

## **“The Relationship between MEAs and WTO Rules and EU Trade Policy Making”**

**Seminar to raise awareness of trade issues in civil society**

**Szentendre, 10 May 2004**

## **Background Paper**

## Table of Contents

<b>1</b>	<b>Introduction .....</b>	<b>3</b>
<b>2</b>	<b>Multilateral Environmental Agreements .....</b>	<b>4</b>
2.1	Trade-Restricting Measures.....	4
2.2	Objectives of Trade Measures in MEAs .....	4
<b>3</b>	<b>The Relationship between MEAs and WTO Rules.....</b>	<b>5</b>
3.1	The Vienna Convention on the Law of Treaties .....	6
3.2	Reform of the WTO .....	6
3.3	Enhancing Synergies between MEAs and WTO Rules .....	9
3.4	Reform of MEAs .....	9
<b>4</b>	<b>European Trade Policy Making .....</b>	<b>10</b>
4.1	Exclusive and Shared Competencies.....	10
4.2	Criticisms of EU Trade Policy Making .....	11
4.3	DG Trade and Civil Society.....	13
4.4	Drivers of Change - Cancún, Enlargement and the EU Constitution .....	13
<b>5</b>	<b>Bibliography .....</b>	<b>15</b>

## 1 Introduction

Within the discussion on trade and its impacts on the environment, the relationship between multilateral environmental agreements (MEAs) and the World Trade Organization (WTO) has long been of particular interest. An ample body of literature on these issues already exists, but many questions remain unresolved. Indeed, no clear consensus on how to best address this relationship has emerged, and so further debate is to be expected. The number of MEAs is growing, and the policy and legislative activities of existing MEAs continue to evolve quite rapidly, often in ways that are likely to increase their interaction with the WTO. The developments of recent years—the Biosafety Protocol in the Convention on Biodiversity, the Rotterdam Convention on Prior Informed Consent (PIC), the Convention on Persistent Organic Pollutants (POPS) and the continuing negotiations on the Framework Convention on Climate Change—reaffirm this assumption. In addition, a number of other policy areas, such as consumer protection, labelling issues and technology transfer, are affected by the negotiations on the relationship between trade-related measures pursuant to MEAs and WTO rules.

At present, the clarification of the relationship between international trading rules and MEAs is an issue of foremost priority on the Doha Agenda. The Doha Declaration calls for negotiations on information-sharing and observer status between WTO committees and MEA secretariats, and on the relationship between existing WTO rules and MEAs. However, the negotiations appear limited in scope, as they are required to neither "prejudice the WTO rights of any member that is not a party to the MEA in question" nor "add to or diminish the rights and obligations of members under existing WTO agreements". So far, it remains unclear what the results of these negotiations will be.

Ultimately, international trade and the MEA regimes can only be mutually supportive in enhancing sustainable development governance if both bodies of law and policy do not undermine one another, and if the relevant institutions co-operate effectively during the entire processes of policy- and decision-making, implementation, monitoring and dispute settlement. Civil society plays a key role as a partner in these processes at the global, European and national levels.

As a result, it is essential to raise awareness among civil society groups of how important these negotiations are, and to promote the formation of individual standpoints while providing the necessary expertise to actively participate in the decision-making processes. The seminar "The Relationship between MEAs and WTO Rules" is intended to contribute to this goal. Thirty-five representatives from Central and Eastern European civil society groups are expected to attend the event, where they will discuss the relationship between MEAs and WTO rules as well as European trade policy making processes.

The following pages provide a first look at the issues and topics to be analysed and discussed at the seminar. It thus gives the participants the opportunity to deepen and update their existing knowledge on the subject and to lay the basis for the discussions during the seminar.<sup>1</sup>

---

<sup>1</sup> For further information about the seminar, please visit: [www.ecologic-events.de/eu-trade-policy](http://www.ecologic-events.de/eu-trade-policy).

## 2 Multilateral Environmental Agreements

Today there are well over 200 multilateral environmental agreements (MEAs), with memberships varying from a relatively small group to over 180 countries.<sup>2</sup> Some of these MEAs are geographically limited, while others are global in scope. Given the transboundary character of most environmental issues, multilateral agreements are considered the most appropriate instruments with which to address these problems. Indeed, the work of the GATT and the WTO on trade and the environment has continually expressed a preference for multilateral solutions over unilateral action.<sup>3</sup>

### 2.1 Trade-Restricting Measures

The rules established by MEAs and the World Trade Organization (WTO) intersect in a range of areas, and their relationship has thus remained one of the key issues in the debate over trade and the environment. At the centre of this discussion are trade-restricting measures incorporated in MEAs that regulate or restrict the trade in particular substances or products, either between parties to the treaty and/or between parties and non-parties. Currently, only a fraction of MEAs contain trade-restricting measures, although the number is increasing.<sup>4</sup>

Trade-related measures in MEAs take a variety of forms, and include requirements for reporting, labelling, identification and notification; export and import bans; and taxes, charges, subsidies and other fiscal measures.<sup>5</sup> As the ongoing negotiations in the WTO address only specific trade measures in MEAs, it is important to distinguish between specific and non-specific trade measures. In most cases, specific trade measures are explicitly described in the MEA or in subsequent decisions of its parties, and in general are mandatory obligations that must be applied by all parties. Non-specific measures are not explicitly described, but may be applied by parties, mostly alongside other measures, as a means of complying with their obligations or fulfilling MEA objectives.

The Montreal Protocol is an example that contains both specific and non-specific trade measures. It includes requirements for a ban on trade with non-parties in the products controlled by the Protocol. However, many parties have also applied non-specific trade measures, including labelling requirements and taxes, in order to meet their obligations for phasing out the use of ozone-depleting substances.<sup>6</sup>

### 2.2 Objectives of Trade Measures in MEAs

Broadly speaking, trade-related measures in MEAs have three different objectives:

---

<sup>2</sup> For an intensive analysis of MEAs, please consult: UNEP/IGM/3/INF/3, online available at: [http://www.unep.org/IEG/docs/working%20documents/MEA\\_full/INF3\\_MEA\\_Add.doc](http://www.unep.org/IEG/docs/working%20documents/MEA_full/INF3_MEA_Add.doc).

<sup>3</sup> See Report by Hukawa, Chairman of the Group on Environmental Measures and International Trade (1999), here from: Condon (2002), p. 563.

<sup>4</sup> For example, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade entered into force in February 2004. The Stockholm Convention on Persistent Organic Pollutants (POPs convention) was agreed and enter into force 17 May 2004.

<sup>5</sup> WTO: Note by the Secretariat: Matrix on Trade Measures Pursuant to selected Multilateral Agreements, WT/CTE/W160/Rev. 2TN/TE/S/5, 25 April 2003.

<sup>6</sup> Brack and Gray (2003), p. 6.

- First, trade measures, such as reporting and labelling requirements or notification and consent arrangements, provide a means of monitoring and controlling trade in products where the uncontrolled trade itself would create environmental damage. For example, the Rotterdam Convention contains a prior informed consent procedure for a number of specified chemicals and pesticides. Another example is CITES' requirement for export permits for trade in all endangered species listed in the agreement's appendices.
- Second, trade measures can be applied to achieve the objectives of the MEA itself, such as the control of consumption and production of ozone-depleting substances under the Montreal Protocol. Here, a variety of trade restrictions, such as import licences, partial import bans, excise taxes and labelling requirements, have been employed.
- The third aim of trade measures is to prevent non-parties to MEAs from enjoying a competitive advantage in trade with other states controlled by the MEA. Accordingly, the Basel Convention stipulates that no category of wastes be exported to non-parties, unless these countries are signatories to another agreement that is at least compatible with the aims of the Convention. Under the International Convention for the Conservation of Atlantic Tunas (ICCAT), parties decided to ban imports of certain fish products from some non-parties and non-complying parties, while warnings have been issued to others.<sup>7</sup>

While it is difficult to gauge the degree of success of trade measures in MEAs, their contribution to compliance to MEAs is generally accepted. From an environmental perspective there is a general consensus that trade-related measures should be used when they are the most or the only effective means to achieve a necessary, MEA-mandated objective. However, it is also accepted that trade measures should not be adopted in isolation from other compliance instruments, such as financial and capacity building assistance.<sup>8</sup>

### **3 The Relationship between MEAs and WTO Rules**

Trade-restrictive measures taken pursuant to MEAs potentially run against basic WTO rules, namely not to discriminate between other WTO members' "like products", or between domestic and international production. In particular, enforcement measures may cause imports to be treated less favourably than domestic goods in the market.<sup>9</sup> Other rules adopted in the other WTO treaties also have the potential to create conflicts. For example, the Biosafety Protocol provides a framework to ensure that its parties can adopt precautionary measures to control the transboundary movement of living modified organisms, while the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) places constraints on the measures that WTO members may take to do so.<sup>10</sup> Also, the WTO agreements on intellectual property rights (TRIPS) and on trade in services (GATS) may have important impacts on the implementation of MEAs.<sup>11</sup>

---

<sup>7</sup> Brack and Gray (2003), p. 8ff.

<sup>8</sup> Neumayer (2002); Qiu and Yu (2001); Hoffmann (2002), p. 5.

<sup>9</sup> See also: Charnovitz (2002)

<sup>10</sup> Stewart and Johanson (2003); Safrin (2002); Mann and Porter (2003), pp.27 and pp. 37.

<sup>11</sup> Stilwell and Tarasofsky (2001), p. 11.

Nevertheless, a number of issues suggest that the relationship between MEAs and international trading rules is not primarily characterised by conflict, but by mutual recognition and even support. Several documents from the WTO Committee on Trade and Environment (CTE)<sup>12</sup> and the Rio Declaration<sup>13</sup> confirm this assumption. Also, many proponents point to the broad scope for applying trade measures in a manner consistent with WTO rules<sup>14</sup>, the small number of MEAs that include trade-restricting measures, and the wide overlap of constituencies of regimes<sup>15</sup>. In addition, win-win situations, such as increased trade in environmental goods and services, technology transfer and the harmonisation of standards, are often mentioned as positive features of the MEA-WTO relationship.<sup>16</sup>

So far, all environmental measures challenged in the WTO have been unilaterally imposed rather than required under an MEA. However, it seems that the potential for conflict is not only real, but threatens to be aggravated as the use of trade restrictions in MEAs becomes more prevalent and trade rules more stringent. In addition, some states did not sign or ratify recent environmental instruments, such as the Convention on Biological Diversity, the Biosafety Protocol and the Kyoto Protocol.<sup>17</sup> Yet, even without a formal conflict, the consequences and costs of uncertainty are significant. For example, concerns about legality have already hampered recent negotiations, including those on genetically modified organisms and persistent organic pollutants.<sup>18</sup>

### 3.1 The Vienna Convention on the Law of Treaties

In case of inconsistency between WTO rules and an MEA, the question arises as to which international regime prevails. Article 30 of the Vienna Convention on the Law of Treaties states that in cases in which both entities in the conflict are parties to both regimes, the later treaty prevails. This could invalidate MEAs (or parts of them) that became binding before 1994. However, other norms, such as *lex specialis*, are also relevant to resolving conflicts.<sup>19</sup> Additionally, Article 31 of the Vienna Convention, which provides general rules for the interpretation of international treaties, may also be useful in allowing two treaties to be interpreted in a manner that avoids conflict, e.g. applying GATT Article XX in a way that permits trade measures taken in compliance with MEAs. However, it seems that the Vienna Convention does not suffice to clarify the relationship. As a result, there have been a number of proposals to reform the WTO or create a better relationship between MEAs and the WTO.

### 3.2 Reform of the WTO

With regard to environmental reform of the WTO, proposals from states and experts can be mainly grouped into three categories, namely status quo; ex post or waivers; and ex ante or environmental window, which are to be explained in more detail:

---

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

<sup>13</sup> United Nations Conference on Environment and Development, Agenda 21, Chapter 2.

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

<sup>15</sup> A number of MEAs, such as CITES, the Montreal Protocol or the Basel Convention, have more members than the WTO. Cosby (2000), p. 2; Krist (2001), p. 2.

<sup>16</sup> See for example: UNDP (1998).

<sup>17</sup> Stilwell and Tarasofsky (2001), p. 10.

<sup>18</sup> See Stilwell & Tuerk (1999); Krajewski (2001).

<sup>19</sup> Voon (2000), pp. 78.

Proponents of the **status quo** frequently point to the exceptions provided by GATT Article XX, the incorporation of the aim of sustainable development into the WTO's preamble, and the acknowledgement that WTO rules should not be interpreted in "clinical isolation"<sup>20</sup>. Moreover, the rulings of the Appellate Body have become more environmentally friendly, as evidenced in particular by the findings of the so-called shrimp-turtle case.<sup>21</sup> However, scepticism exists as to whether the Appellate Body is capable of taking environmental concerns sufficiently into account, and whether it is able to constitute a general rule for the relationship between MEAs and WTO rules.<sup>22</sup> Based on the system currently in place, the EU proposed to reverse the burden of proof in Article XX, thus strengthening the position of parties invoking Article XX on environmental bases.<sup>23</sup> Another recommendation stems from the Committee on Trade and Environment (CTE) report, adopted by the Ministerial Conference in Singapore in 1996. It states that WTO members that are also parties to MEAs should resolve disputes over the use of trade measures applied between themselves pursuant to the MEA through the dispute settlement mechanism available under the environmental treaty.<sup>24</sup>

Another method suggested to accommodate the relationship inside the WTO is to issue **waivers**. The WTO agreement allows parties to waive GATT obligations in exceptional circumstances. Consequently, several countries, such as Egypt, Hong Kong and ASEAN members, submitted proposals for granting waivers to trade measures in MEAs that meet certain criteria, such as necessity, proportionality, least-trade restrictiveness, effectiveness, broad multilateral support and/or scientific evidence.<sup>25</sup> Critics, however, emphasise the requirement of exceptional circumstances for waivers, their time limit, and the fact that the status of MEAs, which often take years to negotiate, would be dubious until it receives the ex post blessing of a waiver.<sup>26</sup>

Conversely, **ex ante approaches** suggest spelling out criteria under which MEAs would be compatible with WTO rules, either by an expansion of Article XX general exceptions or by the adoption of a collective interpretation of Article XX that would validate existing MEAs and spell out under what specific conditions the WTO would accept the use of trade measures taken pursuant to MEAs. An amendment could be based on: the NAFTA approach, which accepts certain MEAs while leaving the status of future MEAs open; a newly added paragraph to Article XX referring to the relationship between trade measures taken pursuant to MEAs<sup>27</sup>; or a newly created agreement on trade related environmental measures

---

<sup>20</sup> Appellate Body in *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996.

<sup>21</sup> Haverkamp (2001), p. 7; e.g. the Shrimp/Turtle appellate decision strengthened the right of the state to adopt conservation measures by a liberal interpretation of GATT Art. XX (g) exhaustible natural resources. Moreover the AB acknowledged the relevance of the preamble including the aim of sustainable development in interpreting article XX of the GATT. See United States: Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4. 129-31, 152-55, WTO/DS58/AB/R, 12 October 1998. See also: Appellate Body in Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/RW, 22 October 2001; see also: Mann and Porter (2003), p. 21-23.

<sup>22</sup> Submission by Switzerland, TN/TE/4, 6 June 2002.

<sup>23</sup> Submission by European Communities, WT/CTE/W/170, 19 October 2000.

<sup>24</sup> Report of the WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

<sup>25</sup> non-Papers from Egypt, 18 June 1996 and Hong-Kong, 22, July 1996; here from TN/TE/S/1, 23 May 2002; Submission by ASEAN, WT/CTE/W/39, 24 July 1996.

<sup>26</sup> Winter (2000), p. 248.

<sup>27</sup> non-Paper from the EC, 19, February 1996; here from TN/TE/S/1, 23 May 2002.

(TREMs)<sup>28</sup>. However, as amendments require a two-thirds majority and the acceptance of each party's legislature before it binds that party, any amendment of WTO rules is not likely in the near future. An interpretive understanding, guidelines, or a "principles and criteria approach" could avoid the requirements of an amendment, and support negotiators in designing future MEAs in a way consistent with WTO rules. Switzerland proposed an interpretive understanding that would ensure that MEAs are entitled to determine the objective, proportionality and necessity of trade measures, while the WTO would have the authority to assess whether the trade measure is applied in an arbitrary, discriminatory or protectionist manner.<sup>29</sup> Canada promotes a "principle and criteria approach", where principles determine MEAs and specific trade measures, and criteria assess how the trade measures are applied.<sup>30</sup>

Currently, Paragraph 31 (i) of the Doha Development Agenda (DDA) calls for negotiations on the relationship between existing WTO rules and specific trade obligations set out in MEAs. However, the mandate is limited, as negotiations shall "not add to or diminish the rights and obligations of Members under existing WTO agreements... nor alter the balance of these rights and obligations". Moreover, this mandate is limited, as it addresses only specifically enumerated measures between MEA parties, ignoring the difficult issues of non-specific trade measures or measures applied against non-parties to an MEA.<sup>31</sup> Up to now, negotiations have dealt mainly with procedural issues and questions about how to define MEAs, specific trade measures and MEA members. For example, the European Union attempted to spell out criteria for MEAs in order to include future MEAs<sup>32</sup>, while other states claim that the DDA mandate is limited to MEAs currently in force<sup>33</sup>. Regarding specific trade measures, Switzerland proposed analysis along four different categories in order to clarify under what conditions specific trade obligations are automatically in conformity with WTO rules.<sup>34</sup> Argentina and the US limit specific trade obligations to a single one that is mandatory and specific in character.<sup>35</sup> Canada added a conceptual approach, stating that examining MEAs with mandatory and specific trade obligations could provide significant insights, emphasising the important concept of the level of "discretion" left to a party in choosing from a range of measures.<sup>36</sup> While a number of observers hope that the ongoing negotiations might help to clarify the relationship between MEAs and WTO rules, others point to the risk that the outcome might be less supportive of a mutually integrative approach to trade and environment than what is now seen in practice.<sup>37</sup>

---

<sup>28</sup> Cosbey (2000), p. 11.

<sup>29</sup> Submission by Switzerland, WT/CTE/W/139, 8 June 2000.

<sup>30</sup> Submission by Canada, WT/CTE/M/10, 12 July 1996.

<sup>31</sup> Stilwell (2002), p. 1.

<sup>32</sup> Submission by the European Union, TN/TE/W/1, 2002.

<sup>33</sup> Submission by Australia, TN/TE/W/2, 2002; Submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, TN/TE/W/11, 3 October 2002.

<sup>34</sup> Submission by Switzerland, TN/TE/W/4, 6 June 2002.

<sup>35</sup> Submission by Argentina, TN/TE/W/2, 23 May 2002; Submission by the United States, TN/TE/W/20, 10 February 2003.

<sup>36</sup> Submission by Canada, TN/TE/W/22, 10 February 2003.

<sup>37</sup> Mann and Porter (2003), p. 25.

### 3.3 Enhancing Synergies between MEAs and WTO Rules

Another approach to accommodating the relationship between MEAs and the international trading system is to examine mechanisms that attempt to enhance synergies and increase mutual supportiveness between trade and environment. Most proposals aim to make them work together better by improving the exchange of information and strengthening co-ordination. Suggestions range from holding back-to-back meetings to exchanging information between MEAs and the WTO if new trade questions arise<sup>38</sup>, to enhancing communication and co-operation between compliance, enforcement and dispute settlement mechanisms<sup>39</sup>. Also, DDA paragraph 31 (ii) calls for negotiations on the procedures for regular information exchange and criteria for the granting of observer status.<sup>40</sup> Regarding this, the EU suggested that information exchange sessions and observership to both regular and special sessions should become a formal feature in the WTO<sup>41</sup>; and indeed, UNEP and a number of MEAs' secretariats were recently allowed to attend the CTE negotiations. However, several countries emphasise that attendance and participation by these bodies is on an ad hoc basis, leaving the larger observership question still open.<sup>42</sup> Moreover, it is recognised that greater co-ordination and co-operation between international institutions must be underpinned by greater co-ordination between trade and environment ministries at the national level.<sup>43</sup>

### 3.4 Reform of MEAs

Yet another approach to MEAs and WTO rules is to focus on the environmental regimes. Generally, greater membership in and compliance with MEAs will help to avoid conflicts between environmental and trading rules, as conflicts are most likely between parties and non-parties. Therefore, it has been proposed that future MEAs be designed for a larger constituency and in a more self-enforcing fashion.<sup>44</sup> Further calls are being made to strengthen the dispute settlement system within MEAs<sup>45</sup>, to support the WTO's attempts to define MEAs by establishing general criteria, and to include provisions in MEAs that establish a hierarchy between the treaty and other international laws that shifts depending on context-specific laws and facts. It is generally accepted that trade-restricting measures should only be the means of last resort. It is also suggested that trade-related measures should not be unnecessary, arbitrary, protectionist or unjustifiably discriminatory.<sup>46</sup> An institutional proposal is to cluster all MEAs that are of concern for the trade regime.<sup>47</sup> However, it is difficult to predict in which environmental regimes economic factors will develop into specifically trade-related issues, and it is also not yet clear how a grouping would help MEAs and WTO rules support each other.<sup>48</sup>

---

<sup>38</sup> Submission by European Communities, TN/TE/W/1, 21 March 2002.

<sup>39</sup> Stilwell (2002), p.2.

<sup>40</sup> For an extensive analysis see: von Moltke (2003).

<sup>41</sup> Submission by the European Communities, TN/TE/W/15, 17 October 2002

<sup>42</sup> Bridges Weekly, Vol. 7, No. 6, 2003.

<sup>43</sup> UNEP (2002).

<sup>44</sup> See Barrett (2003).

<sup>45</sup> Submission by New Zealand, WT/CTE/W/180, 9 January 2001.

<sup>46</sup> Contribution by Switzerland, TN/TE/W/21, 10 February 2003.

<sup>47</sup> Esty (1994), p. 154.

<sup>48</sup> von Moltke (2000), p. 9.

To sum up, the fundamental roles that MEAs and the WTO each play in global governance are widely accepted. Unfortunately, so is the potential for conflict between them. Despite extensive negotiations and a large number of proposals on how to clarify the relationship between both regimes during the last decade, no solution has been found or is in sight yet. The Doha Development Round and its limited mandate will most likely not resolve the complex relationship between MEAs and WTO rules. However, the ongoing negotiation process may contribute to its clarification, which in turn could help generate consensus on how a mutually supportive relationship could be achieved. While a case in front of the WTO dispute settlement body would certainly shed more light on the relationship, greater clarity about MEAs could also assist in reconciling the relationship between both regimes.

## 4 European Trade Policy Making

In contrast to foreign policy or security policy, external trade policy has been dealt with at the European level since the beginning of the European Community. At its creation in 1957, trade policy was assigned as a Community responsibility. It was recognised that Europe would achieve greater international influence if it were, among other things, to negotiate trade deals with one voice. Moreover, a joint external trade policy was seen as a prerequisite for a single common market with free movement of goods. As a result, the EU trade policy making process was highly centralised.<sup>49</sup> However, the relationship between the Commission and the Member States has always been a standing debate.<sup>50</sup> Also, given the shift in focus of international trade policy from traditional trade barriers, namely tariffs and quotas, to new types of non-tariff barriers, trade policy has come under scrutiny from other interest groups. This trend was strengthened by the inclusion of sensitive issue areas, such as services and intellectual property rights, in the WTO, which created the perception of a gradual loss of national sovereignty over issues such as food safety and environmental protection.<sup>51</sup>

### 4.1 Exclusive and Shared Competencies

It is crucial to differentiate between two different forms of European trade policy making. The 1957 Treaty of Rome formally transferred the authority to negotiate and conclude international agreements on trade in goods from the individual Member States to the collective entity. This is often referred to as “exclusive competence”, which prevails in all negotiations on trade in goods and in certain services.

Under the EU trade policy, the Commission elaborates proposals for the initiation and content of international trade negotiations. These proposals are issued to the so-called 133 Committee. Composed of senior civil servants and trade experts from the Member States, as well as Commission representatives, the Committee examines and proposes amendments to Commission proposals on a consensual basis. Then, the Committee submits the proposal to the Committee of Permanent Representatives (COREPER) and subsequently to the General Affairs and External Affairs Council (GAC, GAERC), which delivers the negotiation mandate

---

<sup>49</sup> Ahearn (2002), p. 1; WWF (2003), p. 6

<sup>50</sup> See for example Meunier and Nicolaidis (1999 and 2000), Young (2000); Leal-Arcas (2001); Smith (2001); MacLeod et al. (1996).

<sup>51</sup> Meunier (2003), p. 1.

to the Commission. Legally, this mandate could be adopted by qualified majority. In practice, however, Member States have always managed to reach consensus on a common text at this stage of the process.<sup>52</sup> During negotiations, the Commission acts on the mandate agreed upon by the Council of Ministers. Depending on the Council mandate, the Commission has an exclusive, highly autonomous authority, and Member States offer little input to discussions and negotiations. At the ratification stage, individual Member States no longer have the power to formally ratify international agreements, but instead delegate this power to the Council of Ministers, which approves or rejects the trade agreement by qualified majority.<sup>53</sup> The European Parliament itself is completely absent in the process, with neither prior nor final say on the making of European trade policy.<sup>54</sup>

In other cases, such as on issues of investment and certain services, trade policy is governed by the regime of “mixed competence”. In contrast with exclusive competence, all issues which fall under shared competence are negotiated by the Commission together with the Member States. Under shared Community competence, the trade policy making procedures work as follows: The negotiation mandate is initiated and elaborated by both the Council (voting unanimously) and the Member States. Although the process of agreeing on the mandate follows a different procedure under shared competence, the proposal for such an issue is still taken to the 133 Committee. During the negotiations, the Commission still represents the Member States. However, Member States are more actively involved in the shared negotiation process than in the case of exclusive competence, and Member States and the Community are required to co-ordinate and co-operate closely. Once negotiations are concluded, the resulting agreement is ratified by the EC voting unanimously in the Council, as well as separately by the Member States.<sup>55</sup>

Negotiations under mixed competence were frequently believed to complicate both their conclusion and their administration<sup>56</sup>, and the Commission, with help of some Member States, has tried repeatedly to widen the scope of Article 133 TEC.<sup>57</sup> However, others observe that mixed competence has not translated into the fragmentation of unity and loss in power of the European Commission.<sup>58</sup> Attempts to reform Article 133 TEC were undertaken in the framework of the Convention on the Future of Europe.

## 4.2 Criticisms of EU Trade Policy Making

For almost four decades, trade policy was a matter of complex, technical deals between obscure negotiators, and as such raised little media or public interest. However, this has been changing in the EU, as it has been changing at the global level since the WTO meeting in Seattle in 1999.

The most frequent criticism of EU trade policy is that it has large impacts on other policy areas, such as the environment and consumer policy, but does not sufficiently take such

---

<sup>52</sup> Ahearn (2002), p. 4; Meunier (2003), p. 10.

<sup>53</sup> Meunier (2003), p. 9.

<sup>54</sup> WWF (2003), p. 15.

<sup>55</sup> Leal-Arcas (2001), p. 11.

<sup>56</sup> Leal Arcas (2001), p. 3.

<sup>57</sup> Meunier and Nicolaidis (2000), p. 338.

<sup>58</sup> Young (2002), p. 12; Meunier and Nicolaidis (1999), p. 329.

concerns into account. In addition, it is perceived that the EU trade policy process is dominated by trade technocrats from the EU Commission and lacks democratic control.

At the centre of criticism is the Article 133 Committee, which prepares decisions on both shared and exclusive procedures. Since the Article 133 Committee is an advisory body, no formal votes are recorded and its deliberations are not published. Matters tend to be discussed until a clear consensus or effective majority has been reached, and the Commission tends to follow its advice.<sup>59</sup> As a result, the Article 133 Committee is frequently regarded as a closed shop that insufficiently considers voices speaking for non-trade-related issues, such as the environment. This view is underpinned by the perception that the 133 Committee is strongly influenced by Commission officials. Due to the Commission's initiative in drawing up proposals and its greater technical expertise compared with national trade officials, Council representatives on the 133 Committee need to act strongly, usually with a group of countries approaching a qualified majority, in order to significantly change Commission proposals.<sup>60</sup> Moreover, it is said that, depending on the negotiation and the mandate provided by the Council, the Commission has considerable flexibility in deciding on negotiating tactics.<sup>61</sup>

Yet another criticism is that the allegedly undemocratic policy making process, and the extreme complexity of decision-making procedures of European institutions, make EU institutions hard to understand for citizens.<sup>62</sup> The European Parliament – the only body that is directly elected – has limited powers in trade policies, as the European Parliament is not involved at all in the negotiation procedure, either under exclusive or shared competence.<sup>63</sup> Additionally, national parliaments are not formally consulted on European policies on international trade agreements; they are merely informed. Given the complex technical nature of international trade issues and somewhat varying interests among the EU member states, there has been little formal involvement of national parliaments, despite the effects of international trade agreements on national policy issues.<sup>64</sup> Trade is certainly a policy area that can arouse suspicions of illegitimacy because of its traditional reliance on delegation, executive authority and technicality. Generally, trade policy making has often given the impression of shutting out, by design, popular input from the process.<sup>65</sup> The main argument for this isolation is the collective action problem, given the chronic imbalance between those who benefit from trade protection and those who pay the costs.<sup>66</sup> However, there is also a perceived trade-off between efficiency and legitimacy, as every enhancement in terms of broader participation and legitimacy would reduce the room for manoeuvre within negotiations and impede their ability to conclude complex international agreements.<sup>67</sup>

---

<sup>59</sup> Ahearn (2002), p. 5.

<sup>60</sup> WWF (2003), p. 13.

<sup>61</sup> Ahearn (2002), p. 3.

<sup>62</sup> Meunier (2003), p. 2; See also: European Commission (2002)

<sup>63</sup> Meunier (2003), p. 2.

<sup>64</sup> WWF (2003), p. 15.

<sup>65</sup> Meunier (2003), p. 5.

<sup>66</sup> According to trade theory, those who benefit from trade liberalisation are diffuse, and their gains are small, whereas those who lose from trade are concentrated and organised.

<sup>67</sup> Meunier (2003), p. 7.

However, the involvement of non-governmental actors in the making of trade policy is nothing new. Trade unions, industry associations and business groups have long lobbied on trade policy, both at the national and international levels. NGOs claiming to represent “civil society” complain, however, of the closer links and privileged consultation methods between the makers of EU trade policy and groups representing European business.<sup>68</sup> On the other hand, civil society actors point to the perceived illegitimacy of the process given the slow flow of information that comes on a very short notice. In response to criticism, the 133 Committee has introduced a 10-day rule for consultation on proposals relating to the current WTO round. However, NGOs perceive this as inadequate to permit proper consultation within the commission or Member States.<sup>69</sup>

### **4.3 DG Trade and Civil Society**

In order to rein in some of these critics and address its perceived lack of political legitimacy, the Commission has engaged in an ambitious program of consultation with civil society in the specific area of trade. Launched in 1998, the “Trade Dialogue with Civil Society”, where representatives of civil society present proposals of their own to the Commission, has made up a larger number of general meetings and thematic meetings.

However, some observers regard this process as merely a PR effort to convey the message that “civil society” is heard and is from now on included in the process<sup>70</sup>, while the actual effect that this dialogue has on policy, if any, is most likely very limited. In the end, there has been criticism of both DG Trade and the members of the contact group<sup>71</sup>. Yet another channel of participation is the Sustainable Impact Assessments (SIA) Programme, which was launched in 1999 as an effort to better integrate sustainability concerns into trade policy making. While it was acknowledged that participation processes in SIAs can contribute to building structures and frameworks for an institutionalised public participation in the trade and sustainability area<sup>72</sup>, it is still too early to gauge the impacts of participation in SIAs on EU trade policy making.<sup>73</sup>

### **4.4 Drivers of Change - Cancún, Enlargement and the EU Constitution**

At present, several forces are pushing for reform of the EU trade policy making process.

- First, the collapse of the trade negotiations in Cancún led to a period of intense discussion about the ways of international trade negotiations. In this regard, the process of EU policy making and the way it came to a decision on the Singapore issues also came under scrutiny.
- Second, the European enlargement in May 2004 will add new national traditions and interests to the existing union. With respect to trade policy, this increased diversity is likely to put a strain on the current institutional mechanism and voting procedures.

---

<sup>68</sup> Meunier (2003), p. 14.

<sup>69</sup> WWF (2003), p. 14-15.

<sup>70</sup> Meunier (2003), p. 13.

<sup>71</sup> Smith (2001).

<sup>72</sup> WWF (2002).

<sup>73</sup> Knigge and Leiprand (2003).

- The strongest push for reform stems from the debate about the future European constitution. Currently, the final constitutional draft mainly simplifies the Articles on Common Commercial Policy. Competencies mainly stay as before, with a slight shift towards centralisation. Trade in services and commercial aspects of intellectual property rights, as well as foreign direct investment, now regularly fall under the exclusive competence of the EU. Suggestions for stronger democratic control by the European Parliament, for example through consultations in the drafting process of the mandate, participation in the 133 Trade Committee or consultations before approval of all trade agreements, were not considered to their full extent. The conclusion of international trade agreements now requires the consultation of the European Parliament, and the European Parliament will be immediately and fully informed at all stages of the procedure.

## 5 Bibliography

- Ahearn, Raymond J. 2002: *Trade policymaking in the European Union: Institutional Framework*. No. RS21185: Congressional Research Service
- Barret, Scott 2003: *Environment and Statecraft The Strategy of Environmental Treaty-Making*. London: Oxford University Press
- Brack, Duncan and Kevin Gray 2003: *Multilateral Environmental Agreements and the WTO*: Royal Institute for International Affairs / International Institute for Sustainable Development. Online available at:  
<http://www.riia.org/pdf/research/sdp/MEAs%20and%20WTO.pdf>
- Charnovitz, Steve 2002: "The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality." *The Yale Journal of International Law*, Vol. 27, 59 – 110
- Condon, Bradly 2002: "Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?" *Tulsa Journal of Comparative and International Law*, Vol. 9, 533-567
- Cosbey, Aaron 2000: *Institutional Challenges and Opportunities in Environmentally Sound Trade Expansion: A Review of the Global State of Affairs*. Coral Gables, Florida: University of Miami North-South Center
- Esty, Daniel 1994: *Greening the GATT*. Washington, D.C.: Institute for International Economics
- European Commission 2002: *Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*. COM(2002) 704 final, [http://europa.eu.int/comm/governance/docs/comm\\_standards\\_en.pdf](http://europa.eu.int/comm/governance/docs/comm_standards_en.pdf)
- Haverkamp, Jennifer 2001: "The Conflict between the WTO and MEAs - In the View of the U.S. Government only a Theoretical Problem," in: Heinrich Böll Foundation (ed.): *Trade and Environment, the WTO, and MEAs - Facets of a Complex Relationship*, 71-90. Washington, D.C.: Heinrich Böll Foundation.
- Hoffmann, Ulrich 2002: *Clear and Effective Trade Measures in Multilateral Environmental Agreements and Their Compatibility with the Rules of the Multilateral Trading System*. Discussion Paper, presented at the UNEP-UNCTAD CBTF Workshop on Post-Doha Negotiating Issues on Trade and Environment in Paragraph 31. Singapore
- Knigge, Markus and Anna Leipprand 2003: *The role of public participation in SIAs*. Sustainability Impact Assessment of trade agreements and new approaches to governance. International Workshop CPDR/UCL, Louvain-la-Neuve, 27/28 March 2003
- Krajewski, Markus 2001: "The Dispute Settlement "Chill Factor" and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO," in: The Heinrich Böll Foundation Liane Schalatek (ed.): *Trade and Environment, The WTO, and MEAs - Facets of a Complex Relationship*, 92-102. Washington, D.C.: The Heinrich Böll Foundation

- Krist, William K. 2001: "Neither Friends nor foes, but neighbors an introduction to the relationship between the WTO and MEAs," in: Liane Schalatek (ed.): *Trade and Environment the WTO, and MEAs - Facets of a Complex Relationship*, 1-4. Washington, D.C.: Heinrich Böll Foundation
- Leal-Arcas, Rafael 2001: "Unitary Character of EC External Trade Relations." *Columbia Journal of European Law*, No. Fall 2001
- Mann, Howard and Stephen Porter 2003: *The State of Trade and Environment Law 2003 - Implications for Doha and Beyond*. International Institute for Sustainable Development, Center for International Environmental Law
- Macleod, I.; I. Hendry and S. Hyett 1996: *The External Relations of the European Union*. Oxford: Clarendon Press
- Meunier, Sophie and Kalypso Nicolaidis 1999: "Who Speaks for Europe? The Delegation of Trade Authority in the EU." *Journal of Common Market Studies*, Vol. 37, No. 3, 477-501
- Meunier, S. and K. Nicolaidis 2000: "EU trade policy: the exclusive versus shared competence debate," in: M. Green Cowles and M. Smith (eds.): *The State of the European Union Volume 5: Risks, Reform, Resistance and Revival*, 325-346. Oxford: Oxford University Press
- Meunier, Sophie 2003: *Trade Policy and Political Legitimacy in the European Union*. Princeton: Center of International Studies, Princeton University
- Neumayer, Eric 2002: *Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement*, Consumer Unity and Trust Society CUTS. Jaipur, India
- Qiu, Larry D. and Zhihao Yu 2001: *Multilateral Environmental Agreements and Environmental Technology Transfer*, <http://www.bm.ust.hk/~larryqiu/MEA.pdf>
- Safrin, Sabrina 2002: "Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements." *The American Journal International Law*, Vol. 96, 606-628
- Smith, M. 2001: "The Quest for Coherence: Institutional Dilemmas of External Action from Maastricht to Amsterdam," in: N. Fligstein; W. Sandholtz and A. Stone Sweet (eds.): *The Institutionalisation of Europe*. Oxford: Oxford University Press
- Stewart, Terence P. and David S. Johanson 2003: "A Nexus of Trade and the Environment: The Relationship Between the Cartagena Protocol on Biosafety and the SPS Agreement of the World Trade Organization." *Colorado Journal of International Law and Policy*, Vol. 14, 1-52.
- Stilwell, Matthew and Elizabeth Turk 1999: *Trade Measures and Multilateral Environmental Agreements: Resolving Uncertainty and Removing the WTO Chill Factor*. Discussion Papers. Geneva: WWF

- Stilwell, Matthew and Richard G. Tarasofsky 2001: *Towards Coherent Environmental and Economic Governance - Legal and Practical Approaches to MEA-WTO Linkages*. WWF-CIEL Discussion Paper. Gland, Switzerland: WWF (World Wide Fund for Nature), CIEL (Center for International and Environmental Law)
- Stilwell, Matthew 2002: *Clarifying the Relationship Between Economic and Environmental Governance: Some Key Challenges*, commissioned by CIEL. Washington D.C. & Geneva: CIEL (Center for International and Environmental Law)
- UNDP 1998: *Strengthening the Fabric of Society - Trade and Environment*. New York: UNDP.
- UNEP 2002: *Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization - A synthesis Report*", Geneva
- von Moltke, Konrad 2000: *Research on the Effectiveness of International Environmental Agreements: Lessons for Policy Makers?* Effectiveness of International Environmental Agreements and EU Legislation. Barcelona
- von Moltke, Konrad 2003: *Information Exchange and Observer Status: The World Trade Organisation and Multilateral Environmental Agreements - Paragraph 31 (ii) of the Doha Ministerial Declaration*. Ecologic,  
[http://www.ecologic.de/download/verschiedenes/2003/documents/paper\\_moltke.pdf](http://www.ecologic.de/download/verschiedenes/2003/documents/paper_moltke.pdf)
- Voon, Tania 2000: "Sizing up the WTO: Trade-Environment Conflict and the Kyoto Protocol." *Journal of Transnational Law & Policy*, Vol. 10, 71-108
- Winter, Ryan L. 2000: "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" *Colorado Journal of International Law and Policy*, Vol. 11, 223-254
- WWF 2002: *An Effective Multistakeholder Process for Sustainability Assessment: Critical Elements*. WWF Position Statement. <http://www.balancedtrade.panda.org/>
- WWF (World Wide Fund For Nature) 2003: *A League of Gentlemen - Who really runs EU Trade Decision Making?*: WWF
- Young, Alasdair R. 2000: "The Adaptation of European Foreign Economic Policy: From Rome to Seattle." *Journal of Common Market Studies*, Vol. 38, No. 1, 93-116