

UNEP DRAFT – NOT FOR QUOTATION

**TRADE-RELATED MEASURES
AND MULTILATERAL ENVIRONMENTAL AGREEMENTS**

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I. Introduction

1. Growing global interdependencies, both economic and environmental, increase the need for coherence and coordination in trade and environmental policies, rules, and institutions. As international rules in both the trade and environmental fields increase in geographic and substantive scope, promoting the complementary functioning and implementation of these sets of rules is crucial to achieving sustainable development objectives.¹ As noted by trade ministers at the Fourth Ministerial Conference of the WTO, held in Doha in November 2001, “an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.”²

2. Maximizing the synergies between multilateral environmental agreements (MEAs) and the rules of the World Trade Organization (WTO) is particularly important in this regard. With a view to enhancing the mutual supportiveness of trade and environment, WTO Members are thus currently engaged in negotiations, pursuant to paragraph 31(i) of the Doha Ministerial Declaration, on:

“the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.”

3. The relevance of the relationship between MEAs and WTO rules for enhancing mutual supportiveness of environment and trade has been clearly reflected in these negotiations. Indeed, over thirty submissions have been put forth on paragraph 31(i) since 2002. Nevertheless, progress has been limited due to fundamental divergences in relation to approach and interpretation of the terms of the above-mentioned mandate.³ In particular, significant discussions have taken place in relation to the various types of trade-related measures established in a number of MEAs, and how these measures may qualify as “specific trade obligations” for the purposes of the negotiations.

4. Another critical element in enhancing mutual supportiveness is promoting the interaction and exchange of information between trade and environmental communities. The Doha Ministerial Declaration emphasizes the need for regular information exchange between trade and environmental institutions. Indeed, Paragraph 31(ii) mandates

¹ United Nations Environment Program (UNEP), “Capacity Building on Environment, Trade, and Development: Trends, Needs and Future Directions” Discussion Paper prepared for the UNEP Workshop on Capacity Building on Environment, Trade, and Development, 19-20 March 2002, Geneva.

² WTO Doha Ministerial Declaration, document WT/MIN(01)/DEC/1, paragraph 6.

³ For an overview of the progress made in the trade and environment negotiations under Paragraph 31(i) of the Doha Ministerial Declaration up to the time of the Hong Kong Ministerial Conference, see the Report by the Chairperson of the Special Session of the Committee on Trade and Environment to the Trade Negotiations Committee, 28 November 2005, document TN/TE/14.

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negotiations on “procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status.”⁴ Several delegations have noted that information exchange can have a positive spillover on Paragraph 31(i), in terms of reducing the risk of conflict between the WTO and MEAs. Finally, the Doha Ministerial Declaration also underlined the importance of capacity building on the trade and environment policy interface and explicitly welcomed cooperation with UNEP.⁵

5. UNEP similarly recognizes the essential need to build capacities on trade and environment issues.⁶ It considers that capacity building enhances the participation of countries in the further development of MEAs, and likewise, provides for more effective trade negotiations.⁷ In 2001, the UNEP Governing Council established a mandate to “promote understanding, dialogue and the dissemination of information about multilateral environmental agreements, including any trade-related measures, inter alia, to develop capacity to ensure that trade and environmental policies are mutually supportive.”⁸ In light of this, UNEP has facilitated a cooperative process of research and multi-stakeholder meetings, including a series of meetings between the Secretariats of various MEAs and the WTO, which also involved governments, other intergovernmental organizations and non-governmental organizations (NGOs).⁹ UNEP also provides technical support to MEAs regarding the implications of the trade rules and the relevance of ongoing trade negotiations to their implementation. Moreover, UNEP, often jointly with MEAs, prepares background papers and notes to contribute to ongoing discussions on these issues.¹⁰

6. The present note, a part of UNEP’s capacity building work, is intended to inform ongoing discussions on trade-related measures in MEAs in the CTESS. MEAs do not refer to “specific trade obligations,” “trade measures,” or “trade-related measures,” although this language may be used informally in discussions surrounding the agreements.¹¹ Nevertheless, MEAs do include specific substantive or procedural provisions that may restrict, regulate or otherwise condition international trade as part of

⁴ Despite the lack of agreement by WTO Parties on the issue of observer status, the Special Session of the Committee on Trade and Environment (CTESS) has invited six MEAs and UNEP to participate, on an ad hoc basis, in its meetings. See Report of the Chairperson of the CTE Special Session to the Trade Negotiations Committee, 15 July 2003, documents TN/TE/7 and Suppl.1.

⁵ See *supra* note 2.

⁶ Background Paper on Trade and Environment prepared by the UNEP Executive Director for Consideration of the Plenary at the twenty-second session of the Governing Council/Global Ministerial Environment Forum, 3-7 February 2003.

⁷ See *supra* note 1.

⁸ UNEP, Twenty First Session of the Governing Council (2001), Decision 21/14, paragraph 4(c), available at <http://www.unep.org/GC/GC21>.

⁹ See for example, UNEP Briefs on Economics, Trade and Sustainable Development Information and Policy Tools, *Multilateral Environmental Agreements and the WTO: Building Synergies* (May 2002).

¹⁰ See *supra* note 4, at paragraph. 46. The capacity building publications of the Economics and Trade Branch, for instance, are available at <http://www.unep.ch/etu/etp/acts/capbld/index.htm>.

¹¹ The use of these terms in this paper, therefore, as well as of other terms such as “multilateral environmental agreement”, is not intended to evince a view by the author or UNEP on the meaning or appropriateness of these terms or on the way they should be used or interpreted in multilateral fora.

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the package of instruments contained to achieve their objectives.¹² These provisions are the focus of this note.

7. In particular, the present note focuses on six MEAs – selected in light of their prominence and their direct or indirect consideration in the WTO, the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD), and other international fora. These MEAs are:

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol);
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention);
- the Cartagena Protocol on Biosafety;
- the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the Rotterdam Convention); and
- the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention).

8. After this Introduction, Section II of the note explains the increasing international significance of MEAs and highlights several of their common principles and characteristics. Section III discusses the relationship between trade and environment and the role of MEA trade-related measures in responding to this relationship. This is followed by a review of the overall objectives, the main provisions, and specific trade-related measures found in the six MEAs noted above. Next, Section IV provides a summary of some of the common elements and functions of the trade-related measures found in the MEAs, and finally, Section V finishes with some closing thoughts on the relevance of all these points for negotiations under Article 31(i) of the Doha Ministerial Declaration.¹³

II. MEAs - their role, importance and approach

9. The importance of international cooperation across a diversity of topics is increasingly recognized and promoted.¹⁴ An ever more interconnected world demands

¹² In this regard, these provisions should be distinguished from the environmental measures in MEAs that, while not trade-related, may have secondary trade effects. For example, the carbon tax established by the Kyoto Protocol is not directly linked to trade, but the actions of countries implementing the Protocol may have trade implications.

¹³ It should be noted that, as the aim of this note is to serve as an informational and capacity building tool to enhance the mutual supportiveness of trade and environmental policies, it does not reach any conclusion or prescribe any particular approach in relation to WTO negotiations.

¹⁴ The United Nations Millennium Declaration, adopted by the UN General Assembly in 2000, recognized that, in addition to States' separate responsibilities to their individual societies, there is a collective responsibility for managing worldwide economic and social development, as well as threats to international peace and security, and that such responsibility should be exercised multilaterally.

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multilateral approaches to trade, security, migration, and a host of other issues. In the environmental context, in particular, there is an appreciation that environmental degradation is often a global problem and, as such, requires global responses. The depletion of the ozone layer, the loss of biodiversity, and the spread of persistent organic pollutants, for instance, result from human activity in countries around the world and have impacts that extend far beyond national borders. As a result, domestic conservation and environmental management strategies alone are insufficient to conserve shared natural resources and safeguard the global ecosystem. International cooperation is not only fundamental; it has also been recognized as the best and most effective way for governments to tackle transboundary or global environmental problems.¹⁵

10. In this context, the function and significance of MEAs continue to grow.¹⁶ MEAs offer a framework for collectively addressing environmental problems on the basis of policy consensus and science. In addition, as environmental challenges become more and more complex, MEAs increasingly provide a comprehensive approach to effectively and equitably deal with those environmental challenges. Thus, most MEAs include a range of provisions that address issues such as: inadequate information; the need for broad stakeholder participation; the differing levels in which countries have contributed to the problem and can contribute to the solution; and the lack of incentives to act.¹⁷ In addition to addressing environmental problems, many of the measures contained in MEAs also have positive social and economic impacts. For example, the harmonization of standards and other policy instruments encouraged by many MEAs is designed to enhance environmental protection, but more harmonized standardization principles and practices may also have positive effects on trade and the economy by avoiding trade distortions, facilitating the technical and legal implementation of standards and technical regulations, and assisting consumers in their decision-making.¹⁸

11. Certain common principles and characteristics of MEAs particularly illustrate the approach, role, and importance of these instruments. Although each MEA contains a framework designed to respond to a unique set of environmental problems, a number of concepts are generally present within MEAs. These commonalities arise from a number of different factors. One is the tendency of States to use and build on their previous experience – both successes and challenges – in developing MEAs. The inclusion in post-1987 MEAs of compliance mechanisms that draw on the experience of the Montreal Protocol is an example of this. In addition, MEAs have the following common characteristics that are often applied in an analogous manner. The principle of common but differentiated responsibilities is one example.

¹⁵ See for example the Johannesburg Declaration on Sustainable Development at the World Summit for Sustainable Development, September 2002. This has also been recognized in the trade context, see for example the Report of the WTO Committee on Trade and Environment to the Singapore Ministerial Conference, 12 November 1996, WTO document WT/CTE/1 (CTE Singapore Report).

¹⁶ There is no agreed definition of “MEA” in general, though UNEP has developed working definitions for certain projects. For instance, in the context of *Environment and Trade: A Handbook*, MEAs were defined as environmental agreements with more than two parties. For the purpose of the present note, no definition is required, as the six selected environmental agreements are widely recognized as MEAs.

¹⁷ Diverse types of measures in selected MEAs are analyzed in Section III of the present paper.

¹⁸ Stevens, Candice, *Harmonization, trade and the environment*, International Environmental Affairs 5 (1): 42-49 (1993).

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12. The principle of common but differentiated responsibilities, elaborated, *inter alia*, in Principle 7 of the Rio Declaration:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

13. In light of the principle of common but differentiated responsibilities, MEAs seek to address environmental problems in a balanced and equitable manner. To accomplish this, each MEA contains a set of measures intended to complement and support each other, typically with provisions establishing certain regulatory parameters, provisions setting out a range of exceptions and flexibilities, and provisions assisting with implementation and compliance. Acknowledging the differing contribution of countries to the causes of environmental problems and their diverse capacities to resolve them is possible in several ways. Some MEAs provide for less stringent measures or longer compliance timeframes for developing countries. For example, the Stockholm Convention, appreciating that some of the chemicals it covers are still widely used in developing countries, allows “specific exemptions” to enable the elimination of production and use over time, as substitutes are phased in.¹⁹ Other MEAs emphasize provisions for capacity building and technological and financial assistance. The Basel Convention, for instance, provides for regional or sub-regional centers for training and technology transfer.²⁰ By attempting to give full consideration to principles such as equity and common but differentiated responsibilities, MEAs promote participation and effective international cooperation.²¹

14. Several other characteristics are intrinsic to and thus widely shared by MEAs. For example, MEAs are driven by science, which contributes to identifying and analyzing global environmental problems, as well as developing appropriate solutions.²² For example, the impetus for the Montreal Protocol resulted largely from the mounting scientific data about the decreasing concentration of ozone in the stratosphere and the role of certain chemicals in the process.²³ That scientific data also provided the basis for the Montreal Protocol’s coverage, control measures and phase-out schedules. In addition, the Montreal Protocol has been adjusted and amended to take account of new information

¹⁹ See Stockholm Convention on Persistent Organic Pollutants, Articles 3 and 4 and Annexes A and B.

²⁰ See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Article 14. Basel Convention Regional Centers for Training and Technology Transfer are currently operational in Africa and West Asia (centers located in Egypt, Nigeria, Senegal and South Africa), Asia and Pacific Region (centers located in China, Indonesia and Samoa), Latin America and Caribbean (centers located in Argentina, El Salvador, Trinidad and Tobago, and Uruguay), Central and Eastern Europe (centers located in Slovak Republic and Russian Federation).

²¹ See for example, Report of United Nations Commission on Trade and Development (UNCTAD) Trade and Development Board, Commission on Trade in Goods and Services, and Commodities, *Positive Measures to Promote Sustainable Development, Particularly in Meeting the Objectives of Multilateral Environmental Agreements*, TD/B/COM.1/EM.3/2 (25 August 1997).

²² Hunter, David et al, *International Environmental Law and Policy*, (1998), 273.

²³ Benedick, Richard, *Ozone Diplomacy*, (1991), 9-19.

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about the extent and scope of stratospheric ozone depletion, as well as the development of alternative technologies and the availability of new sources of financing.²⁴ Science thus underpins MEAs, providing the evidence on which they are built and further developed. Moreover, science provides the basis for common standards and policies with other treaties containing provisions related to human health and environmental risks, which enables positive coordination.

15. Another noteworthy characteristic is the careful tailoring of each MEA to address a particular set of environmental issues. The range of measures contained in each MEA is crafted with the aim of effectively achieving its environmental objectives. CITES, for instance, which aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival, recognizes the need to complement conservation efforts with support for responsible trade in wildlife.²⁵ Sustainable trade in wild fauna and flora is key to building support for conservation among local communities and can contribute to raising funds for protecting species of concern.²⁶ CITES also acknowledges the importance of capacity building for developing countries to monitor and control both wildlife trade and wildlife populations.²⁷ In a similar manner, other MEAs also include measures carefully designed to jointly contribute to achieving their environmental goals.

16. Finally, MEAs also share the characteristic of having the widespread support of the international community. CITES, the Montreal Protocol, and the Basel Convention all have well over 160 Parties. Ratifications for MEAs finalized more recently continue to increase.²⁸ Wide membership is crucial to achieving a number of environmental objectives.²⁹ The negotiation and design of MEAs focus on encouraging a large participation and high levels of implementation in several ways. First, an open and transparent process of negotiation allows States to develop a sense of ownership and commitment to new norms.³⁰ Second, the characteristics of MEAs, including those discussed above, also contribute to the wide support for these instruments: the careful

²⁴ The London Amendment, adopted in 1990, the Copenhagen Amendment, adopted in 1992, and the Beijing Amendment, adopted in 1999 introduced, inter alia, control measures regarding new groups of substances.

²⁵ Resolution Conf. 8.3 (Rev. CoP13) of CITES, for instance, states that the sustainable use of wild fauna and flora, whether consumptive or non-consumptive, provides an economically competitive land-use option and that, unless conservation programmes take into account the needs of local people and provide incentives for the sustainable use of wild fauna and flora, conversion to alternative forms of land use may occur. In addition, Resolution Conf. 13.2 urges Parties to make use of the Addis Ababa Principles and Guidelines for Sustainable Use of Biodiversity, that were adopted by the Conference of the Parties to the Convention on Biological Diversity at its seventh meeting.

²⁶ The balance between trade and conservation, however, remains delicate and is often controversial. The debate over elephants and the illegal ivory trade that took place at CITES COP 13 is a clear example. While a number of countries believe that further ivory sales from African elephants should be prohibited to reduce future threats to elephants and deter poachers and traders, others are convinced that one-off sales of ivory stockpiles and the sustainable use of elephant products help fund anti-poaching and conservation activities.

²⁷ Though not provided for in the Convention itself, a critical part of CITES is the broad range of training and technical assistance activities conducted by the Secretariat under its capacity building program.

²⁸ For instance, the Rotterdam Convention has 95 Parties, the Stockholm Convention has 102 Parties, and the Biosafety Protocol has 124 Parties, as of June 2005.

²⁹ See UNDP and UNCTAD, *Strengthening the Fabric of Society: Trade and Environment* (1998).

³⁰ Werksman, Jacob, *Five MEAs, Five Years Since Rio: Recent Lessons on the Effectiveness of Multilateral Environmental Agreements*, Rio+5 Special Focus Report (1997).

tailoring of measures to each environmental challenge and a scientific basis for the development and adjustment of the rules are essential to a continuing commitment to MEAs.³¹

III. Trade, environment and MEAs

17. As all economic activity is based to some degree on the environment, the interaction between trade and environment is inevitable and has thus been addressed in both the trade and environmental context.³² The Preamble to the Agreement establishing the WTO, for example, recognizes that trade should “protect and preserve the environment” in a manner consistent with Members’ different levels of economic development.³³ The WTO has also recognized that not only is there no inherent policy contradiction between an open, equitable and non-discriminatory multilateral trading system and the protection of the environment, but that sustainable development requires the two systems to be mutually supportive.³⁴

18. From an environmental perspective, trade poses challenges as well as opportunities. Trade-related provisions are thus incorporated in certain MEAs as part of the range of measures designed to effectively address an environmental problem.³⁵ On one hand, the increasing scale of economic activity made possible by international trade can magnify certain environmental problems. For example, international trade may promote expanded economic activity leading to the over-exploitation of some resources and thus lead or contribute to environmental damage.³⁶ Trade liberalization may also facilitate the international movement of goods that pose serious environmental risks.³⁷ A degree of regulation of trade within environmental instruments thus becomes necessary and has been developed in those cases.

19. In addition, trade-related measures are sometimes needed and incorporated in MEAs to address problems such as the lack of adequate information for policy development or decision-making and the absence of incentives to contribute to the protection of public environmental goods. Measures such as these are also important from an economic point of view, since they ensure that trade liberalization is based on effectively functioning, rather than distorted, markets.³⁸ Moreover, trade-related measures often play an important

³¹ *Id.*

³² International Institute for Sustainable Development (IISD) and UNEP, *Environment and Trade: A Handbook, 2nd Edition* (2005). The environment is the basis for all basic inputs –natural resources– and for the energy needed to process them. It also receives the waste products of economic activity.

³³ Marrakesh Agreement establishing the World Trade Organization (WTO Agreement), 15 April 1994.

³⁴ *See for example* the Declaration of the Doha Ministerial Conference, 20 November 2001, WTO document WT/MIN(01)/DEC/1 and the CTE Singapore Report *supra* note 21.

³⁵ It is important to note that only one in ten MEAs, more or less, includes trade-related provisions.

³⁶ Some of the risks posed by transboundary movement of goods, for instance, are described in the background to the MEAs analyzed in Section III of the present note.

³⁷ *For instance*, the case of the transboundary movement of hazardous waste, addressed by the Basel Convention.

³⁸ In economics, there are certain situations in which markets do not efficiently organize production or allocate goods and services to consumers. These situations are called “market failures” and may require government intervention. In the essay “The Market for Lemons,” for example, Nobel laureate George Akerlof described how a market for a good where the seller has more information than the buyer regarding the quality of the product can either collapse an entire market or contract it into an adverse selection of low-

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role in supporting other MEA provisions, including the phase-out of certain substances, and ensuring the effectiveness of MEAs, for example by assisting in compliance and enforcement.

20. On the other hand, trade can have distinctly positive environmental impacts. Beyond the constructive contribution in terms of poverty reduction when higher rates of trade lead to enhanced economic welfare, trade can promote the dissemination of more environmentally friendly technologies and products and increase the efficiency of natural resource use.³⁹ Diverse measures in MEAs address these issues, encouraging equitable sustainable development through the principle of common but differentiated responsibilities, promoting transfer of environmentally sound technologies and products, and addressing market failures, leading to inefficiencies.

21. In summary, there are a number of elements that must be considered in any analysis of trade-related measures in MEAs, including the role, importance, and particular approach of MEAs, as well as the fundamental functions of trade-related measures in that context. The following analysis considers trade-related measures in the context of the overall objectives and package of measures of six specific MEAs.

A. Convention on International Trade in Endangered Species (CITES)

i. Objectives and Overview of CITES

22. CITES aims to ensure that international trade in specimens of wild animals and plants does not threaten the survival of these species.⁴⁰ Annual international wildlife trade is estimated to be worth billions of dollars and to include hundreds of millions of plant and animal specimens.⁴¹ Levels of exploitation of some animal and plant species are so high that the trade in them, together with other factors such as habitat loss, is capable of heavily depleting or destroying their populations.⁴² CITES was thus conceived as an international effort to safeguard certain species from over-exploitation.⁴³

23. Adopted in March 1973, CITES recognizes that wild fauna and flora are an irreplaceable part of the natural systems of the earth and thus works to ensure the sustainability of trade to safeguard these resources for the future.⁴⁴ CITES subjects international trade in selected species to certain controls. It requires that the import,

quality products. Market failure may also occur in the case of “public goods.” The organizer of a fireworks show, for example, cannot exclude anyone from watching, whether they have paid or not. As a result, each person will seek to “free-ride” by allowing others to pay for the show, and then watch for free. If the problem of “free-riding” cannot be solved, valuable goods and services will not be produced.

³⁹ See for example, the environmental assessment methodology of the OECD, which has been further developed by other practitioners of assessment, including UNEP. UNEP, in its 2001 report, *Economic Reforms, Trade Liberalization and the Environment: A Synthesis of UNEP Country Projects*, described five broad categories of environmental impacts from trade reforms, including both positive and negative impacts.

⁴⁰ Website of CITES Secretariat “What is CITES?”, <http://www.cites.org/eng/disc/what.shtml>

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Preamble and website of CITES Secretariat, “What is CITES?”, <http://www.cites.org/eng/disc/what.shtml>.

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export, re-export and introduction from the sea of these species be authorized through a licensing system.⁴⁵ The species covered by CITES are listed in three Appendices, depending on the level of the threat of extinction they face. Appendix I includes species threatened with extinction, in which trade is only exceptionally permitted. Appendix II includes species not necessarily in danger of extinction but in which trade must be controlled in order to avoid utilization incompatible with their survival. Finally, Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.⁴⁶ CITES is among the largest conservation agreements in existence, with over 160 Parties, and has had significant success: Since it entered into force, not one listed species has become extinct as a result of trade.⁴⁷

ii. Trade-related and other Measures in CITES

24. In CITES, trade-related measures are essential as international trade may itself lead or contribute to environmental damage. Nevertheless, in CITES, as in other MEAs, trade-related measures form part of a broad range of measures established to further the agreement's objectives, including technical assistance, capacity building and a number of flexibility provisions. Trade-related measures in CITES include a licensing system for international trade in listed species, permit requirements, requirements for trade with non-Parties, and measures for cases of non-compliance.

25. Articles III, IV, and V of CITES establish the licensing system. The system of permits and certificates is directed at providing a regulatory framework for the international trade in specimens of certain wild animals and plants that ensure the exploitation of wild species for trade is sustainable. Thus, controls for Appendix I species – those threatened with extinction – are strict, limiting their trade to exceptional circumstances that do not further endanger their survival. Trade in Appendix I species requires an export permit that declares that: a) the export will not be detrimental to the survival of the species; b) the species has been legally acquired; c) the method of shipment for live specimens minimizes risks of injury, damage to health, and cruel treatment; and d) an import permit has been granted. In turn, the import permit must certify that: a) the operation is not for purposes that are detrimental to the survival of the species; b) the recipient is suitably equipped to care for any live specimen; and c) the species will not be used for primarily commercial purposes.⁴⁸ Trade in Appendix II and III species – those not yet threatened with extinction – only requires an export permit with the first three of the above-mentioned characteristics.⁴⁹

26. Articles VI and VII of CITES include related provisions. Article VI requires that permits and certificates granted under the licensing system be in accordance with the Convention.⁵⁰ Each permit or certificate, for instance, must contain the title of the

⁴⁵ Website of CITES Secretariat “How CITES works”, <http://www.cites.org/eng/disc/how.shtml>

⁴⁶ *Id.*

⁴⁷ *See supra* note 48.

⁴⁸ Article III.

⁴⁹ Articles IV and V.

⁵⁰ Article VI.

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Convention, the name and any identifying stamp of the National Management Authority granting it and a control number assigned by the National Management Authority. All permits and certificates should follow the standard format provided as an annex to Resolution Conf. 12.3 (Rev. CoP13). These measures encourage a harmonized system that will avoid the proliferation of different standards and contribute to an effective compliance monitoring. The problems of insufficient information and lack of effective monitoring are also addressed by the CITES requirement that Parties maintain records of trade in covered species and submit periodic reports to the Secretariat.⁵¹ Article VII, on the other hand, facilitates certain kinds of trade that are less likely to cause detrimental impact on wild populations, through the provision of exemptions and special procedures.

27. Article X of CITES also refers to trade, addressing the situation of non-Parties to the Convention. Under CITES, trade in listed species with non-Parties is possible when comparable documentation, which substantially conforms with the CITES requirements for permits and certificates, is issued by the competent authorities in those countries.⁵² Restricting trade with non-Parties to situations where CITES requirements are met aims to prevent non-Parties from “free-riding” on the efforts made by Parties to CITES. It also serves to avoid trade in listed species by non-Parties from undermining the conservation achievements of CITES Parties.

28. The compliance mechanism in CITES, while not referring expressly to trade-related measures, does authorize the COP to recommend appropriate measures in cases of non-compliance, including the temporary suspension of trade with the Party in question. The focus of Article XIII, however, which addresses cases where species included in Appendix I or II are being affected adversely by trade in specimens of that species or where CITES provisions are not being effectively implemented, is on working with the Party in question to achieve remedial action. In practice, moreover, the number of general or species-specific recommendations to suspend international trade has not been particularly significant and most did not result in actual trade sanctions.⁵³ Of the various measures to address a Party’s non-compliance and bring about its full compliance with the Convention, the temporary suspension of commercial or all trade in specimens of one or more CITES-listed species is generally used as a last resort. The use of trade-related measures in this context would normally only occur where a Party’s non-compliance is “persistent” and the Party shows “no will or intention” to comply, including cases in which a Party does not follow recommendations, take advantage of offers of assistance, agree to a compliance action plan, or comply with an agreed plan.⁵⁴ Article XIV of CITES, which recognizes the right of Parties to adopt stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species

⁵¹ Article VIII.

⁵² Article X.

⁵³ The Summary Reports of the CITES Standing Committee are available at <http://www.cites.org/eng/cttee/SC/index.shtml>. Figures are also available in Reeves, R., *Verification Yearbook 2001, Verification mechanisms in CITES*, VERTIC (2001), 144-150.

⁵⁴ The *Guidelines for Compliance with the Convention* are in draft form and under discussion with the CITES Standing Committee. The most recent version of the draft text was discussed at the 53rd Standing Committee meeting, 25 June – 1 July 2005, in Geneva. For this version of the *Guidelines* (SC53 Doc.30), see <http://www.cites.org/eng/com/SC/53/index.shtml>.

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included in Appendices I, II, and III, or the complete prohibition thereof, has also been considered to support the COP recommendations to suspend trade. These types of trade-related measures are usually only employed in order to avoid a continuing violation of the Convention from being detrimental to the survival of CITES-listed species and reflect, in all cases, a multilateral decision.

29. As mentioned, these trade-related measures function in the context of the integrated package of CITES, which is intended to achieve not only effectiveness and efficiency, but also equity. CITES contains a number of exceptions and flexibilities, for instance. The certification system contained in Articles III, IV and V, for example, does not apply to pre-Convention specimens, personal or household effects and commercially produced species (captively bred, artificially propagated or ranched).⁵⁵ In addition, Parties have the right to opt out of specific listings by entering a reservation. That is, for that species, the State is not bound by CITES provisions and is treated as a non-Party in respect to trade.⁵⁶ Moreover, the CITES licensing system is dynamic and can adapt to changing needs and circumstances. Appendices I and II may be amended by two thirds of the Parties present and voting at a COP, while Appendix III species may be submitted and withdrawn by Parties unilaterally at any time.⁵⁷

30. Though not provided for in the Convention itself, another critical part of CITES is the broad range of training and technical assistance activities conducted by the Secretariat under its capacity building program. The main objectives of the capacity building program are to ensure that Parties have and are able to use all of the technical information, knowledge and skills necessary for them to fulfill their responsibilities under the Convention and thus ensure the achievement of the CITES objectives.

B. Montreal Protocol on Substances that Deplete the Ozone Layer

i. Objectives and Overview of the Montreal Protocol

31. The Montreal Protocol aims to protect the stratospheric ozone layer, and thus human health and the environment, by equitably controlling the emissions of substances that deplete it, with the ultimate objective of their elimination.⁵⁸ Following the discovery of the Antarctic ozone hole in 1985, governments recognized the need for measures to reduce the production and consumption of a number of gases harmful to stratospheric ozone – the protective layer shielding the Earth from harmful ultra-violet radiation.⁵⁹ Certain industrial processes and consumer products result in the atmospheric emission of “halogen source gases” that are known to be harmful to the ozone layer. For example, chlorofluorocarbons (CFCs), once used in almost all refrigeration and air conditioning systems, eventually reach the stratosphere and release ozone-depleting chlorine atoms. The increased UV-B radiation resulting from ozone depletion can be extremely harmful,

⁵⁵ Article XXIII.

⁵⁶ Article VII.

⁵⁷ Articles XV and XVI.

⁵⁸ Preamble.

⁵⁹ Website of the UNEP Ozone Secretariat, Treaties and Ratification, http://www.unep.ch/ozone/Treaties_and_Ratification/index.asp.

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causing, for example, skin cancer and cataracts in humans and some animals, and inhibiting growth and photosynthesis in certain plants.⁶⁰ The Montreal Protocol, adopted in 1987, thus addresses the need to take appropriate measures to protect human health and the environment against adverse effects resulting from human activities that modify the ozone layer.⁶¹

32. To achieve these objectives, the Montreal Protocol establishes legally binding controls on the national production and consumption of ozone-depleting gases.⁶² The core of the Montreal Protocol is thus the control measures it imposes on the production and consumption of ODS.⁶³ Article 2 of the Protocol defines phase-out schedules for the various categories of ODS. In addition, the Protocol was designed so that the phase-out schedules could be revised on the basis of periodic scientific and technological assessments. Following such assessments, the Protocol was adjusted to accelerate the phase-out schedules. It has also been amended to introduce other kinds of control measures and to add new controlled substances to the list.⁶⁴ As a result of the Protocol, now ratified by over 180 nations, the total abundance of ozone-depleting gases in the atmosphere has begun to decrease in recent years and, if States continue to follow its provisions, effective levels of ozone-depleting gases should fall to early 1980s levels by the middle of this century.

ii. Trade-related and other Measures of the Montreal Protocol

33. Although regulating trade in ODS is not the primary concern of the Montreal Protocol, it does contain trade-related measures to supplement and strengthen the controls on production and consumption. Similarly, a broad range of other measures ensure the effectiveness of the control system, including those regarding financial assistance and those promoting research, development, and exchange of information on best management technologies and possible alternatives for controlled substances.

34. Articles 4, 4A, and 4B contain some of the Montreal Protocol's main trade-related provisions. Article 4 prohibits the import and export of controlled substances with respect to non-Parties, also establishing a process for Parties to limit the international movement of products containing controlled substances or produced with controlled substances. The imports and exports of controlled substances may be permitted from, or to, any non-Party, nevertheless, if a meeting of the Parties determines that country to be in full compliance with the Protocol's control measures. These trade restrictions thus aim

⁶⁰ Website of the UNEP Ozone Secretariat, Public Information, Frequently Asked Questions, 2002 *Environmental Effects Assessment - Questions and Answers About the Effects of the Depletion of the Ozone Layer on Humans and the Environment*, pages 6-9, http://www.unep.org/ozone/Public_Information/eeapfaq2002.pdf.

⁶¹ Preamble.

⁶² Website of the UNEP Ozone Secretariat, Public Information, Frequently Asked Questions, 2002 *Scientific Assessment Report - Questions and Answers About the Ozone Layer*, page 28, http://www.unep.org/ozone/pdfs/Scientific_assess_depletion/11-qa.pdf.

⁶³ UNEP Ozone Secretariat, *Action on Ozone*, 2000 edition, <http://www.unep.org/ozone/pdfs/ozone-action-en.pdf>.

⁶⁴ Website of the UNEP Ozone Secretariat, Treaties and Ratification, http://www.unep.ch/ozone/Treaties_and_Ratification/index.asp.

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to promote a broad participation in the agreement, and they seek to ensure that the environmental gains made by Parties are not undermined by activities in other countries.

35. Article 4A controls trade between Parties to the Montreal Protocol. In particular, it addresses the situation in which a Party is unable, despite having taken all practicable steps to comply with its obligation under the Protocol, to cease production of that substance for domestic consumption. In those circumstances, Article 4A ensures there is no perverse incentive to maintain that production by banning the export of used, recycled and reclaimed quantities of the substance produced, other than for the purpose of destruction. The trade-related measure thus supports the phase-out of controlled substances. Article 4B requires Parties to establish and implement a system for licensing the import and export of controlled substances, in order to monitor the imports and exports of ODS, prevent illegal trade, and enable data collection.⁶⁵ These information requirements, along with reporting and other measures of the Montreal Protocol have been significant in effectively reducing global emissions of ODS.

36. Article 8 may also be considered a trade-related provision. It instructs the COP to establish the procedures and institutional mechanisms for determining noncompliance, as well as the treatment of Parties found to be in non-compliance. The non-compliance procedure, however, adopted in 1998, focuses on providing parties with the incentives and assistance they require to meet their obligations under the Protocol. Nevertheless, in cases of non-compliance Parties may suspend the treaty rights of the non-complying Party, including its rights to trade controlled substances and technologies with other Parties.⁶⁶ These measures are considered fundamental in certain situations to avoid undermining the Protocol's environmental gains.

37. As mentioned, not only trade-related provisions but also a variety of different measures support the Protocol's control system. For instance, the control measures themselves provide flexibilities that seek to facilitate compliance. The formula used to determine consumption, the granting of an ozone depleting value to each covered substance, among other measures, grant countries the possibility of choosing how to best satisfy their obligations.⁶⁷ In addition, the Protocol recognized that the burdens of the control system were sometimes disproportionate for developing countries and sought to offset some of the economic and social costs associated with ratification and compliance. For instance, the Protocol allows developing country parties with a limited annual per capita consumption of controlled substances to defer their phase-out obligations for up to ten years.⁶⁸ Further, the Protocol establishes mechanisms for providing technological and financial assistance to these Parties as they make the transition to more ozone-friendly technologies. The London Amendments, adopted at the Second COP, required Parties to

⁶⁵ Report of the Fifteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.15/9, Decision XV/20, see http://www.unep.org/ozone/Meeting_Documents/mop/15mop/15mop-9.e.pdf.

⁶⁶ The use of such measures, however, is rare. In the Sixteenth Meeting of the Parties of the Montreal Protocol in November 2004, of the sixteen decisions adopted on non-compliance, only one incorporated trade-related measures. The decision on Azerbaijan's non-compliance due to excess consumption of CFCs in 2001-2003 urged Azerbaijan to report 2004 consumption data and introduce a ban on the import of CFCs, in order to support complete phase out by 2005.

⁶⁷ Article 3 and Annexes A, B and C.

⁶⁸ Article 5.1.

establish a mechanism of financial and technical cooperation to enable developing countries to comply with the Protocol. Moreover, developing countries' compliance was made contingent upon the effective implementation of these financial and transfer of technology provisions. As a result, these positive measures not only make trade-related measures more efficient, but also, in some cases, decrease the need for their actual use.

C. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

i. Overview and Objectives of the Basel Convention

38. The Basel Convention addresses the challenges posed by hazardous wastes and other wastes. In the late 1980s, stricter environmental standards and higher disposal costs in developed countries increased the shipment of hazardous waste to countries that were not always able to adequately manage the waste. Improper management, indiscriminate dumping, and accidental spill of wastes can result in air, water, and soil pollution that endangers entire communities, burdens countries with colossal clean up costs, and undermines prospects for development. A public outcry over the mounting evidence of uncontrolled movement and dumping of hazardous wastes, including incidents of illegal dumping in developing nations by companies from developed countries, led to the adoption of the Basel Convention in 1989, a global agreement principally devoted to setting up a framework for controlling the movements of hazardous wastes and other wastes across international frontiers, and ensuring their environmentally sound management.⁶⁹

39. The Basel Convention came into force in 1992. Its fundamental aims are: the control and reduction of transboundary movements of hazardous wastes and other wastes subject to the Basel Convention,⁷⁰ the disposal and treatment of such wastes as close as possible to their source of generation, the prevention and minimization of their generation, the environmentally sound management of such wastes and the active promotion of the transfer and use of cleaner technologies.⁷¹ One of the key elements in the Basel Convention is thus a control system for the transboundary movement and disposal of such wastes. For example, transboundary movements of hazardous wastes and other wastes can only take place upon prior written notification by the State of export to the competent authorities of the State of import, and upon the informed consent by the importing State to the import.⁷² Another central goal is environmentally sound management, which aims to protect human health and the environment, inter alia, by minimizing the generation of hazardous waste whenever possible. Environmentally

⁶⁹ Website of the Basel Convention Secretariat, Introduction, <http://www.basel.int/pub/basics.html>.

⁷⁰ Article 2 contains the definition of “waste,” which must be read in conjunction with the definition of “disposal” in Annex IV. A waste is “hazardous” under the Convention if it included in Annex I (unless it does not possess any of the hazardous characteristics contained in Annex III) or if it is considered hazardous under the domestic legislation of one of the countries involved in the transboundary movement (Article I).

⁷¹ Website of Basel Convention Secretariat, Strategic Plan, <http://www.basel.int/meetings/cop/cop6/StPlan.doc>.

⁷² See *supra* note 79.

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sound management means addressing the issue through an “integrated life-cycle approach,” and integrated waste management, which involve strong controls from the generation of a waste to its storage, collection, segregation, transport, reuse, and final disposal. During its first decade, the Basel Convention was primarily devoted to setting up the framework for controlling the transboundary movements of hazardous wastes. At its Sixth COP in 2002, the Basel Convention’s more than 160 Parties decided to build on this framework by emphasizing full implementation and enforcement of treaty commitments at the national level, the minimization of hazardous waste generation, as well as capacity building.

ii. Trade-related and other Measures of the Basel Convention

40. The framework established by Basel Convention for controlling the transboundary movements of hazardous wastes and other wastes applies to different contexts, including trade, in order to effectively protect human health and the environment. Measures addressing trade are thus a part of a broader structure focused towards minimizing hazardous waste generation; reducing transboundary movement of such wastes; promoting cleaner technologies and production methods; developing and applying environmentally sound management; and improving institutional and technical capabilities of Parties, particularly developing countries and countries with economies in transition.⁷³ Trade-related measures play a significant role, nevertheless, because the Basel Convention governs all movements of hazardous wastes and other wastes between Parties and therefore establishes a regulatory framework for the import and export of these environmentally hazardous items.

41. A prior informed consent mechanism constitutes the core of that regulatory framework. Article 6, which establishes the procedures for prior informed consent, is not only fundamental to the Basel Convention’s control system but also addresses important information deficiencies in hazardous waste management. It requires Parties to notify in writing the intended country of import of any hazardous wastes and other wastes that would be contained in the proposed shipment, as well as of other facts such as the reason for the waste export; the generator, exporter, carrier, and disposer of the waste; the countries of export and import of the waste, and the competent authorities; information relating to insurance; designation and physical description of the waste and information on any special handling requirements, including emergency provisions in case of accidents; and method of disposal.⁷⁴ The Party of import is obliged to respond to the notifier in writing, either consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information.⁷⁵ Until written consent has been received, along with a confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question, the Party of export cannot allow the generator or exporter to commence the transboundary movement.⁷⁶

⁷³ *Id.*

⁷⁴ Annex V A.

⁷⁵ Article 6.2.

⁷⁶ Article 6.3. Information problems are also addressed elsewhere in the Basel Convention, not necessarily in trade-related measures. For example, Article 13 requires Parties to inform, in the case of an accident

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42. Other measures related to trade, such as those regarding the import, export, packaging, and labeling of hazardous and other wastes, also constitute fundamental elements of the regulatory framework of the Basel Convention. Article 4 sets out the general obligations for Parties to the Convention and most of these measures. For example, it recognizes Parties' right to prohibit the import of hazardous wastes or other wastes. On the other hand, other Parties are obliged to reinforce that right by not allowing the export of hazardous wastes and other wastes to the Parties which have established such prohibitions or if there is reason to believe the wastes will not be managed in an environmentally sound manner.⁷⁷

43. In addition, Article 4 addresses the issue of trade with non-Parties. It provides that Parties shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.⁷⁸ Nevertheless, trade with non-Parties is allowed as long as it is subject to a bilateral, multilateral or regional agreement or arrangement, the provisions of which are no less stringent than those of the Basel Convention and thus do not derogate from the environmentally sound management of hazardous wastes.⁷⁹ That is one example of how the trade provisions in the Basel Convention promote the effectiveness of the Convention, by ensuring that transboundary movement of hazardous waste is adequately controlled and that the environmental gains of such control are not undermined.⁸⁰

44. Finally, Article 4 requires that hazardous wastes and other wastes that are the subject of a transboundary movement be packaged, labeled, and transported in conformity with generally accepted and recognized international rules and standards, as well as be accompanied by a movement document from the point at which a transboundary movement commences to the point of disposal.⁸¹ These measures clearly relate to the basic aims of the Basel Convention of ensuring environmentally sound management, while at the same time addressing information deficiencies in the transboundary movement of hazardous waste and promoting harmonized identification systems.

45. Arguably, the Convention's most contentious trade-related measure is the Basel Ban Amendment. Though foreseen in the Basel Convention, and contained in a decision adopted by the COP in 1995, the Amendment is not yet in force. The so-called Basel Ban prohibits all exports of hazardous wastes for final disposal and recycling from what are known as Annex VII countries (Basel Convention Parties that are Members of the

occurring during the transboundary movement of hazardous wastes or other wastes or their disposal, which is likely to present risks to human health and the environment in other States, those states that might be at risk. The Secretariat also acts as a clearing-house for decisions made by Parties not to consent totally or partially to the import or export of hazardous wastes or other wastes, as well as for reports on transboundary movements of hazardous wastes or other wastes in which Parties have been involved and other relevant information.

⁷⁷ Article 4.1 (a), (b), and (e).

⁷⁸ Article 4.5.

⁷⁹ Article 11.

⁸⁰ This is recognized, for instance, in *Trade Measures In The Basel Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Their Disposal*, OECD, 27 May 1998, COM/ENV/TD(97)41/FINAL (1998).

⁸¹ Article 4.7 (b) and (c).

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OECD, EC and Liechtenstein) to non-Annex VII countries (all other countries). The Basel Ban is intended to respond to lingering problems around illegal trade in waste, including both the mislabeling of wastes and the smuggling and dumping of wastes. Moreover, some developing countries had expressed concern about their inability to effectively monitor and enforce their own import restriction policies.⁸² Similar measures were thus also adopted, for instance, by the Caribbean and Pacific Group of States in the Lome IV Convention in 1989 and by African nations in the Bamako Convention in 1991. Nevertheless, the Basel Ban has since been severely criticized by some countries that assert that it will prevent the growth of legitimate and potentially profitable recycling industries in developing countries. These countries have questioned the presumption that developing countries lack the capacity to manage waste in an environmentally sound manner.⁸³

46. As mentioned above, a number and range of non-trade measures are also incorporated in the Basel Convention to achieve its objectives. The Convention contains provisions, for instance, on the collection of information, on establishment of technical guidelines, on the provisions of legal and technical assistance, etc.⁸⁴ In addition, COPs have developed a number of important elements. For instance, the Basel Protocol on Liability adopted by COP 5 established a comprehensive regime for liability, including both strict and fault-based liability, as well as provided for adequate and prompt compensation for damage occurring during a transboundary movement of hazardous wastes and other wastes. Another example is Article 14, which contains a commitment to establish regional or sub-regional centers for training and technology transfer that has also been built upon by each COP, leading to the designation of centers all over the world.⁸⁵ The core functions of the centers include developing and conducting training programs in the field of environmentally sound management of hazardous wastes; identifying, developing and strengthening mechanisms for the transfer of environmentally sound technologies; and providing assistance and advice to the Parties and non-Parties of the region at their request on any relevant matters and on the implementation of the Convention.⁸⁶ Moreover, the compliance mechanism, adopted at the sixth Conference of the Parties, consists of a non-confrontational, facilitative procedure that aims to assist Parties facing compliance difficulties through advice and non-binding recommendations. It is through the combination of these various and diverse measures that the Basel Convention remains an evolving system that is a balanced and adequate way to achieve the Convention's

⁸² See *supra* note 90 at 9. See also interventions of developing country representatives stressing the need for technical assistance to prevent illegal traffic into their territories during COP; for example Report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, paragraph 21, <http://www.basel.int/meetings/cop/cop1-4/cop3repe.pdf>

⁸³ See for example, Earth Negotiations Bulletin, *Basel Convention COP 7 - Summary and analysis*, Vol. 20 No. 18, November 2004, <http://www.abinee.org.br/informac/arquivos/enb2018e.pdf>.

⁸⁴ Articles 4, 13, 10 and 16.

⁸⁵ The latest COP of the Basel Convention, COP 7, for instance, established a Regional Center in Tehran, Iran.

⁸⁶ Basel Convention Secretariat, Regional Centers, <http://www.basel.int/centers/regdescr.html>.

objectives.⁸⁷

D. Rotterdam Convention on Prior Informed Consent

i. Overview and Objectives of the Rotterdam Convention

47. The Rotterdam Convention provides countries considering the importation of certain toxic pesticides and hazardous chemicals the tools and information they need to identify potential hazards and exclude chemicals they cannot manage safely.⁸⁸ In addition, if a country agrees to import chemicals, the Rotterdam Convention promotes their safe use through labeling standards, technical assistance, and other forms of support.⁸⁹ Toxic pesticides and other hazardous chemicals raise significant risks to human health and the environment, killing or seriously sickening thousands of people every year and also damaging the natural environment and many wild animal species.⁹⁰ Governments began to address the problem in the 1980s by establishing a voluntary Prior Informed Consent (PIC) procedure and in 1998 strengthened the procedure by adopting the Rotterdam Convention, which makes PIC legally binding.⁹¹

48. The Rotterdam Convention has two primary objectives. First, it aims to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm.⁹² Second, it seeks to contribute to the environmentally sound use of those hazardous chemicals by facilitating information exchange about their characteristics, by providing a national decision-making process for their import and export, and by disseminating these decisions to Parties. The Rotterdam Convention initially covered 22 pesticides and 5 industrial chemicals, with the possibility of more being added by the COP.⁹³ Indeed, since the Rotterdam Convention entered into force in February 2004, the First COP has already added fourteen chemicals, including several forms of asbestos, two lead additives for gasoline, and a range of highly toxic pesticides.⁹⁴ There are currently 39 chemicals listed in Annex III of the Convention: 24 pesticides, 11 industrial

⁸⁷ The Basel Strategic Plan sets out the guidelines for the Convention's activities up to 2010, focusing on the minimization of hazardous waste generation. Particularly, the Strategic Plan focuses on developing countries, establishing a vision that environmentally sound management should be accessible to all Parties and a commitment to improve their institutional and technical capabilities and further develop regional and sub-regional centers to achieve that vision. See Basel Convention COP 6, *Strategic Plan For The Implementation Of The Basel Convention (to 2010)*, <http://www.basel.int/meetings/cop/cop6/StPlan.pdf>.

⁸⁸ Website of Rotterdam Convention Secretariat, What is PIC, Introduction, <http://www.pic.int/en/ViewPage.asp?id=190>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Website of Rotterdam Convention Secretariat, What is PIC, Overview, <http://www.pic.int/en/ViewPage.asp?id=101>

⁹³ The Rotterdam Convention covers pesticides and industrial chemicals that have been banned or severely restricted for health or environmental reasons and that Parties have notified for inclusion in the PIC procedure. One notification from each of two specified regions triggers consideration of addition of a chemical to the PIC procedure, while severely hazardous pesticide formulations that present risks under conditions of use in developing countries may also be nominated for inclusion in the procedure.

⁹⁴ The First Ministerial Conference of Rotterdam Convention was held in Geneva in September 2004.

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chemicals, and 4 severely hazardous pesticide formulations. The Rotterdam Convention currently has 107 Parties – 106 countries and the European Community.

ii. Trade-related and other Measures of the Rotterdam Convention

49. The Rotterdam Convention focuses on the regulation of international trade of certain hazardous chemicals as a way to protect human health and the environment from potential harm and to contribute to their environmentally sound use. Whereas the use of both industrial and agricultural chemicals has traditionally been greatest in industrialized countries, their fastest growing market is now in developing countries.⁹⁵ Of the challenges raised by the use and management of toxic pesticides and other hazardous chemicals, therefore, international attention has centered on the fact many countries lack the institutional capacity to make informed decisions on chemical imports and their subsequent management, which raises concern for human health and the environment.⁹⁶ The regulatory framework for international trade in certain hazardous chemicals established by the Rotterdam Convention thus emphasizes information exchange and adequate national decision-making processes. The PIC procedure, the core of the Convention and main trade-related measure, is designed to overcome the problem of lack of adequate and precise information. It ensures countries have accurate data on which to base their policy decisions concerning harmful effects of certain banned or severely restricted chemicals and severely hazardous pesticides. Informed choices are also fundamental for acceptable internal regulations concerning the manufacture, use, and disposal of the chemicals. As a result, other measures within the Rotterdam Convention also aim to address information gaps or deficiencies. In that context, both trade-related and other measures are an integral part of the regulatory package of the Convention.

50. Article 10 establishes the obligations in relation to imports of substances subject to the PIC procedure, a means for formally obtaining and disseminating the decisions of importing countries on future shipments of specified chemicals and for ensuring compliance with these decisions by exporting countries.⁹⁷ Once a chemical is included in the PIC procedure, a "decision guidance document" (DGD) containing information concerning the chemical and the regulatory decisions to ban or severely restrict the chemical for health or environmental reasons, is circulated to importing countries.⁹⁸ These countries are given nine months to prepare a response concerning the future import of the chemical. The response can consist of either a final decision (to allow import of the chemical, not to allow import, or to allow import subject to specified conditions) or an interim response, which may entail a request for additional information or assistance

⁹⁵Website of Rotterdam Convention Secretariat, News and Highlights, 16 March 1998, *95 Countries Agree On New International Convention On Dangerous Chemicals And Pesticides*, <http://www.fao.org/WAICENT/FaoInfo/Agricult/AGP/AGPP/Pesticid/PIC/picnews6.htm>.

⁹⁶ As mentioned, in 1987 the UNEP Governing Council adopted The London Guidelines for the Exchange of Information on Chemicals in International Trade, UNEP/GC, 14/17, Annex IV. In addition, in 1985, the FAO adopted the first International Code of Conduct on the Distribution and Use of Pesticides, which established voluntary standards to aid countries without existing pesticide regulation, M/R8130, E/8.86/1/5000.

⁹⁷ See *supra* note 98.

⁹⁸ Articles 7.3 and 10.2.

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by the Secretariat. To ensure decisions are not made in a protectionist manner, any prohibitions or specific conditions must apply equally to domestic production.

51. Exporting Parties must also comply with PIC procedure requirements. Article 11 establishes the obligations in relation of exports of covered substances in the PIC procedures. It provides that exporting Parties are obliged to take appropriate measures to ensure that exporters within their jurisdiction comply with decisions in each response, as well as to ensure that exports to an importing Party that has not produced a response only take place if there is explicit consent or the chemical is already registered or used in that country. In addition, Article 12 establishes that even if a chemical is not included in the Convention, if it is banned or restricted within the jurisdiction of the exporting Party, that Party is obliged to provide notification of the first export after the regulatory measures and then of the first export in each calendar year, and provide the same information as it would for a covered substance. Finally, Article 13 states that, without prejudice to any requirements of the importing Party, each exporting Party must require that chemicals covered by the Convention, chemicals banned or severely restricted in its territory, and chemicals subject to labeling requirements in its territory be, when exported, subject to labeling requirements that provide adequate information with regard to risks and/or hazards to human health or the environment.

52. As mentioned above, trade-related measures within the PIC procedure are complemented by a number of other provisions in the Rotterdam Convention. For instance, beyond the exchange of information resulting from PIC, Article 14 provides that Parties are obliged to promote the exchange of scientific, technical, economic and legal information concerning the covered chemicals, including toxicological and safety information. Also, Article 16 provides that Parties must cooperate in promoting technical assistance for the development of the infrastructure and the capacity necessary to manage chemicals to enable implementation of this Convention.

E. Cartagena Protocol on Biosafety

i. Objectives and Overview of the Biosafety Protocol

53. The Cartagena Protocol on Biosafety seeks to protect biological diversity and human health from the potential risks posed by living modified organisms resulting from modern biotechnology.⁹⁹ Genetic modification, achieved by the application of recombinant DNA technology, allows for genes to be transferred in ways that are not possible in nature, which may lead to useful products and technologies.¹⁰⁰ Agenda 21, for example, states that modern biotechnology could significantly contribute to improving health care and enhancing food security through sustainable agricultural practices.¹⁰¹ However, there is also concern about the potential risks of genetic modification for biodiversity, including potential dispersal of genetically modified organisms in the environment, potential impacts on non-target species, and potential transfer of the inserted genetic material to

⁹⁹ Website of CBD Secretariat, The Biosafety Protocol, Background, <http://www.biodiv.org/biosafety/background2.aspx>.

¹⁰⁰ Mackenzie, Ruth et al, *An Explanatory Guide to the Cartagena Protocol on Biodiversity*, IUCN (2003), <http://www.iucn.org/themes/law/pdffdocuments/Biosafety-guide.pdf>.

¹⁰¹ Chapter 16, Agenda 21.

other organisms.¹⁰² Given the growth of the international market for genetically modified organisms and products made from them, an international framework to ensure their safe transfer, handling and use and to achieve an adequate balance between their potential benefits and risks is thus of fundamental importance.

54. The Cartagena Protocol on Biosafety, a supplementary agreement to the Convention on Biological Diversity (CBD), recognizes both the potential of biotechnology for human wellbeing and their potential adverse effects on biological diversity and human health.¹⁰³ Its objective is to contribute, in accordance with the precautionary approach, “to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms, taking also into account risks to human health, and specifically focusing on transboundary movements.”¹⁰⁴ Its scope is thus limited to living modified organisms (LMOs) – biological entities capable of replicating or transferring genetic material and constitute a novel combination of genetic material obtained through use of modern biotechnology.¹⁰⁵ The Biosafety Protocol establishes an advanced informed agreement (AIA) procedure for ensuring that countries are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory.¹⁰⁶ It also contains reference to a precautionary approach and reaffirms the precaution language in Principle 15 of the Rio Declaration on Environment and Development.¹⁰⁷ In addition, the Biosafety Protocol also establishes a Biosafety Clearing-House to facilitate the exchange of information on living modified organisms and to assist countries in the implementation of the Protocol. The Biosafety Protocol, which came into force in September 2003, currently has 124 Parties.¹⁰⁸

ii. Trade-related and other Measures of the Biosafety Protocol

55. The Biosafety Protocol, although containing a broader overall objective, does focus on transboundary movements of LMOs, including trade. Thus, a number of provisions are related to trade, most significantly the measures within the AIA mechanism, but also those that refer to trade with non-Parties and to the handling, labeling and packaging of LMOs. Crosscutting provisions on information exchange, capacity building, public awareness, liability and redress, financial assistance, and an institutionalized mechanism for compliance, however, also form an integral part of the framework of the Biosafety Protocol.

56. The AIA mechanism is considered the backbone of the agreement. The need to know and to take informed decisions was identified from the outset of negotiations as a crucial element for adequate biosafety in light of the possible risks of LMOs, including that they could be environmentally hazardous, contribute to environmental damage, or pose risks

¹⁰² See *supra* note 110.

¹⁰³ Preamble.

¹⁰⁴ Article 1.

¹⁰⁵ Article 3. Some categories of LMOs or transboundary movements were also excluded, either as general exclusions from the Protocol or as specific exclusions to the AIA procedures. See *for example*, Article 5.

¹⁰⁶ See *supra* note 109.

¹⁰⁷ *Id.*

¹⁰⁸ As at 16 June, 2005.

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to human health. Article 7 requires the first importation of an LMO destined for intentional introduction in the environment and not identified by a decision of the Parties as unlikely to have adverse effects to comply with AIA procedures. These procedures center around two components: notification and decision-making.¹⁰⁹ Article 8 establishes the notification procedures, requiring the Party of export to notify to the Party of import, in writing, the proposed transboundary movement. The notification must contain, at least, the information specified in Annex I, which includes: the taxonomic status, common name, point of collection or acquisition, and characteristics of recipient organism or parental organisms related to biosafety; the centers of origin and centers of genetic diversity, if known, of the recipient organism and/or the parental organisms and a description of the habitats where the organisms may persist or proliferate; a description of the nucleic acid or the modification introduced, the technique used, and the resulting characteristics of the LMO; and the intended use of the LMO or products thereof.

57. Article 10 establishes the decision procedure, which the Party of import must follow to either approve the import, with or without conditions, prohibit it, or request additional time or information. The basis for the decision must be a risk assessment carried out in a scientifically sound manner and in compliance with requirements contained in Article 15 and Annex III. In addition, the Parties may establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified in the risk assessment provisions. Moreover, in keeping with the precautionary approach of the Protocol, the lack of scientific certainty does not prevent Parties from taking a decision.¹¹⁰

58. LMOs destined for direct use as food, feed or for processing (FFP) are not subject to the AIA mechanism but rather to a set of simplified procedures. Article 11 establishes a multilateral information exchange process: where a Party makes a decision on domestic use of a LMO that may be exported for FFP, it must notify the Biosafety Clearing House within fifteen days and provide the information contained in Annex II. Annex II includes such information as: the name and contact details of the applicant for a decision and of the authority responsible for the decision; the name and identity of the LMO; the description of the gene modification, the technique used, and the resulting characteristics of the LMO; the approved uses of the LMO; a risk assessment report; and suggested methods for the safe handling, storage, transport and use, including packaging, labeling, documentation, disposal and contingency procedures, where appropriate. As in the AIA mechanism, Article 11 provides that the lack of scientific certainty does not prevent

¹⁰⁹ It should be noted that the scope of the AIA mechanism is narrower than that of the Protocol. LMOs in transit or destined for contained use, for instance, are not subject to the AIA mechanism. *See also* the description of the Article 11 procedure in the main text.

¹¹⁰ The Protocol contains provisions that aim to simplify the dynamic of AIA when appropriate. For example, Parties may choose to apply their own domestic regulations rather than the Protocol, as long as those are consistent with the Protocol. In addition, a Party of import may indicate that certain transboundary movements of LMOs may commence during the notification process and that certain LMOs are exempted from the AIA procedure altogether. Finally, Parties to the Protocol may enter into bilateral, regional and multilateral biosafety agreements provided they are consistent with the objective of the Protocol and do not result in a lower level of protection.

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Parties from taking a decision. With respect to decision making on import of LMO-FFPs, the Party of import may follow its own domestic regulatory frameworks.

59. Other trade-related measures in the Biosafety Protocol include the provision of trade with non-Parties and handling, packaging, and transport requirements. Article 24 does not prohibit transboundary movements of LMOs between Parties and non-Parties, but rather sets up a flexible system to ensure the environmental objectives of Protocol are not undermined. It requires trade with non-Parties to be consistent with the objective of the Protocol, though it does not require that they follow the Protocol's specific provisions, such as AIA. Moreover, though article 24 foresees the possibility of these movements being subject to other agreements, it does not require them to be. Article 18 establishes handling, transport, packaging and documentation requirements for LMOs subject to intentional transboundary movement within the scope of this Protocol. The provision encourages harmonized systems of identification (requiring, for instance, relevant international rules and standards to be considered and certain information to be included in the accompanying documentation) and also requires that transportation takes place under conditions of safety in order to avoid adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.

60. As mentioned, although one of the Protocol's primary measures, the AIA mechanism, is related to trade, the scope of the agreement is broader and a number of other measures complement the trade-related provisions. The scope of the Protocol is established in Article 4, which refers to the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health. Thus, the Protocol also contains measures regarding unintentional transboundary movements and the transit or passage of an LMO through the territory of a State, and its provisions apply to a variety of operations involving LMOs.¹¹¹ In addition, the Protocol complements all these provisions with measures to achieve adequate implementation. Article 20, for instance, establishes a Biosafety Clearing House to facilitate the exchange of scientific technical, environmental and legal information on LMOs, while also actively assisting Parties in implementing the Protocol.

61. Article 22 promotes implementation by requiring Parties to cooperate in the development and strengthening of human resources and institutional capacities in biosafety in developing countries; though no specific commitments are included.¹¹² Under Article 34, however, which required the first meeting of the COP serving as the meeting of the Parties to the Biosafety Protocol (COP-MOP) to develop cooperative procedures and institutional mechanisms to promote compliance and to address cases of non-compliance, a Compliance Committee was established. The Compliance Committee may, taking into account the capacity of the Party in question, in particular that of

¹¹¹ See for example, Articles 6 and 17. For a more detailed description of the scope of the Protocol see *supra* note 110.

¹¹² Nevertheless, following the adoption of the Biosafety Protocol, the Council of the Global Environment Facility (GEF) adopted the GEF Initial Strategy on Biosafety, which is aimed at assisting countries to establish national biosafety frameworks (NBFs) to implement the Protocol. Currently, besides running the Biosafety Clearing House, UNEP-GEF is managing a development project assisting 123 countries to develop a draft NBF and eight implementation projects with the goal of establishing operational NBFs.

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developing countries, request or assist the Party in developing a compliance action plan, or invite the Party to submit progress reports on the measures it is taking to bring its actions into compliance.¹¹³ Depending on such factors as the cause, degree, type and frequency of non-compliance, the Committee may also recommend to the Conference of the Parties that they decide to, *inter alia*, provide financial or technical assistance, transfer of technology, training measures, or issue a caution to the Party concerned.¹¹⁴ As a final step, and only in cases of repeated non-compliance, the COP may decide on supplementary measures, as it deems appropriate.¹¹⁵

F. Stockholm Convention on Persistent Organic Pollutants

i. Objectives and Overview of the Stockholm Convention

62. The Stockholm Convention is a global treaty to protect human health and the environment from persistent organic pollutants (POPs).¹¹⁶ POPs are chemicals that remain intact in the environment for long periods, become widely distributed geographically, accumulate in the fatty tissue of living organisms, and are toxic to humans and wildlife.¹¹⁷ With the evidence of long-range transport of these substances to regions where they have never been used or produced and the consequent threats they pose to human health and the environment of the whole globe, States recognized the need for global actions to reduce and eliminate releases of these chemicals.¹¹⁸

63. The Stockholm Convention, the first legally binding agreement designed to protect human health and the environment from the harmful impacts of POPs, came into force in May 2004.¹¹⁹ In order to achieve this objective, the Stockholm Convention seeks the elimination or restriction of production and use of intentionally produced POPs.¹²⁰ It also seeks the continuing minimization and, where feasible, ultimate elimination of releases of unintentionally produced POPs.¹²¹ In addition, the Stockholm Convention helps countries identify and then safely collect, transport, and dispose of stockpiles of obsolete POPs. The Stockholm Convention currently has 80 Parties.

¹¹³ COP-MOP I Decision BS -I/7 Section VI, (1)(d)(f)(g).

¹¹⁴ *Id.* at Section VI, (2)(a) and (b).

¹¹⁵ *Id.*, at Section VI, 2(d)

¹¹⁶ Website of POPS Secretariat, <http://www.pops.int/>.

¹¹⁷ *Id.*

¹¹⁸ Website of UNEP on POPS, <http://www.chem.unep.ch/pops/>.

¹¹⁹ Preamble and Article 1.

¹²⁰ Some of the POPs initially covered by the Stockholm Protocol include aldrin (a pesticide applied to soils to kill termites, grasshoppers, corn rootworm, and other insect pests); chlordane (used extensively to control termites and as a broad-spectrum insecticide on a range of agricultural crops); and DDT (widely used during World War II to protect soldiers and civilians from malaria, typhus, and other diseases spread by insects – now applied against mosquitoes in several countries to control malaria).

¹²¹ The unintentional production of POPs refers to POPs that are unintentional by-products of industrial processes, including dioxins and PCBs.

ii. Trade-related and other Measures of the Stockholm Convention

64. In line with its objectives, the core measures of the Stockholm Convention are those that require eliminating and restricting the production and use of listed chemicals.¹²² The Convention contains trade-related measures to support these aims. For example, the Stockholm Convention limits trade in POPs to those countries that comply with its provisions, in order to ensure that all POPs existing or produced within the Parties are used and disposed of subject to its restrictions. Article 3, for instance, requires Parties to ban imports of listed substances, except if the import is from another Party and is destined for environmentally sound disposal or the chemical is covered by a specific exemption. Article 3 also requires all Parties to ban the export of listed substances to other Parties except for the purpose of environmentally sound disposal. In addition, Parties can export those substances to Parties with that specific exemption as well as to non-Parties that certify compliance with the Convention's provisions.¹²³ In this regard, trade-related measures constitute an important element in promoting the protection of human health and the environment from POPs.

65. As mentioned above, the Stockholm Convention contains a wide range of measures to promote the environmentally sound management of POPs. Article 5, for example, requires Parties to take measures to reduce or eliminate releases from the unintentional production of POPs, including developing national action plans to identify, characterize and address the release of these chemicals and promote the development and use of substitute or modified materials, products, and processes. In addition, Article 6 requires Parties to take measures to reduce or eliminate releases from stockpiles and wastes, a significant measure in light of the large number of waste stockpiles and contaminated sites containing persistent pesticides and PCBs, particularly in the developing world.¹²⁴

66. The core measures of the Stockholm Convention are established in the context of other measures that complement, reinforce, and balance them. Such measures include provisions on information exchange and public information, as well as technical and financial assistance. Article 9, for instance, mandates Parties to facilitate or undertake the exchange of information relevant to reduction or elimination of POPs, with the aim of facilitating implementation of the control measures and of promoting the use of alternatives. Article 10 calls on Parties to, within their capabilities, promote awareness of the risks of POPs and Article 11 outlines the requirements to support and further develop international programs for conducting and financing POPs research, taking into account

¹²² Thus far nine intentionally produced POPs are listed on Annex A (elimination) with only DDT listed on Annex B (restriction). As a dynamic agreement, however, the Stockholm Convention sets out a process whereby further chemicals can be added to the list for action, helping governments identify these substances and incorporating them into the appropriate treaty annexes. The Convention is also dynamic in that it recognizes that some of the covered chemicals are still widely used in developing countries and allows countries to get "specific exemptions" that enable them to eliminate production and use over time, as substitutes are phased in. For example, disease vector control is an acceptable use of DDT, though countries must comply with certain conditions, such as following World Health Organization guidelines.

¹²³ Article 3.2 (b). Once all specific exemptions for a POP chemical are eliminated, because effective alternatives have been developed, trade in that chemical would be prohibited.

¹²⁴ According to the FAO, about 20,000 tons of obsolete pesticides are believed to be stockpiled in Africa, with perhaps another 80,000 tons in Asia and Latin America, and at least 150,000 tons in countries of the former Soviet Union.

the special needs of developing countries. On technical and financial assistance, Article 12 recognizes that timely, appropriate, and request-driven technical assistance is essential to the successful implementation of the Convention and Article 13 foresees a financial mechanism still to be defined by the COP.¹²⁵ Thus, trade-related measures are only an element of a broader framework of provisions established to pursue the goals established in the Convention.

IV. Overview of MEA trade-related measures

67. Each of the MEAs discussed above contains a unique and integrated package of measures and policies that has been closely tailored with the aim of effectively achieving its environmental objectives. Given this, it is not surprising that both developed and developing countries have been demandeurs for the inclusion of trade-related measures in MEAs.¹²⁶ During the negotiation of the Montreal Protocol, for instance, a number of developed countries supported trade-related measures as a necessary way to achieve the goals of the agreement.¹²⁷ During the negotiation of the Cartagena Protocol on Biosafety, on the other hand, it was developing countries that viewed trade-related measures as the “teeth” that would guarantee a strong instrument to meet their needs and concerns.¹²⁸

68. Despite their distinct objectives and structure, trade-related measures in MEAs often serve similar functions and address similar challenges. Indeed, considering trade-related measures in reference to the functions they perform can help to ensure they are viewed within the overall context and framework of the MEAs.¹²⁹ As is clear from the analysis above, MEAs often serve the following specific functions:

¹²⁵ The institutional structure of the Global Environment Facility will, on an interim basis, be the principal entity entrusted with the operations of the financial mechanism.

¹²⁶ It should once again be noted, however, that MEAs do not include references to “trade measures” or “trade-related measures,” though there may be informal references to these terms in discussions surrounding MEAs and their implementation. As mentioned in the introduction, though, MEAs do incorporate specific substantive or procedural provisions that may regulate or otherwise condition international trade as part of the package of instruments used to achieve their objectives – such provisions are the focus of this note.

¹²⁷ For instance, Canada, Finland, New Zealand, and the United States took this position. Montreal Protocol negotiators justified the trade measures because depletion of the ozone layer is an environmental problem most effectively addressed on the global level. The inclusion of trade measures was considered to offer major incentives for non-signatory States to sign the agreement. Furthermore, there was concern that, without the trade measures, there would be economic incentives for non-signatories to increase production, damaging the competitiveness of the industries in the signatory States as well as decreasing the search for less damaging alternatives. *See* Benedick, *supra* note 29.

¹²⁸ *See* Bail, Christoph et al (eds.), *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development?* (2002).

¹²⁹ Analyzing trade-related measures according to their *function or role* is not the only available approach. A number of commentators have developed useful typologies based on the *nature or form* of the trade-related measure, including Jake Werksman and Beatrice Chaytor in “Multilateral Environmental Agreements and the Doha Development Agenda: Structuring an Approach to the WTO-MEA Relationship;” Ulrich Hoffman in “Clear and Effective Trade Measures in Multilateral Environmental Agreements and Their Compatibility with the Rules of the Multilateral Trading System A Discussion Paper;” Duncan Brack in “The Use of Trade Measures in Multilateral Environmental Agreements;” and Brack and Kevin Gray in “Multilateral Environmental Agreements and the WTO.”

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- *Regulating trade in goods sought to be protected, or products derived from those goods:* Agreements relating to the protection of wildlife and biodiversity, for example, establish a regulatory framework to ensure that relevant trade is non-detrimental. CITES, for instance, establishes a licensing system for the import and export of specimens of certain wild animals and plants to ensure international trade in those species does not threaten their survival.¹³⁰
- *Controlling or regulating trade in environmentally hazardous products or goods:* The Basel Convention, for instance, contains measures such as a prior informed consent mechanism, trade restrictions, and labeling and packaging requirements to address the risks to human health and the environment posed by transboundary movements of certain hazardous wastes and other wastes. Likewise, the trade-related measures in the Rotterdam Convention establish a framework for national decision-making processes relating to the import and export of toxic pesticides and other hazardous chemicals.
- *Supporting the phase-out of certain substances:* The trade restrictions in the Montreal Protocol, for example, are designed to supplement and support the phase-out schedules for various categories of ODS. The Stockholm Convention also uses trade limitations to support measures eliminating and restricting the production and use of covered chemicals.¹³¹
- *Addressing the lack of adequate information for policy development or decision-making:* Measures to generate and provide information to policy-makers and consent measures – notification and prior informed consent requirements, for instance – are fundamental in MEAs like the Rotterdam Convention, the Basel Convention and the Biosafety Protocol to enable the design of effective environmental strategies. Other types of trade-related measures that address information deficiencies include, for example, the obligation in the Basel Convention to label hazardous and other wastes subject to transboundary movement and to accompany shipments by a movement document.
- *Encouraging harmonized systems:* Information-related requirements often also serve the purpose of avoiding the proliferation of different standards and thus enhance environmental protection. Beyond the measures mentioned above relating to information more generally, measures in CITES that establish format and content requirements for permits and certificates and measures in the Biosafety Protocol that establish handling, transport, packaging and documentation requirements for covered organisms and products, should also be noted.
- *Avoiding “free-riding” and promoting a level playing field:* For certain MEAs, one of the fundamental challenges is impeding non-Parties from

¹³⁰ All the measures cited here as examples are described in detail in Section III.

¹³¹ Article 3 of the Stockholm Convention, for instance, requires Parties to ban imports of listed substances, except if the import is from another Party and is destined for environmentally sound disposal or the chemical is covered by a specific exemption.

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taking advantage of environmental gains achieved through other Parties' commitments without making similar efforts. Trade-related measures can be significant incentives for countries to join the MEAs, thus also increasing their coverage and ensuring their effectiveness. The Montreal Protocol, which prohibits the import and export of controlled substances with respect to non-Parties, is a good example of an agreement that achieved a large membership and important environmental goals.¹³² However, the Montreal Protocol, similar to other MEAs, allows imports and exports of controlled substances from, or to, any non-Party if a meeting of the Parties determines that country to be in full compliance with the Protocol's control measures.

- *Assisting in compliance and enforcement:* Compliance mechanisms in MEAs generally focus on promoting and facilitating Parties' compliance, rather than penalizing non-compliance.¹³³ As a result, though some MEAs include trade-related measures as one of the instruments to address non-compliance (allowing, for example, the suspension of certain trade-related benefits), the use of these measures has been limited.¹³⁴ The draft guidelines on compliance of CITES, for instance, establish that, of the various measures to address a Party's non-compliance and bring about its full compliance with the Convention, the temporary suspension of commercial or all trade in specimens of one or more CITES-listed species is generally used as a last resort. A similar approach can be found in the Montreal Protocol, the Basel Convention, and the Biosafety Protocol.¹³⁵ The steps in the compliance process of the Biosafety Protocol, for example, include the provision of financial or technical assistance, transfer of technology, training measures, and the issuance of a caution.¹³⁶ As a final step, and only in cases of repeated non-compliance, the Conference of the Parties may decide on supplementary measures as deemed appropriate.¹³⁷

¹³² MEAs emphasize compliance over signature or ratification, however. Article 4 of the Montreal Protocol therefore, while prohibiting trade with non-Parties, allows imports and exports from, or to, non-Parties, if a meeting of the Parties determines that country to be in full compliance with the Protocol's control measures. Comparable provisions can be found in CITES, the Basel Convention, the Biosafety Protocol, and the Stockholm Convention.

¹³³ For an analysis of the particular nature of compliance mechanisms in MEAs, *see for example*, WTO and UNEP Secretariats, *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, WT/CTE/W/191 (June 2001).

¹³⁴ It is recognized that in many cases, when a State is in non-compliance, this is not because of a willful violation, but rather because of a lack of capacity to comply. Therefore, the initial approach for addressing non-compliance is through the provision of assistance, rather than through punitive measures.

¹³⁵ Article 8 of the Montreal Protocol instructs the COP to establish the procedures and institutional mechanisms for determining non-compliance, as well as the treatment of Parties found to be in non-compliance. The non-compliance procedure, however, adopted in 1998, focuses on providing Parties with the incentives and assistance they require to meet their obligations under the Protocol. The Basel Convention compliance mechanism, adopted at the sixth COP, also consists of a non-confrontational, facilitative procedure that aims to assist Parties facing compliance difficulties through advice and non-binding recommendations.

¹³⁶ COP-MOP I Decision BS -I/7, Section VI (2)(a) and (b).

¹³⁷ *Id.*, at Section VI, 2(d).

V. Concluding remarks

69. In the Doha Ministerial Declaration, adopted at the Fourth Ministerial Conference in November 2001, trade ministers agreed that “an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.”¹³⁸ Pursuant to paragraph 31(i) of the Doha Ministerial Declaration, WTO Members are presently engaged in negotiations, with a view to enhancing the mutual supportiveness of trade and environment, on the relationship between existing WTO rules and specific trade obligations set out in MEAs. Discussions have, *inter alia*, addressed the various types of trade-related measures established in a number of MEAs, and considered how these measures relate to the notion of “specific trade obligations.”

70. The objective of the present note, as part of UNEP’s work in promoting understanding and dissemination of information on trade and environment topics, is to contribute to ongoing negotiations at the WTO by providing a framework for an increased and more comprehensive understanding of trade-related measures in MEAs. In particular, in order for negotiations to identify concrete ways to enhance the mutual supportiveness of trade rules and MEAs, trade-related measures in MEAs must be understood in the context of their role in the distinct and balanced structure of each MEA.

71. As has been noted in discussions in the CTE, the wide variety of trade-related measures reflects the diverse environmental concerns that they were designed to address. An adequate classification on the basis of criteria developed outside of the particular context of each MEA can thus be difficult to achieve. Noting the various functions trade-related measures perform within each MEA – as done in this note – can, however, enhance discussions by identifying the relevance of these measures and their inherent link with the objectives and other provisions of MEAs.

72. In addition, the consideration of trade-related measures in the context of each MEA may be useful to further build on the synergies that already exist between the WTO and MEAs. As noted in CTE discussions, a number of features of MEAs contribute not only to their own effectiveness, but also to support international trade rules. Indeed, as the present note has shown, MEAs have widespread backing, and fulfill the international community’s predilection for multilateralism over unilateralism to address environmental and health concerns. Moreover, MEAs are based on science, thus mirroring one of the WTO’s fundamental approaches towards objective, rather than arbitrary, rules.

73. At the same time, it should be noted that the ultimate objective of the WTO – enshrined in the Preamble of the Marrakech Agreement that established the WTO – is sustainable development – of which the environment is an integral element. Negotiators at the WTO now have the chance to make this objective operative. In particular, given the important role that trade-related measures play in the distinct and balanced structure of each MEA, it may be valuable to explicitly recognize the significance and legitimacy of trade-related measures in MEAs. By thus supporting MEAs, negotiations would effectively lead to the enhancement of mutual supportiveness of the WTO and MEAs.

¹³⁸ See *supra* note 2, paragraph 6.