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WTO-Related Matters in Trade and Environment: Relationship Between WTO Rules and MEAs

Aparna Sawhney

October 2004

INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS
Core-6A, 4th Floor, India Habitat Centre, Lodi Road, New Delhi-110 003, www.icrier.org

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Content

List of Tables

Foreword

Today the environment has been mainstreamed into the multilateral trading system, and has significant implications for shaping future rules under the WTO regime. A critical negotiation issue in the Doha Ministerial Declaration is the relationship between existing WTO rules and specific trade obligations pursuant to multilateral environmental agreements.

This study examines each of the questions that have arisen with regard to understanding the relationship between specific trade obligations under certain multilateral environmental agreements (MEAs) and WTO environmental provisions in the negotiations under paragraph 31(i) of the Doha Ministerial Declaration: When are restrictive trade measures on environmental grounds justifiable under the GATT Article XX exceptions? In particular, how has the GATT Article XX been interpreted in environmental trade disputes? What is a MEA, and what is the status of specific trade obligations under certain MEAs vis-a-vis WTO trade rules? What is the current state of the negotiations in the Committee on Trade and Environment Special Sessions on this issue? What is India's current position and an appropriate future strategy?

The paper analyzes how environmental provisions have permeated into the multilateral trading system over the last two decades, through the incorporation of environmental provisions under new WTO agreements, and a wider interpretation of the GATT Article XX exceptions in the post-WTO regime through trade-environment disputes.

The analysis considers six MEAs in detail: the Convention on International Trade in Endangered Species of Wild Flora and Fauna; the Montreal Protocol on Substances that Deplete the Ozone Layer; the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal; the Cartagena Protocol on Biosafety; the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the Stockholm Convention on Persistent Organic Pollutants. The paper examines the trade provisions within the six MEAs and their compatibility with existing GATT/WTO rules.

The paper then takes up the work under the Committee of Trade and Environment on the relationship between MEAs and WTO rules; the current state of the negotiations under Paragraph 31 (i) Doha Ministerial Declaration; and the position taken by India at the WTO. Finally, the study suggests a way forward for India in the negotiations on the relationship between MEAs and WTO rules in light of the current developments, so that her trade interests are not hurt.

The study should contribute to a deeper understanding of the issues involved in the WTO debate on the subject, among policy makers, researchers and members of the business community in India.

We are very grateful to the Sir Ratan Tata Trust for funding our research on WTO issues.

Arvind Virmani
Director & Chief Executive
ICRIER

October 2004

WTO-Related Matters in Trade and Environment: Relationship Between WTO Rules and MEAs

Aparna Sawhney*

I Introduction

Environmental issues began to be systematically addressed in the WTO following the Decision on Trade and Environment taken towards the end of the Uruguay Round at Marrakesh in 1994. The Committee on Trade and Environment was established in the same year, with the explicit mandate to resolve environmental issues in the trading system. Some new agreements under the WTO also contained environmental provisions. In 2001 the environment was explicitly put on the negotiating agenda in the Doha Ministerial Declaration in 2001. Today the environment has been mainstreamed into the multilateral trading system, and has significant implications for shaping future rules under the WTO regime.

Indeed, environment is a horizontal issue cutting across sectors and disciplines within the multilateral trading system of the WTO. In keeping with the principle of supporting sustainable development along with free trade, as set out in the Preamble of the WTO, the environment is significant in the WTO negotiation agenda of goods as well as services.

I.1 Trade and Environment

The trade and environment interface has typically been analyzed in the literature in two parts: first, the effect of trade policy on environment; and second the effect of environmental policy on trade. Under the first, the pertinent question has been whether trade liberalization leads to environmental degradation; and under the second, the pertinent question has been whether more stringent environmental policy has a detrimental (reducing) effect on trade.

The effect of trade liberalization on the environment is subdivided into three categories (i) product effect, (ii) structural effect, and (iii) scale effect.[1] (i) The *product effect* of trade is positive when trade liberalization expands the market for goods produced in an environmentally sound manner and/or environmental services like resource saving technology. Negative product effect results when goods directly harmful to the ecosystem are exchanged internationally. (ii) The *structural effect* of trade is the trade-induced change in the industrial composition and consumption, and depends on the pollution intensity of national output. The effect on the environment is positive if expanding export sectors are less polluting on average than contracting import-competing sectors; and negative if the opposite holds. (iii) The *scale effect* of trade results from enhanced economic activity, including higher levels of production, resource extraction, and transportation. The impact on the environment is typically negative due to the greater pollution generated.

In particular, the scale effect is accompanied by an increase in total production and income, and the latter can have a positive impact on the environment through the increased demand for better environmental quality (acting directly through market, as well as through enhanced demand for environmental regulations from the voting population). The *net* environmental effect of trade liberalization is the sum of the product, structural, scale and income effects, and can be either positive or negative depending on the magnitudes of the component effects.

Apart from the environmental effects mentioned above, trade liberalization can also have *regulatory effect*, where existing environmental policies of a liberalizing economy are changed to facilitate trade. The regulatory effect of trade is likely to be positive since greater trade is associated with stronger domestic environmental policies (say harmonization of environmental standards, or increased enforcement of existing norms).

The adverse environmental effect of trade noted under *structural effect* can take place only in the presence of market failures and regulatory failure. In the presence of an existing market failure, the environmental costs of production and consumption are not adequately reflected in the market prices, thus free trade can accentuate the adverse environmental effect (incorrect resource utilization of an economy) by expanding production in these sectors. Alternatively, regulatory failure can also be the source of the problem, when government policies aimed to encourage certain economic activities have adverse environmental impact, as in the case of subsidies for water or chemical inputs in agriculture that can lead to excessive extraction of ground water or overuse of chemical pesticides resulting in drop in the water table and chemical runoff.

Thus the root cause of environmental degradation following trade liberalization is not trade per se, but the underlying

* *I would like to thank Professor Anwarul Hoda for his valuable insights and comments on an earlier draft. I would also like to thank Jhumur Sengupta of ICRIER and Gayatri Srinivasan of IIMB for the initial research assistance in this project.*

[1] *For details see Stevens (1993) and Grossman and Krueger (1991).*

market or regulatory failures. A WTO Secretariat Report on Trade and Environment (WTO 1999) recognized the theoretical and empirical literature that trade is rarely the root cause of environmental degradation (except under the scale effect) and that most environmental problems result from polluting production processes, certain kinds of consumption, and the disposal of waste products. The WTO report observed that *trade would unambiguously raise welfare if proper environmental policies were in place*. An expansion of trade can conceivably produce large negative environmental effects to outweigh the conventional benefits from liberalization only if a country lacks domestic environmental policy that reflects its environmental values (GATT 1992: 2). Indeed, a lack of appropriate environmental policies creates problems not just in the trade sector, but through every facet of a country's economic life (ibid: 3).

The second aspect of the trade-environment interface, namely the trade effect of environmental policy, raises the question of competitiveness in international trade and whether divergent environmental policies across nations lead to the emergence of pollution havens in developing countries (which are typically lagging behind in environmental regulation compared to the developed countries). The empirical literature on competitiveness indicates that the cost implications of more stringent environmental regulations are minor. Since pollution abatement costs of industries in OECD countries are only a few percentage points of the total production costs, it is unlikely that relatively lower environmental standards would be the moving force for migrating industries (Jaffe et al 1995). A study of US trade by sectors noted that, overall abatement costs being small, it did not have any significant impact over time on the revealed comparative advantage (Ferrantino 1997). In particular, the pollution abatement costs in the US increased from 0.3% of output value in 1970s to 0.8% in 1992 for manufactures (only the capital expenditure for abatement was significant and equal to 10% of total capital costs). On the whole, the composition of foreign investments received by developing countries (net recipients of foreign direct investment) is *not* biased towards polluting industries but rather to labour-intensive industries that are less polluting on average.

Thus the harmonization of environmental standards across countries for local pollutants is not supported on economic grounds, since the competitive effects are minor. Even on ecological grounds, it is not efficient to harmonize environmental standards across countries for local pollution problems, since the resource endowment, buffering capacity of the local ecosystem and preferences are likely to be different across countries.

Harmonization of environmental standards is only relevant for transboundary or global pollution problems, and it has been widely recognized that international cooperation and good governance at the international level are necessary to protect global commons. This is the basis for establishing multilateral environmental agreements (MEAs) – to promote cooperation and shared responsibility to protect the global commons.

The first report of the Committee on Trade and Environment recognized that trade measures based on specifically agreed-upon provisions may be needed in certain cases to achieve the environmental objectives of an MEA, particularly *where trade is related directly to the source of an environmental problem* (emphasis added, WTO 1996: 37). Today, the WTO has become the focal point for resolving the trade-environment interface, especially with regard to trade provisions within MEAs, perhaps because it has "an integrated adjudication mechanism backed by trade sanctions as the ultimate enforcement tool" (WTO 1999). The cooperative model of the WTO, based on legal rights and obligations, seems to offer a potential model for a new global architecture of environmental cooperation. In 1999 a WTO Secretariat report noted that "the issue is how to reinvent environmental polices in an ever more integrated world economy so as to ensure that we live within ecological limits. The way forward, it would seem to us, is to strengthen the mechanisms and institutions for multilateral environmental cooperation, just like countries 50 years ago decided that it was to their benefit to cooperate on trade matters."

I.2 MEAs and Trade Measures

There are about three hundred international environmental agreements existing today (considering amendments as separate agreements, since all Parties to the original agreement sometimes are not Party to subsequent amendments),[2] and about thirty among these contain trade measures. Recently the WTO Secretariat noted that there are 238 international environmental agreements under the UNEP, with 28 of them containing a trade measure or provision that can impact trade (WTO 2003: 127).[3] However, not all of the international environmental agreements are

[2] *The complete list of multilateral environmental agreements and states, which are party to the agreements are available in the following websites: http://www.ecolex.org, which lists more than 400 such MEAs; and http://sedac.ciesin.columbia.edu, which lists over 300 MEAs.*

[3] *For instance, the Convention on the Conservation of Antarctic Marine Living Resources (1980) does not contain trade measures, but provisions related to trade, in that each Party needs to identify the origin of a Dissostichus species imported into or exported from its territories was caught in a manner consistent with the treaty's conservation measures. Each shipment of the fish requires a validated catch document.*

multilateral in the true sense of the term (i.e. with a worldwide participation), since several environmental initiatives are regional in nature.[4]

Multilateral environmental agreements (MEAs) have evolved over the years as a cooperative means of protecting and conserving environmental resources or controlling for pollution that are transboundary or global in nature. The Agenda 21, adopted in 1992, noted that since MEAs are based on international consensus, they provide the best way of coordinating policy action to tackle global and transboundary environmental problems cooperatively.

The MEAs have independent governing systems, and typically have organizational aspects including: (i) enabling their members to prepare, evaluate and make policy decisions; (ii) providing some kind of review of implementation, including monitoring and settlement of disputes; and (iii) providing support for implementation, including capacity building and resource transfer (Oberthur 2002: 12).

Trade measures have been incorporated in MEAs where uncontrolled trade can potentially lead to environmental damage (say, loss of biological diversity for species threatened with extinction as in the Convention on International Trade in Endangered Species), or even as a means of enforcing the agreement and prevent free-riding by banning trade with non-parties (as in the Montreal Protocol).

The trade measures in MEAs include a wide range of measures including monitoring of through export-import permits and consents; identification label requirements; and export-import bans in specific products and states. While some of the trade measures are outlined within the agreements as specific obligations, other trade measures may be neither specific nor mandatory. It is pertinent to note that, in 1992 the GATT Secretariat had observed "as long as participation in a MEA is not universal, trade provisions will be, like negative trade incentive, discriminatory" (GATT 1992: 31).

The current WTO negotiations on the relationship between trade obligations pursuant to MEAs and the multilateral trade rules have been driven by concerns of the Members about the WTO consistency of certain trade measures applied pursuant to some MEAs, especially those which are discriminatory trade restrictions.

In the clarification of the relationship between MEAs and WTO rules, two aspects are important to note: First, trade provisions in MEAs are typically in the form of import or export bans, which are in principle GATT/WTO incompatible. Trade bans are allowed in the GATT only under the general exception clause of Article XX (paragraphs b, d, and g). Second, trade provisions in some MEAs discriminate between Parties and non-Parties, and the implementation of those provisions could result in an inconsistency with the GATT principle of unconditional Most Favoured Nation Treatment (GATT Article I) in case all WTO Members are not Parties to an MEA. Till date, there has been no formal dispute under the WTO that could settle the question of whether and under what circumstances trade measures in MEAs are consistent with WTO rules. Thus the relationship between MEAs and WTO rules remains an untested legal question (Pearson 2000: 297).

I.3 The WTO Negotiation Agenda on the Environment

The environmental agenda of the WTO was initiated with the work programme of the Committee on Trade and Environment (CTE), established under the Decision on Trade and Environment in 1994 at the end of the Uruguay Round. The environment explicitly featured in the negotiation agenda for the first time in the Doha Ministerial Declaration (DMD) in 2001. The inclusion of the environment in the WTO negotiation agenda was pushed by primarily the European Union, and supported by Switzerland, Norway and Japan.

The current negotiation agenda on environment as outlined in the DMD draws on some of the items of the CTE that have been under discussion since 1995. At Doha, the Members agreed that in "enhancing the mutual supportiveness of trade and environment" negotiations would cover:

(i) The relationship between existing WTO rules and specific trade obligations (STOs) set out in the multilateral environmental agreements. 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 will 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.

[4] *For instance, the Phyto-Sanitary Convention for Africa 1967 is open to only countries of the Organization for African Unity, and the Convention for the Conservation and Management of the Vicuña 1979 cover a species limited to a certain region of the world. (WTO 2003: 127)*

(Paragraph 31 i and ii, DMD)[5]

The Doha Ministerial Declaration also clarified that the negotiations on the relationship between STOs contained in MEAs and WTO rules is to be "compatible with the open and non-discriminatory nature of the multilateral trading system", and should "not add to or diminish the rights and obligations of Members under WTO agreements, *in particular the Agreement on the Application of Sanitary and Phytosanitary Measures*" nor "alter the balance of the rights and obligations" (emphasis added, DMD Paragraph 32).

While the negotiation agenda in paragraph 31 of the Doha mandate is limited to only MEAs with specific trade obligations, the final clarification of the relationship will have significant impact on the interpretations of the GATT Article XX exceptions (for the protection of human, animal and plant health; and conservation of exhaustible natural resources); and of the term "sustainable development" in the Preamble establishing the WTO. In other words, the clarification of the relationship between multilateral environmental agreements and the multilateral trading rules is closely linked to the larger question of when and which restrictive trade measures may be considered to be WTO consistent on environmental grounds.

The unresolved issue regarding the relationship between trade measures in MEAs and WTO rules has also spilled over into the discussions among parties of some of the concerned MEAs. For instance, in the fourteenth meeting of parties of the Montreal Protocol in December 2002, a decision was adopted to "monitor developments in the negotiations of the World Trade Organization Committee on Trade and Environment in special session and report to the Parties" (Decision XIV/11). The Ozone secretariat was also requested to report to the Parties of the Protocol on meetings attended at the WTO, and any substantive contacts with the WTO Secretariat and its Committee Secretariats.

I.4 Objective and Outline of the Study

This study addresses the questions that have arisen with regard to the understanding the relationship between specific trade obligations under certain MEAs and WTO environmental provisions in the negotiations under paragraph 31(i) of the DMD. To begin with, when are restrictive trade measures on environmental grounds justifiable under the GATT Article XX exceptions? In particular, how has the GATT Article XX been interpreted in environmental trade disputes? What is an MEA, and what is the status of STOs under certain MEAs vis-a-vis WTO trade rules? What is the current state of the negotiations in the CTESS (Committee on Trade and Environment Special Sessions) on this issue? What is India's current position and an appropriate future strategy?

Section 2 briefly analyzes how environmental provisions have permeated into the multilateral trading system over the last two decades, through the incorporation of environmental provisions under new WTO agreements (like the Agreements on Technical Barriers to Trade; and Sanitary and Phytosanitary Measures), and a wider interpretation of the GATT Article XX exceptions in the post-WTO regime. Section 3 studies the trade provisions in selected MEAs and the associated environmental provisions in the WTO. The analysis considers six MEAs: the Convention on International Trade in Endangered Species of Wild Flora and Fauna; the Montreal Protocol on Substances that Deplete the Ozone Layer; the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal; the Cartagena Protocol on Biosafety; the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the Stockholm Convention on Persistent Organic Pollutants. Section 4 discusses the work under the CTE on the relationship between MEAs and WTO rules, as well as the current state of the negotiations under Paragraph 31 (i) DMD. Section 5 reviews the current position taken by India at the WTO discussions and the way forward. Section 6 concludes.

II Environment issues in the GATT and WTO

II.1 GATT and the Group on EMIT[6]

The only reference to environmental conservation in GATT 1947 was in paragraphs (b) and (g) of Article XX (General Exceptions), where departure from free trade could be made by a country provided the trade restriction was applied in

[5] *The third environmental item committed for negotiations by the members is the reduction/ elimination of tariffs and non-tariff barriers to environmental goods and services (para 31 iii, DMD). The WTO members also agreed to decide on the "desirability of negotiation" and clarification of WTO rules regarding the effect of environmental measures on market access with respect to developing countries; environmental provisions in the TRIPS agreement and labeling requirements for environmental purposes (para 32, DMD).*

[6] *This section largely draws from information in the "Early years: emerging environment debate in the GATT/WTO" (WTO website: http://www.wto.org)*

an non-discriminatory manner against a product harmful to health (human, animal or plant) or exhaustible natural resources. The issue of the environment began to be discussed systematically in the multilateral trading system much later in 1971. It was initiated in the run up to the 1972 United Nations Conference on the Human Environment in Stockholm, when the GATT Secretariat was asked to make a contribution. Consequently, the Secretariat prepared a study entitled "Industrial Pollution Control and International Trade", which examined the implications of environmental protection policies on international trade. The study indicated how environmental policies could become obstacles to trade as well as constitute a new form of protectionism namely, *green protectionism*. During the decades of seventies and eighties, the international focus remained on economic growth, social development and environment, being largely influenced by the 1972 Stockholm Conference.

A Group on Environmental Measures and International Trade (EMIT) was established in November 1971, based on suggestions by some of the GATT parties. The participation in EMIT was open to all GATT Members, and the group was to convene at the request of GATT Members. Yet no such meeting was called until twenty years later in 1991 in order to contribute to another international environmental conference scheduled in 1992, the United Nations Conference on Environment and Development (UNCED).

While the EMIT may have been defunct, the environment did feature in the trade negotiations during the Tokyo Round (1973–1979), when participants took up the question of the degree to which environmental measures (in the form of technical regulations and standards) could form obstacles to trade. The Standards Code or Tokyo Round Agreement on Technical Barriers to Trade was negotiated to ensure non-discrimination in the preparation, adoption and application of technical regulations and standards, and transparency of such technical barriers.

The Standards Code, adopted in 1979, sought to encourage the development of international standards and eliminate the trade barrier effects of technical regulations and standards (including packaging, marking and labelling requirements), in order to improve efficiency in the trade of industrial and agricultural products. The agreement recognized that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or *for the protection of human, animal or plant life or health, of the environment* or for the prevention of deception practices" (emphasis added) provided these were not applied in an arbitrary or unjustifiably discriminatory manner. While the GATT did not contain any reference to the environment explicitly (except for natural resources, human, animal and plant health in Article XX b and g), the Standards Code (a plurilateral agreement) clearly allowed a window for environmental protection through product specifications in case the traded product posed a threat to the environment. The WTO Agreement on Technical Barriers to Trade (a multilateral agreement) that came into effect in 1995 largely drew from the Standards Code, and further clarified the provision for environmental justification (see section 2.2).

While the Standards Code encouraged harmonization of technical specifications to international standards, it allowed parties to adopt their own technical regulations and standards/ certification systems, subject to a transparent notification procedure, whenever a relevant international standard did not exist. However, parties could skip these procedural details in adopting their own regulations/ standards (Article 2.6) and certification systems (Article 7.4) in case of "urgent problems of *safety, health, environmental protection* or national security" (emphasis added).

It should be noted here that the Standards Code covered technical regulations and standards pertaining to the product and not processes or production methods. Parties were encouraged to specify regulations and standards in terms of "performance rather than design or descriptive characteristics" (Article 2.4). Moreover, Annex I, defined the term technical specification to be characteristics of a product such as levels of quality, performance, safety or dimensions."[7]

In the following decade, at the 1982 GATT ministerial meeting, the Members took up the issue of export of domestically prohibited products, following the concern of several developing countries that products prohibited in developed countries on the grounds of environmental hazards, health or safety reasons, continued to be exported to them. Subsequently, a Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances was established in 1989. Meanwhile, in 1987 a report from the World Commission on Environment and Development *Our Common Future* introduced the term "sustainable development", and recognized that international trade could help in the process of development to alleviate poverty and environmental degradation.[8] This concept over time gained significance as a founding principle of the WTO.

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[7] *A technical regulation was defined as a mandatory technical specification, including the applicable administrative provisions. A standard was defined as a non-mandatory technical specification approved by recognized standardizing body for repeated application. (Annex I, Agreement on Technical Barriers to Trade in the 1979 Standards Code).*

[8] *Better known as the Brundtland Report.*

While the Uruguay Round (1986-94) was still in progress, a major environmental conference took place: the 1992 UNCED at Rio de Janeiro. In the 1990 Ministerial meeting at Brussels, the countries from the European Free Trade Area proposed that a formal statement on trade and environment be made by the Ministers, with priority attention to interlinkages between environmental policy and multilateral trading system. This was followed by a request from the EFTA countries (with support from other delegations) to re-convene the EMIT Group, and to prepare a GATT contribution for the forthcoming UNCED. The contracting parties agreed that the EMIT would be convened and examine three issues including: (i) trade provisions contained in existing multilateral environmental agreements vis a vis the GATT principles and provisions; (ii) multilateral transparency of national environmental likely to have trade effects; and (iii) trade effects of new packaging and labeling requirements to protect the environment. The Group on EMIT reactivated and met during November 1991 to January 1994.

The discussions on trade and environment initiated by the EMIT was taken up more formally in 1994 by the Sub-Committee on Trade and Environment of the WTO Preparatory Committee. The GATT study on Trade and Environment (GATT 1992) identified 17 MEAs containing trade measures, and the WTO Sub-Committee on Trade and Environment identified another such MEA in force by 1994 (WTO 1994). In particular, the issues of trade measures applied unilaterally by a WTO Member to address environmental problems lying outside its national jurisdiction, and trade measures pursuant to MEAs became items in the work agenda of the CTE. One of the important questions to be resolved was how trade measures pursuant to MEAs could affect WTO Member's rights and obligations.

It is worthwhile to note that in preparing for the Rio summit, the participating countries, in particular developing countries recognized that international trade could help alleviate poverty, which in turn would help improve the environment. At the UNCED, nations adopted Agenda 21: the action programme to promote sustainable development. The concept of sustainable development established a link between environmental protection and economic development at large. Thus environment issues were linked to trade in the new constitution of the multilateral trading system signed in 1994, and the term *sustainable development* was explicitly incorporated in the preamble establishing the new World Trade Organization.

II.2 WTO, Environmental Provisions and the CTE

Towards the end of the Uruguay Round, the issue of the environment featured prominently in the multilateral discussions with respect to the role that WTO in trade-related environmental issues. The Decision on Trade and Environment, signed by the trade ministers at Marrakesh in April 1994, laid the foundation of continuing work undertaken in the WTO, and mainstreaming environment into the multilateral trading system. Moreover, the first paragraph of the Preamble to the Marrakesh Agreement establishing the WTO recognized sustainable development as an integral part of the multilateral trading system, and the importance of environmental protection. The Preamble observed that in the endeavour to promote trade, raise standards of living and ensure full employment, the WTO Members recognize that the optimal use of the world resources would be "in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

Environmental provisions were included within some of the new agreements under the WTO, including: the Agreement on Technical Barriers to Trade (TBT); the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); the Agreement on Agriculture (exemption from reduction commitments for payments in agricultural sector under environmental programmes, Annex 2, para 12); and the Agreement on Trade Related Intellectual Property Rights (ineligibility of certain inventions for patenting to protect human, plant or animal life or health, to avoid serious harm to the environment, Article 27.2 and 27.3). The TBT and SPS, which accommodated the calls for harmonization and level-playing field in product and process specifications, contained provisions for the use of standards to protect health and the environment.

II.2.1 The Agreements on TBT and SPS

While the 1979 Standards Code covered technical aspects of both non-food and food tradable products, under the WTO two separate agreements, namely the TBT and SPS Agreements, now covered the non-food and food items respectively.

The TBT categorized product technical requirements under regulations and standards: The compliance with regulations being mandatory, but that with standards being voluntary. The TBT largely drew from the 1979 Standards Code, but further clarified the basis of using technical regulations to ensure that unnecessary obstacles to trade are not created

while protecting the environment: "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment" (Article 2.2). The assessments of such risks are to be based on "available scientific and technical information, related processing technology or intended end-uses of products". Moreover, in case Members used technical regulations "for one of the legitimate objectives explicitly mentioned in paragraph 2, …in accordance with relevant international standards, it shall be *rebuttably presumed not to create an unnecessary obstacle to international trade*" (emphasis added, Article 2.5).

Another significant change in the TBT, as compared to the Standards Code, was the expansion in the definition of technical regulation to include more than just product characteristics. While Members were to adopt regulations in terms of performance rather than design or descriptive characteristics (Article 2.8 of TBT, comparable to Article 2.4 of Standards Code), the definition in the annex was different. Technical regulations now were defined as "product characteristics or their *related processes and production methods*, including the applicable administrative provisions, with which compliance is mandatory… also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, *process or production method*" (emphasis added, Annex I, TBT).

Similarly, the SPS Agreement covered the quality/safety specifications of food products, including the process and production methods of food. The SPS agreement elaborated "rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)" including the chapeau of the Article XX (SPS Agreement, paragraph 8). The agreement defined sanitary or phytosanitary measures to "include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety" (Annex I, SPS).

The SPS measures necessary to protect human, animal or plant life or health, have to be based on *scientific principles* and cannot be maintained without *sufficient scientific evidence* (Article 2.2), nor *"be applied in a manner which would constitute a disguised restriction on international trade"* (Article 2.3).[9] Moreover, according to the agreement, the SPS measures have to be harmonized with international standards (Article 3), in particular with those in the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention. Members, however, are allowed to introduce or maintain sanitary/ phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or if it is determined to be appropriate (by the Member) in accordance with the relevant provisions of risk assessment contained in Article 5 (Article 3.3).

When introducing SPS measures, Members should make risk assessments, using risk assessment techniques developed by relevant international organizations (Article 5.1), with the available scientific evidence (Article 5.2).[10] Moreover, Article 5.6 requires that members ensure that the measures are *not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility*.[11] In case relevant scientific evidence is insufficient, Article 5.7 allows a Member to provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information. Since such measures can be adopted only on a provisional basis, Members are required to "seek to obtain the additional information and review" the measure accordingly within a "reasonable period of time".

Thus both the TBT and SPS Agreements have a common objective, namely that of harmonization and transparency of standards, in order to eliminate unnecessary trade-restricting measures. At the same time, however, the Agreements allow departures from international standards. The SPS Agreement allows departure from international standards on

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[9] *The Article 2 of the SPS Agreement covers the rights and obligations of the WTO members.*

[10] *The risk assessment exercise required taking into account the relevant ecological and environmental conditions, besides the available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas and quarantine or other treatment (Article 5.2).*

[11] *Article 5.5 states that members shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.*

the basis of a scientific justification, or as a result of risk assessment when a Member chooses to adopt higher standard. Similarly, under the TBT Agreement when a Member adopts technical regulations with the legitimate objective of protecting health or the environment, a risk assessment is required to compare between fulfillment versus non-fulfilment of the objective.

II.2.2 The CTE

While the WTO Agreements contained provisions on the environment and health, the Decision on Trade and Environment laid the foundation of continuing work on the trade-environment interface under a Committee on Trade and Environment (CTE). The principle of the Decision was that "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other". Thus the foundation of the WTO was based firmly on the principle that free and fair trade would be promoted along with sustainable development and environmental protection – and by extension would not go against efforts to protect the environment, such as a multilateral environmental agreement.

The work of the CTE was to ensure that the rules of multilateral trade support environmental and sustainable development. While upholding the GATT/WTO basic principles of national treatment and non-discrimination, the CTE was mandated to take on the unresolved issues from the Uruguay Round. Two of the ten items in the CTE's agenda related to MEAs have been typically considered in conjunction:[12] (Item i) - The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements. (Item v) - The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements.

The issues for the CTE pertaining to the first item on relationship between MEAs and WTO included: (a) ensuring the compatibility of trade measures taken pursuant to MEAs and the WTO, and (b) the adequacy of WTO transparency mechanisms concerning trade measures included in relevant MEAs. For the fifth item, the issues included (a) environmental expertise in trade dispute settlement, and (b) trade expertise in environmental dispute settlement (WTO 1995). The CTE's work on the first item examined whether there was a need to clarify the scope under the GATT/WTO provisions to accommodate trade measures pursuant to MEAs. Several Members made proposals (see section 4.1 later) in this regard, and many felt that the existing WTO provisions allowed for trade measures within MEAs to be applied in a consistent manner.

In 1996, the CTE endorsed multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. It acknowledged that WTO Agreements and MEAs are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both.

In particular, the CTE recognized that a range of provisions in the WTO could accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to MEAs. The CTE noted that trade measures are within the scope provided by the relevant criteria of the general exception provisions of GATT Article XX, and this accommodation within the multilateral trading system is valuable and it is important that it be preserved by all (WTO 1996: 38).

II.3 Interpretation of the GATT Article XX in Environmental Trade Disputes

The GATT Article XX general exceptions to free trade contain the first environmental provisions of the multilateral

[12] *Other items include: (ii) The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system. (iii) A. The relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes. B. The relationship between the provisions of the multilateral trading system and requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling. (iv) The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects. (vi) The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions. (vii) The issue of exports of domestically prohibited goods. (viii) The relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights. (ix) The work programme envisaged in the Decision on Trade in Services and the Environment. (x) Input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO.*

trading system. The exceptions contained in paragraphs (b), (d) and (g) of the article have been invoked in trade disputes related to the protection of the health and environment. The Article XX states that so long as trade measures applied are not arbitrary or unjustifiably discriminatory between countries or a "disguised restriction on international trade", Members can adopt measures

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

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement

(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 pre-WTO regime, six trade disputes involved environmental/ health-related measures under GATT Article XX exceptions. These disputes and the corresponding year of panel report adoption, include: (i) *US – Prohibition of Imports of Tuna and Tuna Products from Canada* (1982), (ii) *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* (1988), (iii) *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (1990), (iv) *US – Restrictions on Imports of Tuna from Mexico* also referred to as Tuna I (1991, but not adopted)[13], (v) *US – Restrictions on Imports of Tuna from EEC* also referred to as Tuna II (1994, but not adopted); and (vi) *US –Taxes on Automobiles* (1994, not adopted).

Under the WTO, rulings have been made on three environmental trade disputes under GATT Article XX (food safety disputes being now covered separately under the SPS Agreement). The three environmental disputes and the corresponding year of adoption of panel/ Appellate Body reports by the Dispute Settlement Board include: (i) *US – Standards for Reformulated and Conventional Gasoline* also referred to as Reformulated Gasoline (1996); (ii) *US – Import Prohibition of Certain Shrimp and Shrimp Products* (1998) also referred to as Shrimp-Turtle; and (iii) *EC – Measures Affecting Asbestos and Asbestos-Containing Products* (2001).

A comparison of the environmental trade disputes in the pre- and post-WTO regimes illustrates a significant change in the interpretation of GATT Article XX provisions. This subsection briefly discusses the two pre-WTO environmental disputes of Tuna I and Tuna II; and the two post-WTO environmental disputes of Reformulated Gasoline and Shrimp-Turtle. All four of these disputes concerned trade restrictions invoked under GATT Article XX exceptions for the protection of environment/ exhaustible natural resources.

II.3.1 Tuna I

The Tuna I dispute in 1991 between the United States and Mexico, for the first time turned the focus on the question of GATT-consistency of Member nations following sovereign environmental policies and imposing the same on a trading partner. The US had imposed an embargo on imports of yellow-fin tuna and tuna products from Mexico, Venezuela and Vanuatu and from the intermediary countries of Costa Rica, France, Italy, Japan and Panama based on its domestic regulation, the Marine Mammal Protection Act (MMPA) of 1972 as amended. The MMPA prohibited the incidental killing or seriously injuring any marine mammal (beyond the US standard set[14]) in connection with the harvesting of fish within the jurisdiction of the US. Moreover, Section 101(a)(2) of the Act provided for a ban on importation of commercial fish or products from fish caught with commercial fishing technology which resulted in the incidental killing or incidental serious injury of ocean mammals in excess of United States standards. Thus the Act effectively set a ceiling limit on dolphin catches for American fishing fleet and for countries exporting to the US.

Mexico complained against the US embargo on the grounds that the embargo was inconsistent with the GATT rules, like: that the provision under MMPA was inconsistent with Article III (National Treatment of traded products), the embargo was also not "necessary" in the sense of Article XX, and that Article XX (b) referred to protection of the life and health of humans and animals within the territory of the contracting Party protecting them. On the other hand, the US argued that the GATT's National Treatment provision permitted the enforcement of dolphin protection standards set out in the MMPA, and the import embargo was justified under Article XX exception clauses to protect animal health or exhaustible natural resources.

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[13] *Unlike the system of decision making now contained in the Dispute Settlement Understanding of the WTO, in the GATT a panel report was not adopted if there was no consensus. Under the WTO, if the members do not by consensus reject a panel report after 60 days, it is automatically accepted or adopted.*

[14] *On an average, the vessel of harvesting nations could not take (incidental killing/ injury) more than 15% of eastern spinner dolphin and not more than 2% of coastal spotted dolphin as a proportion of the total number of marine mammals taken by such vessels in a year. (GATT 1994a)*

The Dispute Panel noted that the US embargo was not covered under GATT Article III, since the latter "covers only those measures that are applied to the product as such", and regulations on incidental killing/ injury to dolphin "could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product" (GATT 1991). Under the principle of National Treatment, the US was obliged to treat Mexican tuna no less favourably than domestic tuna (the traded product), irrespective of the ways in which they may have been harvested since it did not impact tuna as a product. *This implied that non-product related process and production methods could not used as a basis of trade measures under the GATT.* The Panel ruling found that the US embargo was contrary to Article XI:1 (elimination of quantitative restrictions).

The Dispute Panel also ruled the import prohibition of Mexican tuna as unjustifiable under Article XX (b) or (g); and the import prohibition on "intermediary countries" unjustifiable under Article XX (b), (d) or (g). The Panel noted that while the provisions of the GATT did not restrain a contracting party in the implementation of domestic environmental policies, "*a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own*" (emphasis added, GATT 1991). The Dispute Panel considered the Article XX exceptions to protect exhaustible natural resources (here dolphins) to be applicable only to natural resources lying within the jurisdiction of the government imposing the regulations.

II.3.2 Tuna II

In 1992, the EC and Netherlands complained that the US embargo against primary and intermediary countries, based on the MMPA, did not fall under Article III (National Treatment), was inconsistent with Article XI:1 (Elimination of Quantitative Restrictions) and was not covered by the exceptions of Article XX. The US argued that the intermediary nation embargo was consistent with GATT, covered by Article XX (b), (d) and (g), and that the primary nation embargo did not nullify or impair any benefits accruing to the EC or the Netherlands since it did not apply to these countries.

On the jurisdictional issue of its action, the US argued that provisions under international environmental agreements allowed for import restrictions that did not necessarily restrict jurisdictional applicability. In particular, Article 3 of the Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933, allowed for the prohibition of products from intermediary countries unless otherwise certified. The US argued that while the Convention applied to hunting and killing within the parties' respective territories, the restrictions on importation required application to *activities beyond the territorial jurisdiction of the importing party*, and were designed to protect resources outside the importing party's jurisdiction (emphasis added). Similarly, Article IX of the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (1940) provided for each contracting government to take the necessary measures to control and regulate the importation, exportation and transit of protected fauna and flora through an export certification system or the "prohibition of the importation of any species of fauna or flora or any part thereof protected by the country of origin unless accompanied by a certificate of lawful exportation". Apart from these two Conventions the US also cited the provisions for import prohibitions under other MEAs: Article 3 of the International Convention for the Protection of Birds (1950); Article V of the Agreement on the Conservation of Polar Bears (1973); Article VIII:2 of the Convention on Conservation of North Pacific Fur Seals (1976); Article 3 of the Convention on the Prohibition of Fishing with Long Driftnets in the South Pacific (adopted 1989, but not yet in force). Two of these agreements, namely, the International Convention for the Protection of Birds and the Agreement on Conservation of Polar Bears, did not provide any jurisdictional limitation on the import and export prohibitions.

In the light of Article 31 (general rule of interpretation) of the Vienna Convention on the Law of Treaties, the US interpreted that there was no jurisdictional limitation on the location of the resource or living thing in GATT Article XX (g) and (b). The Dispute Panel, however, pointed out that the Article 31 of the Vienna Convention refers to "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", while the international agreements cited in the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement. Thus these agreements did not apply to the interpretation of the General Agreement or the application of its provisions.[15]

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[15] *The Panel also observed that under the general rule of interpretation in the Vienna Convention account should be taken of "any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation." However, the Panel noted that practice under the bilateral and plurilateral treaties cited both the primary and intermediary nation embargoes on tuna were taken by the United States so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the protection of the life or health of dolphins. (GATT 1994a)*

In determining the necessity of the US measure for conservation of dolphins, the Panel concluded that measures taken to force other countries to change their policies, and which were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b). Thus an essential condition of Article XX (b) had not been met. The Panel found that the import prohibitions on tuna and tuna products maintained by the United States inconsistent with Article XI:1 and not justified by Article XX (b).

The Dispute Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, is recognized by the contracting parties to the General Agreement. The Panel did not question the validity of the environmental objectives of the US to protect and conserve dolphins, but examined whether, in the pursuit of its environmental objectives, the US could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction. The Panel ruled that the US import prohibitions (both the primary and the intermediary nation embargo) on tuna and tuna products under the MMPA "did not meet the requirements of the GATT Article III, were contrary to Article XI:1, and were not covered by the exceptions in Article XX (b), (g) or (d)".

II.3.3 Reformulated Gasoline:

In January 1995, Venezuela, followed by Brazil, complained against US discrimination in import of gasoline under the latter's Gasoline Rule. The complainants argued that the US restriction was inconsistent with GATT Article III (National Treatment) and not covered by GATT Article XX exceptions. The US Gasoline Rule (based on the 1990 Amendment of the Clean Air Act)[16], effective 1995, permitted only gasoline of a specified cleanliness (reformulated gasoline) to be sold to consumers in the most polluted areas of the country, while in the rest of the US, gasoline no dirtier than that sold in the base year of 1990 (conventional gasoline) could be sold.

The Dispute Panel ruled that the US Gasoline Rule was inconsistent with Article III since imported and domestic gasoline should be considered as "like products". Moreover, the US action was not justified under the GATT Article XX paragraphs (b), (d) or (g). The US appealed on the Panel's findings on Article XX (g), and subsequently the Appellate Body found that the baseline establishment rules (for both domestic gasoline and imported gasoline) in the Gasoline Rule fell within the terms of Article XX (g). However, the Appellate Body ruled that the US application of the baseline rules constituted "unjustifiable discrimination" and a "disguised restriction on international trade… and not entitled to the justifying protection afforded by Article XX as a whole" (WTO 1996b: 30). According to the Appellate Body, the US action failed to meet the requirements of the chapeau of Article XX, since the US could have used alternative means to implement its Clean Air Act by "imposition of statutory baselines without differentiation as between domestic and imported gasoline" (WTO 1996b: 26).

The Appellate Body used the principle of interpretation based on Article 31.1 of the Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (WTO 1996b: 17-24), and considered the objective of the Gasoline Rule (namely, to implement the US 1990 Clean Air Act) and GATT Article XX including its chapeau to interpret them. The Appellate Body, however, noted "two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines" (WTO 1996b: 30). Hence the US action was unjustifiable under Article XX.

Thus the first environmental trade dispute brought to the WTO affirmed that a Member (here the US) had the right to adopt the stringent environmental standards, provided the application of the regulation does not discriminate against foreign imports. "WTO Members have a *large measure of autonomy* to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement." (emphasis added, WTO 1996b: 32). Moreover, if the Member could demonstrate cooperation with other Members towards the implementation of the regulation, such unilateral environmental legislation may be found justifiability under GATT Article XX. In its final conclusion, the Appellate Body recalled the preamble to the WTO Agreement as well as the Decision on Trade and Environment, to emphasize the importance of cooperation and "of coordinating policies on trade and the environment."

[16] *The 1990 US Clean Air Act Amendment established certain compositional and performance specifications for reformulated gasoline, in order to reduce the emissions of volatile organic compounds and toxic air pollutants. The Rule established baselines (1990) for domestic refiners, and related baselines for blenders and importers of gasoline.*

II.3.4 Shrimp-Turtle:

An amazingly similar dispute to the Tuna I case was brought to the WTO against the US in 1996. The US had banned shrimp imports from countries where the shrimp was harvested without Turtle Excluder Devices (hence killing too many Olive Ridley Turtles in the process) as required under its domestic legislation, the 1989 Public Law 101-162, Section 609. Malaysia and Thailand, followed by Pakistan and then India, complained that the import prohibition was inconsistent under Article I:1 (Most Favoured Nation), Article XI:1 (Elimination of Quantitative Restrictions), and Article XIII:1 (Restrictions to Safeguard Balance of Payments). The US justified its measure under Article XX (b) and (g), arguing that the provision did not constrain jurisdictional limitations nor the location of the natural resources/ animals to be protected and conserved.

In 1997, the Dispute Panel ruled in favour of the complainants, and found that the import ban in shrimp and shrimp products as applied by the United States was inconsistent with Article XI:1 of GATT 1994, and unjustifiable under Article XX of GATT. After the US appeal on the Panel's interpretation, in 1998 the Appellate Body also found the US unilateral action unjustified, but reversed the Panel's finding that the US measure at issue was not within the scope of measures permitted under the chapeau of Article XX of GATT 1994. The Appellate Body ruled that the US measure qualified for provisional justification under Article XX (g), but it failed to meet the requirements of the chapeau of Article XX since the measure was discriminatory, and therefore not justified under Article XX.[17]

The Appellate Body also clarified the meaning of *exhaustible* natural resources in Article XX to include renewable living resources, and indicated that the complainants had misinterpreted the term: "Textually, Article XX (g) is not limited to the conservation of 'mineral' or 'non-living' natural resources. The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be exhaustible natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities." (WTO 1998: paragraph 128).

Moreover, the Appellate Body reiterated the Preamble of the WTO Agreement, which states that the optimal use of natural resources should be in accordance with sustainable development. The Appellate Body indicated that the language of the Preamble allowed for a wider interpretation of the WTO provisions and agreements, based on the "intentions" of the WTO negotiators to acknowledge the environmental dimensions into the multilateral trading system:

"(the) language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the .. preamble." (WTO 1998, paragraph 153)

The Appellate Body Report noted the intent of the international community to protect environmental resources and made several references to international conventions. More significantly, the Appellate Body observed that the WTO agreements should not be viewed in "clinical isolation" from other rules of international law, including treaties.[18] In particular, the Olive Ridley sea turtle was listed under species threatened with extinction in Appendix 1 of the CITES, and also as a migratory species in Annex I of the Convention on the Conservation of Migratory Species of Wild Animals. The references were made to illustrate that the sea turtle should be considered as "exhaustible natural resources", as well as the international community's efforts to conserve this resource. In this dispute, however, the traded product was shrimp (not an endangered species) and not the endangered turtles, thus the CITES (ratified by both India and the US) did not apply.

The final ruling by the Appellate Body upheld the principle of cooperation to protect global environmental resources as contained in the MEAs like the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals; as well as the Rio principle of the avoidance of protectionist trade measures, and

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[17] *Report of the Appellate Body, "US- Import Prohibition of Certain Shrimp and Shrimp Products" (AB-1998-4), WT/DS58/AB/R, dated 12 October 1998: pages 75-76.*

[18] *This approach was evident in the ruling of the US –Gasoline (1996) dispute too. As will be seen later in Section 4, this has been quoted by the EC in its submission on current negotiations on trade measures pursuant to MEAs to highlight the true interpretation of WTO rules.*

the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives (WTO 1998, paragraph 154). The Appellate Body also recalled Article 3.2 of the WTO Dispute Settlement Understanding, under which the WTO agreements are to be interpreted in accordance with "customary rules of interpretation of public international law". Since MEAs are international treaties, they form part of the international law, and bear on the settlement of environmental trade disputes under the WTO.

The environmental provision under the GATT/WTO were interpreted with reference to "sustainable development" in the Preamble and in a wider context of the "intentions of negotiators of the WTO Agreement" (*ibid*, para 153). The US unilateral ban on shrimp was found unjustifiable for much the same reason as in the Gasoline dispute – lack of cooperative efforts before resorting to trade measures to protect the environment. In this case, the US had failed to engage in any concerted bilateral or multilateral effort to conserve the sea turtles:

"*Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members*"
(WTO 1998: paragraph 166)

This suggested that in case the US engaged in bilateral or multilateral environmental agreements to protect the sea turtle in question, the unilateral measure would be justified.

Not surprisingly, in the 2001 dispute on the Compliance panel report, after Malaysia took recourse to Article 21.5 (Understanding of Rules and Procedures Governing the Settlement of Dispute) of the DSU and appealed on the grounds of dissatisfaction with US action, the US was found to be justified in its action. By this time, the US had demonstrated good faith efforts by negotiating a Memorandum of Understanding with certain countries in the Indian Ocean and South-East Asia region (the South-East Asian MOU) that took effect on 1 September 2001" (WTO 2001: 50). The 2001 ruling clearly established that a WTO Member with demonstrable cooperative efforts to protect the environment with its trade partners is justified in unilateral trade restrictions under GATT Article XX. Thus Barfield (2001) observed that the Shrimp-Turtle dispute set forth an "evolutionary interpretation of unilateralism".

II.4 WTO Jurisprudence in Environmental Trade Disputes

The GATT Article XX exceptions on environmental grounds have so far provided ample room for departures from free trade, and its interpretation over the last decade has expanded considerably (comparing the Tuna I analysis with that of the Shrimp Turtle). Several changes are significant.

First, in the pre-WTO regime, process and production methods unrelated to the product (e.g. incidental kill of dolphin during tuna harvest) was a matter of consideration, however, in the post-WTO Shrimp-Turtle dispute, the distinction between product- related or non-product-related production process was of no consequence. This probably reflected the cognizance of the total environmental impact of a product from cradle to grave – i.e. the aggregate environmental resource cost, irrespective of the fact whether it affects the final product characteristics or not.

Second, and more importantly, the extra-jurisdictional aspect of a Member country imposing domestic environmental regulation on its trading partner did not arise in the post-WTO environmental disputes. In the Tuna I case, the Dispute Panel had categorically noted that *a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own*, and Article XX exceptions were interpreted to apply only to environmental resources *within the Member country's jurisdiction*. In the Appellate Body rulings of the Gasoline and Shrimp-Turtle[19] disputes, however, the extra-jurisdictional aspect of similar unilateral action was not an issue, and the focus was on the depletable/ exhaustible nature of the environmental resources in question, namely, air and turtles respectively. While this new jurisprudence is appropriate from the ecological perspective, there is a risk of the same logic being extended to differential environmental regulations for local pollutants in future disputes, since Members have autonomy to a large degree in determining their own environmental policies.

[19] *In the Shrimp-Turtle dispute, the Appellate Body noted that: "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." (WTO 1998: paragraph 133).*

Both in the Gasoline and the Shrimp-Turtle disputes, the issue of extra-jurisdictional imposition of environmental standards/ regulations was disregarded, and the focus was turned on whether the US had engaged in any cooperative efforts before resorting to the unilateral trade sanction. In the Gasoline case, the Appellate Body also noted that the cost of compliance with the American standards by foreign countries had been neglected. Thus both rulings provided a clear avenue for *justifiable* unilateral trade sanctions in case the US could demonstrate its good faith efforts in environmental protection cooperatively with the trading Member prior to the unilateral action. Since the 2001 Shrimp-Turtle Compliance dispute was ruled in favour of the US in recognition of such good faith effort, it is likely that a trade restriction pursuant to a MEA is likely to survive a potential WTO-challenge. After all an MEA is a *good faith* multilateral effort, and multilateral actions are generally preferred to unilateral action under the WTO system (Brack and Gray 2003: 26).

Third, in the post-WTO disputes, the environmental provisions under the GATT/WTO system have been "interpreted in good faith" and "in the light of its object and purpose" (Article 31.1, Vienna Convention on the Law of Treaties). In future the GATT Article XX exceptions will continue to be interpreted in the wider context since "context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes…. any agreement …or instrument" among the parties (Article 31.2, Vienna Convention), and not in the narrow context used in the Tuna I dispute. The Appellate Body analysis of the recent disputes recognized the "intentions of negotiators of the WTO Agreement", and gave due regard to the international community's efforts to conserve the environment, including MEAs. This suggests that even if no new environmental provisions are negotiated under the WTO, the existing commitment to support "sustainable development" and "protect and preserve the environment", as stated in the Preamble, is sufficient for the multilateral trading system to acknowledge and support contemporary environmental initiatives of the international community.

This argument could be even extended to suggest that the WTO would acknowledge and support new MEAs even if not all of its Members are party to the new treaty. While a new treaty cannot create rights and obligations for a third party without its consent (Article 34, Vienna Convention), there is provision for rules in a treaty to become binding on a third party through international custom ("as a customary rule of international law, recognized as such") under Article 38 of the Vienna Convention.

Finally, the jurisprudence in the interpretation of GATT Article XX in the environmental trade disputes under the WTO is significant since it comes under the category of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31.3 b, Vienna Convention), and has in effect established the meaning of exceptions under Article XX (b), (d), and (g).

It is interesting to note that the two major WTO Members, namely the US and the EC, support and approve of the current jurisprudence of the WTO. In particular, the US has been and continues to be a proponent of a robust dispute settlement system in the WTO. Indeed the establishment of the WTO dispute settlement system, considered to be "one of the most significant changes adopted as a part of the Uruguay Round" was sought by the US Congress in the negotiations since it considered the GATT dispute settlement to be "ineffective".[20] In 2002, the US Secretary of Commerce noted that an "effective dispute settlement system advantages the United States not only through the ability to secure the benefits negotiated under the agreements, but also by *encouraging the rule of law among nations*".[21] The US had anticipated in its negotiations that the application of the DSU would "improve its ability to contest foreign trade remedy actions against U.S. exporters". The US Secretary of Commerce's assessment of the WTO dispute settlement system is that, overall the system has worked to the benefit of the U.S., providing a means to enforce U.S. rights and contributing to greater compliance by WTO Members. The United States has been able to successfully use (in several disputes where the US was the complainant) the WTO dispute settlement "to open markets for U.S. business; to preserve and create U.S. jobs; to eliminate trade distorting practices from the global marketplace; and to defend successfully U.S. laws and policies."

Given these benefits accrued through the WTO dispute settlement system, the US will continue to support and actively use the system to enforce its domestic environmental standards unilaterally through the multilateral trading system,

[20] *US Secretary of Commerce (2002). "The WTO Dispute Settlement Understanding achieved the objectives set out by the Congress by effecting important changes in the GATT 1947 dispute settlement process, including time limits for each stage of the dispute settlement process; appellate review; automatic adoption of panel or Appellate Body reports in the absence of a consensus to reject the report; and procedures to suspend trade concessions with any Member failing to implement Dispute Settlement Body (DSB) recommendations and rulings."*

[21] *Emphasis added, ibid.*

rather than be party to a multilateral environmental initiative. Indeed, whenever, domestic commercial interests are threatened, the US has refrained from being a party to a MEA. For instance, the US is not a party to the Basel Convention, nor the Cartagena Protocol on Biosafety, since it is one of the largest exporters of hazardous wastes (covered under the Basel) and genetically modified products (covered under the Cartagena Protocol).

At the same time, the EC has been encouraged by the new jurisprudence in the environmental trade disputes under the WTO, since the approach adopted in resolving such cases "*strongly suggests* that the conclusion of an MEA could well be a key element to determine the justification of certain measures under Article XX of the GATT" (WTO 2002a). The EC particularly favours the Appellate Body observation (in the Gasoline dispute) that WTO rules should not be considered in "clinical isolation" of other international law and that Article XX must be interpreted "in light of contemporary concerns of the community of nations about the protection and conservation of the environment" has sanctified the acceptance of MEAs within the WTO system. Thus, while the EC is opposed to unilateralism (which US is prone to adopt), and remains a forceful proponent of multilateral consensus in using trade measures on environmental grounds, the wider interpretation of GATT Article XX exceptions in the recent disputes has appeal for both the trading giants.

II.5 Food Safety Trade Disputes under the WTO

Four food safety-related trade disputes have been settled under the WTO including: (i) Australia – Measures Affecting Importation of Salmon (1998); (ii) EC – Measures Concerning Meat and Meat Products (Hormones) (1998); (iii) EC – Measures Affecting Livestock and Meat (Hormones) (1998); (iv) Japan – Measures Affecting Agricultural Products (1999). All the health and safety-related trade disputes settled under the WTO have involved developed countries. The issue at stake in all the disputes was the use of restrictive sanitary measures based on precaution without appropriate risk assessment and/or scientific evidence.

In the first dispute of Australia's prohibition of imports of salmon from Canada based on a quarantine regulation, in 1995 Canada alleged that the prohibition was inconsistent with GATT and the Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement). The Dispute Panel found that Australia's measures were inconsistent with certain provisions of the SPS Agreement. After Australia's appeal on the Panel's interpretation, the Appellate Body ruled that the Australian prohibition was inconsistent with Articles 5.1 (risk assessment), 5.5 (non-discrimination), 2.2 (scientific evidence) and 2.3 (non trade-restrictive) of the SPS Agreement. Moreover, the Appellate Body reversed the Panel's finding that Australia had acted inconsistently with Article 5.6 of the SPS Agreement, since factual evidence was insufficient to support such a conclusion.

In the case of Japanese restrictions on agricultural products, the US alleged violations under provisions of the SPS Agreement, GATT 1994, and the Agreement on Agriculture. The Dispute Panel found that Japan acted inconsistently with Articles 2.2 and 5.6 of the SPS Agreement, and Annex B and, consequently, Article 7 (transparency) of the SPS Agreement. Following Japan's appeal on the Panel's interpretation of certain law, the Appellate Body upheld the basic finding that Japan's varietal testing of apples, cherries, nectarines and walnuts is inconsistent with the requirements of the SPS Agreement.

The two disputes on the use of hormones are especially relevant in relation to a recent multilateral environmental agreement, the Cartagena Protocol on Biosafety, considering hormone fed cattle as living modified organisms (LMOs). In the first meat-hormone dispute in 1996, the US complained that the measures taken by the EC under the "Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action" to restrict imports of meat and meat products were inconsistent with provisions under GATT 1994, SPS Agreement, TBT Agreement and the Agreement on Agriculture. Similarly, in the second meat-hormones dispute, Canada complained that the EC ban on importation of livestock and meat from livestock treated with certain substances having a hormonal action violated provisions under the SPS; GATT; TBT; and Agreement on Agriculture.

The final dispute ruling for the two cases found that the EC import prohibition on beef from cattle raised on growth hormone was inconsistent with Articles 3.3 (scientific justification for more stringent standards) and 5.1 (risk assessment) of the SPS Agreement.[22] The Appellate Body noted that studies on the specific hormones in question failed to show how their use in growth promotion would result in hormone residue in beef and the associated health risks. Moreover, the Appellate Body (as well as Panel) noted that the hormone ban was inconsistent with the EC practice of permitting the use of two known carcinogenic additives in feed for piglets.[23]

[22] *Update of WTO Dispute Settlement Cases (WT/DS/OV/160), dated 17 October 2003: page 60-61.*

[23] *This differential treatment, according to the US and Canada demonstrated the protectionist nature of the ban, to take care of the condition of the EU market for meats. (Kelly 2003)*

At the heart of the EC-hormone disputes was the issue of risk associated with the introduction and consumption of genetically or living modified organisms in an importing country. The transboundary movement of LMOs is now covered by the Catagena Protocol on Biosafety (in force since September 2003), which has been ratified by the EC, but not the US or Canada. Under the Protocol, a Party may choose not to import even if scientific information is insufficient (emphasis added, Article 11.8).[24]

The provision in the Cartagena Protocol allowing import restriction with insufficient scientific information is potentially in conflict with the science-based provision in the SPS Agreement. Article 5.7 of the SPS Agreement allows a Member to apply a measure only on a provisional basis in case of insufficient scientific information, and a Member is expected to review such measures "within a reasonable period of time". Considering the long-standing difference between the US and EC on the issue of living/genetically modified organisms, the interpretative decision pursuant to the negotiations under DMD Para 31 (i) will have a major bearing on trade disputes of this nature. It should be noted, however, that the Doha Declaration contains a condition, stating negotiations on the clarification of relationship between trade measures in MEAs and WTO rules should not disturb the rights of the WTO Members especially under the Agreement on Application of Sanitary and Phytosanitary Measures. In other words, Article 11.8 of the Cartagena Protocol should not disturb the rights of a WTO Member like the US (non-Party to the Protocol), as per Article 5.7 of the Agreement on Application of Sanitary and Phytosanitary Measures. The clause in the DMD safeguards the US commercial interests against the provisions of the Catagena Protocol, since the US remains the foremost proponent of research and practice of genetically modified crops and livestock.

III Case of Six MEAs

Among the three hundred MEAs existing today, about thirty contain trade measures. Recently the WTO Secretariat released a matrix on trade measures pursuant to fourteen selected MEAs (WTO 2003). Some MEAs, however, like the Convention of the Conservation of Antarctic Marine Living Resources, the Convention on Biological Diversity, and United Nations Framework Convention on Climatic Changes do not contain any trade-related measures. Other treaties contain obligations for trade measures like export or import certifications (for example the International Plant Protection Convention). A few agreements like the International Tropical Timber Agreement and the International Convention for the Conservation of Atlantic Tuna, have provision for developing trade measures. Thus analysis by the WTO Members in the CTE has in particular focused on six of these MEAs, which contain explicit trade obligations.[25]

Of these six MEAs, four are already in force and two are soon to come into force. The four MEAs already enforced (also been ratified by India) include: the Convention on International Trade in Endangered Species or CITES (1973); the Montreal Protocol on Substances that Deplete the Ozone Layer (1987); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989); and the Cartagena Protocol on Biosafety (2000). The two MEAs yet to come into force include the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998) and the Stockholm Convention on Persistent Organic Pollutants (2001).

This section analyzes the trade measures contained in the six MEAs, and their relationship with the environmental and health provisions under the GATT/WTO rules. While clarification of the relationship between trade measures in MEA and WTO rules has been sought in the WTO in the 1990s, the issue had been raised earlier too. For example, during the original negotiations of the Montreal Protocol in 1985-87, the parties sought to clarify the relationship of the Protocol with respect to the GATT.[26] More recent MEAs like the Cartagena Protocol state that the treaty is mutually supportive of the GATT/WTO system: "trade and environment agreements should be mutually supportive with a view to achieving sustainable development" (Preamble to the Cartagena Protocol). The Cartagena Protocol also clarified in its Preamble that the "Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements" and that "the above recital is not intended to subordinate this Protocol to other international agreements", even though it contains provisions that are not consistent with some of the rules

[24] *See section 3.1 for a brief description of the Catagena Protocol on Biosafety.*

[25] *These six MEAs were identified by the United States in the October 2002 meeting of the CTE in Special Session, as those that appear to contain specific trade obligations.*

[26] *Consultations were held with a legal expert from the GATT Secretariat in April and September 1987. The expert provided advise as to whether particular language was relatively closer to or further away from traditional interpretations of the GATT, and stressed that "the judgment 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." Brack and Gray 2003: 20.*

within the multilateral trading system as discussed below. Section 3.1 outlines the goals and the trade provisions in the six MEAs, section 3.2 briefly discusses the effectiveness of such measures in practice, and section 3.3 summarizes the rules within the GATT/WTO compatible with the trade obligations under the six MEAs.

III.1 Objectives and Trade Provisions of the Six MEAs

The trade provisions in some of the MEAs are required to reduce environmental harm: either because environmental degradation is directly related (say, negative product effect) or indirectly related to trade. For instance, the Basel Convention, the Cartagena Protocol, the Rotterdam Conventions and the Stockholm Convention are associated with the adverse *product effects* of trade, since the products crossing border is hazardous or threatens to degrade the ecosystem of the destination countries.

The trade measures outlined in the CITES, on the other hand, can be associated with adverse *scale effect* of trade (exploitation for exports driving extinction of species). Yet another reason for the use of trade measures in MEA is to enforce the environmental objective of the agreement. For example, in the Montreal Protocol, trade is prevented between parties and non-parties so that the effectiveness of the agreement is not undermined (i.e. while domestic production of ozone depleting substances is controlled among parties, the production is not shifted to non-parties through increased imports). Table 1 at the end of the section provides a summary of the objectives and trade provisions of the six MEAs.

III.1.1 Convention on International Trade in Endangered Species of Wild Flora and Fauna (1973)

The CITES was adopted in 1973 and came into force in 1975. The CITES seeks international cooperation for the protection of certain species of wild fauna and flora against over-exploitation through international trade. The trade measures incorporated in the Convention are meant to prevent harmful practices like improper transport of these species. In order to promote conservation of prioritized endangered species, trade measures include outright prohibition in commercial trade or restricted traffic in these species. The Convention distinguishes between three lists of species based on the threat of extinction: Appendix I includes species threatened with extinction; Appendix II include species that could be threatened with extinction unless trade is regulated; and Appendix III include all species which any Party identifies as being subject to regulation within its jurisdiction, and requests cooperation of other Parties in the control of trade to prevent unsustainable or illegal exploitation. One or more Scientific Authorities of the State have to monitor the trade of specimens of species threatened with extinction; and Management Authorities are in charge of trade permits and certificates (Article IX).

The trade measures for the three types of species of the Convention are contained in three articles (III, IV and V). Trade in specimens of species in Appendix I is allowed only on condition that a scientific assessment ascertains such export and import are not detrimental to the survival of that species and that the specimen has not been obtained in violation of the state's law to protect such species. (Article III). Trade in specimen of species from Appendix II is allowed through permits[27] provided trade is not detrimental to the survival of the species in the wild (Article IV). Trade in species from Appendix III is only allowed in these species with permits or certificates (Article V). An import permit corresponding to an export permit among Parties ensures the prevention of circumvention to non-Parties (Article VI).

Article X allows trade with non-Parties on condition that the latter largely conforms to requirements of the Convention and the trade is conducted with comparable documents. Article XIV.1 also allows a Party to adopt domestic measures restricting trade or prohibiting trade in species (a) included in the three appendices; and (b) not included in Appendix I, II or III. The Standing Committee used Article XIV.1.a to impose import and export prohibitions on CITES species in Thailand in 1991-92 and Italy in 1993 (PC-WTO 1994: 2).

III.1.2 Montreal Protocol on Substances that Deplete the Ozone Layer (1987)

The Montreal Protocol was adopted in 1987 and came into force in 1989. The Protocol aims to reduce and finally eliminate the emissions of ozone depleting substances from anthropogenic sources. Under the Protocol's obligations, parties are required to control production as well as consumption of ozone depleting substances (ODS).[28] Consumption

[27] *No import permit is required for trade in species included in Appendix II, however, major importing countries have instituted a system of import permits for trade in species on the basis of other conditions and non-CITES related criteria like tariffs, health, veterinary, phytosanitary and animal welfare provisions. (WTO 2003: page 51)*

[28] *The different types of ODS are listed in the annexes: Annex A lists Chlorofluorocarbons (CFCs) and Halons. Annex B includes Carbon tetrachloride, Methyl chloroform and other CFCs. Annex C lists three groups: Group I -hydrochlorofluorocarbons (HCFCs), Group II - hydrobromofluorocarbons (HBFCs), and Group III -bromochloromethane. Annex D contains Annex A substances banned from May 1992.*

is defined as the sum of domestic production and the net imports, thus the Protocol requires the parties to control trade as well to comply with the phase-out of ODS. After the phase-out date, the parties are to cease production of the controlled substance for domestic consumption, other than for the use agreed by the parties to be essential. The Protocol's provisions have been strengthened through four subsequent Amendments: in London (1990), Copenhagen (1992), Vienna (1995), Montreal (1997) and Beijing (1999), which entered into force in the years 1992, 1994, 1999 and 2002 respectively.

The trade control with parties is contained in Article 4A of the Protocol, and states that in case after the phase-out date applicable to the ODS, a Party is unable to comply with its production obligations, then it shall ban the export of used, recycled and reclaimed quantities of the substances, other than for the purpose of destruction. Each Party is obligated to implement a system for licensing import and export of ODS in Annexes A, B, C and E (Article 4B).

Article 4 prohibits trade in ODS with non-parties: As of 1990 each Party should have banned the import of the controlled substances in Annex A (CFCs and halons) from any State not Party to the Protocol. Moreover, as of 1993, each Party should have banned the export of any controlled substances in Annex A to any State not Party to the Protocol. Similarly trade in Annex B substances (other CFCs) is banned with non-parties to the London Amendment (effective August 1993); and trade in Annex C substances (HCFCs, HBFCs) are banned since June 1995 for non-parties (Copenhagen Amendment 1992).

III.1.3 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (1989)

The Basel Convention was adopted in 1989 and came into force in 1992. The Convention controls the transboundary movement of hazardous wastes, to encourage the treatment and disposal of hazardous wastes near the region of waste generation. Under the Convention, parties are obliged to "ensure that transboundary movement of hazardous wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes" (Article 4.2). The hazardous wastes covered include those listed in the Convention and as well as those defined as hazardous by domestic legislation of parties. An amendment to the Basel Convention, called the Ban Amendment, which is yet to come into force, added a preambular paragraph 7 that recognized the high risk especially to developing countries, which lack an environmentally sound management of hazardous wastes as required by the Convention.

The trade measures pursuant to the Convention are contained in Article 4. Under the obligations, export of hazardous wastes is not permitted to parties that have prohibited such import (Art 4.1b), and only allowed when the sate of import consents in writing (Art 4.1c). Transboundary movement of hazardous wastes to Parties, *especially developing countries*, is not allowed if there is reason to believe that the wastes in question will not be managed in an environmentally sound manner (Art 4.2e). Trade in hazardous wastes, or other wastes, is banned between a Party and non-Party (Art 4.5). The trade among Parties can be conducted only through written consent to import after an export notification (Article 6). The Ban Amendment brought in the new Article 4A (stronger than Convention's Article 4.2e), under which a Party listed in Annex VII (OECD, EC, Liechtenstein) is prohibited all transboundary movements of hazardous wastes which are destined for operations to States not listed in Annex VII (developing countries).

Article 11.1 of the Convention allows for trade with non-Party, and a Party may enter into bilateral, multilateral or regional agreements/ arrangements on transboundary movement of hazardous wastes with non-Parties, provided such agreements do not derogate from the environmentally sound management of wastes as required under the treaty; and should notify the Secretariat of such agreements. The largest exporter of wastes in the world, namely the US, is not Party to the Basel Convention, trade with Parties under this provision. For instance, Canada and Mexico (both parties to the Convention) have bilateral agreements with the US (PC-WTO 1994: 4).

III.1.4 Cartagena Protocol on Biosafety (2000)

The Cartagena Protocol was adopted in 2000, and came into force in September 2003. The Protocol is a supplementary agreement to the Convention on Biological Diversity, is the only international agreement today dealing exclusively with living modified organisms (LMOs)[29]. The objective is to contribute to the safe transfer, handling and use of

[29] *A LMO is defined in the Cartagena Protocol as any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology. Colloquially LMOs are usually considered to be the same as GMOs (Genetically Modified Organisms), for example, agricultural crops genetically modified for greater productivity or for resistance to pests or diseases including tomatoes, cassava, corn, cotton and soybeans.*

LMOs that may have adverse effects on biological diversity and pose a risk to human health. While the Protocol covers the transboundary movement of LMOs, it does not include non-living products derived from LMOs, such as cooking oil from genetically modified (GM) corn or ketchup from GM tomatoes.

The trade measures pursuant to the Protocol include prior notification and informed consent essential for trade in LMOs: Before the first shipment of LMOs, an exporting Party needs to follow the advance informed agreement (AIA) procedure, and provide sufficient information for the importing parties to make an informed decision. An export notification (under Article 8) has to be followed by an acknowledgement of receipt of notification (Article 9), and then the import decision (Article 10). Parties are required to use the Biosafety Clearing-House to fulfill a number of obligations, including specific information on national biosafety laws; risk assessment summaries; and final decisions by importing Parties with supporting reasons.

As noted earlier in section 2.5, the Protocol contains a provision that allows a Party to ban import of LMOs for food or feed or processing that is inconsistent with the SPS Agreement, even though the preamble of the Protocol states that it is mutually supportive with the WTO agreements. According to the Protocol the "(L)ack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects." (Article 11.8) The risk assessment, of course, has to scientifically sound and the guidelines are provided in Annex III (Article 11.6). Thus the Protocol has a wider scope for import restriction compared to the SPS Agreement, under which food imports may be *provisionally* restricted on the principle of precaution in the face of scientific uncertainty.

Article 14 of the Protocol allows bilateral/ regional/multilateral trading agreements and arrangements on transboudary movement of LMOs, *provided such agreement does not result in a lower level of protection than that provided for by the Protocol*. Thus the Protocol supports regionalism with more stringent standards on biosafety.

III.1.5 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)

The Rotterdam Convention on PIC, convened jointly by the UNEP and FAO, was adopted in 1998, and will enter into force in February 2004.[30] The Convention promotes the safe use of hazardous chemicals (through labeling standards, technical assistance), and ensures that exporters comply with the requirements. The Convention supports the Agenda 21 principle (chapter 19) on environmentally sound management of toxic chemicals, and the hazardous substances covered by the Convention include banned or severely restricted chemicals and hazardous pesticides, but not other chemicals like narcotic drugs, radioactive materials, wastes, food, chemical food additives, chemical weapons, pharmaceuticals, and chemicals imported in reasonable amounts for research analysis/ personal use (Article 3).

The trade measures pursuant to the Convention include export ban on extremely hazardous chemicals, and export notification for domestically restricted chemicals. A Party cannot export the chemicals listed in Annex III[31] from its territory (Article 11). An export notification has to be issued to the importing Party in case the chemical is banned or restricted in the exporting Party's own territory (Article 12). Exporters need to obtain prior informed consent from the state of import before proceeding with trade. Obligations for imports include issuance of consent for import, or refusal or even interim import consent based on *appropriate legislative and administrative measures* (Article 10).

III.1.6 Stockholm Convention on Persistent Organic Pollutants (2001)

The Stockholm Convention was adopted in May 2001, and is yet to come into force (will come into force only after the 50th Party ratifies the agreement).[32] Based on the precautionary approach (Principle 15, Rio Declaration), the Convention aims to protect human health and the environment from persistent organic pollutants (POPs)[33] by

[30] *Based on information in the website: http://www.pic.int/en/viewpage.asp. India is not a Party to the Rotterdam Convention.*

[31] *Annex III lists chemicals as pesticides, severely hazardous pesticides, and industrial chemicals. These include common pesticides like aldrin, chlordane, DDT, dieldrin, lindane, pentachlorophenol, hexachlorobenzene, etc, used in developing countries like India.*

[32] *India is a signatory (signed in May 2002) but has not accepted or ratified the agreement.*

[33] *POPs are chemicals that remain intact in the environment for long periods, resist degradation, can travel widely through air, water and migratory species and thus get distributed in distant geographical areas. POPS accumulate in the fatty tissue of living organisms and are toxic to humans and wildlife.*

reducing/ eliminating their release. The Stockholm Convention contains production and consumption restrictions on the pollutants listed in its annexes: Parties are required to *prohibit* or take measures to *eliminate* the production and use of chemicals listed in Annex A (e.g. aldrin, chlordane, dieldrin, mirex), and *restrict* the production/ use of chemicals in Annex B (e.g. DDT). Annex C lists chemicals *unintentionally* produced from anthropogenic sources, say during the manufacture of paper and pulp, or incineration of wastes, particularly medical waste.

Trade obligations pursuant to the Convention requires each Party to prohibit and/ or take legal and administrative measures necessary to eliminate import and export of chemicals listed in Annex A (Article 3.1 a). The import and export of chemicals in Annex A or B is allowed only for the purpose of environmental sound disposal or for the designated use permitted in these annexes (Article 3.2 a, b i, ii). A chemical listed in Annex A, for which production and use specific exemptions are no longer in effect for a Party, cannot be exported except for environmentally sound disposal (Article 3.2 c). The Protocol allows a Party to export Annex A or B chemicals to a *non-Party* on condition that the latter conform to some of the Protocol's provisions (Article 3.2 b iii).

Selected WTO Members and Ratification of the Six MEAs

The potential conflict between the multilateral trading rules and trade measures pursuant to MEAs triggered speculation that countries may choose not to participate in environmental treaties in future (also called the *chill* effect). While Western European nations are well-known to be proponents of environmental initiatives, most developing countries (as well as least developed countries) have also been Parties to the major MEAs existing today. However, not all major WTO Members are Party to all the major MEAs. Table 2 provides the ratification of selected WTO Members, including Australia, China, EC, India, Japan, Malaysia, Norway, Switzerland, and US.

The WTO Members listed in Table 2, represent some of the countries whose proposals on paragraph 31 (i) of the DMD are discussed in section 4 later. In particular, Norway and Switzerland have accepted or ratified all the six MEAs (including the amendments), followed closely by the EC. Japan has accepted four of the MEAs (though not all amendments) but not the Cartegena Protocol and the Rotterdam Convention. Australia has ratified three of these treaties, including CITES, Montreal and the Basel. The US, has so far ratified only two of the six MEAs, namely the CITES and Montreal Protocol. China has ratified three of the MEAs, including the CITES, Montreal and the Basel (as well as the Ban Amendment). In comparison, India has accepted all but two of these MEAs, namely the Rotterdam Convention and the Stockholm Convention. India, however, has not ratified the Ban Amendment under the Basel Convention). Malaysia has accepted five of these MEAs (including the Ban Amendment under the Basel Convention, but not the amendments under CITES), but not the Stockholm Convention on POPs.

I.1 Table 1: Six Multilateral Environmental Agreements: Objectives, Membership[34] and Trade Measures

i) Convention on International Trade in Endangered Species (1973)	
Objective to protect endangered species against exploitation through international trade, and regulate international trade in wildlife for conservation (especially non-endangered species in the international market that could become endangered without trade regulation). *Entry into force*: 1975 *Membership*: 1973 Convention with 164 parties, 1979 Bonn Amendment with 126 parties (entered into force 1987); 1983 Gaborone Amendment with 70 parties (not in force).	*Article III*: (2) export (3) import and (4) re-export in any specimen of species listed in Appendix I (threatened with extinction, is allowed through prior grant and presentation of a permit only after scientifically assessed that such trade would be non-detrimental to the species. *Article IV*: (2) Export and (5) re-export of specimens in Appendix II species (that may become endangered unless controlled) regulated through export permits and after scientific assessment. (3) Scientific Authority of State to monitor actual exports and export permits. (4) Imports require supporting export permits. *Article V*: (2) Export, (3) import and (4) re-export in species listed in Appendix III (identified by a Party for regulation within its own jurisdiction) through permits. *Article VI*: Guidelines for permits and certificates for trade.

[34] *Refers to the number of parties that have ratified/ accepted a treaty as of January 2004, based on information in the concerned MEA website.*

ii) Montreal Protocol on Substances that Deplete the Ozone Layer (1987)

Objective to reduce and eliminate anthropogenic emissions of ozone depleting substances, and develop a regime to limit the release of ozone depleting substances into the atmosphere.
Entry into force: 1989
Membership: 1987 Protocol with 186 parties;
1990 London Amendment with 171 parties;
1992 Copenhagen Amendment with 159 parties;
1997 Montreal Amendment with 113 parties;
1999 Beijing Amendment with 66 parties.

(The four Amendments entered into force in 1992, 1994, 1999 and 2002 respectively)

Article 4: Parties to ban (1) import (as of January 1990) and (2) export (as of 1993) of controlled substances in Annex A with non-parties.
Trade ban with non parties of substances in: Annex B from August 1993 (London Amendment); Annex C Group II from June 1995 (Copenhagen Amendment); Annex C Group III after February 2003 and Annex C Group I from January 2004 (Beijing Amendment).
Trade ban in HCFCs with countries which have not ratified Copenhagen Amendment (Beijing Amendment)
Article 4A: (1) Parties unable to cease production of controlled substance in the applicable time, despite all steps, shall ban export of new/ used/ recycled/ reclaimed quantities of the substance except for destruction.
Article 4B: (1) Parties shall implement licensing system for import and export of new, used, recycled, reclaimed controlled substances in Annexes A, B, C & E.

iii) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)

Objective to promote environmentally sound management of hazardous wastes, and reduce transboundary movements of hazardous wastes to protect human health and the environment from adverse effects from handling, transport and disposal of hazardous wastes. Also minimize the generation in terms of quantity and hazardousness of wastes.

Entry into force: May 1992.
Membership: Convention with 159 parties.
1995 Ban Amendment with 42 parties, *not yet in force*.
1999 Basel Protocol on Liability and Compensation for Damage has only
14 signatories, *not in force*.

Article 4.1: (a) Inform other parties of the decision to prohibit import of hazardous wastes for disposal. (b) Prohibit the export of hazardous wastes to Parties that have notified import prohibition of those substances, or (d) have not consented in writing to the specific import.
Article 4.2: (d) ensure transboundary movement of hazardous wastes is minimized consistent with environmentally sound and efficient management of wastes; (e) Ban export of hazardous wastes to parties, especially developing countries, if wastes in question will not be managed in an environmentally sound manner, or if import is prohibited by domestic legislation; (g) prevent import of hazardous wastes in case wastes will not be managed in an environmentally sustainable manner.
Article 4.5: Party shall ban trade of hazardous wastes with a non-Party.
Article 4.7: Party shall (a) prohibit all persons in its national jurisdiction from transporting hazardous wastes unless authorized; and ensure trade in hazardous wastes is (b) packaged, labeled; (c) accompanied by documents.
Article 4.8: Exporting Party shall ' require that wastes are managed in environmentally sound manner in state of import.
Article 6: (1, 2, 3, 4) Prior information consent procedure for trade between parties, (9, 10, 11) procedure on receipt of wastes, covered by insurance.
Article 8: Duty to re-import by State of export if the wastes cannot be disposed in an environmentally sound disposal.
Article 9: (2, 3, 4) In case of illegal traffic of hazardous wastes, responsible Party (exporting or importing) or concerned parties will dispose of wastes.

iv) Cartagena Protocol on Biosafety (2000)	
Objective: Adequate level of protection in the field of safe transfer, handling and use if LMOs that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health. *Entry into force*: September 2003 *Membership*: 84 parties (Party to the Protocol has to be a Party to the Convention on Biodiversity)	*Article 7:* (1) Advanced Informed Agreement (AIA) to apply to first intentional movement of LMOs (other than food or feed) *Article 8:* Export notification in writing for LMOs other than food or feed. *Article 9:* Acknowledgement of export receipt in writing, *Article 10:* (1-4) Import decision procedure for LMO (not food or feed). *Article 11:* (1,2,5) Import decision procedure for LMO (food/ feed) *Article 14.2:* Parties shall inform others of bilateral/ regional/ multilateral trade arrangements they have entered into before or after this Protocol. *Article 18.2:* (a, b, c) Party to ensure documentation accompanies LMOs.
v) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)	
Objective: Promote shared responsibility and cooperative effort in the international trade of certain hazardous chemicals to protect human health and the environment from potential human harm and encourage environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties. Entry into force: to enter into force from 24 February 2004. Membership: 59 parties	*Article 5:* (1, 2) Parties shall notify the Secretariat in writing of regulatory action and information on chemicals (banned or severely restricted or hazardous) that are to be subject to the prior informed consent procedure. *Article 10:* Parties shall (2, 4, 7) notify Secretariat a response on future import of the chemicals listed in Annex III; and (9) decide on the import of the chemical from any source. *Article 11.2:* Party shall ensure that a chemical listed in Annex III is not exported from its territory to an importing Party even if latter fails to respond. *Article 12:* (1-4) Party shall provide export notification for chemicals banned or severely restricted in its own territory, providing information set out in Annex V. Obligation ceases when chemical is listed in Annex III. *Article 13.2:* Each Party shall require that chemicals (in Annex III or those domestically banned or severely restricted) are labeled according to international standards.
vi) Stockholm Convention on Persistent Organic Pollutants (2001)	
Objective: Reduction or elimination of releases of persistent organic pollutants into the environment. Entry into force: not yet in force. *Membership:* 48 parties	*Article 3.1:* (a) (ii) Each Party shall prohibit and/ or take legal and administrative measures necessary to eliminate import and export of chemicals listed in Annex A. *Article 3.2:* (a, b) Each Party to ensure that import or export of chemical listed in Annex A or B occurs only for purpose of environmentally sound disposal or for use permitted for the Party under Annex A or B; (c) For a Annex A chemical, for which production or use exemption is no longer in effect, is not exported except for the purpose of environmentally sound disposal.

Source: Compiled from information in the websites of the respective MEAs (as of January 2004) and WTO (2003).

Table 2: Six MEAs: Ratification Status of Selected WTO Members

MEA and year enforced	*Aust-ralia*	*China*	*EC*	*India*	*Japan*	*Malay-sia*	*Nor way*	*Switz-erland*	*US*
CITES, *1975*	r 1976	ac 1981	-*	r 1976	at 1980	ac 1977	r 1976	r 1974	r 1974
Bonn Amendment, 1987	1986	1997	-*	1980	1980	-	1979	1981	1980
Gaborone Amendment	1991	1988	-*	1989	-	-	1984	1994	-
Montreal Protocol, *1989*	r 1989	ac 1991	ap 1988	ac 1992	at 1988	ac 1989	r 1988	r 1988	r 1988
London Amendment, 1992	*at 1992*	*ac 1991*	*ap 1991*	*ac 1992*	*at 1991*	*ac 1993*	*r 1991*	*r 1992*	*r 1991*
Copenhagen Amendment, 1994	at 1994	ac 2003	ap 1995	ac 2003	at 1994	ac 1993	r 1993	r 1996	r 1994
Montreal Amendment, 1999	at 1999	-	ap 2000	ac 2003	at 2002	r 2001	r 1998	r 2002	r 2003
Beijing Amendment, 2002	-	-	ap 2002	ac 2003	at 2002	r 2001	r 2001	r 2002	r 2003
Basel Convention, *1992*	ac 1992	r 1991	ap 1994	r 1992	ac 1993	at 1993	r 1990	r 1990	-
Ban Amendment	-	r 2001	ap 1997	-	-	r 2001	at 2001	at 2002	-
Cartagena Protocol on Biosafety, *2003*	-	-	ap 2002	r 2003	ac 2003	r 2003	r 2001	r 2002	-
Rotterdam Convention on PIC, *2004*	-	-	ap 2002	-	-	at 2002	at 2001	r 2002	-
Stockholm Convention on POPs	-	-	-*	-	at 2002		r 2002	r 2003	-

Source: Compiled from "Ratification Status" of the websites of the multilateral environmental agreements: CITES Secretariat (http://www.cites.org/eng/parties/index.shtml); UNEP Ozone Secretariat (http://www.unep.org/ozone/ratif.shtml); Secretariat of Basel Convention (http://www.basel.int/ratif/ratif.html); Biosafety Protocol (http://www.biodiv.org/biosafety/signinglist.aspx); Rotterdam Convention on PIC (http://www.pic.int/en/viewpage.asp); Stockholm Convention http://www.pops.int/documents/signature/signstatus.htm

** Some EU members like Austria, Finland, Germany, Luxembourg, Netherlands and Sweden, however, have accepted/acceded or ratified the MEAs.*

ac = accession; ap = approval; at = accepted; r = ratified. Ratification, acceptance and approval are legally equivalent actions but are only applicable in relation to the States that signed the MEA when it was opened for signature. Acceptance and approval are the actions taken by certain States when, at national level, constitutional law does not require a treaty to be "ratified". The term accession is used in relation to the States that did not sign the Convention initially.

III.2 Effectiveness of Trade Measures Pursuant to MEAs

Although trade restrictions are used as instruments in MEAs to help acheive environmental conservation, it is widely recognized that trade measures are neither the most efficient nor the most effective means of achieving an environmental goal since international trade per se may not be the cause driving the environmental degradation. Not surprisingly, the environmental worth of trade measures in MEAs has typically been low on evaluation of their effectiveness. This was evident from the evaluation of trade obligations under the CITES to preserve endangered species of flora and fauna (UNCTAD 2000). The threat to endangered species is driven by not just the destruction of the species directly but also indirectly through the destruction of habitat of the species. Sometimes, conditional trade restrictions have also induced exploitation and illegal trade. For instance, while the CITES prohibits trade in wild orchids, it allows trade in cultivated flowers, which has led to illegal trade in some rare species.

Similarly, the Basel Convention, intended to eliminate the problem of dumping of hazardous wastes from industrialized countries to developing countries, ignored the fact that a number of developing countries are increasingly becoming generators of hazardous waste. Rapid industrialization in developing countries has been accompanied by an increasing demand for secondary retrievable material from certain wastes (especially lead and zinc wastes) and the ban on export of hazardous wastes from OECD countries under the Basel Convention has enhanced the existing trade of hazardous wastes among developing countries (UNCTAD 2000: 10). It is noteworthy that since the largest exporter of waste worldwide, the US, is not a Party to the Basel Convention, it undermines the essential goal of the Convention. More importantly, the Basel

Convention has failed to promote environmentally sound hazardous waste management in developing countries[35], even though it may have reduced the flow of wastes from European developed nations to the developing countries.

The Basel Convention has created much discontent among industrializing countries about the wastes listed as "hazardous" in the Convention. Some of the wastes, listed as hazardous in the Convention, contain recyclable materials like lead acid and zinc ash. The ban being wide, it precludes extraction of recyclable materials in the industrializing countries through waste import. Questions have been raised whether such a ban would be able to promote environmentally sound hazardous waste management in developing countries (one of the goals of the Convention), since the demand for cheaper recycled metals in industry as opposed to virgin mined metal still remain. According to analysts of MEAs (Brack and Gray, 2003: 13), flexibility is both desirable and also workable as demonstrated in the one-off sales of elephant ivory permitted under CITES, or allowing trade in farmed or ranched species.

Trade measures, however, continue to play an important role in these MEAs, and the concern within the WTO is that the trade measures can affect WTO Members' rights and obligations (WTO 1996: 2). Indeed, the MEAs negotiated in the post-WTO era, especially the Cartagena Protocol on Biosafety (2000), the Rotterdam Convention on Prior Informed Consent (1998), and the Stockholm Convention on Persistent Organic Pollutants (2001), contain statements in their respective Preambles that reinforce the mutual supportiveness of trade and environment, and that the MEA does not change the rights and obligations of the parties under existing international agreement.

III.3 Trade Obligations in MEAs and Compatible WTO Provisions

Most of the trade obligations applied amongst Parties in the six multilateral environmental agreements discussed in section 3.1 are compatible with the provisions in the GATT/WTO. The quantitative trade restrictions in the MEAs are justified under the GATT Article XX exceptions to protect exhaustible or depletable natural resources, and the labeling requirements fall under the category of technical regulations in the TBT Agreement. Moreover, since the GATT/WTO provides its Members the autonomy to adopt environmental policies in support of sustainable development, any domestic environmental legislation requiring a ban on trade of hazardous substance, say under Basel or Rotterdam Convention, would be consistent with the multilateral trading rules.

Four of the MEAs discussed here require prior informed consent to international trade, namely, the Basel Convention, the Cartagena Protocol, the Rotterdam Convention, and the Stockholm Convention. The prior consent requirements are conditions to the entry into a country's market, and can be viewed as conditional market access requirements or binding technical requirements on trade. As conditional market access requirements they are covered by the prohibition under Article XI of GATT 1994, but are justifiable under GATT Article XX. As binding technical requirements they are covered by the TBT Agreement. The prior informed consent notification requires detailed product characteristics/ information, which clearly come under the definition of technical regulations (Annex 1.1, TBT Agreement).[36]

There are, however, some inconsistencies, for example the differential treatment among Parties in the Basel Convention, or the precautionary basis of import refusal in the Cartagena Protocol. Another aspect inconsistent with the GATT/ WTO trade rules results from the discrimination between Parties and non-Parties obligatory in the Basel Convention and the Montreal Protocol. Since all of the Members of the GATT/WTO are not parties to such an MEA the Party vs non-Party issue violates the GATT Article I (MFN clause).

The consistency of trade measures under MEAs with GATT/WTO rules is important especially where the Parties to an MEA constitute only a subset of the WTO Members. It may be noted that Article 41 of the Vienna Convention allows "two or more of the parties to a multilateral treaty" to conclude an agreement "to modify the treaty as between themselves" as

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[35] *The Preamble to the Convention recognized the "increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other States, especially developing countries", and "the need to promote the transfer of technology for the sound management of hazardous wastes and other wastes produced locally, particularly to the developing countries in accordance with the spirit of the Cairo Guidelines and decision 14/16 of the Governing Council of UNEP on Promotion of the transfer of environmental protection technology" (emphasis added). The Convention considered "that enhanced control of transboundary movement of hazardous wastes and other wastes will act as an incentive for their environmentally sound management and for the reduction of the volume of such transboundary movement". (Preamble to the Basel Convention)*

[36] *The general interpretative note to Annex 1A of the Multilateral Agreements on the Trade in Goods of the of the Uruguay Round Final Act states that: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreement in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict." Thus, if a measure is consistent with the TBT agreement (one of the agreements in Annex 1A), it will prevail even if there is an apparent inconsistency with another provision of the GATT.*

long as such a modification is either provided by the original treaty (Article 41.1 a) or not prohibited in the treaty (Article 41.1 b). The conditions of the current WTO negotiations fall under Article 41.1 b of the Vienna Convention, which requires that the new treaty among the subset of parties *"(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;" and "(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole*."

The GATT/WTO rules compatible with the trade measures pursuant to each of the six MEAs (among Parties) are briefly discussed below, and listed in Table 3 at the end of the section:

CITES: The commercial trade prohibition of species listed in Appendix I (threatened with extinction) and the regulated trade of species in Appendices II (endangered unless regulated) are consistent with GATT Article XX (g) to conserve the exhaustible natural resources in conjunction with domestic regulations. The regulation of trade in Appendix III species (identified by Party within its own jurisdiction) is consistent with GATT Article XX (d). The specifications on export and import permits are technical regulations falling under the TBT Agreement.

Montreal Protocol: The trade ban of ozone depleting substances between parties and non-parties may be justifiable under GATT Article XX (b) and (g), given the domestic control of production and consumption of ODS in the economy of the Party (and considering the broad interpretation of the exceptions in the Gasoline dispute). Under the Montreal Protocol, the domestic producers of the parties are subject to restrictions on ODS production, and National Treatment may allow discrimination with non-parties of the Protocol.[37]

Basel Convention: The ban on export of hazardous and other wastes to countries which have prohibited the import of such wastes (Article 4.1), and the obligation to re-import in case the state of import cannot dispose of the wastes in a sustainable manner (Article 8) seems consistent under GATT Article XX (b). The ban on export from developed to developing countries or parties where environmentally sound management of waste is not followed (Article 4.2 e), would be consistent with GATT Article XX (b), but based on an extra-jurisdictional argument of minimizing the risk to human health in the developing countries.

The Convention requires that the state of export notify "competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes" and the notification should "contain the declarations and information specified in Annex V A" (Article 6.1). Among other information, the notification is should provide information on the "designation and physical description of the waste including Y number and UN number and its composition and information on any special handling requirements including emergency provisions in case of accidents" (Annex VA.13). The notification requirement is mandatory and would seem to fall under the TBT Agreement. The notification requirement does not infringe any GATT rule as long as it does not have a restrictive effect.

Cartagena Protocol: The Advance Informed Agreement of the Protocol requires that "The Party of export shall notify, or require the exporter to ensure notification to, in writing, the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism …. The notification shall contain, at a minimum, the information specified in Annex I" (Article 8.1). The information requirements specified in Annex I include product characteristics like the "identity of the living modified organism", "description of the nucleic acid or the modification introduced, the technique used, and the resulting characteristics of the living modified organism", as well as "suggested methods for the safe handling, storage, transport and use, including packaging, labelling, documentation, disposal and contingency procedures, where appropriate". The Advanced Informed Agreement of the Protocol would seem to fall under the exception in Article XX (b). The accompanying documentation on product characteristics during trade of LMOs, are technical regulations consistent with the TBT Agreement.

On the other hand, the decision to import LMOs for food/feed would correspond to Article 2 of the SPS Agreement and Article XX (b). However, the provision for the precautionary principle outlined in the Protocol for food/ feed LMOs in Article 11.8, which that allows decision based on insufficient scientific evidence (reflects Principle 15 of the Rio Declaration), is different to the precautionary principle contained in the SPS. The SPS Article 5.7 does allow for the use of precaution when scientific evidence is insufficient to establish safety, but such measures can be adopted only on

[37] *A sub-group of the Protocol had provisionally concluded that the proposed trade measures against non-parties could be justifiable under GATT Article XX (b) and possibly XX (g), and the GATT Secretariat at the time had not objected to the proposed trade measures. In 1996, however, the Director of the WTO Trade and Environment Division questioned the necessity and efficacy of the Protocol's trade provisions, and suggesting that they would not be saved by Article XX exceptions. In 1999, the Ozone Secretariat issued a communication to the WTO CTE, that the measures against non-parties could be defended under Article XX since the ozone layer is an exhaustible natural resource. Brack and Gray (2002): page 20.*

a *provisional* basis![38]

Rotterdam Convention: As noted earlier, prior informed consent requirement is not consistent with Article XI.1 of GATT 1994, but can be justified under Article XX (b) and (d) to protect health and to secure compliance with domestic regulations. The Convention also requires that the export of chemicals be accompanied with documented information: "Without prejudice to any requirements of the importing Party, each Party shall require that both chemicals listed in Annex III and chemicals banned or severely restricted in its territory are, when exported, subject to 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." (Article 13.2) The product labeling of the consignment is consistent with the TBT Agreement.

The provision on declaration of domestically prohibited/ restricted hazardous chemicals (Article 12) relates to the issue of domestically prohibited goods (DPGs) in the GATT/WTO. The concern for export in DPGs was first taken up in the GATT in 1982, and although a notification system was set up, the system failed to work effectively. The issue of DPGs is one of the items in the work agenda of the CTE and is yet to be resolved.

Stockholm Convention: The export and import prohibition (to support the MEA objective of elimination/ limiting identified pollutants, just as in the Montreal Protocol) would be justifiable under Article XX (b) exceptions. The Convention allows for limited trade (for permitted use and/or final disposal) in "a chemical listed in Annex A for which any production or use specific exemption is in effect or a chemical listed in Annex B for which any production or use specific exemption or acceptable purpose is in effect, taking into account any relevant provisions in existing international prior informed consent instruments" (Article 3.2.b). The information requirement and screening criteria (Annex D) for a Party to list a chemical as POP in Annex A/ B include detailed product characteristics. Thus for a Party exporting a chemical which it has listed in Annex A/B, the applicable WTO provision is the TBT Agreement.

Table 3. Trade Obligations in MEAs and Compatible GATT/WTO provisions

	Multilateral Environmental Agreement	Compatible provision under WTO
1.	CITES	Article XX (d), (g)
2.	Montreal Protocol	Article XX (b), (g)
3.	Basel Convention	Article XX (b), (d), TBT
4.	Cartagena Protocol	Article XX (b), TBT and SPS*
5.	Rotterdam Convention (PIC)	Article XX (b), (d), TBT
6.	Stockholm Convention (POPs)	Article XX (b) and TBT

* Cartagena Protocol Article 11.8 allows import restrictions with insufficient scientific information (principle of precaution), but Article 5.7 of the SPS Agreement allows only provisional food import restrictions in the face of scientific uncertainty.

IV WTO Deliberations on MEAs and Trade Rules

This section summarizes the submissions made by WTO Members on the relationship between trade measures pursuant to MEAs and WTO rules for almost one decade since 1995. The issue was first taken up within the GATT in 1991 under the EMIT. The Sub-Committee on Trade and Environment (under the Preparatory Committee for the WTO) towards the end of the Uruguay Round built on the initial exchange of information, and began the work on the question of consistency between trade measures pursuant to MEAs with the multilateral trade rules. The issue was then itemized (item i) in the CTE work agenda, and WTO Members began deliberating through unofficial papers as well as official proposals. In the Doha Ministerial in 2001, the issue was finally put on the negotiating agenda of the WTO (paragraph 31 i), and the Members continue their efforts to resolve the relationship between *obligatory* trade measures pursuant to MEAs and WTO rules.

IV.1 CTE Discussions prior to Doha

After the discussions on item (i) of the CTE work agenda began on the issue of the scope of WTO provisions to use such trade measures for environmental purposes, in 1996 several Members including the EC, Hong Kong, India, Korea, Switzerland and the US submitted non-papers (unofficial papers), while ASEAN, Japan and New Zealand submitted official proposals. Before the Doha Ministerial in November 2001, however, more formal proposals were

[38] *Six grain exporting countries, the Miami Group (Argentina, Australia, Canada, Chile, Uruguay and US), opposed the ratification of the Cartagena Protocol due to the apprehensions that it would limit trade.*

submitted on this item, in particular by the EC, New Zealand, and Switzerland.

In one of the first contributions under CTE item (i), the EC suggested the development of an Understanding on the recognition of an MEA as an international written instrument adopted in conformity with the customary international law aimed to solve environmental problems. The paper also suggested an amendment to the GATT Article XX by adding a new paragraph (k) to allow for the application of trade measures pursuant to an MEA (EC non paper, 19 February 1996). Alternatively, GATT Article XX (b) could be amended to explicitly include protection of the *environment* and *measures taken pursuant to specific provisions of MEAs;* along with an Understanding. The MEA, according to the EC, had to be open to participation to all parties concerned about the environmental objectives of the agreement and reflect adequate participation of parties with relevant significant trade and economic interests. Both options proposed by the EC constituted a radical change through an amendment of the GATT Article XX, and making a legal framework for "de jure compatibility of trade measures taken pursuant to MEAs" without questioning whether such trade measures are necessary to achieve the environmental objective of the MEA.

In a later formal submission, the EC sought confirmation that "WTO rules and MEAs are separate but equal bodies of international law and that, accordingly, MEAs are not subordinate to WTO rules and vice versa" (para 14, WTO 2000). While the EC opposed "eco-protectionism", the proposal suggested the "reversal of the burden of proof" in order to accommodate specifically mandated trade measures pursuant to MEAs. This meant that a country challenging a measure taken by a trading partner would have to prove that the measure does not meet the conditions of Article XX. Effectively, the EC proposal considered the specific trade measures mandated in MEAs not only to be *de jure* compatible with GATT Article XX conditions, but a WTO Member challenging such a measure would need to that it was not compatible contrary to practice.

While not suggesting an amendment of the GATT Article XX like the EC, Switzerland proposed a Coherence Clause similar to EC's proposed Understanding (non paper 1996). The Coherence Clause would apply in case of a conflict between WTO rules and a specific trade provision of an MEA to ensure that the applied measure did not constitute an arbitrary or unjustifiable discrimination, but would not question either the legitimacy or the necessity of the trade measure. In 2000, Switzerland officially proposed this idea as an interpretative decision on *mutual supportiveness and deference* between the WTO and MEAs, whereby a trade measure under an MEA would be presumed to be in conformity with WTO rules, but only its implementation would remain subject to WTO requirements.

The first official proposal was made by New Zealand (February 1996) and suggested that Members develop an Understanding to accommodate trade measures pursuant to MEAs provided certain substantive criteria were satisfied. In particular, an MEA should reflect a genuine multilateral consensus requiring equitable participation to all interested countries, representing various geographical areas as well as varying levels of development. New Zealand distinguished between specifically mandated trade measures within MEAs versus non-specific measures, and also those applied between Parties and those against non-Parties. The substantive criteria for specifically mandated trade measures within Parties were to ensure that the measures were necessary to achieve the environmental objective of the MEA (considering effectiveness of the measure in achieving the environmental objective; whether the measure is least-restrictive or distorting; and the proportionality of the measure to the need for trade restriction to achieve the environmental objective).

The substantive criteria for the MEA (effectiveness and proportionality) outlined by New Zealand made the proposed Understanding different from that of the EC or Switzerland, since the latter *presumed* trade measures pursuant to an MEA to be necessary and in conformity with the GATT Article XX. Similar to New Zealand, Korea suggested that only specific trade measures applied among Parties of an MEA should be eligible for consideration within the WTO through a qualified codification on a time-basis.

In 1996, the ASEAN submitted a proposal for a waiver option within the WTO, while distinguishing between specific and non-specific trade measures pursuant to MEAs (like New Zealand and Korea). The proposed multi-year waiver on a case-by-case basis was subject to non-binding guidelines, including necessity, least-trade restrictiveness, effectiveness, proportionality and the degree of scientific evidence. The waiver could be extended annually until its termination. The proposal suggested that as Members learnt and revisited the issue over time, a more substantive alternative may emerge in the future. Since effectiveness and efficiency of discriminatory trade measures pursuant to MEAs are still questionable (for example those under the Basel Convention discussed earlier in section 3.2), the ASEAN proposal was a "measured and incremental response" to accommodate such measures within the WTO.

It is significant to note that the ASEAN reinforced the fact that the WTO was a trade regulating body, and the GATT 1994 in the context of trade can be regarded as "*lex specialis derogate generali*" (the more specific agreement in

relation to trade) in case of a WTO dispute regarding infringement of Member right following the implementation of trade measures pursuant to MEAs. The case-by-case waiver option, according to the ASEAN, offered to the WTO and MEA authorities a "flexible approach" whereby the interests of both regimes could be preserved – MEA negotiators could still use discriminatory trade measures if absolutely necessary to achieve their environmental objectives, and WTO Members would retain the right to raise justifiable trade implications within the WTO through its dispute settlement mechanism. More importantly, both the regimes could work towards greater coordination in the achievement of their differing objectives.

Hong Kong also proposed the option of a waiver on condition that certain criteria were satisfied (non-paper, 22 July 1996). The proposal suggested the creation of a factual reference guide containing WTO principles by the WTO Secretariat, which could be used by MEA negotiators in their consideration of proposed trade measures. All measures taken under MEAs would be eligible for a waiver provide they satisfied certain consistency criteria (for specific trade measures they included (i) wide participation in the negotiation of the MEA, (ii) criteria set out in the headnote to the GATT Article XX, (iii) grant of waiver does not prejudice WTO Members' rights and obligations under the DSU, even if they are not Parties to the MEA in question and (iv) least inconsistent with WTO provisions). The waiver would be automatically renewed in case no new developments affect the exceptional circumstances which led to the granting of the waiver earlier.

Japan, on the other hand, proposed developing non-binding interpretative guidelines on application of WTO provisions for trade measures pursuant to MEAs, which reflect wide consensus and address transboundary/ global environmental problems. The trade measures also needed to incorporate certain characteristics including necessity (to achieve the environmental goal), effectiveness (trade measures are effective to achieve the environmental goal, and alternative measures are ineffective) and proportionality.[39]

India maintained that the existing provisions of GATT 1994 provide sufficient scope for Members to apply trade measures pursuant to legitimate environmental objectives contained in existing MEAs and that trade measures pursuant to future MEAs should be formulated keeping in mind the provisions of the multilateral trading system (WTO 1996a). Moreover, in case trade measures are restrictive in nature in MEAs, they must respect the rule-based nature of the multilateral trading system and their costs in terms of trade restriction must be fully taken into account. To ensure the principle of non-discrimination, the trade measure for environmental protection should be within the scope of Article XX of GATT 1994.

Considering the issue of consistency between trade measures in MEAs and GATT/WTO rules, India noted that a priori trade measures incorporated in MEAs may not successfully pass the tests of *necessity*, *effectiveness*, *least trade distortive* and *proportionality*. Hence, the focus in the CTE should not be to encourage dependence on such trade measures. India reiterated that MEAs, by and large, should provide for functions to support implementation towards the environmental objective through capacity building and resource transfer (including technological assistance) [40], and trade measures are provided for only in a handful of MEAs to encourage enforcement.

The United States too stated that there is already a broad scope provided by the existing WTO rules for Members to take measures for environmental protection, including those pursuant to MEAs. In the general framework on this issue, the US suggested that when negotiating trade measures in MEAs (that apply between parties), governments should consider how the intended use of these measures relate to the multilateral trading system.

IV.2 State of Current Negotiations under DMD Para 31 (i)

Following the submissions and discussions on the issue in the CTE prior to November 2001, at the Doha Ministerial,

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[39] *Japan proposed an increase in the cooperation between the WTO and MEAs, by inviting MEA representatives into the CTE for interaction. Similarly Korea suggested enhanced dialogue and cooperation between MEAs and WTO from the stage of negotiation to implementation of an MEA. Switzerland proposed a more formal process of information exchange and cooperation between the WTO and MEA Secretariats, where the WTO examine all envisaged trade provisions of a MEA and report back to the MEAs.*

[40] *Indeed, an UNCTAD study (2000) argues that the major reason for India to accede to the Montreal Protocol was the expectation that sufficient funds would be made available to facilitate the use of alternative technologies in the phase-out process and in the production of CFC-substitutes. The study indicates that the trade effects of the consumption and production quotas do not seem to have affected the efficiency of the phase-out schemes. The effectiveness in the phase-out of aerosols and foams is attributed largely to the easy availability of substitute technologies and products at good prices. However, in certain sectors like refrigeration and air-conditioning, production of CFC-substitutes (like HFC 134a) faced problems in technology transfer. While resource dependence should not be a motive for being party to a MEA, such provisions can help developing, particularly the least developing countries, to support international environmental initiatives when the expected burden of compliance for such countries is relatively high.*

Members committed to negotiate on the relationship between *specific* trade *obligations* under MEAs and WTO rules (Paragraph 31 i, DMD). Till date fifteen WTO Members, including nine developed and six developing countries have made formal submissions: Argentina, Australia, Canada, China, Chinese Taipei, European Community, Hong Kong, India, Japan, Korea, Malaysia, New Zealand, Norway, Switzerland, and United States. Several Members have made multiple submissions including Switzerland (4), Japan (2), EC (2), Chinese Taipei (2), and Hong Kong (2).[41]

The negotiations so far have been structured by the exact wording of the negotiation item in paragraph 31 (i), namely that the relationship to be clarified is between "existing" WTO rules and "specific trade obligations" (STOs) set out in the multilateral environmental regulations, the scope being limited to "parties" (to the MEA in question). Some Members have also emphasized that the negotiations are not to "prejudice the WTO rights of any Member that is not a Party to the MEA in question".

The Members considered several options to clarify the relationship between the rules and provisions of the WTO system and those of MEAs, and these can be classified into three categories (WTO 2002). First, status quo, where the issue could be left to be settled by the dispute settlement mechanism (as and when environmental trade disputes arise) and allow a legal system, Dispute Settlement Board, to decide the relationship when an environmental trade dispute arises between WTO Members.[42] Second, Article XX of GATT 1994 could be amended, i.e. a legislative change after reviewing of the GATT Article XX. Third, an *interpretative decision* could be adopted regarding trade measures in MEAs and WTO rules.

The option of status quo dependent on the WTO Dispute Settlement makes for an unpredictable future. Moreover given the trend in unilateralism in the use of restrictive trade measures on environmental purposes and wider interpretation of Article XX exceptions in the disputes of the recent past, it puts multilateralism at risk. The second option of a legislative amendment has not appealed to the Members since it is a major change to accommodate a set of exceptional trade measures whose effectiveness and necessity is still questionable. Thus current negotiations seem to be heading towards the option of an interpretative decision.

The negotiations so far have distinguished the process, principle and outcome of the decision on the relationship between STOs in MEAs with the multilateral trade rules of the GATT/WTO as well as the definitions of MEAs and STOs. Members have also identified STOs in selected MEAs that have featured in earlier discussions. Section 4.2.1 briefly describes the positions of the Members on each of these aspects, and section 4.2.2 gives a brief analysis of the submissions.

IV.2.1 Submissions under DMD Para 31 (i)

The submissions by the WTO Members have distinguished the different steps in the negotiations, including procedure to be followed, definition of MEA and STO, relationship between current WTO rules and STOs, Party vs non-Party issue, and also the expected outcome of the negotiations. While not all Members have elaborated on each of these subheadings, the discussion below considers the submissions under these sub-headings and highlights the some proposals which have commented on that aspect.

IV.2.1.1 The procedure

A well-defined step by step approach to the negotiations was proposed by Australia in June 2002. First, Members could identify "specific trade obligations" in MEAs (from those listed in the Secretariat Note, WT/CTE/W/160/Rev.1), and then identify any relevant WTO rules that have to be considered in relation to any action that might be taken by WTO Members pursuant to each obligation. The second phase would include information exchange with MEA secretariats and experience-sharing among WTO Members, especially to determine whether there have been particular implementation issues with these "specific trade obligations". The third and final phase would consider the work under the first two phases and discuss the way forward.

This three-phased approach was supported by several Members, including Brazil, Chinese Taipei, China, Canada,

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[41] *One observer country namely Saudi Arabia has also made a formal submission.*

[42] *Article 13 and Appendix 4 of the DSU allow a panel to seek information and technical advice from any individual or body which it deems appropriate, to seek information from any relevant source and to consult experts to obtain their opinion on certain aspects of the matter, and to request a report in writing from an advisory review group with respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute. This facility is available to panels examining disputes that arise over the use of any environment-related trade measures, whether these have been applied pursuant to an MEA or not. WTO (1996): paragraph 39.*

Chile, Cuba, Egypt, Indonesia, India, Korea, Malaysia, Mexico, Pakistan, Thailand, and Singapore among others in 2002.[43] Switzerland, however, opposed the Australian step-by-step proposal, suggesting that the CTE Special Sessions could conduct parallel examination of the "*principles governing the relationship between the WTO rules and MEAs*" (emphasis added). The EC too is keen on clarifying the principles in the relationship rather than such a structured approach which would limit the scope.

In October-November 2002, Members agreed to examine the STOs in certain MEAs, and complement the review with a conceptual analysis. In particular, the US proposed six MEAs (namely the CITES, Montreal Protocol, Basel Convention, Cartagena Protocol, Rotterdam Convention on PIC and the Stockholm Convention on POPs) that could be examined, and this gained support from several Members. Indeed, Australia stated that the six MEAs identified by the US were likely to be the only agreements to contain STOs. All other agreements were either (1) not multilateral, (2) did not have environmental protection as their main objective, or (3) did not contain STOs. [44] Argentina, Brazil, Hong Kong China, Indonesia, Korea, Malaysia, Mexico, Pakistan, Peru, Philippines and Thailand support examining the trade obligations in different MEAs in a systematic way.[45]

It is useful to note here that a structured approach has the advantage of allowing Members to understand and examine trade measures within MEAs and the provisions of the GATT/WTO system completely before interpreting a relationship between the two distinct regimes. After all, both the systems (the MEAs and the WTO) are dynamic and evolving continuously over time and a step-by-step approach examining selected MEAs is a judicious choice before establishing a relationship between the two.

IV.2.1.2 Definition of MEA

The EC defined an MEA as a legally binding instrument between at least *three parties*, negotiated under the aegis of the UN, in which the main aim is to protect the environment and which is open to all countries concerned from the moment negotiations begin. In the context of the WTO, an MEA should also be relevant to the aims set out in sub-paragraphs (b) or (g) and the headnote of GATT Article XX. . The MEA should be open to all WTO Members for accession. Moreover, regional agreements should be included provided it is open to all countries in the region for negotiation and accession, and "open" to any countries outside the region whose interests may be affected by the agreement.

Japan too proposed a wide definition, where the environmental agreement is open to any country sharing the environmental objective, and the agreement has been developed and agreed "taking into account works including those under the aegis of the United Nations or its specialized agencies and with the participation of a substantial number of the countries". Besides MEAs in force, for practical reasons, Japan states, that it would be necessary to include in the discussion MEAs which have already been signed and adopted in due course but yet entered into force.

As opposed to the wide scope proposed by the EC and Japan, Argentina defined the scope of the negotiations to cover only those MEAs that are *currently in force*. India too has supported this interpretation of MEA in the mandate of negotiations, as including only "an MEA that has entered into force". Moreover, the MEA should have been negotiated and signed under the aegis of the United Nations, its specialized agencies like the UNEP, have attained a certain degree of universality and are open.

The Indian proposal also added an explicit condition that the MEA should have "effective participation in the negotiations by countries belonging to different geographical regions and by countries at different stages of economic and social development" (similar to the condition in New Zealand's proposal on *item i* in February 1996). Malaysia endorsed the Argentinean and Indian definition in its submission, and explicitly added that regional agreements do not fall in the purview of the Doha mandate. Similarly, China has defined characteristics of a MEA as covering an agreement negotiated under the auspices of the UN, universal, open for accession by relevant parties, with explicit trade measures that exert a substantial "impact on trade", and currently in force.

It is interesting to note here that China explicitly defined the universality of a MEA to mean "*substantial number of contracting parties account for a majority of WTO Members*". This condition is possibly to take care of multilateralism in its true sense (the principle voiced by EC), and to ensure that only MEAs that can be strongly associated with

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[43] *Summary Report on CTESS, TN/TE/R/2 (dated 25th July 2002): page 11.*

[44] *Summary Report on the 6th Meeting of the CTE Special Sessions, (TN/TE/R/6), 12 June 2003*

[45] *Ibid.*

international trade are included.[46]

Considering the definitions proposed so far by the Members, the aspects of universality and meaningful participation by countries representing different geographical regions and stages of development are important to ensure that the scope of the negotiations are only environmental treaties that are truly multilateral in nature. The MEAs should be concerned with truly global environmental problems, and not regional or national issues. In this respect, negotiations need not be restricted to only MEAs in force and but also include those to come into force in the near future (e.g the Stockholm Convention on POPs, which is likely to come into force by mid-2004).

IV.2.1.3 Definition of Specific Trade Obligation

The EC's definition of STOs was just as broad as its definition of MEAs. In particular the EC classified trade measures in MEAs as those which are (i) explicitly provided for and mandatory under MEAs;(ii) not explicitly provided for nor mandatory under the MEA itself but consequential of the "*obligation de résultat*" of the MEA; (iii) not identified in the MEA which has only an "*obligation de résultat*" but that Parties could decide to implement in order to comply with their obligations (iv) not required in the MEA but which Parties can decide to implement if the MEA contains a general provision stating that parties can adopt stringent measures in accordance with international law. While to several WTO Members only the first type of measure appear to fit the Doha mandate, the EC called for a detailed analysis *in order to determine where any cut-off point (or points) between "specific" and "non-specific" trade obligations exist*. Moreover, in its second submission,[47] the EC defined "set out in MEAs" should not be interpreted as being limited to the treaty itself, as originally adopted, but should also cover all subsequent decisions by the Conference of the Parties (COP), provided that they qualify as STOs.

The Japanese submission reiterated the EC classification of trade measures, and indicated that the first category of measures (explicit and mandatory) could be deemed as STOs compatible with WTO rules among MEA Parties, while those in the second category (*obligation de résultat*) could be "rebuttably presumed" to be the STOs consistent with WTO rules, if the measures are based on scientific principles and are proportional to the scope/ range of the MEA. The trade measures in the last two categories are to be decided on a case-by-case basis.

Switzerland also endorsed the EC proposal on the four categories of trade measures and added that STOs can be classified under two headings: (1) trade measures that are explicitly provided for and mandatory under MEAs; and (2) other measures that are relevant and necessary to achieve an MEA objective. I.e. the Swiss definition of STOs includes all trade measures under the first three categories of trade measures outlined by EC and Japan.

The other WTO Members, in particular, Argentina, China, India, Korea, Malaysia, Taipei and US proposed a more limited approach to identifying STOs. These proposals indicate that only explicitly identified as mandatory ("specific") export/import operations that are legally enforceable (obligation) within the framework of an MEA should be considered to be STOs. China added that the MEA trade measures should be relevant (i.e. *related to WTO disciplines*) with the objective of protecting the environment/ natural resources in order to be STOs.

Several Member submissions have identified the STOs in selected MEAs. Based on the country definition adopted, the identified STOs for a particular MEA are different across the Member submissions. In particular, the EC has not identified any specific trade obligation measure within the MEAs except to indicate that trade measures are key instruments in the CITES, Basel and Rotterdam Conventions, while the Montreal, Cartagena and Stockholm agreements contain STOs. Similarly, Switzerland has only indicated that the CITES, Basel, Cartagena and Stockholm Conventions contain explicit obligatory trade measures (1st category of STOs), while the Montreal Protocol and Rotterdam Convention contain trade measures relevant and necessary to achieve the environmental objectives (2nd category of STOs). Following the same line of reasoning, Norway's submission did not list the set of STOs within the six MEAs, but pointed out that there is "grey area" in identification of trade obligations and a clear demarcation of STOs versus trade measures falling outside the negotiation mandate is not possible.

On the other hand, while Japan has supported EC's broader mandate, the official submission has followed the MEA review procedure. The Japanese submission provided the analysis of three MEAs as an illustration, however the

[46] *Recall from discussion in section 1 before that trade is hardly ever the reason for environmental degradation, and that typically MEAs include trade measures to ensure enforcement of their environmental objective. Moreover, even in the MEAs with explicit trade obligations like CITES and Basel it is not evident that enforcement of the trade obligations have indeed achieved the original environmental goals.*

[47] *Submission by European Communities, TN/TE/W/31 dated 14 May 2003.*

classification of STOs seem wider than those of by other country submissions like China, India, Korea, Malaysia, or US. For example, Article 7 in the Basel Convention banning transboundary movement of hazardous wastes through states which are non-Party has been classified as an STO by Japan but not by the others since it is outside the mandate of the current negotiations.

In the submissions by China, India, Korea, Malaysia and US, the STOs identified in the MEAs by each Members do not match. Consider the case of the Basel Convention: The obligation under Article 4.1(a), which states that "Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal shall inform the other Parties of their decision pursuant to Article 13" is not considered to be an STO by China, India, Malaysia and Korea. The provision to decide has been considered to be a *right* of the Party and the *obligation* to inform others of its decision follows only after the right has been exercised. This fine distinction between a specific trade obligation versus a trade obligation following the *exercising* of the Party's *right* is arguable. The US, however, has included obligations like Article 4.1(a) and 4.2(f) (f. requires that "information about a proposed transboundary movement of hazardous wastes and other wastes be provided to the States concerned") as STOs, since it involves information directly related to trade.

Similarly, the trade obligation under Article 4.7.b of the Basel Convention, which covers packaging and labeling of hazardous wastes, has not be considered to be a STO by India, Malaysia, but included by the US (while China and Korea have excluded 4.7 completely). The provisions in Article 6.1-6.3 cover the prior information consent procedure and have been listed as STOs by China, Korea, Malaysia, and the US, but India has excluded Article 6.2 since it involves the *right* of the importing country to consent or refuse trade. However, Article 8, which lays down the exporting Party's obligation to re-import hazardous wastes in case the trade is incomplete, has been classified as an STO by the US, as a trade obligation by India (but not by China, Korea and Malaysia) on the grounds that it is not *specific*. Finally, the US has classified provisions on transmission of information contained in Article 13.2, 13.3.a and 13.4 as STOs, while China, India, Korea and Malaysia have excluded these.[48] Indeed, the US identification of STOs pursuant to the Basel Convention corresponds closely to the Japanese submission with regard to transmission of information. The Table 4 below lists the STOs corresponding to the six MEAs from selected country submissions.

The above example of STOs identified within the Basel Convention by various Members illustrate that there are indeed grey areas based on the language of the provisions. As rightly pointed out by Canada (WTO 2003i), it is relatively easy to identify a provision as an STO if it affects traditional areas of trade law i.e. import and export bans and restrictions on trade, but an STO may also include provisions that affect trade such as notifications, technical regulations, packaging and labelling requirements all of which are subject to WTO rules (e.g. Article 4.7 (b) Basel Convention). It is also difficult to classify when an STO does not become an obligation of one Party until another Party has asserted a right or privilege (Article 4.1 (a), (b) & (c) of the Basel Convention). Another complexity arises due to the discretion contained in a provision as in Article 4.2 (e) of the Basel Convention, which requires Parties to take appropriate measures to not allow the export of hazardous wastes to a country "if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner, according to criteria to be decided by the Parties at their first meeting". Thus a core component in the identification of STOs seems to be the level of discretion left to a Party in the choice of a range of measures, and the implementation and the design of a measure. The Canadian paper further suggested that Members should consider whether provisions in MEAs which permit considerable discretion should have the same relationship to WTO rules as those with little or no discretion. This is a useful principle for the current negotiations.

The aspect brought forward by Canada and Japan on defining a STO, highlight the fact that greater the discretion provided in MEAs greater the difficulty to establish a relationship with WTO rules. In case the EC definition of STOs is adopted (where non-specific, non-mandatory trade provisions or *obligation de résultat* are admitted), there is a perceptible risk of protectionist trade measures being used by WTO Members as STOs under MEAs. To avoid such protectionist pitfalls, a more restrictive definition is advisable. In this respect, it may be prudent to classify STOs on a case-by-case basis for MEAs providing considerable discretion.

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[48] *In the May 2003 CTESS on the structured analysis of identification of STOs in MEAs, Australia noted that under the Basel Convention, while the US had suggested that there were 28 STOs, India had suggested only seven. The US included MEA obligations that had to be fulfilled for trade to take place, while India had only included those obligations directly related to the actual trade taking place. Australia's preliminary analysis of the six MEAs in question suggested that the STOs fell somewhere between the US and Indian papers.*

Table 4: STOs Identified in Six MEAs in Country Submissions (Entries indicate the articles of the concerned MEA)

WTO Member	CITES	Basel Convention	Montreal Protocol	Cartagena Protocol	Rotterdam Conv.	Stockholm Conv.
China	III, IV, V, VI	4.1.b, 4.1.c, 4.2.e, 4.5, 4.6, 6 are STOs	4 (a, b, c)	-	-	-
EC	Trade measures key instruments in this MEA	Trade measures key to achieve goals of MEA.	Trade obligations in the MEA, but 2.11 not obligatory	Contains STOs: obligatory advanced informed agreement.	Trade measures key to achieve the MEA objectives. 15.4 not obligatory.	Contain STOs: prohibition of import and export of certain POPs.
India	III.2, III.3, III.4; IV.2, IV.4, IV.5, IV.6, IV.7; V.2, V.3, V.4; VI are trade obligations (XIV not STO)	4.1.b, 4.1.c are STOs 4.2e, 4.6, 4.7c, 6.1, 6.3, 8 are trade obligations	4A(1) is trade obligation; 4B(1) is obligation	7.1, 8.1, 11, 18.2 b, c are trade obligations. 2.4, 10.3, 10.6, 12.1, 13, 14.1, 26.1 are rights of a Party. 16 is not STO	10.9, 11.2, 12 are trade obligations. 5, 6, 7, 8, 9 are trade measures. 13.2 is obligatory. 10.4, 13.3, 15.4 are rights.	3.1, 3.2 are trade obligations. 4, 8 are rights.
Japan	III, IV, V, VI are STOs. VIII.1 obligation de resultat.	4.1, 6, 7, 8, 9, 13 are STOs	2A to 2H obligation de resultat	-	-	-
Korea	III; IV; V; VI (VIII, XIV not STO)	4.1 b & c, 4.5, 4.6, 6 are STOs (4.1 not STO; 4.2e ambiguous, 8 not clear)	4 is STO	7, 8, 9, 10, 11.1, 11.2, 15 are STOs. 2.4, 11.4, 11.8, 13, 14, 16, 26 are not STOs. 18 is unclear.	5.1, 5.2, 6, 7, 8, 10.4, 10.9, 11.2, 12.1, 13.2 are STOs. 9, 13.3, 15.4 are not STOs.	3.1, 3.2 are STOs. 4, 8 are not STOs.
Malaysia	III.2, III.3, III.4, III.5; IV.2, IV.4, IV.5, IV.6, V.2, V.3, V.4, VI.2, VI.3, VI.4 VI.5, VI.6, VIII.6	4.1b, 4.1c (via Article 13), 4.6, 4.7c, 6.1, 6.2, 6.3	4A, 4B	-	-	-
Switzerland	1st category of STO	1st category of STO	2nd category of STO	1st category of STO	2nd category of STO	1st category of STO
US	II.4, III, IV.1, IV.2, IV.3, IV.4, IV.5, IV.6; V; VI.1, VI.2, VI.3, VI.4, VI.5, VI.6; VIII.1a & b, VIII.3, VIII.4, VIII.6, VIII.7; IX are STOs.	3.1, 3.2, 4.1, 4.2e f g; 4.6, 4.7, 4.8, 4.9, 4.10, 5.1, 6.1, 6.2, 6.3, 6.4, 6.5, 6.9, 6.10, 8, 9.2, 13.2, 13.3a, 13.4 are STOs. Not 4.5 (against non-Party).	4A(1) is STO 4 not a STO (obligation for trade action against non-parties rather than parties).	7.1, 7.3, 8, 9.1, 9.2, 10.1, 10.2, 10.3, 10.4, 18.2, 19 are STOs. 16 not STO (not specific, Party has discretion)	5.1, 5.2, 10.2, 10.4, 10.5, 10.7, 10.8, 10.9, 11, 12.1, 12.2, 12.3, 12.4, 13.2, 13.4 are STOs. 13.3 not STO (Party has discretion).	3.1a (ii), 3.2 a, b (i), (ii); 3.2 c; Annex A Part II para c (among parties) are STOs.

Source: Compiled from information in WTO (2003a), WTO (2003e), WTO (2003g) and WTO (2003h).

IV.2.1.4 Relationship Between Existing WTO rules and STOs

According to the EC, the foremost *demandeur* of the current environmental negotiation agenda, the MEAs and WTO as *equal bodies of international law*, and that the WTO rules are not to be considered in "clinical isolation" (an approach already corroborated by the WTO Appellate Body in a dispute). The clarification of the relationship between MEAs and WTO, according to the EC should be a result of political consensus and not left to the dispute settlement process of the WTO. The clarification of the relationship would "render multilateralism de facto more attractive than unilateralism", and help in the interpretation of WTO law in dispute involving non-Parties. The EC position has strong support from Switzerland, who has indicated a foregone compatibility/ consistency between trade obligations under MEAs and the WTO trading system. Switzerland has reiterated that trade measures under MEAs should be considered under the principles of "no hierarchy", "mutual supportiveness" and "deference" in relation to the WTO rules. The Swiss proposal has gone further to a principle of "reversal of the burden of proof" under the

principle of presumption of conformity, which implies that a WTO Member no longer needs to show that its trade restrictive measure was covered under Article XX (b).

The US, on the other hand, while not opposed to the current negotiations, maintains that the MEA/WTO relationship has worked "quite well", and observed that WTO rules have not had a "stifling effect on MEA negotiators' willingness to include trade obligations in MEAs". However, the US noted that the clarification of the relationship between WTO rules and MEA is critically important for "enhanced domestic coordination between MEA and WTO policy makers and negotiators". In this regard, agenda item 31(ii) of the DMD on enhanced communication and cooperation between MEAs and WTO is valuable to promote "coordination between environment and trade officials at national levels". Thus while the EC and Switzerland (with support from Japan and Norway) seek multilateral consensus to override WTO rules with STOs under MEAs, the US views the relationship to enhance coordination of WTO rules with its domestic policies!

The other WTO Members including Argentina, Chinese Taipei and India, have emphasized on the need to ensure that STOs in MEAs are consistent with the WTO rules. Thus to these countries the clarification of the relationship between STOs in MEAs and WTO rules would improve the policy coherence between trade and environment, and the rights and obligations of the WTO Members would be protected through the clarification.

IV.2.1.5 Party and non-Party Issues

The Party versus non-Party issue is divided among the trade giants, namely the EC and the US. Understandably, the US clearly stated that the STOs considered in the mandate are those that apply among Parties, and not obligations that require Parties to take particular trade action in relation to non-Parties (considering the US is a non-Party to four of the six MEAs under consideration). The EC, on the other hand, noted that although the discussions are "currently only considering the applicability of WTO rules as among Parties to MEAs (it) does not mean that MEAs should not be an important element of interpretation of WTO law in disputes involving non-Parties". Among those supportive of the broader agenda of EC, Norway agreed to restrict the current negotiation mandate "among Parties" to the MEA in question, but Switzerland indicated that the phrase "among Parties" is unclear since Parties to an original convention may not ratify subsequent amendments.

Close to the US position, Argentina strongly indicated that the rights of a WTO Member should not be prejudiced in case the Member is not a Party to a MEA, especially considering the fact that some MEAs contain a clause, which protects rights and obligations under other international agreements (for example, the Marrakesh Agreement). Similarly, the Chinese Taipei submission states that the current negotiations should not prejudice the WTO rights of any Member not Party to the MEA in question.

Considering the issue of a potential dispute among WTO Members over trade measures pursuant to a MEA, the EC stated that a potential conflict among parties to an MEA is unlikely, since the STOs in MEAs are negotiated by consensus. In case of such a dispute between Parties brought to the WTO for resolution, the EC suggested that the panel should take "due account" of the MEA and consider the trade measures under the MEA as "legitimate". According to the EC, since the WTO and MEAs have "equal status", the resolution of a dispute should consider which of the two sets of rules (WTO vs MEA) "provides for a more specific regulation of the issue under dispute" (WTO 2002a: page 7)! This suggestion is far-reaching, since even without a change in the legislative provisions of the GATT/WTO, the EC submission proposes that in a WTO resolution of Party-Party dispute the MEA rules may override any non-specific WTO rule on that matter (the principle of *lex specialis generali derogat* or more specialized law replaces the general, even though the MEA and WTO are distinct specialized legal documents). It is important to note here, that according to the general rule of interpretation in the Vienna Convention (which has been used extensively by the Appellate Bodies in the WTO disputes, as seen in section 2.3 and 2.4 before) account has to be taken of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" or "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31.3 a, b). Thus if a subsequent practice allows for MEA provisions to override WTO rules, then it would be deemed as the interpretation of environmental provisions in international law.

As opposed to the EC position on potential disputes between WTO Members-Parties to a MEA, Taipei has proposed that *the complaining Member alone* should have the right to bring the case to the dispute settlement mechanism under the WTO regime or the regime of the MEA in question (WTO 2002c: para 9). In case of a dispute between WTO Member/ non-Party and a WTO Member/Party to a MEA, the WTO panel should (if applicable) give weight to

the fact that the WTO Member/non-Party to the MEA in question was precluded from participation in the negotiations of such a MEA.

IV.2.1.6 Outcome of the Negotiations

Although the WTO Members are progressing towards an *interpretative decision* on the relationship between STOs in MEAs and the WTO rules, the expectations from the outcome of the negotiations are different among the Members. On the one hand, some Members, most prominently Argentina and Australia, have reiterated that this decision should not disturb the rights under the WTO, and on the other hand, Members including the EC, Norway, Switzerland and Japan are driving a much broader agenda.

According to Switzerland, in particular, the interpretative decision on the relationship between the trade and the environment protection *systems* would serve two objectives: first, it would "clarify the scope of WTO law" that would be useful in negotiating the development of trade rules in MEAs; and second, it would provide "guidance for the WTO Dispute Settlement Board". Switzerland has emphasized the principles of no hierarchy, mutual supportiveness, deference, and consistency between the two international systems of law, namely the WTO and MEAs. This stand endorses the EC position that WTO and MEA are to be accorded "equal status". Norway and Japan have also argued on the lines of presumed consistency between the trade measures in MEAs and the WTO rules. For this set of Members, the present negotiations are meant to *reaffirm* the mutual supportiveness of the two systems of law.

The majority of the Members does not support such a radical objective of the current negotiations and have adopted a more restrictive position to draw up STOs pursuant to MEAs which are consistent with the WTO provisions.

IV.2.2 Analysis of the submissions

The submissions by the respective Members reflect the positions they adopted in the initial discussions on CTE item (i) on the relationship between trade measures pursuant to MEAs and WTO rules. The submissions can be divided into two distinct sets, one that represents the more radical change to accommodate trade measures (where the terms *specific* and *obligation* are determined) within MEAs in the WTO system; and the other which is more restrictive in nature trying to ensure consistency of only *specific* trade *obligations* within MEAs with the multilateral trading system, without disturbing Member rights. The first set of submissions has come from the EC, Norway, and Switzerland. While the second set of submissions following a more restrictive review of MEAs come from Members including Argentina, Australia, Canada, China, Chinese Taipei, India, Malaysia, and United States. These Members are trying to structure the negotiations to ensure that the scope is limited to the mandate agreed at Doha. Japan, although supportive of the EC, has submitted a structured analysis of MEAs adopted by the latter group of Members who have a more restrictive approach.

The negotiation stance of the EC, the principal *demandeur* of the Paragraph 31 (i) of DMD, as well as that of Switzerland and Norway, is to push for a broad scope legitimizing trade measures based on cooperative environmental initiatives (taken among at least three parties). The official stand is that the decision would clarify the environment for "trade policy makers and negotiators of MEAs alike and help prevent conflicts from happening in the first place because clearer parameters would mean that MEAs would take WTO rules into account and WTO law would give due weight to obligations arising under MEAs" (WTO 2002a, paragraph 15). The objective of the negotiations is to make STOs under MEAs "more secure than similar measures taken unilaterally and without any form of international frame of reference, endorsement or debate" (*ibid* paragraph 16). In particular, the EC states that this would boost multilateralism as opposed to unilateralism. Thus the submissions by EC, Norway and Switzerland has refrained from doing an MEA-by-MEA analysis of STOs, and instead commented on the conceptual relationship of two *equal* legal systems, namely the MEAs and the WTO.

While the objective of the radical set of submissions is well-founded, the restrictive structured analysis of STOs in the submissions of the second set of Members can be appreciated too. In particular, the resistance to the broad conceptual decision by the developing country Members like Argentina, Chinese Taipei, China, Hong Kong, India, and Malaysia stem from the perceived threat of an increase in protectionism on environmental grounds. Since the existing environmental provisions in the WTO have allowed a Member to invoke restrictive trade measures unilaterally in the recent past, the apprehensions are that a decision on STOs pursuant to MEAs would enhance restrictions on legitimate trade restriction on a regional basis. The developing countries have been known to be supportive of international environmental treaties (see Table 2 on the ratification status of the six MEAs by China, India and Malaysia) more than some developed countries (like the US), which illustrates their cognizance and commitment to environmental protection.

Moreover, the developing countries view the WTO system as a means of ensuring fair gainful trade to promote sustainable economic development, which might be hampered in case the trading regime is complicated with rules from another regime namely that of the MEAs

The submissions of Australia, Canada and the US, too fall in the category of the more restrictive negotiation stand, although their stakes are quite different from that of the developing countries. The submissions follow the same MEA-review analysis, but the negotiation position is different. These developed countries' position seems to come more as an opposition to EC's policies (for example high farm subsidies and import restrictions on genetically modified food), which have constrained for instance food exports from the US (as evident from the EC-hormone disputes).

Both the EC and the US have been trying to promote the "environment" in the WTO system in their own ways, the former through the negotiation for a new WTO rule recognizing trade measures in MEAs, and the latter through the unilateral use trade restrictions justifiable under existing WTO rules. The environmental priorities of the US and the EC are distinct, and the difference is being reflected in the current negotiations stands at the WTO. Thus the position of developing countries in the current negotiations is quite distinct from the US, even though both favour a structured and restrictive agenda.

V Indian strategy in the Negotiations and the Way Forward

India had long maintained a position that the existing WTO rules provide are "more than adequate to deal with trade measures taken for achieving genuine environmental goals" and it is neither necessary nor desirable to exceed that scope (WTO 1996a: paragraph 13). In the current negotiations on DMD Para 31 (i), however, the Indian submission has followed the MEA-by-MEA review to analyze STOs to arrive at the interpretative decision. In particular, the MEAs under consideration should include only those negotiated under the aegis of the UN and/or specialized agencies, whose negotiations included effective participation from countries belonging to different geographical regions and by countries at different stages of economic and social development (WTO 2003f). India has also indicated that specific trade obligations identified under the MEAs should satisfy each of the terms, namely they should be mandatory and specific obligations (not obligation *de resultat*).

India's pre-Doha stand on status quo has changed to the MEA-by-MEA analysis to accommodate STOs in the WTO system. While the current negotiation stand seems restrictive, it is part of the softer option to accommodate trade obligations pursuant to MEAs within the WTO rules without disturbing Member rights.

In the meetings of the CTE Special Sessions in 2003, most of the Members have supported the negotiation based on the MEA-by-MEA analysis of STOs (also called the bottom-up approach). The discussions have also brought into focus whether COP decisions of MEAs should be considered within the formal definition of MEA (favoured by the EC). Members from the more restrictive group, including Australia and Malaysia favour limiting the provisions to those contained in the body of the agreements, and in their protocols or annexes, rather than all COP decisions. Members have also questioned the presumed consistency and the radical Swiss principle of reversal of burden of proof under GATT Article XX. Most prominently Argentina, Australia and Brazil have noted that such a principle constitutes a fundamental change in the balance of rights and obligations, and is not a mere procedural change. Recently, the US also called upon the *demandeurs* to engage in experience sharing, indicating that there is a need to share "STO negotiation and implementation experiences" under MEAs as the way forward in the negotiations.[49] The recent negotiations indicate the MEA-by-MEA analysis is moving toward information sharing before an interpretative decision is finally made.

The clarification sought by the current negotiations on the relationship between STOs pursuant to MEAs and WTO rules is bound to be complicated since they represent two distinct regimes. There cannot be hierarchy in the ranking of the MEAs and the WTO since they pertain to completely different sets of rules for two distinct matters of concern. After all, as the ASEAN pre-Doha proposal had noted, the WTO is the "*lex specialis derogate generali*" i.e. the more specialized treaty on trade than any other treaty, and by the same token the MEAs will remain the specialized fora to solve environmental problems. The question of MEAs and WTO being "equal" legal bodies, as the EC has proposed, does not seem appropriate since the two distinct and dissimilar regimes cannot be ranked. However, one regime can in principle recognize some rules of another regime (and vice versa) and the two regimes can be supportive of each other.

[49] *Summary Report on the 6th Meeting of the CTE Special Sessions, (TN/TE/R/6), 12 June 2003*

The softer option in the current negotiations allows India to oppose the recent trend in unilateralism (and imposing domestic environmental rules extra jurisdictionally), and also steer clear of the more radical approach of presumed consistency, precautionary principle based on lack of scientific evidence and reversal of burden of proof (fundamental move away from the science and rule based GATT/WTO system). While the radical approach of the EC is in support of "multilateralism", it contains risks of protectionism and national discretion. As noted earlier, provisions within some MEAs allow for Party discretion or environmental priority in the use of restrictive trade practices among Parties (e.g. Article 11.8 of the Cartagena Protocol to ban trade in LMOs) even though there may be no scientific basis for such environmental measures. Thus a decision/rule that completely accommodates MEAs within the WTO system poses a potential risk to multilateralism.

It is pertinent to reiterate at this point that trade obligations pursuant to MEAs may not be effective or efficient, since they are meant to work in conjunction with other provisions laid out in the treaty. As noted in section 3.2 earlier, even specific trade obligations considered critical to achieve the environmental objective of the MEA (e.g. the CITES) have not worked when conducive domestic factors were lacking (e.g. habitat loss endangering species). Thus the conditions of *necessity*, *effectiveness* and *proportionality* of trade measures (submission by Chinese Taipei, and pre-Doha proposals by New Zealand and ASEAN) are meaningful and important aspects to maintain during the current negotiations for the decision on STOs pursuant to MEAs and WTO rules. Thus a WTO decision to support MEAs cannot overlook the fact whether the trade measures pursuant to an MEA are indeed an integral, crucial and efficient tool to achieve the environmental objective.

India has traditionally supported multilateral efforts to protect the environment as well as the principle of free and fair trade, and will continue to do so. The efforts to promote sustainable development at home have to be balanced with her gains from trade under the WTO regime. For instance, India's environmental interests would be to ensure concessional import of environment friendly technology and prevention of hazardous products that are domestically prohibited in industrialized countries (the information enhancing MEAs are of particular relevance here).

At the same time, India is looking forward to the further opening up of markets for exports, particularly agricultural and textile products, in industrialized countries. The interests of other developing countries, like China and Malaysia, are similar to that of India, and their position in the current negotiations reveal that they too are keen to ensure that their export prospects are not hurt by the interpretative decision. Thus a well-structured analysis of STOs in a MEA-by-MEA, where the MEAs considered are those with majority WTO Members is the most attractive option at the current negotiations. This would allow for balancing India's commercial as well as environmental interests.

Since each MEA is distinct, the case-by-case analysis allows for recognizing the uniqueness of each treaty and the corresponding STOs. Although, the STOs identified by the Members do not necessarily match based on the interpretation of the legal language of a treaty and the Party discretion contained in the provisions, the exercise is clearly bringing out the nuances which can help interpret which trade obligations pursuant to an MEA is necessary and justifiable to achieve the environmental objective.

In this light, the recognition of STOs on a MEA-by-MEA basis in the WTO system seems the most systematic and thorough approach to clarify the relationship sought under the current negotiating agenda. The results from such an analysis can also be used to derive an understanding to support MEAs within the WTO regime.

The decision on trade obligations pursuant to MEAs and GATT/WTO rules is long overdue, since the Members have been deliberating for a decade now. Moreover, in view of the increasing significance of the environment in political, social and business agendas across all major countries (including developing countries), the current negotiations need to be successful to ensure the multilateral trading system under WTO continues to thrive in the new century.

VI Conclusion

The literature on the interface of trade and environment, as well as the evaluation of trade measures within MEAs indicate that trade restrictions are not the only nor necessarily the most effective policy instrument to achieve the environmental objective of the MEAs. The root cause of environmentally unsustainable development is the existence of market or regulatory failures, when the true value of environmental resources or cost of polluting economic activities are not reflected in market prices due to structural defects in the system or due to improper government policies. Co-operative environmental efforts as reflected by MEAs remain important to address transboundary and global environmental problems, and trade measures can play an important role in some of these MEAs. Indeed, India noted in an initial paper in 1996 to the CTE that, in dealing with only one element of an MEA, namely, the trade

measure, "we may be unconsciously encouraging dependence on trade measures to achieve environmental objectives, when we are all agreed that this is not the best way of handling environmental concerns".

Given the rise in environmental consciousness and concerted efforts across the globe to tackle genuine environmental problems (which defy national jurisdictions) through MEAs, one cannot disregard trade obligations pursuant to such MEAs within the WTO especially when those directly relate to certain trade rules. India has recognized the principle to support environmental initiatives and has been Party to most major MEAs. At the same time, India recognizes that gains from fair and free trade are important to support sustainable development at home. The current negotiations on Para 31 (i) of the DMD need to be successfully arrive at an interpretative decision, since it is long overdue.

Although the present provisions within the GATT/WTO allow for unilateral trade measures on environmental grounds, a new decision on the relationship between STOs pursuant to MEAs and rules of the multilateral system is essential to curb the trend in unilateralism. The jurisprudence in a recent environmental-trade dispute ruling indicates that *bilateral good faith efforts* to protect the environment can make departure from free trade justifiable, since the interpretation of the GATT Article XX provisions has been significantly broadened (e.g. Malaysia-US Compliance Dispute on Shrimp-Turtle 2001).

Given the recognition of autonomy of a WTO Member in determining domestic environmental regulations (which can affect trade with Members), and the widening of interpretation of justifiable trade restrictions, the multilateral trading system is at risk of protectionism. By default any domestic environmental regulation would take into consideration only its own environmental/ ecological and economic interests, with complete disregard to other countries. Yet, such local environmental considerations are neither ecologically nor economically efficient. A WTO decision that supports specific trade obligations pursuant to MEAs (represented by large participation of countries from various regions and stages of development) is the only way to restrain unilateral measures that currently threaten multilateralism.

The EC, the main demander of the environment agenda in the WTO, regards MEAs and WTO as holding equal legal status, even though the two distinct regimes defy such ranking. The broad agenda of the EC (supported by Switzerland and Norway), poses risk to the multilateralism it claims to uphold, since some MEAs allow Party discretion to undertake unilateral restrictive trade measures based on the Party's environmental priorities or evaluation. Thus the broad agenda of EC carries a potential threat of regionalism/ unilateralism.

There is also a risk of protectionism in the definition of individual terms within the current negotiations. While it may seem that the WTO Members have engaged in semantics of each term contained in Paragraph 31.1 of the DMD, the final interpretation of the provisions under the MEAs hinge on these definitions. Even supporters of the broader agenda, like Japan, have acknowledged that the discretion provided in some MEAs make the definition of STOs difficult, and indeed a case-by-case analysis may be required for those MEAs. In this light, a restrictive definition of STOs as adopted by India is a sound approach, especially to check for the protectionist pitfalls of a broader definition.

Finally, a structured MEA-by-MEA analysis is a judicious negotiating stand to clarify the relationship between of STOs pursuant to MEAs with WTO rules, since this would lead to a clear understanding of what kind of trade measures for environmental purposes are consistent under the WTO. It is important for India to work towards such a multilateral interpretative decision and understanding within the WTO. A conceptual understanding is particularly significant in the face of unilateral trade restrictions on environmental being sanctified in the post-WTO era.

It is in the best interest of India to re-affirm her commitment to promoting sustainable development along with trade liberalization, as set out in the Preamble to the WTO Agreement and the Decision on Trade and Environment), and continue to support environmental initiatives through MEAs. After all, the WTO is not an environmental policy making body, and should continue to promote trade liberalization with due respect to multilateral environmental consensus coming from organizations specializing in those issues.

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