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# **Report on Trade and Multilateral Environmental Agreements**

**Author: Markus Knigge, Ecologic**

**Reviewer: Duncan Brack, RIIA**

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## Preface

The Concerted Action on Trade and Environment (CAT&E) is designed to provide an opportunity for the large and growing community of European researchers working on trade and environment issues to meet regularly, to discuss research hypotheses and methods, to review results, and to develop new lines of co-operative research. CAT&E will launch a dialogue with policy makers at all levels. It aims to create a process that can document the progress of research and generate new research impulses in this area. It seeks to advance the resolution of current conflicts between trade and environment.

The information obtained in the course of the Concerted Action is annually summarised in state of the art reports and bibliographies in a fashion that is useful to both researchers and policy makers. These reports serve as an input to CAT&E's annual members' meetings and open conferences. To structure the reporting and discussions, the following themes have been identified initially (in random order; the theme of the present paper is underlined):

- ✓ Subsidies
- ✓ Government Procurement
- ✓ Investment
- ✓ TBT, SPS, and Labelling
- ✓ Trade and Development
- ✓ Trade, Environment, and Human Rights
- ✓ Trade in Commodities
- ✓ Implementation Procedures
- ✓ Trade in Services
- ✓ Intellectual Property Rights
- ✓ Trade and Multilateral Environmental Agreements
- ✓ Dispute Settlement
- ✓ Transparency and Participation
- ✓ Sustainability Assessment of Trade Agreements
- ✓ European Trade Policy Development
- ✓ Trade and Agriculture
- ✓ Trade, Environment, and Labour
- ✓ Trade, Environment, and Public Health
- ✓ Science and Precaution
- ✓ Trade and Environment in the Architecture of International Governance.

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## 1. Introduction and scope of the paper

Although considerably debated over the past decade, the relationship between international environmental rules and the international trading system has not been clarified yet. The absence of an adverse ruling by the World Trade Organization (WTO) on a Multilateral Environmental Agreement (MEA) trade measure seems to demonstrate that these regimes do not conflict in practice. However, at present, the clarification of the relationship between international trading rules and MEAs was put high on the Doha Development Agenda (DDA), illustrating in particular the wish of the EU to establish clearer rules and achieve higher predictability for both regimes.

This report offers a survey of the current discourses on the relationship between MEA and WTO rules. It begins with the fundamental question as to whether the relationship is primarily characterised by mutual recognition and supportiveness or rather by conflict. This is followed by the identification of proposals made either to enhance synergies between both sets of international rules or to avoid conflict between them. To achieve this aim, this report examines the relevant literature, cases and international rules governing environment and trade. Additionally, state proposals for reform will be taken into consideration.

## 2. Identification of relevant research hypotheses

A starting point for the debate concerning the relationship between MEAs and WTO rules is the question how this relationship can be primarily characterised.

A number of issues give rise to the assumption that the relationship between MEAs and international trading rules is primarily characterised by mutual recognition or even supportiveness. Several documents from the WTO Committee on Trade and Environment (CTE)<sup>1</sup> or the Rio Declaration confirm this assumption<sup>2</sup>. However, while it is generally accepted that trade measures taken pursuant to MEAs represent a potential for conflict, many proponents point to the broad scope for applying trade measures in a WTO-consistent manner<sup>3</sup>, the small number of MEAs including trade restricting measures and the wide overlap of constituencies of regimes<sup>4</sup>. Moreover, it is significant that all environmental measures challenged to date in the WTO have been unilaterally imposed rather than required under an MEA.<sup>5</sup> In addition to a relationship of good neighbourhood, Win-Win possibilities, such as increased trade in environmental goods and services and the harmonisation technical of standards, are often mentioned as positive features of the MEA-trade relationship.

Another point of view is that trade restrictive measures taken pursuant to MEAs are incompatible with free trade goals. Analysts frequently assume that these tensions are likely to in-

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<sup>1</sup> Report of the WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

<sup>2</sup> United Nations Conference on Environment and Development, Agenda 21, Chapter 2

<sup>3</sup> Report of the WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

<sup>4</sup> A number of MEAs, such as CITES, the Montreal Protocol or the Basel Convention etc., have more members than the WTO. Cosbey, 2000, p.2, Krist, 2001, p. 2.

<sup>5</sup> Voon, 2000, p. 85; Condon, 2002, p. 535; Winter, 2000, p. 234.

crease as the use of trade restrictions in MEAs becomes more prevalent, and trade rules more stringent, and because of the considerable number of non-parties to certain MEAs.<sup>6</sup>

In case of inconsistency between WTO rules and a MEA the question arises as to which regime prevails. Art. 30 of the Vienna Convention on the Law of Treaties states that in cases in which both entities are parties to both regimes, the later treaty prevails; this could invalidate MEAs (or parts of them) that became binding before 1994. However, Article 30 of the Vienna Convention is not the only relevant norm; others, such as *lex specialis* may also help resolve such situations.<sup>7</sup> Article 30 also does not provide a complete answer since it does not offer guidance as to how to consider the question of when it came into existence and how to define the same subject matter, both of which can be complex undertakings.<sup>8</sup> Article 31 of the Vienna Convention, which provides general rules of interpretation of treaties, may also be useful in allowing two treaties to be interpreted in a manner that avoids conflict, e.g. applying GATT Article XX in a manner that permits MEA trade measures.

### 3. Survey of methodological approaches

A large number of methodological approaches to the relationship between MEAs and WTO rules exists. First, the relevant literature covers a relatively broad range of issues, and policy debates. While most analysts focus on the legal aspects of the relationship, others centre their attention on the design of both regimes or their interaction. Moreover, studying the relevant WTO jurisprudence, international rules governing environment and trade, and proposals for reform can bring further insights. Approaches to the relationship concentrate mainly on WTO rules, the interaction between MEAs and the WTO or reforms of the MEAs themselves.

In regard to the WTO, proposals made in the literature as well as by states, can be mainly grouped into three categories: status quo, ex post or waivers, and ex ante or environmental window. Proponents of the status quo frequently point to the exceptions provided by Article XX, the incorporation of the aim of sustainable development in its preamble and the acknowledgement that WTO rules should not be interpreted in "clinical isolation"<sup>9</sup>. Moreover, the rulings of the Appellate Body (AB) have turned more environmentally friendly<sup>10</sup>, as evidenced in particular by the findings of the so-called shrimp-turtle case.<sup>11</sup> However, scepticism exists as to whether the AB is capable of taking environmental concerns sufficiently into

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<sup>6</sup> Submission by European Communities, WT/CTE/W/170, 19 October 2000.

<sup>7</sup> Voon, 2000, pp. 78.

<sup>8</sup> Submission by Japan, TN/TE/W/10, 3 October 2002.

<sup>9</sup> Appellate Body in *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996.

<sup>10</sup> Haverkamp, 2001, p. 7; e.g. the Shrimp/Turtle appellate decision strengthened the right of the state to adopt conservation measures by a liberal interpretation of GATT Art. XX (g) exhaustible natural resources. Moreover the AB acknowledged the relevance of the preamble including the aim of sustainable development in interpreting article XX of the GATT. See United States: Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4. 129-31, 152-55, WTO/DS58/AB/R, 12 October 1998.

<sup>11</sup> Appellate Body in *Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/RW, 22 October 2001.

account and whether it is generally able to constitute a general rule for the relationship between MEAs and WTO rules.<sup>12</sup> Based on the system currently in place, the EU proposed to reverse the burden of proof in Article XX, thus strengthening the position of parties invoking Article XX on environmental bases.<sup>13</sup> Another recommendation stems from the CTE report, adopted by the Ministerial Conference in Singapore, that WTO members which are also parties to MEAs, should resolve disputes over the use of trade measures applied between themselves pursuant to the MEA through the dispute settlement mechanism available under the environmental treaty.<sup>14</sup>

Another method to accommodating the relationship inside the WTO are waivers. The WTO agreement allows parties to waive GATT obligations in exceptional circumstances. Consequently, several countries, such as Egypt, Hong-Kong and ASEAN countries, submitted proposals for granting waivers to trade measures in MEAs that meet certain criteria, such as necessity, proportionality, least-trade restrictiveness, effectiveness, broad multilateral support and/or scientific evidence.<sup>15</sup> Critics, however, emphasise the requirement of exceptional circumstances for waivers, their time limit<sup>16</sup>, and the fact that the status of MEAs, which often take years to negotiate, would be dubious until it receives the ex post blessing of a waiver.

Conversely ex ante approaches suggest to spell out criteria under which MEAs would be compatible with WTO rules, either by an expansion of Article XX general exceptions or by the adoption of a collective interpretation of Article XX that would validate existing MEAs and spell out under what specific conditions the WTO would accept the use of trade measures taken pursuant to MEAs. An amendment could be based on the NAFTA approach, which accepts certain MEAs while leaving the status of future MEAs open, on a newly added paragraph to Article XX referring to the relationship between trade measures taken pursuant to MEAs<sup>17</sup>, or on a newly created agreement on trade related environmental measures (TREM)s<sup>18</sup>. However, as amendments require two thirds of the majority and the acceptance of each party's legislature before it binds that party, any amendment of WTO rules is not likely in the near future.

An interpretative understanding, guidelines or a principles and criteria approach could also help negotiators to design future MEAs in a way consistent with WTO rules. Switzerland proposed an interpretative understanding that would ensure that MEAs are entitled to determine objective, proportionality and necessity of trade measures, while the WTO would have the authority to assess whether the trade measure is applied in an arbitrary, discriminatory or protectionist manner.<sup>19</sup> Canada promotes a principle and criteria approach, where principles determine MEAs and specific trade measures, while criteria look at how the trade measures are applied.<sup>20</sup>

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<sup>12</sup> Submission by Switzerland, TN/TE/4, 6 June 2002.

<sup>13</sup> Submission by European Communities, WT/CTE/W/170, 19 October 2000.

<sup>14</sup> Report of the WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

<sup>15</sup> non-Papers from Egypt, 18 June 1996 and Hong-Kong, 22, July 1996; here from TN/TE/S/1, 23 May 2002; Submission by ASEAN, WT/CTE/W/39, 24 July 1996

<sup>16</sup> Winter, 2000, p. 248.

<sup>17</sup> non-Paper from the EC, 19, February 1996; here from TN/TE/S/1, 23 May 2002

<sup>18</sup> Cosbey, 2000, p. 11.

<sup>19</sup> Submission by Switzerland, WT/CTE/W/139, 8 June 2000.

<sup>20</sup> Submission by Canada, WT/CTE/M/10, 12 July 1996.

Currently, Paragraph 31 (i) of the DDA calls for negotiations on the relationship between existing WTO rules and specific trade obligations set out in MEAs. However, the mandate is limited as negotiations shall "not add to or diminish the rights and obligations of Members under existing WTO agreements...nor alter the balance of these rights and obligations". Moreover, this mandate is limited as it addresses only specifically enumerated measures between MEA parties, ignoring the difficult issues of non-specific trade measures or measures applied against non-parties to an MEA.<sup>21</sup> Hitherto, negotiations dealt mainly with procedural issues as well as how to define MEAs, specific trade measures and MEA members. For example, the European Union attempted to spell out criteria for MEAs in order to include future MEAs<sup>22</sup>, while other states claim that the DDA mandate is limited to MEAs currently in force<sup>23</sup>. Regarding specific trade measures, Switzerland proposed analysis along four different categories in order to clarify under what conditions specific trade obligations are automatically in conformity with WTO rules.<sup>24</sup> Argentina and the US limit specific trade obligations to a single one that is mandatory and specific in character.<sup>25</sup> Canada added a conceptual approach, stating that examination of MEAs with mandatory and specific trade obligations could provide significant insights, emphasising the important concept of the level of "discretion" left to a party in choosing from a range of measures.<sup>26</sup> Concerning the membership of MEAs the question arose as to whether a state that did not ratify all annexes concerned is still regarded as member to the MEA.<sup>27</sup>

Another approach to the relationship between MEAs and the international trading system is to examine mechanisms that attempt to enhance synergies and increase mutual supportiveness between trade and environment. Most proposals on the interface between WTO rules and MEAs aim at enhancing synergies by improving the exchange of information and strengthening co-ordination. Suggestions range from holding back-to-back meetings to exchanging of information between MEAs and WTO if novel trade questions arise<sup>28</sup>, to enhancing communication and co-operation between compliance, enforcement and dispute settlement mechanisms<sup>29</sup>. For example, it was proposed that WTO members should notify a WTO Secretariat database of trade measures taken pursuant to MEAs<sup>30</sup>, and that a jointly developed code of good conduct for MEA trade measures might help to develop a mutually

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<sup>21</sup> Stilwell, 2002, p. 1; Specific trade measures are explicitly described in the MEA or in subsequent decisions of its parties and in general are mandatory obligations that must be applied by all parties. In some cases, a specific measure may not be mandatory but may form part of a series of options available to the party to satisfy MEA requirements. Non-specific measures are not explicitly described, but may be applied by parties, probably alongside other measures, as a means of complying with their obligations or fulfilling MEA objectives. Brack, 2003, p. 6.

<sup>22</sup> Submission by the European Union, TN/TE/W/1, 2002.

<sup>23</sup> Submission by Australia, TN/TE/W/2, 2002; Submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, TN/TE/W/11, 3 October 2002.

<sup>24</sup> Submission by Switzerland, TN/TE/W/4, 6 June 2002.

<sup>25</sup> Submission by Argentina, TN/TE/W/2, 23 May 2002; Submission by the United States, TN/TE/W/20, 10 February 2003.

<sup>26</sup> Submission by Canada, TN/TE/W/22, 10 February 2003.

<sup>27</sup> Submission by Switzerland, TN/TE/W/4, 6 June 2002.

<sup>28</sup> Submission by European Communities, TN/TE/W/1, 21 March 2002.

<sup>29</sup> Stilwell, 2002, p.2.

<sup>30</sup> non-Paper from the Korea 12 June 1996; here from TN/TE/S/1, 23 May 2002.



supportive relationship<sup>31</sup>. New Zealand suggested that the relationship should be in the form of consultative mechanisms, focusing on the utility of consultation as a means for identifying the source of the conflict, the least trade restrictive policies and alternatives.<sup>32</sup> Another proposal is a mechanism that gives the WTO Director General the mandate to enter into co-operation agreements with MEAs.<sup>33</sup> In the WTO, the CTE has taken a first step in clarifying and reconciling the potential conflict between MEAs and WTO rules by bringing together different views

Also DDA paragraph 31 (ii) calls for negotiations on the procedures for regular information exchange and criteria for the granting of observer status. In this regard, the EU suggested that information exchange sessions and observership to both regular and special sessions should become a formal feature of WTO.<sup>34</sup> Indeed, UNEP and a number of MEAs secretariats were recently allowed to attend the CTE negotiations. However, several countries emphasise that attendance and participation by these bodies is on an ad-hoc basis, leaving the larger observership question still open.<sup>35</sup> Moreover, it is recognised that greater co-ordination and co-operation between international institutions must be underpinned by greater co-ordination between trade and environment ministries at the national level.<sup>36</sup> UNEP has expressed interest in launching a reflection on the timelines and effectiveness of the exchange systems so far in place.<sup>37</sup>

Yet another approach to MEAs and WTO rules is to focus on the environmental regimes. An institutional proposal is to cluster all MEAs that are of concern from the perspective of the trade regime.<sup>38</sup> However, it is not only difficult to predict in which MEAs economic factors will develop into specifically trade-related issues, but it is also not clear yet how a grouping would enhance synergies.<sup>39</sup> Most proposals made aim at making MEAs more robust in regard to WTO law. As trade restrictions affect the environment only indirectly while causing economic distortions, it is generally accepted that they should only be the means of last resort. Additionally, it is suggested that trade related measures should not be unnecessary, arbitrary, protectionist or unjustifiably discriminatory.<sup>40</sup> Generally, an increased membership and enhanced compliance will help to avoid conflicts between environmental and trading rules, although this will not always be true. Therefore, it has been proposed that future MEAs be designed for a larger constituency and in a more self-enforcing fashion.<sup>41</sup> Further calls are made to strengthen the dispute settlement system within MEAs<sup>42</sup>, to support the WTO struggle to define MEAs by establishing general criteria or to include provisions in MEAs that establish a hierarchy between the treaty and other international law that shifts depending on context-specific law and facts.

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<sup>31</sup> Submission By the European Communities, WT/CTE/W/170, 19 October 2000.

<sup>32</sup> Submission from New Zealand, WT/CTE/W/162, 10 October 2000 and WT/CTE/W/180, 9 January 2001.

<sup>33</sup> non-Paper from Switzerland 20 May 1996; here from TN/TE/S/1, 23 May 2002.

<sup>34</sup> Submission by the EU, TN/TE/W/15, 17 October 2002

<sup>35</sup> Bridges Weekly, Vol. 7, No. 6, 2003.

<sup>36</sup> UNEP, Enhancing Synergies and Mutual Supportiveness of MEAs and the WTO, 2001.

<sup>37</sup> Submission by UNEP, WT/CTE/W/213, 12 June 2002.

<sup>38</sup> Esty, 1994, p. 154.

<sup>39</sup> von Moltke, 2000, p. 9.

<sup>40</sup> Contribution by Switzerland, TN/TE/W/21, 10 February 2003.

<sup>41</sup> Barrett, 2003.

<sup>42</sup> Submission by New Zealand, WT/CTE/W/180, 9 January 2001.



As evidenced in this section, the large number of methodological approaches and areas of research give testimony to the complexity of the relationship between MEAs and WTO rules. While at present attention is mainly focused on the ongoing trade negotiations and the limited mandate to negotiate the relation between MEAs and WTO rules, it seems sensible to contribute to clarifying the relationship and enhancing the effectiveness of both regimes by carrying out further research on a larger set of aspects, such as the relationships between several MEAs or the relationship between UNEP and MEAs.

## 4. Conclusion

In conclusion, the fundamental roles that MEAs and the WTO each play in global governance are widely accepted. Unfortunately, so is the potential for conflict between them. Despite a fair amount of negotiation and a large number of proposals on how to clarify the relationship between both regimes during the last decade, no solution has been found or is even in sight yet. So far negotiations under the Doha mandate have also failed to provide sufficient further insight on how to reconcile both regimes. While a case in front of the WTO dispute settlement body would certainly shed more light on the relationship, greater clarity about MEAs could also assist to reconcile the relationship between both regimes. Another area of important research can be based on the search for an adequate institutional set up that ensures effective interaction or the forces which drive the debate forward. Also, the debate on the system of international environmental governance and a reform of the UNEP could shed light on how to more effectively co-ordinate MEAs and reduce potential conflicts between the trade and the environment regime. In addition, a stakeholder analysis which determines who is in favour of a solution to the issue and who is not could provide a deeper look into how the relationship might evolve. The Doha Development Round and its limited mandate will certainly not resolve the complex relationship between MEAs and WTO rules; however, the ongoing negotiation process may contribute to the clarification which in turn could help to generate consensus about how a mutual supportive relationship might be achieved.

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