time passes by. Maybe more importantly still, the vast majority of countries, which are WTO members, but not parties to one of the four MEAs, are small and very poor developing countries that have never so far initiated any dispute before the WTO and are highly unlikely to do so related to trade provisions contained in one of the MEAs.<sup>4</sup>

Furthermore, it might be the only option realistically available. As will be discussed further below, all other options need the approval of most, if not all, developing country WTO members and they strongly favour the current status quo. Further below I will argue in favour of amending the GATT to provide a MEA savings clause along the blueprint given by NAFTA. This could be achieved in the next round of trade negotia-

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4 The most conspicuous exception being of course the United States, a non-party to both the CBD and the Basel Convention.

tions if developed countries can convince the developing countries of the benefits of such an approach (or bribe them with concessions in other areas to concord). Until then, the best and indeed the only option is wait and see.

#### **4.2 Require environmental experts on panels and appellate bodies**

A second option that is going a bit beyond the wait and see approach is to change the composition of WTO panels and appellate bodies such that in any potential future dispute involving trade provisions of MEAs one or more of the panelists must have explicit expertise in environmental matters in addition to expertise in international trade law. This proposal addresses, at least with respect to MEAs, a common concern shared by many: that trade lawyers with no particular expertise in environmental matters decide on environmentally related disputes. The hope would be that with the infusion of environmental expertise the panel might come to decisions that take environmental aspects better into account.

*Assessment:* To require environmental experts on panel and appellate bodies is neither necessary nor sufficient for solving conflicts between trade provisions in MEAs and WTO rules. Already now panels have the right to seek information from outside expert groups (Dispute Settlement Understanding Art. 13) and they actually do so. The panel in the shrimp/sea turtle case, for example, has confronted five environmental experts with an exhaustive list of investigating questions (WTO 1998a). This together with the possibility of environmental NGOs to submit position papers, so-called *amicus curiae* briefs, as explicitly allowed for by the appellate body in the so-called shrimp/sea turtle case (WTO 1998b), should guarantee sufficient provision of environmental expertise. Furthermore, in past dispute settlements it does not appear that decisions, which were regarded by some as environmentally unfriendly, were taken because of a lack of

environmental expertise, but rather because of a specific legal interpretation of WTO rules.

#### **4.3 Certification by MEA secretariat**

MEAs could be designed such that their secretariats have the option to certify trade measures undertaken by countries in alleged pursuance of or compliance with a MEA (Marceau 1999, p. 150). The idea is that such certification could serve as further evidence in a potential future dispute that the trade measure is genuinely undertaken for the alleged objective.

*Assessment:* This seems to be a good idea that can lead to some further clarification should a future dispute arise. However, this option stops a long way short of reconciling the conflict itself.

#### **4.4 Restricting access to WTO dispute settlement**

The Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding (DSU)) could be amended to the effect that countries, which are both members to a MEA and to the WTO, are either required to settle their dispute via the dispute settlement mechanism of the MEA and would therefore be prohibited from entering the WTO dispute settlement process or would be required to try to exhaust the possibilities of MEA dispute settlement first before having recourse to WTO dispute settlement. Amendment of the DSU can only be undertaken by consensus, however (Art. X:8 of the Agreement Establishing the WTO).

*Assessment:* This option is not very helpful for two reasons: First, dispute settlement in MEAs is usually institutionally weak with no streamlined timetable and no enforcement mechanism via retaliatory and cross-retaliatory trade sanctions as existent in the WTO system. Some MEAs even do not have provisions for dispute settlement. WTO

members might therefore be more than hesitant to forgo their right to challenge trade measures before the WTO either completely or until the dispute settlement mechanisms of the relevant MEA are exhausted. Second, and more importantly, this option can only apply to cases where both countries are members to both the WTO and the relevant MEA. A future dispute is most likely to arise between two countries where only one country is a member of the MEA and imposes trade measures on the other country as a non-party to the MEA. As non-parties cannot challenge a trade measure before the MEA, they would automatically have to challenge the measure before the WTO.

#### **4.5 Temporary waiver**

Art. IX:3 of the Agreement Establishing the WTO provides for the temporal waiving of WTO obligations, which could be used to waive certain obligations with respect to trade provisions in MEAs. Waiving decisions should normally be taken by consensus, otherwise by a three-fourths majority. A waiver must be temporary with a fixed date of termination and is allowed in exceptional circumstances only (Art. IX:4).

*Assessment:* A temporary waiver is a non-option as it would not really solve any conflict. It does not provide any security or permanence. It is ad hoc and unpredictable (Schoenbaum 1997, p. 283; Rutgeerts 1999, p. 84).

#### **4.6 Interpretative statement**

According to Art. IX:2 of the Agreement Establishing the WTO, the Ministerial Conference and the General Council of the WTO 'have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. An interpretation becomes adopted if it gains the support of three-fourths of WTO members. In 1996 the EU had put forward a proposal for an interpretation of Art. XX(b) such that, under certain conditions, a trade measure undertaken by a country in pursuance of an

MEA would automatically be regarded as ‘necessary’ in the meaning of the article and would therefore merely have to pass the test of the preamble to Art. XX (WTO 1996, p. 5).<sup>5</sup> The conditions were that the ‘MEA was open to participation by all parties concerned with the environmental objectives of the MEA, and reflected, through adequate participation, their interests, including significant trade and economic interests’ (ibid.).

*Assessment:* An interpretative statement to GATT articles has the important advantage over the amendment of GATT articles discussed below that it does not need ratification. However, it is somewhat unclear how far reaching an interpretative statement can be. This is because Art. IX:2 of the Agreement Establishing the WTO states that the paragraph allowing interpretative statement ‘shall not be used in a manner that would undermine the amendment provisions in Article X’. Even the EU proposal might be contested by many as calling for an amendment to GATT Art. XX rather than an interpretation. To be on the safe side, it seems therefore much more appropriate to go the way via amending GATT articles if one wants to have substantive change.

#### **4.7 Amendment to GATT**

The most far-reaching option is to amend the GATT. A proposal for amendment needs a two-thirds majority and has effect only for those Members that have accepted the amendment (Art. X:3 of the Agreement Establishing the WTO).<sup>6</sup> The amendment would need ratification by the accepting countries (Wold 1996, p. 916). GATT could be amended in a number of ways. For example:

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5 Because the proposal was never formally submitted to the Committee on Trade and Environment (CTE), it is called a ‘non-paper’ in WTO nomenclature.

6 Amendments to GATT Art. I and II need consensus (Art. X:2).

- Brack (1996, p. 82) suggests the introduction of a ‘sustainability clause’, which would set out ‘agreed principles of environmental policy - such as the polluter pays principle and the precautionary principle - against which trade measures can be judged’.
- Several countries have proposed to establish a number of pre-specified ex ante requirements for a MEA to be granted exception from WTO obligations (see WWF 1996 and WTO 1996). These requirements were supposed to be more or less binding and were regarded with suspicion by environmental NGOs such as the WWF as they would introduce ‘new criteria, guidelines, or legal tests that are grounded in trade, not environment, policy considerations’ (ibid., p. 10). WWF, for its part, has called for a general exception for MEAs without providing any detailed proposal, however (ibid., pp. 29ff.).
- Hudec (1996, pp. 120-142) has proposed a new exception to Art. XX, which would introduce a two-tier approach modelled after the existing Art. XX(h), which excepts international commodity agreements. According to this proposal, in its first part such a new exception would lay down pre-specified criteria as to the substance, structure and negotiating procedure a MEA would need to fulfill to qualify for the exception. In its second part, the new exception would allow the submission of any MEA to WTO members for approval and granting of the exceptional status, which would be possible whether or not the criteria in the exception’s first part were met or not. Similarly, Housman and Zaelke (1995, pp. 324-327) suggest a number of criteria for a MEA to be protected from challenge before the WTO.
- A similar suggestion, but one going one step beyond GATT amendment, is to conclude a special agreement on trade-related environmental measures (TREMAs) (suggested, for example, by Cosbey (2000)). In its chapter on MEAs, the TREMs Agree-

ment would have to specify ‘what constitutes an MEA under the agreement, how different types of trade measures should be treated, and what types of complementary measures must be applied under what circumstances’ (ibid., p. 5).

- A final possibility to amend GATT is to introduce a MEA savings clause in following the blueprint set by NAFTA’s Art. 104, which governs the relation to environmental and conservation agreements. Its first paragraph states that ‘in the event of any inconsistency between this Agreement and the specific trade obligations set out in’ CITES, the Montreal Protocol, the Basel Convention and two further bilateral agreements between NAFTA partners ‘such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.’ Its second paragraph opens the possibility for the inclusion of further future MEAs in stating that ‘parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement’.

*Assessment:* The ‘sustainability clause’ will mitigate, but will not solve the conflict. The Agreement Establishing the WTO already contains a commitment to sustainable development in its preamble. Art. 31:3(c) of the Vienna Protocol on the Law of Treaties requires to take into account other ‘rules of international law applicable to the partners’ and it is standard practice of panels and appellate bodies to take international environmental principles such as the polluter pays principle into account.

To establish pre-specified criteria that MEAs must comply with in order to qualify for exception of GATT obligations is, in my view at least, inferior to a MEA savings



clause following the blueprint given by NAFTA. The exact wording of these criteria will be highly contested and open to interpretation. The criteria necessarily need to be kept non-specific. For example, it would not make much sense to specify the exact number of parties or the range of interests to be represented as this would have to differ from MEA to MEA. Equally contested will be who has the right to decide on whether the criteria are fulfilled.

The much clearer and cleaner approach is to explicitly state which MEAs are exempted. This could take the form of either an environmental side agreement (a special agreement or a MEA code in WTO language) or the form of a simple MEA savings clause in a re-negotiated GATT. During the next round of trade negotiations the CBD, CITES, the Basel Convention and the Montreal Protocol including their amendments could be explicitly exempted. The same holds true for other MEAs with similar widespread international participation. What about future MEAs? To require consensus for inclusion of a future MEA might be appropriate for an agreement like NAFTA with only three partners. It would be too demanding for the WTO, however. I would suggest that other MEAs also become exempted if three fourths of WTO members are in favour. Such a decision rule would ensure that no MEA is exempted if the majority of developing countries, the major proponents of the wait and see approach, is not in favour. On a case by case basis countries could decide whether they regard the MEA in question to be satisfactory on such criteria as number of parties, range of interests represented or existence of a fair compromise between trade measures (sticks) and financial and technological assistance (carrots) to grant them exemption from WTO obligations.

Against such a proposal, Caldwell (1994, p. 192) raises the fear that a MEA savings clause might reinforce 'the perception, particularly frustrating to the environmental community, that the GATT and the goals of liberalized trade it represents have priority over all other concerns'. Nothing could be more wrong than this suggestion, however,

as a MEA savings clause actually gives precedence for MEAs over the GATT. It is therefore the environmental objective of the exempted MEAs that have priority over GATT's goals of liberalized trade, not vice versa.

Note that for those MEAs, which do not become explicitly exempted by WTO members, no presumption is implied that measures taken in their pursuance could successfully be challenged before the WTO. Those trade measures could still be justified under GATT Art. XX or other provisions in one of the WTO Agreements and the normal rules of dispute resolution would apply. Also, should a WTO panel or an appellate body ever find a trade measure taken in pursuance of a MEA in violation of WTO rules, there would be enormous pressure on countries to exempt the MEA in retrospect. Non-exemption of a MEA at some point of time therefore does not leave the MEA without any protection from being challenged before the WTO.

## **5 Conclusion**

If, as suggested by this article, the potential for a clash between trade measures employed in MEAs and WTO rules exists, then it will be just a matter of time until a country will challenge such a measure. When this will be is difficult to say. It could well be within the next two years or so, but it could also be that nothing happens for at least another decade. Even if a measure became challenged it is far from clear that a WTO dispute panel or appellate body would find the measure in conflict with WTO rules. Obviously, much depends on the concrete measure and its design, but as suggested in this article there are good arguments to presume that such a panel or body might find the measure to be covered by one of the environmental exceptions contained in GATT Art. XX. It is reasoning such as this that makes the 'wait and see' approach so attractive. Most, especially developing, countries therefore support this approach.

In spite of its attractiveness, ‘wait and see’ does not provide a solution, however. It is an unimaginative and short-sighted approach. Instead I would submit that we need to be more anticipative and seek a more long-term solution. Such a solution is the MEA savings clause proposed above. It is simple and clear, leaving very little room for ambiguity. As it would need the consent of the vast majority of developing countries, it cannot be denounced as biased against their interest, as so many other WTO provisions have in the past (see Neumayer 1999b). Combined with the possibility for specific trade measures undertaken by countries to become certified by MEA secretariats it offers the best policy option to reconcile trade measures in existing and future MEAs with WTO rules.

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