

TRADE MEASURES AND MULTILATERAL ENVIRONMENTAL AGREEMENTS - RESOLVING WTO UNCERTAINTY

A PAPER FOR WWF INTERNATIONAL

BY

**MATTHEW STILWELL & ELIZABETH TURK
CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW**

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Center for International Environmental Law

U.S. Office: 1367 Connecticut Ave., NW, Ste. 300, Washington, DC 20036 • Tel: +1 (202) 785-8700 • Fax: +1 (202) 785-8701

Geneva Office: B.P. 21 (160a Route de Florissant), CH-1231 Conches, Geneva, Switzerland • Tel/Fax: +41 (22) 789-0738

Writer's Direct E-Mail: cielms@igc.org • *Organizational E-Mail:* cielgva@igc.org

Web: <http://www.econet.apc.org/ciel/>

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EXECUTIVE SUMMARY

This paper discusses the potential conflict between the World Trade Organization's (WTO) rules and trade measures contained in Multilateral Environmental Agreements (MEAs). It examines the experience of three MEAs - the Biosafety Protocol, the Agreement on Persistent Organic Pollutants, and the Montreal Protocol - to illustrate the importance of trade measures in MEAs, and to demonstrate how perceived conflicts with WTO rules may, unless amended, "chill" the development of effective international environmental law.

Today, over twenty MEAs include trade measures as part of a package to address shared global problems. Trade measures are included in some of the most important and effective MEAs, and are being considered in MEAs that are currently being negotiated. In these agreements, trade measures serve a number of purposes. They regulate trade in environmentally harmful products; remove economic incentives to environmental destruction; ensure compliance; and encourage broad country participation. Without trade measures, the effectiveness of many MEAs would be undermined – with serious consequences for human health and the environment.

Despite their importance, the use of trade measures in MEAs remains under a cloud of uncertainty at the WTO. Trade measures that distinguish between parties and non-parties to an MEA may conflict with the WTO's "non-discrimination" obligations. And bans on trade in environmentally harmful substances may conflict with the WTO's prohibition on "quantitative restrictions". Moreover, it remains unclear from recent WTO cases, including the *Shrimp-Turtle* decision, whether trade measures in MEAs are protected by the WTO's environmental exceptions.

This uncertainty about WTO rules is seized on by countries, or by coalitions of countries, that are economically advantaged by weak MEAs. These countries use uncertainty about WTO rules during environmental negotiations to protect or promote their trade prospects by reducing the scope of MEAs and weakening their provisions. They also use this uncertainty to bolster arguments for the insertion of "WTO savings clauses", which address potential conflicts by seeking to subordinating MEA rules to those of the multilateral trading system: an approach that both fails to adequately address the underlying uncertainties, and that threatens to undermine the mutual supportiveness of these rules.

The use of WTO uncertainty to chill the development of new MEAs is illustrated by the recent Biosafety Protocol negotiations. These negotiations are developing a Protocol to protect against the risks posed by genetically modified organisms (GMOs) to biodiversity. To regulate the "safe transfer, handling and use" of GMOs, the Protocol includes a number of measures that affect international trade. Concerned about their trade interests, a coalition of countries are using perceived conflicts with WTO rules to reduce the Protocol's scope, to weaken its provisions (including those on "advance informed agreement" and GMO labeling and tracking), and to support the insertion of a

"WTO savings clause". Simultaneously, a number of them have asked the WTO to develop new rules on agricultural biotechnology – a move that may create further tensions with the Biosafety Protocol.

The example of the Biosafety Protocol may prove instructive in other fora, such as the ongoing negotiations for an Agreement on Persistent Organic Pollutants (the POPs Agreement). To be effective, the POPs Agreement may require trade measures to restrict the import and export both of persistent organic pollutants, and of products containing them. Effective trade measures may, however, be undermined by exporting governments that are seeking to promote their chemical industries' trade prospects. To promote trade, bracketed negotiating text establishing trade measures may be removed, and text including a savings clause, retained. Unless the relationship between the proposed trade measures and WTO rules is clarified, uncertainty about WTO rules may be used to undermine the creation of an effective POPs Agreement.

Denying new MEAs the use of trade measures may prevent them from achieving the effectiveness of existing MEAs such as the Montreal Protocol. The Montreal Protocol is one of the great success stories of international lawmaking. To help control ozone depleting substances, the Protocol includes trade measures both between parties, and among parties and non-parties. These measures have contributed to the Protocol's effectiveness by encouraging compliance, increasing membership, and preventing "leakage" through increased production by non-parties. These trade measures, many of which may contravene core WTO obligations, have allowed the Protocol to promote the restoration of atmospheric ozone levels to pre-1980 levels by 2050.

The importance of trade measures in MEAs, and the potential for them to be chilled by uncertainty about the rules of the multilateral trading system, suggest the need for a clarification of WTO rules. Greater clarity would ensure that the environmental community is able to develop strong, future MEAs to address new transboundary and global environmental problems, and it would help preserve the integrity of the multilateral trading system, which is increasingly criticized for its involvement in non-trade, social and environmental issues.

Upcoming WTO trade negotiation provide a critical opportunity for WTO Members to adopt a multilateral, cooperative solution to this problem. This paper therefore concludes with recommendations for WTO Members. It suggests that they may wish to:

- immediately agree a political statement affirming both the consistency of MEA trade measures with WTO obligations, and their intention not to challenge MEA trade measures at the WTO; and
- negotiate, in subsequent multilateral trade discussions, a separate WTO agreement on MEAs, acknowledging that MEAs and WTO rules have equal status, and exempting them from WTO challenge;

Adopting these measures would address WTO uncertainty and reduce the tendency of WTO rules to chill the development of MEAs. Specifically, a separate agreement on MEAs and WTO rules avoids the need to reinterpret or amend Article XX, an option that

may raise concerns about unilateralism. And it would constitute a major step towards policy coherence between MEAs and the WTO, and towards ensuring that trade and environmental laws are mutually supportive, thereby securing their joint contribution to the overarching goal of sustainable development.

I. INTRODUCTION

This paper examines the potential for conflict between the rules of the World Trade Organization (WTO) and trade measures contained in Multilateral Environmental Agreements (MEAs).¹

The WTO is the preeminent political and legal institution at the international level concerning global trade. It provides a forum for negotiations on trade liberalization, settling trade disputes, and administering and enforcing the WTO agreements that bind the organization's 134 Members.² MEAs, in turn, are agreements among governments to cooperatively address shared environmental problems. During recent years the importance and scope of MEAs has increased dramatically as the international community struggles to address increasing global environmental problems. Today, around 200 MEAs exist to address these problems, and to coordinate the environmental protection activities of states towards sustainable development.

Central to many of these MEAs are trade measures. Trade measures provide one essential policy instrument in the toolbox of measures available to environmental negotiators, and are now used in over 20 MEAs, including some of the most important and recently negotiated ones (see attached table).³ These trade measures serve a variety of purposes. In some cases they regulate trade in environmentally harmful products. In others, they remove the economic incentives that encourage environmental destruction. In still other cases, they are used to ensure compliance with the MEA's provisions, and to encourage broad country participation, thereby reducing the potential for non-parties to undermine the treaty's objectives. Without trade measures, the effectiveness of many key MEAs would be undermined, with serious consequences for human health and the environment.

Despite their importance, the use of trade measures in MEAs lies under a cloud of uncertainty at the WTO. Concerns exist that WTO disciplines may override trade measures in existing MEAs such as the Montreal Protocol on Substances that Deplete the Ozone Layer,⁴ the Convention on International Trade in Endangered Species of Fauna and Flora,⁵ and the Basel Convention on the Transport of Hazardous Waste.⁶ Additionally, concerns exist that the potential for conflict with WTO provisions may "chill" the development of comprehensive new MEAs to address shared global problems such as climate change, the proliferation of persistent organic pollutants, and trade in genetically modified organisms. These new MEAs may be silently undermined by uncertainty over WTO rules, and by the strategic use of this uncertainty by recalcitrant states to weaken specific MEAs.

Clarifying the relationship between trade measures in MEAs and WTO rules is a crucial step towards promoting coherence among international rules and institutions. The upcoming WTO trade negotiations provide a critical opportunity for WTO Members to address this issue.

The purpose of this paper is to discuss the use of trade measures in MEAs, to explain the potential conflict with WTO rules, and to call on WTO Members to develop a

multilateral, cooperative solution to this conflict. It commences with an overview of the role and importance of MEAs and the use of trade-related environmental measures to achieve their goals. It then discusses the potential conflict between these measures and the rules of the WTO, noting that significant uncertainty exists as to their compatibility with the fundamental obligations of the multilateral trading system. Following this, it describes experiences relating to the use of trade measures in three MEAs. Specifically, it examines:

- the recent collapse of the Biosafety Protocol negotiations in Cartagena illustrates how trade concerns, and uncertainty over the application of WTO rules, recently undermined the successful conclusions of a Protocol to address the impacts of genetically modified organisms on biological diversity;⁷
- the current negotiation of an international agreement on persistent organic pollutants (POPs Agreement) illustrates the potential for WTO rules to undermine ongoing negotiations of an agreement to reduce the production and release of POPs;⁸ and
- the successful Montreal Protocol provides an example of how trade measures may form an essential environmental policy tool to address global environmental problems.

After a discussion of these three MEAs, the paper concludes with some recommendations about how WTO Members could proceed to resolve the potential conflict between trade measures in MEAs and WTO rules.

II. UNDERSTANDING THE WTO/MEA CONFLICT

The potential conflict between the use of trade measures in MEAs and WTO rules arises from a number of sources. First, the development of these two international systems has occurred on largely separate tracks. Trade negotiations culminating in the Uruguay Round occurred along side, but without significant cross-fertilization, with the development of international environmental law, including the 1992 United Nations Conference on Environment and Development.

Second, there is the inherent tension between these two systems. To prevent trade protectionism and promote international trade the WTO limits the scope of measures that may be taken by governments. Environmental law, by contrast, is regulatory in nature and requires national and international measures to correct market failures and otherwise protect health and the environment. While mostly these two systems will be mutually supportive, striking the right balance is, in practice, often a matter of compromise between competing interests. In many cases, this balance is struck in MEAs, which involve cooperative efforts among governments to jointly address serious transboundary and global environmental problems.

1. The Role and Importance of MEAs

MEAs embody the broad-based consensus of the international community, both about the seriousness of an environmental problem and about the need for collective action to

address it. The use of international agreements to address transboundary environmental issues dates from the early part of this century. Recently, in response to a proliferation of new environmental problems, the number of MEAs has increased. Today, they number over 200, and address a wide range of global and transboundary environmental threats. The intensity and growth of these problems highlight the extent of the environmental challenges facing humankind and the need for new political will to address them.

MEAs are the preferred way to deal with transboundary and global environmental problems. In many cases, it simply will not be possible to address global environmental problems such as climate change and ozone depletion without a cooperative, multilateral effort. Additionally, from an economic perspective, multilateral measures may reduce unnecessary economic and trade effects by harmonizing measures and preventing a proliferation of different national rules. Finally, MEAs, as compared to unilateral measures, are important as they embody cooperative approaches that are negotiated among a number of countries with often diverse interests. They are thus more likely to reflect an equitable sharing of the benefits and burdens of environmental protection.

2. The Use of Trade Measures in MEAs

An essential policy tool used in many of these MEAs are trade measures. Trade measures are now used in over 20 MEAs, including a number of the most important:

- the Montreal Protocol uses trade measures to address the depletion of stratospheric ozone which threatens to expose the Earth's surface to harmful ultraviolet radiation and lead to the increase of crop damage, biodiversity loss and skin cancer;
- the Convention on International Trade in Endangered Species (CITES) uses trade measures to address threats to endangered species of plants and animals posed by their international trade; and
- the Basel Convention uses trade measures to address health and environmental threats posed by the transboundary movement of hazardous wastes.

In addition to these MEAs, a number of new MEAs are likely to include measures that affect international trade. These MEAs include:

- the Biosafety Protocol, which is currently being negotiated to address threats to biodiversity resulting from transboundary movement and release of genetically modified organisms;
- the POPs Agreement (persistent organic pollutants), which is currently being negotiated to address threats from certain persistent and highly dangerous chemicals;
- the Rotterdam Convention on Prior Informed Consent, which has been negotiated to ensure importing countries have advance notice of transboundary movement of certain highly dangerous chemicals and pesticides;⁹ and
- the Kyoto Protocol to the Climate Change Convention, which includes a number of mechanisms designed to encourage the cost effective reduction of greenhouse gas emissions and curb climate change.¹⁰

In these and other MEAs, measures affecting trade may provide an essential tool of international environmental lawmaking and serve a number of purposes:

- trade measures may *establish a regulatory framework*. Where a product or substance – such as hazardous waste, chemicals or genetically modified organisms – pose a threat to the environment, trade measures may promote safe transboundary movement of these products by establishing a regulatory framework. A number of MEAs include reporting and transportation requirements, as well as provisions for the use, handling and safe disposal of dangerous products;¹¹
- trade measures may *ban transboundary movement*. Where the threat posed by a product or substance to the environment is significant, trade measures may prohibit trade of the product all together. The Basel Convention, for example, bans trade under conditions where the importing country lacks the capacity to manage the waste in an environmentally sound manner;
- trade measures may *remove market incentives* that promote environmental harm. Where the existence of a market provides an incentive for an environmentally harmful activity, then trade measures may be used to ensure that access to these markets is removed. CITES, for example, bans trade in endangered species thereby removes the economic incentive to kill them;
- trade measures may *encourage compliance* with an MEA. The Montreal Protocol, for example, allows the meeting of the parties to use trade measures to address non-compliance by a party to the Protocol; and
- trade measures may *promote broad participation* in the MEA. In relation to global environmental problems, broad membership may be critical to the success of the MEA. In these cases, trade measures may be used to create incentives for non-parties to join the agreement, or to establish a comparable bilateral, multilateral or regional agreement. In the case of the Montreal Protocol, trade bans with non-parties remove incentives to remain outside the agreement and have thus effectively increased the coverage of the agreement, and prevented its goals from being undermined by the actions of non-parties to the MEA.

These examples underscore the importance of trade measures. Given the variety of goals that may be served by trade measures, and their central importance in many effective MEAs, negotiators should be given significant latitude to include trade measures as part of a package of measures to address global and transboundary harm.

3. *The Potential Conflict between MEA Trade Measures and WTO Rules*

Despite their central role in many effective MEAs, the relationship between trade measures in MEAs and WTO rules remains unclear. The potential for conflict between WTO obligations and the use of trade measures in MEAs has been explicitly acknowledged by WTO Members. At the conclusion of the Uruguay Round, they established the Committee on Trade and Environment (CTE) with the mandate of examining "the relationship between the provisions of the multilateral trading system and

trade measures for environmental purposes, including those pursuant to multilateral environmental agreements". The mandate also included making "appropriate recommendations on whether any modification of the provisions of the multilateral trading system are required".¹²

Despite this mandate, and after almost 5 years of discussion, the CTE has failed to resolve this issue. Moreover, despite proposals by a number of WTO Members to amend WTO agreements, it has offered no recommendations about modification of the rules of the trading system, or other measures, to address the tensions between WTO and MEAs using trade measures. As a consequence, a number of WTO agreements continue to raise questions about the use of trade measures in MEAs. These include:

- the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement);¹³
- the Agreement on Technical Barriers to Trade (TBT Agreement);¹⁴ and
- the General Agreement on Tariffs and Trade (GATT).¹⁵

The GATT, which forms the main focus of this paper, includes three core principles that are also reflected in various forms in the TBT and SPS Agreements. These core principles may affect the use of trade measures in MEAs:

- the "*most favored nation*" obligation (Article I) prevents Members from treating the products of one trading partner differently from those of another. This obligation may frustrate the use of trade measures that treat the products of countries differently depending on whether they are in, or out, of the MEA, thereby undermining the use of trade measures to promote broad MEA participation.
- the "*national treatment*" obligation (Article III) prevents Members from treating the products of its trading partners differently from similar domestically produced goods. This obligation may frustrate the use of more stringent measures to regulate products that were produced in an environmentally harmful way.
- the "*elimination of quantitative restrictions*" prohibits the use of any ban, quota or import or export license. This obligation may frustrate restrictions imposed on trade in a product to reduce market incentives that promote environmental damage or to restrict trade in hazardous products either among parties to MEAs or between parties and non-parties.

Particular concern arises over the use of trade measures against non-parties to MEAs (i.e. countries that are WTO Members, but have remained outside MEAs and are therefore not formally bound by their trade provisions). In these cases, different treatment by MEAs of parties and non-parties may offend both the WTO's non-discrimination requirements and the ban on quantitative restrictions.

In cases where a measure violates any of these core provisions it may still be deemed WTO consistent if the WTO determines that it deserves protection under the exceptions included in Article XX of the GATT. This provision protects measures "necessary for the protection of human, animal or plant life or health" (Article XX(b)) and measures "relating to the conservation of exhaustible natural resources" (Article XX(g)). A

country's right to these exceptions is qualified by some introductory language to Article XX (the "chapeau"), which provides that these measures must not be applied in a way that constitutes "arbitrary or unjustifiable discrimination" between countries, or a "disguised restriction on international trade".

The precise meaning of these terms, and their implications for trade measures in MEAs, are unclear. Article XX was interpreted by the WTO Appellate Body in the recent *Shrimp-Turtle* case. Doubt remains, however, as this case did not concern a direct conflict regarding a trade measure explicitly authorized or required by an MEA. While the Appellate Body expressed support for multilateral solutions to transboundary environmental problems, two aspects of its decision continue to cast doubt over the WTO consistency of trade measures in MEAs.

First, the Appellate Body explicitly declined to rule "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."¹⁶ If such a limitation exists, then extra-jurisdictional measures taken against non-parties may conceivably still be characterized as WTO-inconsistent.

Second, the Appellate Body noted that "perhaps the most conspicuous flaw in this [US] measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments."¹⁷ Again, while the full implications of this statement are unclear, it may raise doubt over the use of trade measures against non-parties where these measures are designed to affect specific policy decisions made by foreign governments.

4. *Resolving the Potential Conflict - Are "WTO Savings Clauses" Appropriate?*

Savings clauses are introduced into MEAs to deal with uncertainty about the relationship between trade measures in MEAs and the WTO's rules by subordinating the former to the latter. A number of formulations have been used, including the broad statement that nothing in the MEA will "alter rights and obligations under existing international agreements".¹⁸ The use of savings clauses in MEAs is a relatively recent development, and is now regularly promoted by countries that wish to preserve their right to challenge at the WTO.

There are, however, a number of reasons to doubt the appropriateness of savings clauses. First, they fail to achieve the goal of reducing uncertainty. A single clause that affirms the integrity of existing international law cannot address the numerous and complex questions about how MEAs and WTO rules relate in specific instances. Rather, these crucial questions of international policy coherence are "punted" to dispute settlement where they are decided, not by numerous experts representing national governments, but by a few unelected dispute settlement officials, with little expertise in the relevant environmental issues.

Second, savings clauses may deny MEAs equal status with WTO rules. In a dispute, a complaining party may use a savings clause to justify recourse to WTO dispute settlement procedures, rather than to those in a MEA. Once at the WTO, a complaining

country would argue that the savings clause renders the MEA irrelevant, or reduces its value, when applying the WTO's environmental exceptions.

Third, savings clauses may limit the effective implementation and enforcement of the MEA. Questions of coherence with WTO rules have arisen during the implementation of a number of international agreements. In CITES, for example, parties have debated whether proposed measures banning trade in ivory are WTO consistent. The inclusion of a savings clause would strengthen the hand of those countries that prefer weak implementation of MEAs.

Finally, by failing to precisely define the competencies of the WTO and MEAs, savings clauses may overburden the WTO with contentious non-trade issues. Preventing this requires action both at the WTO and in MEAs. The WTO must provide space for governments to agree carefully tailored trade measures in MEAs; and MEAs, when considering trade measures, must precisely define their relationship with existing WTO rules.¹⁹

Rather than using savings clauses, governments both at the WTO and in MEAs must proactively define the WTO/MEA relationship before these rules can – in fact rather than merely in theory – be mutually supportive. The failure to resolve this issue continues to raise doubt about the use of trade measures in existing MEAs, and to chill the development of trade measures in new MEAs, as illustrated by the following three examples.

III. EXAMPLES OF MEA TRADE MEASURES AND THE POTENTIAL WTO CONFLICT

Some valuable lessons can be learned by examining the use of trade measures in existing, and in potential future, MEAs. This section of the paper considers three such MEAs – the Biosafety Protocol, the POPs Agreement, and the Montreal Protocol. It examines the potential for real or perceived conflicts with WTO rules to be used by recalcitrant countries to undermine the creation of effective, enforceable rules to address global and transboundary environmental problems.

1. The Biosafety Protocol and Risks Associated with Trade in GMOs

Recent scientific advances in biotechnology have allowed scientists to transfer genetic material across species boundaries – among plants, animals and humans – to create genetically modified organisms (GMOs).²⁰ While the proponents of GMOs affirm their benefits to society, biotechnology is a new and rapidly evolving field, and remains shrouded by scientific uncertainty. The interaction between GMOs and complex biological systems such as natural ecosystems cannot in many cases be anticipated or fully tested before commercial release.

GMOs pose risks to health and the environment.²¹ Risks similar to those from the introduction of any exotic species into an ecosystem arise. Because of their altered

characteristics, GMOs have potential to become a weed or to harm related species, thereby threatening biodiversity. These risks are heightened by the danger that altered DNA will spread horizontally to related species, irreversibly changing their characteristics. To have even a basic understanding of the effects of GMOs – on target and non-target organisms, agricultural structures, crop varieties, ecosystem integrity – long-term testing in complex environments will be required. These tests will need to be extensive, as the effect of releasing GMOs is sensitively dependent on the receiving environment and it is thus not possible to use the results of field tests in one region to accurately extrapolate risks in another.

Regulating to address the risks associated with GMOs is a difficult task, and is compounded when GMOs are traded across national borders. In many cases, countries have not yet established national regulatory systems to adequately address the risks associated with the development, commercialization and transboundary movement of GMOs. This is particularly true in some developing countries, which may lack the financial and technical resources to test and safely handle GMO products. The difficulties facing importing countries increase when GMOs are introduced without their knowledge, as commodities intended for human or animal consumption, or as part of a package to intensify their agricultural production. The challenges facing these countries are multiplying rapidly as the variety and volume of GMOs that are traded across national borders increases.

To protect biodiversity and to help countries effectively regulate GMOs, an international instrument governing the use and transfer of GMOs is necessary. This need was recognized by the parties to the Convention on Biological Diversity when they agreed in 1995 to negotiate a protocol "setting out appropriate procedures ... in the field of the safe transfer, handling and use of any living modified organisms".²² In accordance with this mandate, parties to the Biodiversity Convention (and the United States, which is not a party) established an Ad Hoc Working Group on Biosafety (BSWG) in November 1995. After three years of extended discussions the BSWG scheduled a sixth negotiating session in February 1999 in Cartagena, Colombia with the goal of successfully concluding the Biosafety Protocol negotiations.

The Cartagena negotiations, however, failed because consensus was blocked by a small coalition of grain-exporting countries known as the "Miami Group."²³ This group strongly opposed a variety of aspects in the Protocol on the basis that these might adversely affect trade in genetically modified agricultural products. To protect their trade interests they sought both to weaken the Protocol's provisions, and to make it subservient to the WTO. Discussions at Cartagena focused on a number of aspects of the Protocol including its scope (i.e. which GMOs it covers), liability for GMO related damage, and trade-related issues such as the use of labeling and trade bans. To weaken these provisions, the Miami Group cited potential conflicts between WTO rules and the draft Protocol. In particular, they exerted pressure on the following trade-related measures:

- *Advance informed agreement procedures (AIA)*. The AIA procedures promote informed decision-making by importing countries.²⁴ They aim at establishing the

responsibilities of importing and exporting countries, and are especially important to developing countries with limited capacity to test and safely handle GMOs. To promote export opportunities for their GMO products, the Miami Group insisted at Cartagena on excluding commodities, pharmaceuticals and a range of other GMO products from the scope of GMOs falling under the AIA procedures. Further challenges to the proposed Biosafety Protocol AIA procedures may arise from proposals by the United States for the WTO to develop disciplines for "timely, predictable and transparent" processes for the approval of "agricultural biotechnology products";²⁵

- *Ban on trade with non-parties.* An earlier draft Biosafety Protocol considered a ban on exports and imports of GMOs to and from non-parties.²⁶ The goal of this ban (like those in the Montreal Protocol) was to encourage broad participation in the treaty and to enforce compliance. As noted above, unless WTO rules are clarified, trade bans risk being found inconsistent with a number of WTO obligations. At Cartagena, again under pressure from the Miami Group, the provision containing the ban was eliminated.²⁷
- *Labeling and documentation.* Among the tools considered in the draft Biosafety Protocol were labeling and documentation requirements to identify shipments of GMOs. Negotiators include them into the Protocol through a provision on "handling, transport, packaging and labeling".²⁸ Under pressure from the Miami Group, references to labeling and the tracking of GMOs through the distribution system were removed from the draft text during the Cartagena meeting.²⁹ The compromise refers only to the provision of "accompanying documentation" and it remains unclear whether strong identification and labeling requirements will be included in future drafts of the Biosafety Protocol.³⁰

Related to these conflicts is a second contentious, trade-related issue. At the negotiations, the Miami Group pushed to include a "savings clause" which seeks to ensure that obligations arising from existing international agreements, namely the WTO, would prevail over the Biosafety Protocol if a conflict between the two arose. This provision aims to render the Protocol subservient the SPS and TBT Agreements and the GATT, which limit the measures governments may use to regulate imports in order to protect health, food safety and the environment.

The failure of the Cartagena meeting illustrates how trade aspects may be used to undermine an international environmental agreement that is crucial to the protection of biodiversity. Moreover, it illustrates how uncertainty about the relationship between WTO rules and trade measures in MEAs may be used for political purposes. Under pressure from their agribusiness and biotech companies, the Miami Group governments were able to use claims of potential conflicts with WTO rules and other trade-related concerns to threaten the creation of a strong Biosafety Protocol.

To regain the political momentum for concluding the Biosafety Protocol, negotiators met for informal talks in Vienna in September 1999. While this meeting made little progress on substantive issues, it concluded with an acknowledgement by all parties, including the

Miami Group, that they have the political will to conclude an effective Biosafety Protocol. The next steps will be a resumption of the Meeting of the Extraordinary Conference of the Parties in January 2000, at which the parties are scheduled to recommence formal negotiation.

Recently, however, a handful of countries including the United States and Canada have attempted to bring biotechnology into the WTO's formal agenda. As noted, the United States has called for the WTO to address "disciplines to ensure trade in agricultural biotechnology products is based on transparent, predictable and timely processes."³¹ Canada has proposed the creation of a WTO Working Party on Biotechnology to allow the WTO to "engage in a collective exercise aimed at establishing how trade and investment in biotechnology are covered by existing WTO provisions and whether the latter constitute a sufficiently effective regime from the WTO perspective."³² These proposals have met with opposition by other WTO Members who are concerned that bringing biotechnology into the WTO agenda may increase pressure to narrow the Biosafety Protocol's scope, weaken its provisions or, ultimately, undermine the successful conclusion of the Biosafety Protocol.

The case of the Biosafety Protocol illustrates how the lack of clarity about the relationship between WTO rules and MEAs may be used to chill the development of new MEAs to address transboundary and global environmental problems.

2. *Persistent Organic Pollutants and Trade*

Governments are currently negotiating an agreement to regulate the emission and release of persistent organic pollutants (POPs). To address this global environmental threat, negotiators are considering the use of measures that may have a significant impact on international trade. Already, however, pressure is being exerted by a small group of countries to prevent the use of trade measures in this nascent agreement. The POPs Agreement might thus become the next MEA that is chilled by potential conflict with WTO rules.

POPs are chemical substances that persist in the environment, bioaccumulate in human and animal tissue, and pose a risk of serious adverse effects. They can lead to changes in the immune system, shortened lactation periods in nursing mothers, and reproductive deficits and sex-linked disorders. The potential danger of POPs is significant because their negative effects appear even after exposure to very low dosages. This impact is worsened by the fact that POPs are capable of long range transport, and can cause harm in regions far from where they are used or released. POPs therefore create a global problem that can only be effectively addressed through coordinated multilateral action.

A global response to the threat of POPs started taking shape in June 1998 in Montreal, Canada when over 90 governments met to negotiate an "International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants".³³ These negotiations, under the auspices of UNEP, aim at establishing a regulatory framework to minimize emissions and releases of POPs. They also address the accumulation of stockpiles of pesticides and toxic chemicals, particularly in

developing countries. Currently these negotiations focus on 12 of the worst POPs, amongst which are DDT and dioxins.³⁴

The magnitude of the threat posed by POPs means that it is vital to establish the best possible framework for their quick and efficient elimination. Today society has achieved broad consensus on the necessity and the urgency to establish such a framework. Therefore, negotiators should be given sufficient latitude to establish a truly effective agreement. In order to establish such an effective agreement, negotiators might consider the inclusion of trade measures such as bans on the production and transboundary movement of these substances.

However, strong rules to regulate POPs may be undermined by the possibility of conflict with WTO rules. There is considerable potential for countries that favor a weak POPs Agreement to use real or perceived WTO conflicts to place downward pressure on the negotiations. Uncertainty about WTO rules may be used to undermine a variety of trade-related measures including the following:

- to support a ban on the production and use of certain POPs, *restrictions on imports and exports* may be necessary to prevent leakage and to ensure that trade does not undermine domestic measures. The negotiating text includes bracketed text on import and export restrictions. These, however, are at risk of being removed under pressure from exporting governments, citing potential conflicts with WTO obligations,³⁵
- the objectives of the treaty may be enhanced by other trade-related measures. While draft text does not currently include these, negotiators might consider *restricting trade in products produced in manner that uses POPs* as done in the Montreal Protocol, or banning trade in the listed POPs for purposes other than environmentally sound destruction. Again, WTO uncertainty could be used to undermine the use of these measures; and
- as POPs are capable of long range transport, broad participation in the POPs treaty is required to achieve its objectives. To provide incentives to join, the agreement must avoid offering a competitive advantage to non-parties of the treaty. Again, as was the case with the Montreal Protocol, explicit *trade bans between parties and non-parties* may be envisioned to encourage countries to join the agreement.

In addition to these questions about the use of trade measures, countries favoring WTO rules over those in the POPs Agreement have sought to address the potential conflict by including a "savings clause". Currently Article "N bis" of the draft text contains such a provision.³⁶ Introducing a savings clause into the agreement may place the rules of the multilateral trading system above the POPs Convention. Consequently, in case of a conflict, WTO rules may override the POPs Convention's safeguards.

At the recent negotiating group meeting in Geneva during September 1999, the specter of potential conflict remained present. If successful, proposals to include a "savings clause", and to take trade measures off the table, would considerably restrict the potential tools available to achieve the goal of the POPs Agreement. These proposals could

simultaneously weaken the agreement's provisions and, in the event of a conflict, subordinate them to WTO rules. Their use reflects an inherent tension that underlies many environmental negotiations. On one hand, to protect human health and the environment, governments are attempting to establish an effective regulatory framework, which includes measures that restrict imports and exports of POPs. On the other, in order to provide free market access for their chemical industries, a number of exporting governments are seeking to *remove* restrictions on trade. Uncertainty about WTO rules may be used by this latter group to strengthen their hand and to undermine the creation of an effective POPs Agreement.

3. *Montreal Protocol and the Race to Save the Ozone Layer*

The Montreal Protocol is one of the great success stories in international environmental lawmaking. Its success is demonstrated by the fact that the ozone layer is expected to recover to pre-1980 levels by the year 2050. Without the Protocol, levels of ozone-depleting substances are projected to have been five times higher by 2050 than they are today, and levels of ultra violet (UV-B) radiation would have doubled at mid-latitude in the northern hemisphere.³⁷ The success of the Protocol is due, in no small part, to the use of effective trade measures.

During the 1980s, science produced increasing evidence of the negative consequences of ozone depletion. One consequence, greater UV-B radiation, has serious negative impacts upon animal, plant and human health and can weaken the immune system and increase the rate of skin cancer and eye damage. Because neither the effects of the depletion, nor its causes, are strictly linked to specific geographic areas of the world, ozone depletion is a global problem, which can only be effectively addressed through a global response.

Broad recognition of the dangers of ozone depletion catalyzed an international response. In 1985, governments signed the Vienna Convention for the Protection of the Ozone Layer.³⁸ Pursuant to this framework agreement, negotiators concluded the Montreal Protocol in 1987.³⁹ The primary goal of the Protocol is to protect the ozone layer by reducing the production and consumption of certain ozone depleting substances. To achieve this goal, the Montreal Protocol contains a series of measures to control, and ultimately to phase-out, the "controlled substances" which are listed in four annexes to the Protocol. These substances include chlorofluorocarbons (CFCs), which have been used for a variety of purposes including as solvents, refrigerants and aerosol propellants, and were among the most prevalent ozone depleting substances.

To assist parties to the Protocol to phase-out controlled substances, the Montreal Protocol includes two main categories of trade measures. First, are trade restrictions among the Protocol's parties. The Protocol establishes the parties' control obligations in terms of consumption, which is defined as production plus imports minus exports. To satisfy their control obligations, parties must therefore regulate the import and export of controlled substances. As the Protocol does not specify what kind of measures are required between parties, a variety of different approaches have been adopted, including partial or total import bans, quantitative restrictions and import licenses.

Second, the Protocol includes trade restrictions between parties and non-parties. It contemplates measures that apply both to imports and exports and that include:

- restrictions on trade in *ozone-depleting substances*;
- restrictions on trade in *products*, such as refrigeration equipment, air-conditioners and aerosol products, which *contain* ozone-depleting substances;
- restrictions on trade in *products* made with, but *not containing*, ozone-depleting substances;⁴⁰ and
- obligations to *refrain from exporting technologies* or providing incentives (subsidies, aid, credits etc.) for the production of controlled substances by non-parties.

These non-party measures are an essential element of the Protocol for a number of reasons. First, they reduce the incentives for countries to remain outside the Protocol, thereby increasing its country coverage and effectiveness. Export restrictions by the Protocol's parties, for example, provide non-parties with an incentive to comply with the Protocol in order to maintain their supply of ozone depleting substances (albeit in controlled levels). Similarly, import restrictions on imports of controlled substances, or products containing them, provide an incentive for non-parties to comply in order to maintain market access for their chemicals and products containing them.

Second, trade measures against non-parties prevent "leakage" by discouraging the expansion of production facilities in those countries. In the face of trade restrictions, non-parties have their access to markets limited, both for ozone depleting substances, and for products containing them. Therefore, any comparative advantage they would otherwise receive vis-a-vis parties (who face increased costs associated with phasing-out, and finding replacements) are reduced. Consequently, the incentive for industries to migrate to non-parties is also reduced.

These measures have proven remarkably effective in attracting signatories to the agreement on a global scale. Today, the number of non-parties to the Protocol is small, and a number of countries acknowledge that trade provisions played an important part in their decision to join. The Protocol's broad coverage and its success in lowering risks to human health and to the environment are a strong testimony to the effectiveness of trade measures.

However, to achieve their goals, both trade measures among parties and trade measures between parties and non-parties restrict trade. Consequently, they are likely to raise questions under the rules of the multilateral trading system. Trade measures among parties, for example, will affect import and exports of controlled substances. While these may, in certain cases, conflict with the non-discrimination obligations and the ban on quantitative restrictions, it seems unlikely that parties to the Protocol would, instead of relying on the Protocol's provisions, bring a challenge to the WTO. More contentious are the trade measures against non-parties. A non-party that is a WTO Member could argue that the trade measures contravene both the GATT obligation to avoid quantitative restrictions (Article XI), and the non-discrimination obligations (Articles I and III) (measures apply to non-parties, but not to parties). Of course, a party defending such a

measure would claim that the measure is justified under Article XX. As noted earlier, however, how Article XX would be applied to trade measures against non-parties remains somewhat unclear.

So far, none of the Montreal Protocol's trade measures have faced a challenge under the rules of the multilateral trading system. However, the potential for conflict was a factor in the negotiations. Before agreeing to the trade restrictions, the EC representative insisted on obtaining an opinion on the compatibility of such measures with the GATT from a trade expert in the GATT secretariat.⁴¹ The inclusion of trade measures under the Protocol was vital to the success of the agreement. In the future, it must be ensured that potential conflicts with WTO rules do not impede the inclusion of similar trade measures in other MEAs, thereby frustrating the development of effective response to international environmental problems.

IV. CONCLUSIONS AND RECOMMENDATIONS

Forthcoming WTO negotiations provide an opportunity to clarify the relationship between trade measures in MEAs and the rules of the multilateral trading system. In these discussions, it will be necessary to more clearly delineate the jurisdiction of the WTO, so as to respect the mandates of the MEAs, while allowing the WTO to focus on its core issues and competencies. The WTO's core competence is to administer existing multilateral trade rules, to prevent trade protectionist behavior by its members and to settle trade disputes. That competence should not be extended to threaten existing MEAs, or to undermine the creation of new ones.

To increase the coherence of international policy making in relation to trade and sustainable development, WTO Members should agree to measures to resolve the MEA/WTO conflict. Trade measures in MEAs make an essential contribution to sustainable development and should be available both to regulate trade in environmentally hazardous products and as a mechanism to encourage broad participation in and compliance with multilaterally agreed obligations.

As a step towards resolving this issue, WTO Members should immediately agree a political statement on trade measures in MEAs in which they affirm the consistency of these measures with WTO obligations and affirm their intention not to challenge MEA trade measures at the WTO. In the upcoming negotiations, WTO Members must ensure that trade measures in MEAs are exempt from WTO challenge by negotiating on one of the following options:

- an *amendment of Article XX of the GATT* to include trade measures in MEAs under its list of permitted exemptions;⁴²
- an agreed *interpretation of Article XX* which acknowledges that trade measures in MEAs are presumptively consistent with the existing exemptions;
- a *separate WTO agreement on MEAs*, acknowledging that MEAs and WTO rules have equal status, and exempting them from WTO challenge;

While WTO Members may give careful consideration to each of these proposals, the latter option of negotiating a separate WTO agreement on MEAs seems preferable in a number of ways.⁴³ First, it would allow the creation of criteria tailored specifically to address the relationship between MEAs and the WTO. These would need both to provide flexibility for the use of trade measures in MEAs and reduce the potential for them to be implemented by countries as a form of disguised protectionism. Second, it would avoid the need to reinterpret or amend Article XX, an option that may have implications for other issues, and raise concerns for some WTO Members about the potential for unilateralism and disguised protectionism. Third, it could apply clearly to all WTO agreements, whereas it is currently unclear whether Article XX of GATT covers other WTO agreements. Finally, it would provide an opportunity for trade and environment negotiators, as well as experts from relevant international organizations such as the MEA Secretariats and UNEP, to discuss the appropriate relationship between MEA trade measures and the WTO, ensuring a balanced and informed discussion.

Taking these steps is the minimum that is required to remove the current doubt overhanging the use of trade measures in MEAs. By addressing this uncertainty, and by clarifying the relationship between MEA trade measures and the WTO, WTO Members will promote coherence among international rules and institutions, and they will ensure that international trade and environmental laws develop in a mutually supportive way, thereby securing the joint contribution these systems can and must make to the overarching goal of sustainable development.

¹ In this paper, the term "trade measures" refers both to specific provisions in MEAs that ban trade, and more broadly to measures, such as labeling and prior informed consent procedures, that affect the pattern of trade. More specific references to different kinds of measures are made as necessary.

² Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) GATT Doc. MTN/FAII (15 Dec. 1993) (hereinafter WTO Agreement), in Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, GATT Doc. MTN/FA (15 Dec) 1993 reprinted in 33 I.L.M. 28 (1994).

³ See UNEP; *Trade related environmental measures in the field of safety in biotechnology*; Environment and Trade Monography No. 14, (1997).

⁴ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 30 I.L.M. 537 (hereinafter Montreal Protocol).

⁵ Convention on International Trade in Endangered Species, Mar. 1973, 27 U.S.T. 1087 (hereinafter CITES).

⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (hereinafter Basel Convention).

⁷ See generally, <http://www.biodiv.org/>.

⁸ See generally, <http://irptc.unep.ch/pops/>.

⁹ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals in International Trade. See, <http://irptc.unep.ch/pic/>.

¹⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change, De. 10, 1997, 37, I.L.M. 22 (1998).

¹¹ As a general note, trade measures reflect that different products may require different kinds of rules (at

both the national and international level). While a liberal trading regime is appropriate for benign products, dangerous products require rules, in addition to those of the WTO, to regulate trade. A lack of these rules encourages exporting countries to externalize risks and costs to importing countries and to the global commons, and thus provides an incentive to export riskier goods, and more of them.

¹² Decision on Trade and Environment, adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994, in Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, GATT Doc. MTN/FA (15 Dec) 1993 reprinted in 33 I.L.M 136 (1994)

¹³ The Agreement on the Application of Sanitary and Phytosanitary Measures. The goal of the SPS Agreement is to prevent certain national health and safety regulations from unduly restricting international trade. The SPS Agreement covers measures to protect human and animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in food, beverages and feedstuffs, as well as to prevent the establishment or spread of pests (hereinafter SPS Agreement).

¹⁴ The Agreement on Technical Barriers to Trade. The goal of the TBT Agreement is to minimize the impact of national technical regulations, standards and conformity assessment procedures on international trade by reducing the extent to which regulations operate as barriers to market access, primarily by encouraging governments to harmonize national laws and prevent them from using them as protectionist barriers to trade (hereinafter TBT Agreement).

¹⁵ General Agreement on Tariffs and Trade 1994, GATT Doc. MTN/FA II-A1A 2 (15 Dec. 1993), in Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, GATT Doc. MTN/FA (15 Dec) 1993 reprinted in 33 I.L.M 28 (1994) (hereinafter GATT 1994).

¹⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (hereinafter *Shrimp-Turtle*) at para. 133.

¹⁷ *Id.*, at para 161. In addition, the Appellate Body stated "it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members." *Id.*, para 164.

¹⁸ Savings clauses are included in MEAs including UNCLOS, the Convention on Desertification, the Convention on Biological Diversity and the Rotterdam Convention on Prior Informed Consent. They are also being considered in the Biosafety Protocol and POPs Agreement negotiations. Savings clauses vary. The Convention on Prior Informed Consent, for example, contains a savings clause in its preamble, whilst the relevant provision in the Biodiversity Convention forms part of the actual text of the agreement. They may also be categorized as "qualified" and "unqualified" savings clauses. The Biodiversity Convention, for example, is qualified and excludes the application of the savings clause to cases "...where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."

¹⁹ In some cases, trade measures in MEAs operate as a system of "WTO plus", as more stringent rules are required to address the risks associated with trade in dangerous products. Clearly, subordinating these measures to "existing obligations" at the WTO would undermine the MEA.

²⁰ In the Biosafety Protocol negotiations, GMOs are referred to as LMOs (living modified organisms), the term is defined in Art 3 (h) of the draft BSP (see UNEP/CBD/ExCOP/1/2).

²¹ See, for example, *Genetic Engineering: Examples of Ecological Effects and Inherent Uncertainties*, WWF International (1995). In addition to ecological risks, the use of genetically modified crops may encourage change in farming practices by, for example, eliminating small and medium-sized farmers, reducing labor requirements, or increasing dependency on industrial chemicals and genetically modified inputs. The potentially disruptive effects of GMOs on ecological, agricultural and socio-economic systems, as well as the uncertainties of genetic engineering, suggest the need for states to regulate the release or commercialization of GMOs (and products produced from them) on the basis of the precautionary principle.

²² Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) (hereinafter Biodiversity Convention) Article 19(3).

²³ Countries forming the "Miami Group" include Argentina, Australia, Canada, Chile, the United States and

Uruguay. Industry figures suggest that the United States, Canada and Argentina jointly account for over 95% of all GMO's produced. *See, Global Review of Commercialized Transgenic Crops: 1998*, Report by the International Service for the Acquisition of Agri-biotech Applications (ISAAA), www.isaaa.org/fr/brief8.htm.

²⁴ Article 5, "The Application of the AIA Procedure" in UNEP/CBD/BSWG/6/2, respectively Article 5 in UNEP/CBD/ExCOP/1/2.

²⁵ *Measures Affecting Trade in Agricultural Biotechnological Products*, Communication from the United States, 27 July 1999, para 1, WT/GC/W/288.

²⁶ Article 24, "Non-Parties" in UNEP/CBD/BSWG/6/2.

²⁷ Article 21, "Non-Parties" in UNEP/CBD/ExCOP/1/2.

²⁸ Article 18, "Handling, Transport, Packaging and Labeling" in UNEP/CBD/BSWG/6/2.

²⁹ Article 15, "Handling, Transport, Packaging and Identification" in UNEP/CBD/ExCOP/1/2.

³⁰ Note also that the United States has argued at the WTO that certain GMO labeling rules adopted by the EU to promote the consumer's right to know are inconsistent with the WTO TBT Agreement. *See*, Submission by the United States to the WTO Committee on Technical Barriers to Trade, 16 October 1998, (G/TBT/W/94).

³¹ *Supra*, note 24.

³² *Proposal for Establishment of a Working Party on Biotechnology in WTO*, Communication from Canada, 4 October 1999, para 6. WT/GC/W/359.

³³ Governing Council Decision 20/24 on <http://irptc.unep.ch/pops/newlayout/gc20-24.htm>. Prior to the 1998 meeting, the May 1995 UNEP Governing Council called on organizations including the Intergovernmental Forum on Chemical Safety to examine evidence justified negotiation of a global POPs agreement, focusing initially on the 12 worst POPs (including DDT, PCBs and dioxin). *See*, UNEP Governing Council Resolution 18/32 (May 25, 1995). In November 1999, at the Washington Conference on Protection of the Marine Environment from Land-based Activities over 100 governments called for a global, legally binding instrument for the reduction and elimination of the 12 POPs identified by UNEP. Subsequently, in February 1997, the UNEP Governing Council asked UNEP to confere an intergovernmental negotiating committee, leading to the June 1998 negotiations. *See*, UNEP Governing Council Resolution 19/13C (February 7, 1997).

³⁴ An expert group developed scientific criteria and procedural steps for adding other POPs to the initial list of the 12 prioritized chemicals.

³⁵ *See* Report by the Chair of the Contact Group on paragraphs 1 and 2 of Article D and related annexes UNEP/POPS/INC CRP.27

³⁶ Article N bis, UNEP/POPS/INC.2/6 I.

³⁷ *See*, UNEP State of the Environment, Chapter Two. *See generally*, <http://www.grid.unep.ch/geo2000/>.

³⁸ United Nations Convention for the Protection of the Ozone Layer, March 22, 1985, UNEP Doc. IG.53/5, 26 I.L.M. 1529 (1987), (hereinafter Vienna Convention).

³⁹ The Montreal Protocol's control provisions were strengthened through four adjustments to the Protocol, which were adopted in London (1990), Copenhagen (1992), Vienna (1995) and Montreal (1997).

⁴⁰ When concluding the Montreal Protocol, parties agreed to determine within 5 years, whether applying these restrictions were feasible. This decision has been postponed, and it seems unlikely that parties will implement trade measures of this kind.

⁴¹ Brack, D., "International Trade and the Montreal Protocol", The Royal Institute of International Affairs, London (1996), p 53 and 68. *See also*, Hunter D., et al., "International Environmental Law and Policy", New York (1998), p 596.

⁴² This and other approaches using Article XX should be complemented with an Interpretation noting that Article XX applies to all WTO agreements, including the TBT Agreement, to the extent it does not conflict with the terms of those agreements. It should also ensure that the chapeau is interpreted to presumptively permit trade measures in MEAs.

⁴³ For an excellent discussion of the advantages of a WTO "side agreement" on MEAs, see Brack D., *CTE Issues: MEAs and the WTO* (1995) (on file with author).