

Environment and Trade

A Handbook

Second Edition



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2.4 Multilateral environmental agreements

2.4.1 Structure

Over the past 20 years, an extraordinary number of international environmental agreements have been concluded. More than 200 multilateral environmental agreements (MEAs)—defined in this book as those involving more than two countries—are known to exist. A few of these are global treaties, open to any country. The number of bilateral agreements is unknown, but is thought to be well in excess of a thousand. The result is an international structure for environmental management that is diverse and reflects the extraordinary range of issues and interests involved.

Very few MEAs actually regulate trade or contain trade-related provisions. Of the 20 or so that do, even fewer are of notable significance to the environment-trade interface, as their measures do not substantially affect trade flows, or the value of the trade flows they do affect is not significant in global terms. Seven MEAs that are particularly relevant to trade are discussed in greater detail below.

Box 2-2: Key MEAs relevant to trade

- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)—1973
- Vienna Convention for the Protection of the Ozone Layer—1985
 - Montreal Protocol on Substances that Deplete the Stratospheric Ozone Layer—1987
- Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal—1992

- Convention on Biological Diversity—1992
 - Cartagena Protocol on Biosafety—2000
- United Nations Framework Convention on Climate Change (UNFCCC)—1992
 - Kyoto Protocol to the United Nations Framework Convention on Climate Change—1997
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC)—1998
- Stockholm Convention on Persistent Organic Pollutants (POPs)—2001

(Dates refer to the completion of negotiations. All treaties listed have entered into force.)

The international structure of environmental management is extremely dynamic. The various regimes address a wide variety of issues, ranging from toxic substances to endangered species, from air pollution to biodiversity. As well, they must respond to changing scientific information about the environment, changing perceptions of the significance of this information, and the constant feedback from the successes and failures of the measures adopted in support of their objectives.

2.4.2 The key trade-related MEAs

This handbook defines MEAs as those agreements with more than two parties—that is, multilateral is anything bigger than bilateral. The word “multilateral” has a slightly different meaning for the trade community, for whom the *multilateral trading system* is the *global* trading system. Below are the MEAs that are particularly relevant to trade regimes.

The Convention on International Trade in Endangered Species. The earliest of the key MEAs, CITES was drawn up in 1973 and entered into force two years later. CITES seeks to regulate trade in certain species and their parts, as well as products made from such species. Three annexes list species identified by the Conference of Parties (on scientific advice) as requiring various degrees of trade restrictions to ensure their sustainability. These restrictions range from a general prohibition on commercial trade to a partial licensing system. CITES has long been known for the unusually active participation of non-governmental organizations—scientific and advocacy organizations in particular—in its

deliberations. In recent years it has begun—not without controversy—to address species traded in such volumes as to have a significant economic value, such as certain tree and fish species. (169 parties).

The Vienna Convention for Protection of the Stratosphere, and the Montreal Protocol on Substances that Deplete the Stratospheric Ozone Layer. The Vienna Convention was concluded in 1985, at which time ozone depletion was suspected but not yet confirmed. It provided for research and cooperation to better understand the issue, and formed a framework agreement under which specific protocols could be negotiated as needed. The evidence soon became stronger, and in 1987 the Parties drafted the Montreal Protocol, establishing a regime of control for several classes of industrial chemicals now known to harm the stratospheric ozone layer. The Protocol has been amended four times to tighten controls. The result has been a ban on the production and use of several industrial chemicals, together with severe limitations on others. It has successfully implemented a precautionary approach, by acting before the availability of clear scientific evidence, and that of common and differentiated responsibility, by establishing a fund to assist developing countries in their transition away from the use of controlled substances. Its principal implementation tool—apart from continuing public pressure—is the control of production and trade of ozone-depleting substances and trade in products containing controlled substances. It included the possibility of imposing controls on trade in products produced with (but not containing) controlled substances, but the parties have not considered it necessary to implement such controls. (Vienna Convention: 190 parties; Montreal Protocol: 189 parties).

The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal. The Basel Convention resulted from the concern of developing countries, particularly in Africa, that they could become the dumping ground for hazardous wastes whose disposal in the developed world had become difficult and expensive. Developing countries and non-governmental organizations have played a significant role in the regime since its inception. Discussions within the regime have been marked by disputes over the most appropriate strategy for controlling the movement of hazardous waste (regional bans versus prior informed consent) and the technical difficulty in establishing unambiguous distinctions between wastes and materials for recycling. Parties have adopted an amendment banning the export of hazardous waste from mainly OECD to non-OECD countries (the Basel Ban) and a protocol on liability and compensation, both of which have yet to enter into force even though numerous countries currently adhere to them. (166 parties, 3 signatories not ratified).

Convention on Biological Diversity and the Cartagena Protocol on Biosafety. Opened for signature at the Rio Conference, the Convention's objec-

tive is conserving biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the use of genetic resources. The Convention has resulted in national biodiversity strategies and action plans in over 100 countries, and has produced the landmark Cartagena Protocol on Biosafety, discussed below. It also plays a major role in highlighting the importance of biodiversity issues globally, through research and public education. Linkages connecting the CBD, agriculture and the WTO TRIPS Agreement are discussed in Section 5.6.1. (188 parties, 1 signatory not ratified).

Cartagena is a Protocol to the CBD, covering trade in most forms of living genetically modified organisms (LMOs) and the risks it may present to biodiversity. It creates an advanced informed agreement system for LMOs destined to be introduced to the environment (such as micro-organisms and seeds), and a less complex system for monitoring those destined for use as food, animal feed or processing. It sets out a procedure for countries to decide whether to restrict imports of LMOs, spelling out, for example, the type of risk assessment that must be carried out. In allowing such decisions to be taken even where the risks are unknown, the Cartagena Protocol operationalizes the precautionary approach. (125 parties, 22 signatories not ratified).

United Nations Framework Convention on Climate Change and the Kyoto Protocol. The UNFCCC, adopted at the Rio Conference in 1992, is grappling with one of the most complex of all environmental issues, and the one with greatest potential for economic impacts: it aims to stabilize the emission of various greenhouse gases (such as carbon-dioxide or methane) that contribute to global climate change. Since such emissions can rarely be limited with technical, “end-of-pipe” technologies, the principal strategy of the UNFCCC must be to change the patterns of future production, consumption and investment in favour of activities that emit fewer greenhouse gases. In December 1997 the Kyoto Protocol was adopted, entering into force in February 2005. It created two categories of countries—those with greenhouse gas limitation commitments (industrialized countries) and those without. Although neither the UNFCCC nor the Kyoto Protocol includes trade-related provisions, it is highly likely that the parties, in fulfilling their Kyoto obligations, will adopt domestic policies and measures with significant trade implications. (UNFCCC: 189 parties, Kyoto Protocol: 155 parties).

Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. The Rotterdam Convention is designed to help countries monitor and control trade in certain hazardous chemicals. Many domestically banned or severely limited goods are traded internationally. For years there was controversy over the procedures to ensure that the appropriate authorities in the importing country were informed promptly. Indeed, a GATT (General Agreement on Tariffs and Trade—the predecessor to the WTO) working group devoted sev-

eral years of negotiation to this topic, without achieving a generally acceptable result. UNEP (concerned with the management of potentially toxic substances) and the Food and Agriculture Organization (concerned with pesticide use) had a strong interest in developing a uniform system of notification. The PIC regime offers assurance that information will be provided quickly, and that it will reach the appropriate authorities when needed. And it creates a system that allows developing countries to stop the import of certain substances if they feel a need to do so. (98 parties, 17 signatories not ratified).

Stockholm Convention on Persistent Organic Pollutants (POPS). The POPS Convention entered into force in May 2004. It establishes an international regime for the control of certain substances that persist in the environment and can accumulate in the food chain, all of which are suspected of disrupting hormonal functions in animals and humans (such chemicals are known as endocrine disruptors). The controlled substances are listed in three annexes: one that envisages elimination of nine chemicals or classes of chemicals (subject to time limited exceptions), one that imposes restrictions on DDT, and one that deals with the unintentional production of certain chemicals. The POPS Convention also establishes a procedure for adding to these annexes. (108 parties, 68 signatories not ratified).

Emerging Regimes. Several other international environmental regimes are still being negotiated, or which are likely to remain based on a less formal understanding between the interested parties. The *international forest regime* remains controversial and is not fully articulated; most observers doubt that it will coalesce into a multilateral agreement in the near future. There is, however, a viable private regime for forestry, the result of collaboration between producers and environmental non-governmental organizations on labelling for sustainable practices. We may yet see a similar private *regime for sustainable fisheries* develop. These regimes are highly relevant for trade, since they involve widely traded commodities.

2.4.3 Implementation and dispute settlement

International environmental regimes involve complex interactions between the parties, their sub-national jurisdictions, their citizens and, sometimes, other stakeholders. In practice it often takes several rounds of negotiation before an effective regime emerges. Even then, implementing an MEA at the national level and monitoring its progress at the international level requires continual adjustment—the result of intensive further research on the environmental problem, and on the regime’s effectiveness—and ongoing public debate on the results of the research, among other elements.

International environmental agreements are based on consent. Of all the agreements surveyed above, only the PIC Convention has an elaborate dispute

settlement structure. It is widely recognized that coercing countries into action is not a sound basis for international environmental policy. In the first place, there is seldom potential for the kind of effective economic leverage that is possible under trade dispute settlement. In the second place, non-compliance in environmental regimes is more often due to lack of capacity to implement than it is to strategic misbehaviour. Therefore, international environmental regimes use coercive dispute settlement only on rare occasions, and are more apt to use capacity building, dialogue and transparency as solutions.

Another reason for the lack of coercive mechanisms—and rare use of the few existing mechanisms—is that, unlike in the trade context, non-compliance by one country often does not directly harm another country, but rather usually impairs the global commons. In such cases, it may be that no individual country is so harmed by non-compliance that it is worth the international diplomatic costs to pursue coercive dispute settlement. Following this logic, the most-used coercive mechanisms are in disputes over shared waters in regional and bilateral agreements, where there is direct harm.

Transparency and participation are arguably the most important implementation tools of international environmental regimes. NGOs can be instrumental in this regard by assessing a country's internal implementation of MEAs and exerting pressure on the government for good faith compliance. Scientifically-based assessments of environmental developments provide the foundation for most of these agreements, and all of this activity depends on a free flow of information and ready access to decision-making in the regime.

2.4.4 Trade-related provisions in MEAs

One of the environmental community's fears from the beginning of the trade and environment debates has been that a trade law dispute panel will find that a country, by fulfilling its obligations under an MEA, has breached its trade law obligations. Actual conflicts between WTO law and trade-related provisions in MEAs, though, have been rare; the real core of the trade and environment legal conflicts to date have involved domestic environmental measures of the type surveyed in Section 2.3. The WTO-MEAs relationship is discussed in greater detail in Section 5.5. What follows is a primer on the nature of, and use of, trade-related provisions in MEAs.

It was noted earlier that trade-related provisions in MEAs are uncommon, occurring in roughly one-tenth of all agreements. But those that exist may have important effects on international trade flows. The trade-related provisions found in five MEAs are described in Box 2-3.

Box 2-3: Trade-related provisions in selected MEAs

The Basel Convention: Parties may only export a hazardous waste to another party that has not banned its import and that consents to the import in writing. Parties may not generally import from or export to a non-party. They are also obliged to prevent the import or export of hazardous wastes if they have reason to believe that the wastes will not be treated in an environmentally-sound manner at their destination. The Ban Amendment (see above) envisages a ban on all exports from OECD countries to non-OECD countries.

The Convention on International Trade in Endangered Species: CITES bans commercial international trade in an agreed list of endangered species. It also regulates and monitors (by use of permits, quotas and other restrictive measures) trade in other species that might become endangered.

The Montreal Protocol: The Protocol lists certain substances as ozone-depleting, and generally bans all trade in those substances between parties and non-parties. Similar bans may be implemented against parties as part of the Protocol's non-compliance procedure. The Protocol also contemplates allowing import bans on products made with, but not containing, ozone-depleting substances—a ban based on process and production methods.

The Rotterdam PIC Convention: Parties can decide, from the Convention's agreed list of chemicals and pesticides, which ones they cannot manage safely and, therefore, will not import. When trade in the controlled substances does take place, labelling and information requirements must be followed. Decisions taken by the parties must be trade neutral—if a party decides not to consent to imports of a specific chemical, it must also stop domestic production of the chemical for domestic use, as well as imports from any non-party.

The Cartagena Protocol on Biosafety: Parties may restrict the import of some living genetically modified organisms as part of a carefully specified risk management procedure. Living GMOs that will be intentionally released to the environment are subject to an advance informed agreement procedure, and those destined for direct use as food, feed or processing must be accompanied by documents identifying them.

Why do some environmental agreements incorporate trade-related provisions? The explanation will vary according to the circumstances of the agreement.

There are at least four reasons why such measures are sometimes considered necessary:

1. **Regulatory frameworks.** Participants in a market need to be confident that all others face comparable regulatory constraints, and that these are being implemented properly. Some constraints reflect the economic and social choices of consumers, and can be viewed as part of the normal conditions of competition. Others reflect scientifically-based environmental imperatives and must be respected to avoid severe and irreversible damage, irrespective of other priorities. Sorting out which constraints are mandatory for all market participants and which can be viewed as optional is one of the major tasks facing trade and environmental communities alike.
2. **Containment.** Sometimes, the practical requirements of administering environmental market disciplines impose a need to maintain certain borders. For example, imposing size limits on lobsters that are caught generally protects lobster stocks, but these limitations are enforced not on the boat but in the marketplace. In warmer waters lobsters mature faster, so a smaller size limit achieves the same conservation goal. As such, from a purely ecological perspective smaller lobster should be acceptable from colder water countries. But a trade panel under the U.S.-Canada Free Trade Agreement ruled that the United States may exclude smaller Canadian lobsters from its market because it could not maintain an essential conservation discipline without such a ban; it would be too difficult to prevent under-size U.S. lobster from being passed off in U.S. markets as Canadian. Similar reasoning can apply to hazardous wastes or toxic substances, both of which become increasingly difficult to control the further they are transported.
3. **Controlling markets.** Some products may have high demand but meeting that demand may destroy the resources on which they are based. It can prove difficult or even impossible to ensure that the scarcity value of these products is adequately reflected in the price or that the associated profits are distributed in a way that promotes rather than undermines conservation. Under these circumstances, an international structure of market control is required. This is the logic behind CITES and plays a significant role in the CBD.
4. **Ensuring compliance.** The threat of imposing limits on trade with non-parties can be an effective tool for securing greater compliance with MEAs than might otherwise be so. This was done in the Montreal Protocol. Clearly, it is important to ensure that the limits are neither arbitrary nor disproportionate; that is, they cannot restrict a substantial amount of trade to address a relatively limited environmental problem.

Trade law looks rather differently on trade measures taken for environmental purposes when they are taken pursuant to an MEA. But, in the end, a number of variables come into play, such as whether the measure in question is specifically mandated by the MEA, or not specifically mandated, but taken in pursuit of MEA objectives. This set of issues is explored in more depth in Section 5.5.

Suggested readings

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MEAs

Linkages: A multimedia resource for environment and development policy makers. IISD. <<http://www.iisd.ca/>>. This site has current coverage and archived reports of all key environment and development related meetings and negotiations.

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