MEAs in the WTO: Silence Speaks Volumes

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Abstract

This study contributes to the debate concerning the appropriate role of MEAs in WTO law, and in particular, in WTO dispute settlement. The distinguishing feature of the study is that it seeks to address the relationship between MEAs and WTO law in light of the reason(s) why the parties have chosen to separate their obligations into two bodies of law with hardly any cross-references. Such an approach is in our view warranted, since absent an understanding of the forces that drive the separation, recommendations concerning the relationship between the agreements may not adequately reflect the factual situation at hand. The general conclusion of the analysis is that legislators have largely been silent on the issue, and that this silence should speak volumes to WTO adjudicating bodies.

JEL Classification: F13, K32, K33, Q56
1 Introduction

The role of multilateral environmental agreements (MEAs) in the World Trade Organization (WTO) Agreement remains controversial. The most recent pronouncement on this score is that of the Panel on EC – Approval and Marketing of Biotech Products which dismissed the relevance of MEAs in WTO law altogether, unless if they have been signed by the totality of WTO Members. Commentators by and large criticized this decision which in the majority’s view rests on flimsy grounds.¹ There is thus a disjoint between the attitude of academia and that of WTO adjudicating bodies when it comes to the relevance of MEAs in the WTO.

The present study is a contribution to the debate concerning the appropriate role of MEAs in WTO law, and in particular, in WTO dispute settlement.² The distinguishing feature of the study is that it seeks to address the relationship between MEAs and WTO law in light of the reason(s) why the parties have chosen to separate their obligations into two bodies of law with hardly any cross-references. Such an approach is in our view warranted, since absent an understanding of the forces that drive the separation, recommendations concerning the relationship between the agreements may not adequately reflect the factual situation at hand.

The paper describes the legal landscape in Section 2, where we discuss in contextual manner the relevant passage from the Panel report on EC – Trade in Biotech Products. We explore the legislative (in-)activity at the WTO-level, paying particular attention to the discussions before the WTO Committee on Trade and the Environment (CTE), the natural forum for similar discussions. As it turns out, the CTE has made no substantive progress in tackling the relevance of MEAs in the WTO legal order despite many years of discussion. Against this background, case law has developed a rather cautious approach, scrupulously avoiding unambiguous pronouncements on this relationship: the WTO judge, be it at Panel or at the Appellate Body (AB) level, has refrained from using the few opportunities it has had to lay down the status of MEAs clearly. Besides lack of legislative guidance, the judge could also point to the fact that WTO Members have not made use of some obvious pathways that would guarantee recognition, such as a request to add some MEAs to the current body of plurilateral agreements, as reason to justify its cautious approach: silence by the framers of the WTO could indeed be interpreted as speaking volumes here.

Having described the current legal landscape in Section 2, we next reflect on the question of how MEAs should be treated in WTO dispute settlement. We start by asking the question why is it that MEAs are being concluded outside the confines of the WTO and what should the consequence of this decision be? In Section 3.1, we highlight some reasons why the parties would tend to benefit from a single agreement, whereas in Sections 3.2 and 3.3 we point to two different types of reasons for separation. One is that separation may enhance the bargaining position of certain countries – what we denote

¹See e.g. Howse and Horn (2009).
²Kennedy (2010).
as a “strategic” rationale. As explained in Section 3.2, in situations where countries’ interests with regard to trade and environment differ, some countries may be better off if the two areas are negotiated separately; for instance, developing countries are likely to be more able to resist demands for undertakings in the environmental area, if the latter is negotiated outside the WTO. The second reason for separation, expounded in Section 3.3, is to reduce the costs associated with negotiating complex agreements. “Contracting costs” can take several forms: administrative resources (labor time in particular) that are required to prepare and conduct the negotiations; the time to implement cooperation; the higher risk of breakdown. All these costs serve as strong incentives for the parties to simplify negotiations, and a means of doing this is to conduct separate negotiations on trade and on the environment.

In our view, it thus, seems intuitively plausible that the separation of trade and environmental agreements is the result of both strategic benefits that separation yields for certain countries, and costs of negotiating very large agreements. We believe that for these reasons a cautious attitude regarding the relevance of MEAs in the WTO legal order is quite appropriate for adjudicators to adopt. Additionally, if agreements are separated to save on contracting costs, the parties have refrained from coordinating their cooperation in the trade and the environment spheres. This may plausibly result in various inconsistencies across agreements. There is thus again reason for adjudicators to be cautious when bringing elements from MEAs into the WTO Agreement.

Caution is recommendable, but caution does not equate to closing the door to MEAs: we believe that MEAs could provide a useful source of information for the judge. To the extent that it is not overstepping its mandate, that is, to the extent that by having recourse to an MEA the judge does not alter the balance of rights and obligations between the WTO Members, it would be indeed beneficial for the system as such to profit from knowledge embedded in MEAs. Our overall conclusion, recapped in Section 4, is thus that recourse to MEAs should be function of the information contained therein, and less depend on the number of signatories.

2 The Status of MEAs in the WTO

2.1 The Legislators: Silence

2.1.1 MEAs are Not Covered Agreements

The obvious place to look for answers concerning the role of MEAS in the WTO is Appendix 1 of the DSU: this Appendix lists exhaustively the covered agreements, that is, the agreements that constitute the WTO sources of law, the law that WTO Members must respect as a result of their adherence to WTO. These agreements are the multilateral and plurilateral agreements that form the WTO Agreement. Noteworthy, no MEA features among them. Consequently, no MEA is a covered agreement.
It could be nevertheless that the WTO has entered into contractual arrangements and recognized MEAs as source of law. The *Agreement Establishing the WTO* sets the scope and functions of the WTO and recognizes the treaty making power of the WTO: Art. V in relevant part reads:

> The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.\(^3\)

Based on this provision, the WTO has accorded observer status to a number of institutions that deal exclusively or in part with environmental issues, such as the CBD (*Convention on Biodiversity*); CITES (*Convention on International Trade in Endangered Species of Wild Fauna and Flora*); the Basel Convention (*Control of Trans-boundary Movements of Hazardous Waste and their Disposal*); UNEP (*United Nations Environment Programme*), etc. Not only has the status been confined to that of observers. The GATT/WTO have on occasion been quite reluctant to do this.\(^4\) Still, granting observer status in essence does not entail much: in the overwhelming majority of cases it is tantamount to establishing a communication channel between the WTO and the observing institution. At any rate this is as far as the WTO has gone with MEAs.

The natural conclusion from the discussion so far is that MEAs are no source of current WTO law. A key point in understanding the relationship between MEAs and the WTO is the fact that adherence to the WTO does not require Members to pursue certain environmental policies. These instruments (like any domestic instrument affecting domestic and imported goods, such as public health-, tax policies etc.) can be set freely by WTO Members, provided that their policies respect, by virtue of Art. III GATT, certain constraints, including the two non-discrimination principles – the Most-Favoured Nation (MFN) and the National Treatment (NT) provisions (which call for the obligation that say the environmental policy decided by a WTO Member be applied to both domestic and all imported products without discrimination, as defined though the respective provisions).

### 2.1.2 MEAs in the Committee on Trade and the Environment

WTO Committees have the authority to adopt decisions of legal relevance. Eventually, similar acts can be formally adopted by the WTO organs entrusted with such powers and can complete or amend the existing legislative framework.\(^5\) The WTO Committee of interest to our discussion is the CTE. The CTE was established at the first meeting of the General Council of the WTO following the *Decision on Trade and Environment* adopted

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\(^4\)CITES was complaining for example, for lack of reciprocity since the WTO was invited as observer to participate in all CITES meetings, whereas CITES was invited to participate only in some of the WTO meetings. It was not invited to the, in its view, most important ones, such as the special session of the WTO Committee on Trade and Environment, where it managed to get an invitation under the unceremonious title “ad hoc observer”, see CITES, SC55 Doc. 9 of June 2, 2007; letter by Cristian Maquieira, Chairman of CITES Standing Committee of March 8, 2007 and response by Pascal Lamy of March 2007 (on file with the authors).

\(^5\)For a detailed discussion, see Mavroidis (2008).
in Marrakesh in 1994. It was requested to examine the need for rules to enhance the positive interaction between trade and environmental measures and on this basis make appropriate recommendations to the competent WTO organs. From its very first meeting it dedicated considerable time to studying the interaction between MEAs and the WTO. In the issued document following its first meeting, the CTE notes in §8 the large consensus in favor of multilateral solutions to address environmental concerns. This point by itself is evidence that the WTO Membership does not see a firewall between trade and environmental measures, but considers them as mutually supportive. The question is however, how can the two regimes interconnect? A number of proposals have been advanced to this effect before the CTE, which can be usefully divided into ‘legislative’ and ‘adjudicative’ initiatives. Among the former, WTO Members have expressed ideas ranging from modifying Art. XX GATT, to proposals ensuring effective participation of the trade and the environment community in each other’s meetings (§§9-21). Among the adjudicative proposals we note proposals for how to deal with disputes between WTO Members that are also signatories to a MEA, or where only one of the parties to a dispute is a MEA signatory, and what the forum (WTO or MEA) for such disputes should be (§§ 36ff.).

Fast forward to today: the Chairman to the WTO TNC (Trade Negotiating Committee) issued recently a report that summarizes the state of art in the relationship between trade and environment. The report calls for proposals to discuss in meaningful manner the relationship between specific trade obligations (STOs) included in MEAs and the WTO; the involvement of MEA-expertise in WTO dispute settlement proceedings without altering the balance of rights and obligations as struck by the WTO framers; the provision of technical assistance and capacity building in order to help WTO members with the implementation of STOs; standing information exchange mechanism between MEAs and the WTO; facilitation of granting observer status to MEAs in the WTO. One can easily appreciate that 14 years after its first report, the CTE continues to have a positive attitude towards MEAs but it has not managed to substantively advance the agenda. Virtually nothing of importance has been decided on the role of MEAs or environmental policies more generally in the CTE.

### 2.2 MEAs in WTO Case Law

WTO case law has repeatedly pointed out that domestic policies are set by WTO Members and not at the WTO-level – the WTO is in this respect a negative integration contract. At the same time, domestic instruments that affect trade (as is almost always the case) must respect the MFN and NT principles. Consequently, as long as adherence to MFN and NT has been guaranteed, WTO Members are free to pursue their environmental policies alone, or through an MEA.

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6 WTO Doc. WT/CTE/1 of November 12, 1996.
2.2.1 US – Tuna

In fact, the AB, the highest instance ‘court’ in the WTO, accepted as much in its landmark US – Shrimp report. This admission has not been an easy ride: during the GATT years, two Panels had outlawed legislation aimed at protecting dolphins caught in the nets of tuna fishermen, simply because the measure had been unilaterally decided. The US had enacted legislation (the Marine Mammal Protection Act) which required from all fishermen (domestic and foreigners alike), wishing to sell tuna in the US market, to observe a regulation that required them to fish for tuna using purse seine nets. This fishing technique guaranteed that the accidental taking of the life of dolphins would be highly reduced. The risk was particularly high in some areas, where tuna and dolphin swam together. The sea off the coast of Mexico is one of these areas. The government of Mexico protested that the measure at hand amounted to an unjustifiable restriction in violation of Art. XI GATT. The GATT Panel, having established a violation of Art. XI GATT, rejected the argument advanced by the US that the measure was consistent with Art. XX GATT (the general exceptions clause): in its view, this could not be the case when measures are enacted unilaterally because of the strain that regulatory diversity would impose on international trade. The Panel, in its report on US—Tuna (Mexico) outlawed thus the US measure (§ 5.27):

The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

2.2.2 US – Shrimp

The US – Tuna determination was overturned by the AB in its US – Shrimp jurisprudence. The US government enacted legislation this time to, at least allegedly, prevent the accidental taking of life of sea turtles, a species that was acknowledged as endangered species by a multilateral international convention, the CITES.8 The CITES, as mentioned above, prohibits trade in endangered species that come under its purview. The US went one step further and prohibited the sales of shrimps that had not been fished with TEDs (turtle excluding devices), a US technology that allowed sea turtles to swim out of the net where shrimps had been caught. TEDs were considered an effective means to protect the life of sea turtles, since sea turtles and shrimps often swim together. It later submitted empirical proof to the Panel to back up its allegations in this respect.9

Some producers/exporters of shrimps (Malaysia and Thailand leading the way) complained. In their view, the US law at hand was denying them market access rights,

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8 For the sake of accuracy, a number of categories of sea turtles have been acknowledged as endangered species.
9 See the discussion in Howse and Neven (2007), and Mavroidis (2000).
since the measure forced them to change their production methods, and thus to incur substantial adjustment costs, in order to serve the US market. Referring to prior GATT case law, the complainants challenged the consistency of the US measure with the GATT, arguing that it was inconsistent since it has been unilaterally defined. The Panel that dealt with this dispute followed the ruling on US – Tuna (Mexico), and condemned the US measure because of its unilateral character. The AB overturned the Panel, holding that, in the absence of transfer of sovereignty to the international plane, WTO Members remain free to unilaterally regulate their market, provided that they respect the relevant GATT disciplines; in other words, a measure would not be judged to be GATT-inconsistent, simply because it had been unilaterally defined (§ 121):

... conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply. (italics and emphasis in the original).

This finding has been consistently re-produced and emphasized in subsequent case-law: the AB, for example, in its report on US – Shrimp (Article 21.5 – Malaysia) held in §§ 137 – 138:

We recall that, in United States – Shrimp, we stated:

It appears to us ... that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply. (emphasis added)
In our view, Malaysia overlooks the significance of this statement. Contrary to what Malaysia suggests, this statement is not "dicta". As we said before, it appears to us "that conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX." This statement expresses a principle that was central to our ruling in *United States – Shrimp.* (italics and emphasis in the original).

As a result, it is now uncontested in WTO law that GATT condones *regulatory diversity.*¹⁰

In Horn and Mavroidis (2008) we argued that the purpose of the GATT is to harmonize conditions of competition *within* and not *across* markets. That is, the GATT requests that e.g. environmental policies are pursued in each country such that the conditions for market access are the same for imported and domestic products. But the GATT does not request that environmental policies should be the same in different Member states. Instead, each WTO Members is free to design its environmental policies to its own, including signing MEAs with other countries, WTO Members or not. At the end of the day what matters is whether the challenged environmental policy is GATT-consistent irrespective whether it is unilateral or if it takes the form of an MEA. In fact, the form is irrelevant: the fact that an environmental policy takes the form of an MEA should neither increase nor decrease the likelihood that it will be judged GATT-consistent.

### 2.2.3 EC – Approval and Marketing of Biotech Products

In *EC – Approval and Marketing of Biotech Products*, the EU (European Union) was called to defend its policies on GMOs (genetically modified organisms). The complainant argued *inter alia* that the EU had established a *de facto* moratorium against imports of GMOs. The EU justified its position on GMOs by referring *inter alia* to MEAs that in its view condoned its practice. We quote the relevant passage where the Panel rejected the EU arguments to this effect and the reasons behind the rejection (§§ 7.72-7.75):

> Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.

**(i) Convention on Biological Diversity and Biosafety Protocol**

With the foregoing observations in mind, we now consider whether the multilateral treaties identified by the European Communities are "relevant rules of international law applicable in the relations between the parties". The European Communities has identified two multilateral treaties, the *Convention on Biological Diversity* and the *Biosafety Protocol*. We first address the *Convention on Biological Diversity*.

¹⁰Irwin *et al.* (2008) find that this had always been the intention of the GATT framers., Horn and Mavroidis (2008) and (2009) explain how the concept has been applied ever since the advent of the GATT in case-law.
We note that like most other WTO Members, Argentina, Canada and the European Communities have ratified the Convention on Biological Diversity and are thus parties to it. The United States has signed it in 1993, but has not ratified it since. Thus, the United States is not a party to the Convention on Biological Diversity, and so for the United States the Convention is not in force. In other words, the Convention on Biological Diversity is not “applicable” in the relations between the United States and all other WTO Members. The mere fact that the United States has signed the Convention on Biological Diversity does not mean that the Convention is applicable to it. Nor does it mean that the United States will ratify it, or that it is under an obligation to do so. We have said that if a rule of international law is not applicable to one of the Parties to this dispute, it is not applicable in the relations between all WTO Members. Therefore, in view of the fact that the United States is not a party to the Convention on Biological Diversity, we do not agree with the European Communities that we are required to take into account the Convention on Biological Diversity in interpreting the multilateral WTO agreements at issue in this dispute.

Turning to the Biosafety Protocol, we note that it entered into force only on 11 September 2003, i.e., after this Panel was established by the DSB. Among the WTO Members parties to the Biosafety Protocol is the European Communities. Argentina and Canada have signed the Biosafety Protocol, but have not ratified it since. Hence, they are not parties to it. The United States has not signed the Biosafety Protocol. While this does not preclude the United States from ratifying the Protocol, the United States has so far not done so. Accordingly, it, too, is not a party to the Biosafety Protocol. We do not consider that the rules of the Biosafety Protocol can be deemed to be applicable to the United States merely because the United States participates in the Protocol’s Clearing-House Mechanism. It follows that the Biosafety Protocol is not in force for Argentina, Canada or the United States. We deduce from this that the Biosafety Protocol is not “applicable” in the relations between these WTO Members and all other WTO Members. As we have said above, in our view, the mere fact that WTO Members like Argentina and Canada have signed the Biosafety Protocol does not mean that the Protocol is applicable to them. In view of the fact that several WTO Members, including the Complaining Parties to this dispute, are not parties to the Biosafety Protocol, we do not agree with the European Communities that we are required to take into account the Biosafety Protocol in interpreting the multilateral WTO agreements at issue in this dispute. (italics in the original).

The Panel rejected the EU argument that it was required to take into account the invoked MEA, and the reason it offered was the discrepancy between the signatories of the MEA and the WTO Membership: since not all parties to the dispute were members of the MEA, the MEA was irrelevant to the dispute. The quoted passage is not very informative as to the sources that the Panel used to develop its reasoning: besides a reference to Article 31.3(c) of the Vienna Convention in the Law of Treaties (VCLT), nothing else is explicitly mentioned. This decision has been criticized for constructing the WTO in clinical isolation of public international law.11 The Panel probably used non-participation to the contractual arrangements by some WTO Members as an indication of the irrelevance of the arrangement in the WTO legal.

What if the Panel had made a broader analysis, checking for various sources of information regarding the status of MEAs in WTO, and reflected this thought pattern in the judgment? How would the judgment read then? This is what we propose in what comes next. We first recount the behaviour of the WTO framers: in 2.2 we explain that there is no direct regulation of MEAs in the WTO contract; we then quickly survey the work by the CTE and inter se agreements (that is, agreements between a sub-set of the WTO Membership) to conclude that the CTE has not managed to resolve this issue, and that some of the inter se agreements could have been used as platform to clarify the status of MEAs in WTO law and were not. In short, the behaviour of the WTO framers is

best described as silence, and it is silence that interpreters have been asked to decipher. We thus turn to a discussion of prior to the report on EC – Approval and Marketing of Biotech Products case-law that dealt with this issue in 2.3, only to conclude that, for various reasons, it would not have been of much help either. When ticking the boxes, then, the Panelists in EC – Approval and Marketing of Biotech Products would have to conclude that the WTO framers have been unwilling to decide this issue, and their predecessors in Panels followed suit.

2.3 Other WTO Agreements Between Subsets of WTO Membership

The WTO regime allows for certain arrangements between a sub-set of its Membership. In fact, various arrangements of the sort co-exist with the multilateral trading system and in what follows we provide what we believe is an exhaustive list.

**Plurilaterals:** The WTO is often referred to as the result of a *single undertaking:* this term denotes that trading nations, by virtue of their WTO Membership, had to adhere to all agreements coming under the WTO. The *single undertaking* approach was adopted during the Uruguay Round in order to avoid the situation that resulted from the codes-approach (or GATT à la carte, as it was widely known) followed during the Tokyo Round, where GATT contracting parties had varied legal relationships with each other depending on which of the Tokyo Round codes they had each signed. There is an exception to the single undertaking approach: so-called *plurilateral* agreements, Art. II.3 of the Agreement Establishing the WTO defines the legal status of these Agreements:

> The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them. (emphasis added).

The terms for participation in the Annex 4 Agreements are spelled out in each of the four agreements (Art. XII.3 of the Agreement Establishing the WTO), but they are anyway only open for accession to WTO Members, i.e. to states that have accepted all the multilateral agreements. Art. II.3 of the Agreement Establishing the WTO reads to this effect:

> The agreements ... (hereinafter referred to as 'Plurilateral Trade Agreements') are also part of this Agreement for those Members that have accepted them... (emphasis added).

WTO Members (Art. X. 9 of the Agreement Establishing the WTO) can, through *consensus-voting*, add a *trade agreement* to the existing list of plurilateral agreements:

> The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. (emphasis added).

Four WTO agreements qualify as *plurilateral* or Annex 4, agreements: the Agreement on Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement.
**Preferential Trade Agreements (PTAs):** WTO Members, that have satisfied the requirements included in Art. XXIV GATT, can justifiably treat products originating in WTO Members with which they have formed a PTA better than like products originating in the remaining WTO Members. They can thus, have recourse to *inter se* regarding preferential treatment of their goods.

**Recognition:** Recognition exists in two WTO Agreements dealing with trade in goods (TBT, *Technical Barriers to Trade*, SPS, *Agreement on Sanitary and Phyto-sanitary Measures*), as well as in the GATS (*General Agreement on Trade in Services*, Art. VII). Through (unilateral or mutual) recognition, WTO Members can have *inter se* agreements whereby they recognize each other’s standards as equivalent and thus, absolve participants from the obligation to undergo *conformity assessment* regarding goods.

**Export Credits:** The *WTO Agreement on Subsidies and Countervailing Measures* provides that government grants of export credits in conformity with the provisions of the *Arrangement on Guidelines for Officially Supported Export Credits* (Arrangement on Guidelines) of the *Organisation for Economic Co-operation and Development* (OECD) shall not be considered export subsidies. Annex I(k) of the SCM Agreement states:

[I]f a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

The “international undertaking” described is the OECD Arrangement on Guidelines; by virtue of its incorporation, it is, of course, a source of WTO law. So, according to this provision, a sub-set of the WTO Membership can negotiate separately and interpret the term *export credit* without having to seek approval of the WTO Membership and thus affect the understanding of the key term *export subsidy* for goods.

What implications can be drawn from this discussion? Most importantly, that WTO law contains a number of *inter se* agreements. Yet, some of the legal institutions mentioned *supra* would be ill equipped to serve as blueprints for the inclusion of MEAs in the WTO: one cannot have a lawful PTA for environmental goods only since substantially all trade must be liberalized; the non-application clause is also of no relevance since it means cutting off trade relations in general (and not simply with respect to environment unfriendly goods); in similar vein, recognition is not well-suited to our discussion or at best, this approach is of (very) limited value since it does not cover the negotiation of a new international instrument, which is typically the case of an MEA. It could cover rather atypical cases where an MEA is understood only as a form of coordination of unilaterally decided policies.

The most natural option would have been that WTO Members added MEAs among the plurilateral agreements, although MEAs are not outright trade agreements. They did not. WTO Members also gave the green light to a subset of the Membership to negotiate
disciplines on export credits at the OECD; they have not even started a discussion on this score about environmental agreements that could be negotiated in other fora away from the WTO.

It follows that, if at all, the lesson WTO judges should draw from the above was that caution concerning the relevance of extra-WTO arrangements is warranted, if not required.

2.4 MEAs in Case-law Prior to EC – Approval and Marketing of Biotech Products

There are very few cases dealing with the status of MEAs in WTO law before the Panel report on *EC – Approval and Marketing of Biotech Products*, and chief among them was the above-discussed AB report on *US – Shrimp*. Before the WTO Panel and the AB, the US accepted that its policies were in violation of Art. XI GATT and sought to justify them by invoking Art. XX(g) GATT: in its view, its measures (restricting imports of shrimps caught in sea turtle-unfriendly manner) related to the protection of *exhaustible natural resources*.

The question for the *US – Shrimp* Panel was whether living organisms qualify as exhaustible natural resources? At the Panel stage already, a number of invited experts referred to CITES in order to explain the conditions under which a species is included in the list of endangered species (and thus, becomes protected) and justified the inclusion of sea turtles in the lists. Both complainant and defendant in this case referred to CITES as authority for inclusion of sea turtles in the list of endangered species (§ 5.325). The Panel had the following reference to CITES(§ 7.58):

Both the United States and the complainants have referred to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Parties to the dispute are all parties to CITES and the turtles species covered by the US measures at issue are all listed in Appendix I (Species threatened with extinction). The endangered nature of the species of sea turtles mentioned in Annex I as well as the need to protect them are consequently not contested by the parties to the dispute. However, CITES is about *trade in endangered species* and the subject of the US import prohibition (shrimp) is not the endangered species whose protection is sought through the import ban. We also note that the United States has mentioned that CITES neither authorizes nor prohibits the sea turtles conservation measures which are at issue in this dispute. Therefore, we consider that CITES, even though its object is to contribute to the protection of certain species, does not impose on its members specific methods of conservation such as TEDs (italics in the original, footnotes omitted).

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12 There are other instances as well and most notably the report on *US – Shrimp (Article 21.5 – Malaysia)* where the AB referred to the *Rio Declaration on Environment and Development* to underscore a point that it had already decided, and where it explained that WTO Members have a duty to offer similar possibilities to sign MEAs to all WTO Members (§§ 122-130).

13 WTO Doc. WT/DS/58.

14 S. Eckert at § 5.19; J. Frazier, § 5.12; M. Guinea, § 5.60; H.C. Liew, §§ 5.68, and 5.114.
It is not crystal clear whether the Panel recognized the authority of CITES to regulate trade in endangered species; it did however, use CITES to decide that shrimps is not an endangered species. It further found that CITES did not request a certain type of measure for the protection of the turtles. The Panel then went on to conclude that living organisms could not be considered exhaustible natural resources in the sense of Art. XX(g) GATT: so, in light of this latter finding, reference to CITES was in the Panel’s view unwarranted anyway. In its appeal, the US argued that the ban on shrimps was justified because it was warranted in order to protect sea turtles.\(^{15}\) The US further argued that exhaustible natural resources (Art. XX GATT) should be interpreted in light of the relevant listings for endangered species contained in CITES. EU appearing before the AB as third party, underscored this point, stating its support for solutions to preserve endangered species through multilateral agreements (à la CITES) instead of unilateral initiatives (§ 72).

The AB adopted a two steps-approach: first, it asked the question whether living organisms could be considered exhaustible natural resources; second, having responded in affirmative manner to the first question, it asked the question under what conditions a natural resource should be defined as exhaustible? On both occasions, it made use of CITES in order to respond to the questions it had asked. First, the AB referred to the principle of 'evolutionary' interpretation in order to decide that indeed living organisms can be exhaustible natural resources.\(^{16}\) According to this principle, the interpretation of statutory language should be informed by relevant subsequent practice and/or agreement. The AB mentioned the CBD (Convention on Biological Diversity) and Agenda 21 in its report, two MEAs concluded outside the confines of the WTO, as sources of authority for the proposition that living organisms should be considered exhaustible natural resources in the sense of Art. XX(g) GATT; but it did not explicitly refer to them as subsequent agreements relating to the same subject matter in the sense of Art. 31 VCLT (§§ 130-131). This was maybe an oversight, or a voluntary omission, alas, we will never know. Had the AB explicitly referred to these MEAs as subsequent agreements, the legal path for bringing MEAs into the WTO legal system – as interpretative elements—would have been paved. Second, to respond to the question whether sea turtles are exhaustible, the AB referred to CITES on two occasions (§§ 132, and 135):

\[\text{We turn next to the issue of whether the living natural resources sought to be conserved by the measure are "exhaustible" under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The list in Appendix 1 includes "all species threatened with extinction which are or may be affected by trade."} \]

\[\text{...} \]

Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources. It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all

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\(^{13}\)WTO Doc. WT/DS/AB/58.

\(^{16}\)Art. 31 VCLT reflects this rule when referring to subsequent practice and agreements and obliging the judge to account for them when interpreting a legal text.
participants and third participants in this appeal, indeed, by the vast majority of the nations of the world. None of the parties to this dispute question the genuineness of the commitment of the others to that policy. (italics in the original, footnotes omitted).

In two footnotes in this last paragraph the AB justified its recourse to CITES: in § 120, the AB noted that, at the time of issuing its report CITES was counting 144 members, whereas in footnote 121 it recalled that all parties to the dispute (complainants and defendant) were also members of CITES. Yet, the AB did not explain whether it based its understanding of ‘exhaustibility’ on the fact that all parties to the dispute had conceded this point or on the fact that CITES so says. As a result, we are still in the dark as to whether MEAs are mere supplementary means of interpretation (in the sense of Art. 32 VCLT), recourse to which can be made at the discretion of the judge, or, conversely, whether they should be considered as subsequent agreements, in the sense of Art. 31 VCLT recourse to which is compulsory.17 At any rate, reference to CITES amounted to acknowledging this particular MEA as supplementary means of interpretation.

This dispute was not resolved by the issuance of the AB report. Complainants put into question the manner in which the US implemented the AB recommendations. At the compliance stage,18 the AB had yet another opportunity to refer to MEAs. In § 124 of its report, the AB referred to Principle 12 of the Rio Declaration on Environment and Development to underscore the point that multilateral solutions are to be preferred, without adding any further clarifications regarding the legal relevance of MEAs in WTO law.

2.5 Partial Conclusions

The discussion so far points to two conclusions concerning the attitude of the WTO Membership with respect to the placement of MEAs in the WTO legal order:

(a) WTO Members have not explicitly addressed this issue, neither when designing the WTO nor in subsequent practice ever since;
(b) Although various contractual arrangements have seen the light of the day in order to accommodate inter se agreements under the aegis of WTO law, WTO Members have yet to extend their coverage to environmental issues as well.

Under these circumstances, it is not surprising that WTO adjudicating bodies have shown a relative reluctance when addressing this issue. The two reports examined in detail (US – Shrimp, EC – Approval and Marketing of Biotech Products) share a cautious attitude towards MEAs: even the seemingly MEA-friendly AB report on US – Shrimp did not go the full nine yards and resolve this issue once and for all. The adjudicators behaved like true agents in these cases when confronted with an issue left unresolved by

17 Similarly, in footnote 174, the AB states that: “While the United States is a party to CITES, it did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by states. In this context, we note that the United States, for example, has not signed the Convention on the Conservation of Migratory Species of Wild Animals or UNCLOS, and has not ratified the Convention on Biological Diversity”. Does this mean that had the US done just that, it would oblige the AB to take it into account? It is hard to tell, but this is yet another argument in favour of constructing MEAs as relevant subsequent agreements.

18 WTO Doc. WT/DS/AB/58/RW.
their principals: even a fast perusal of the CTE documents cited above evidence the reluctance, if not hostility altogether, of many WTO Members to bring MEAs within the WTO house of law, and an open arms attitude by others. Adjudicators have thus responded with murmurs to legislative silence.

There is a difference between the two reports though, a marked difference. EC – Approval and Marketing of Biotech Products implicitly suggests a necessary condition for acknowledging the relevance of MEAs into the WTO legal order: when all WTO Members are party to it; whether this is a sufficient condition for the Panel is unclear. But the report does not address the question of how to view the fact that the MEA is negotiated outside the confines the WTO. US – Shrimp used MEAs as supplementary means of interpretation: it is for the judge to decide when it is appropriate to borrow from an MEA and when not. We believe this is the right approach, and in what follows we explain under what circumstances recourse to MEAs could be useful to the WTO adjudicating process.

3 How Should MEAs Be Viewed in WTO Disputes?

In the previous Section we established how WTO Members have included various inter se agreements in the WTO Agreement. We now turn to the question of how MEAs should be treated in the WTO. Our starting point is the observation that WTO Members have chosen not to use the possibilities to bring MEAs into the WTO that seemingly exist. In order to pronounce on how a WTO judge should view MEAs under the WTO Agreement we therefore believe that it is necessary to first understand:

(a) why there are separate trade and environmental agreements? and
(b) why the relationship between these separate agreements is not explicitly laid down in the agreements?

As we explain in Section 3.1 infra, there are several reasons why the parties would benefit from having a single agreement that regulates all issues of mutual interest. The answers to questions (a) and (b) above must hence point to forces that are strong enough to dominate these gains. Drawing on the economic literature, we will identify two broad plausible reasons for the separation of trade and environmental agreements. Section 3.2 explains why separation could be justified by the strategic gains for certain, and Section 3.3 argues that separation could reduce negotiating costs. Section 3.4 explains, in light of the analysis in the two preceding Sections, when, and under what circumstances, recourse to MEAs should be encouraged.

3.1 Reasons for a Single Agreement

One can identify at least three broad advantages with a single, rather than with separate agreements:

(a) it may allow for better enforcement;
(b) it may save on fixed costs; and
(c) it may allow for linkages between concessions in policy areas that would otherwise be addressed through different agreements.
We will say a few words about each.

A first advantage of forming a joint trade and environment agreement is that a single agreement may *enhance the possibility to enforce* obligations. For instance, it is often argued that while an environmental agreement may be hard to enforce on its own, since there are no means of targeting an individual deviator from say a climate agreement through the withdrawal of undertakings concerning the climate. It would therefore be much easier to enforce an environmental agreement if this could be done through the treat of withdrawal of e.g. tariff concessions. A fair amount of research has been done on this form of benefit from linkages, but since we will not focus on enforcement aspects in what follows, we do not delve into this literature.\(^\text{19} \text{20}\)

A second advantage with a single agreement is that it *reduces duplication of certain efforts* that are required in connection with negotiating and administrating agreements. To take an extreme example, it would be possible for each pair of countries to negotiate separate agreements for each tariff line and for each trade direction. However, this would be extremely costly since each of a tremendous number of agreements would require the negotiation of certain provisions that are also found in the other agreements. It would also be extremely costly to maintain a separate dispute settlement mechanism for each such agreement. Furthermore, the quality of adjudication would likely be lower, given the very few cases that each dispute settlement system would adjudicate. The decision, consequently, to form an agreement containing a package of tariffs saves on administrative costs, and enhances the quality of the cooperation.

A third type of benefit from a single agreement on trade and environment is that it would *allow for linkages between concessions* in the two areas, thus allowing countries to go further in their cooperation than it would have been possible, if separate agreements had been formed instead.

There are two distinct aspects here. First, by merging negotiations, the parties may *overcome lack of, or costly, side payments*. The following two–country example illustrates this benefit: Home imposes an import tariff on a product X that is exported by Foreign. Loosely speaking, the tariff benefits Home less than it costs to Foreign, and is hence “internationally inefficient.” There is thus in principle scope for a mutually beneficial exchange, where Home reduces its tariff in return for some compensation from Foreign. For product Y the roles of the parties are reversed. One possibility would be to have separate agreements, and to let the compensation in each agreement take the form of a monetary (or some other) transfer. However, this would be costly, since the taxes would distort the economies, and there would also be collection costs. In addition, it would require the parties to determine the monetary value of their tariff reductions, which may be complicated. An alternative would have been to exchange concessions, thus avoiding (or at least reducing) the need for financial transfers in order to exploit

\(^{19}\) For discussion and analyses of the enforcement aspect, see e.g. Copeland and Taylor (1995), Barrett (1997), Abrego et al. (2001), Ederington (2001), and Limão (2005).

\(^{20}\) The same problem may actually appear with trade agreements when the bilateral trade relations are highly unbalanced, since it is not possible to withdraw concessions for someone that does not import your products; see Maggi (1999). See also Bernheim and Whinston (1990, sect 5).
the gains from trade. This is of course a main reason why trade agreements contain packages of tariff concessions.

The same mechanism could be at work for the two countries also on the environmental side. In their decisions on abatement levels, each country disregards the benefits of their abatement efforts for the other country, and as a result they both abate too little from the perspective of their joint interests. They could in principle negotiate two separate agreements, one for each country’s abatement, where the polluter is paid in order to increase abatement. But the chosen path is instead to let the payment take the form of reciprocal undertakings to reduce emissions, with a package of such exchanges forming the core of an MEA.

Reciprocal exchange of concessions requires however, that the parties have something to give in exchange for receiving concessions, and sometimes such means do not exist, or are too costly to allow countries to fully exhaust the possibilities for international cooperation. In terms of the example, suppose that Home is exposed to Foreign’s emissions, but that Home does not pollute the environment itself. There would then be no scope for an environmental agreement, despite the fact that Home would in principle be willing to compensate Foreign for polluting less. Or, on the trade side, even if free trade is jointly preferable for the two countries, Home may prefer unilateral setting of tariffs to free trade, if it has sufficiently more market power in the world market compared to Foreign.21 A negotiated exchange of tariff reductions will then not take the countries all the way to free trade, despite this being jointly optimal outcome for the two countries, if Foreign cannot compensate Home enough through a tariff concession to induce Home to liberalize completely. In either of the two sketched situations, it would be possible to go further in terms of international cooperation if trade and environmental negotiations were to be conducted together (unless the smaller country from a trade point of view is also the polluting country), since the resulting linkage serves as a substitute for side payments. This is the third reason for forming a single agreement on trade and the environment.

To conclude, there are several important sources of gains from forming a single agreement. If countries nevertheless choose to have separate agreements, there must be considerable gains from doing this. In what follows we will point to two plausible types of benefits from separation.

### 3.2 Separation for Strategic Reasons

Many studies of negotiations employ “non-cooperative” bargaining theory. This approach requires the analyst to give a detailed description of how the interaction between the parties takes place over time, including all possible developments of the game, how and when each party can make and accept bids, and when an agreement can be implemented. Applying non-cooperative bargaining theory to shed light on the role of the separation of negotiations, one quickly notices that the notion “separate agreements” could be given many meanings. For instance, each of the following

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21The observation that larger countries may benefit from a “trade war” dates back at least to Johnson (1953-4), and has been developed further by e.g. Kennan and Riezman (1988), and Syropoulos (2002).
bargaining formats captures a different meaning of “separation” of agreements, in a situation where tariffs and environmental instruments are negotiated:

(a) One area (say tariffs) is negotiated first, and, only when an agreement on tariffs has been reached, is the other area (abatement levels) negotiated;
(b) Both areas are negotiated simultaneously, but through separate negotiating processes (so that a bid is a set of tariffs in the trade negotiations, and a set of abatement levels in the environmental negotiations, but where there are no combined offers made). There is immediate implementation of an agreement in one area even if negotiations are on-going in the other area;
(c) Both areas are negotiated simultaneously, but through separate negotiation processes (so a bid is either a set of tariffs, or a set of abatement levels, but not both). Implementation only occurs when there is agreement in both areas.

A typical finding in the literature is that differences in bargaining format may have profound impact on the outcome, in terms of e.g. the distribution of the surplus from the cooperation. The mechanisms behind this feature are often rather subtle. Just to give a couple of indications of the type of aspects that these models capture, suppose first that in a situation where two countries are to negotiate, one country stands a lot to gain from a trade agreement, and therefore is anxious to see it implemented as soon as possible. This country would be rather weak in the environmental negotiations in a case where implementation of the trade agreements awaits an agreement on the environment. Hence, the other party will have an incentive to try to enforce such bargaining format. Or, to take another example, countries for which environmental commitments are costly may prefer to keep environment outside the trade agreement, in order to avoid having their environmental concessions being enforced through potent trade countermeasures.22 23 While these are just examples, they illustrate the more general finding that certain countries may benefit from imposing separate negotiations (and agreements) over related issues – what we will denote as “strategic” benefits from separation.

The strategic gains-explanation critically rests on the assumption that the parties cannot make “side payments” through other means than the trade and environmental policy instruments that are being negotiated, or at least that such transactions are costly. To see why, note that even though the separation of agreements may yield strategic gains to certain countries, these gains come at a cost to the parties as a whole, since separation implies that the benefits from having a single agreement are foregone. That is, the strategically acting country gets a larger piece of the cake, but the cake as a whole shrinks in the process. It would therefore, in principle, be possible for the parties to form a single agreement that would be better for the parties as a group. If nothing else, they could have the two areas in the same agreement just to avoid duplication of some fixed costs, but without any other interaction between the areas. The reason they do not do

22 The analysis of Horstmann, Markusen and Robles (2005) captures similar rationales.
23 Busch and Horstmann (1997, 2002) show how a party may benefit strategically from negotiating one area before another, when the bargaining friction is discounting, and the areas differ in that one area is potentially more important than the other to the party. For other analyses of the role of bargaining formats, see e.g. Conconi and Perroni (2002), Fershtman (1990), Horn and Wolinsky (1988), In and Serrano (2004), and Inderst (2000).
this is the assumed lack of means of inducing the parties that benefit from a separation of agreements, to accept a single agreement.

Applying the reasoning above, suppose (reasonably) that developing countries would lose from incorporating environment into the WTO. Because of the factors mentioned supra, richer and more environmentally ambitious Members should then be able to compensate developing countries for accepting environmental regulations in the agreement. In order for this not to occur, the richer countries must be unable to make concessions on trade issues that would suffice to compensate the developing countries for their concessions on environment.\(^{24}\) In addition, there must not be any other means of compensating developing countries, such as e.g. monetary transfers.

The assumption concerning like of “side payments” is not innocuous. Witness for instance the promised huge transfers to developing countries both through the aid-for-trade program in connection with the WTO Doha Round negotiations, and for environmental investments through the 2009 Copenhagen Accord. Monetary side payments are hence sometimes used in both trade and environmental negotiations. But it seems safe to say that countries normally do not use side payments, at least not in monetary form. One likely reason is that such transfers require parties to undertake more elaborate calculation of the costs and benefits of e.g. a tariff reduction than required when paying with concession of the same kind. This difficulty of calculating the value of concessions is reflected in the fact that in the GATT/WTO, reciprocal tariff reductions are not seen as promises concerning specific trade outcomes, but as promises with regard to a specific treatment of imports. The assumption that there are no side payment possibilities, which is central to the strategic motives explanation for separation, hence seems reasonable as a first approximation.

### 3.3 Separation to Save Contracting Costs

It is tempting to see international negotiations in areas such as trade and the environment as an antagonistic haggling over how to distribute the costs and the benefits of trade liberalization and environmental protection. We believe that this view does not accurately describe the role of negotiations, however. Of course, one aspect of negotiations is to divide the benefits that the international cooperation will bring. But it is rare that a “cake” of known size and properties lies on the negotiating table as negotiators enter into the negotiations. No one knows how to design a single agreement that addresses all relationships between countries with regard to trade and to the environment (as well as any other externalities that may exist); indeed, to design such an agreement would essentially amount to central planning at a global scale. A central role of negotiations is therefore to identify packages of concessions that would benefit all parties. That is, negotiators do not only divide the cake, they also largely “bake” it, and this can be very costly.

Our second, possibly complementary, explanation for the separation of agreements builds on the existence of such contracting costs. It does not have as solid theoretical

\(^{24}\)This could in principle be the case if developing countries are already receiving sufficiently favourable terms of market access, or if they expect that their preferential treatment will be eroded through subsequent reductions of trade barriers facing other richer countries.
support as the strategic gains explanation, but it is inspired by the incomplete contracts literature, and in particular the literature on contracting costs. The basic idea is that when the parties form agreement(s) they not only take into consideration the benefits that the various possible agreements yield from reduced international externalities. They also have to take account of the fact that negotiating and implementing agreements is costly; for the reasons just described it may therefore be desirable to forego the gains from very elaborate agreements if such agreements are very costly to bring about, and instead settle on cruder, but cheaper agreements.

There are two obvious forms of costs from international negotiations. First, it requires administrative resources, both at the negotiating table, and in ministries and governmental agencies of the parties, in particular in the form of labour time. Second, negotiating a large agreement takes time, implying that the parties have to wait before they can enjoy the fruits of their cooperation – in economic jargon, there is a welfare loss due to the discounting of the future benefits from the agreement. There are of course ample actual examples of extremely protracted negotiations in both the trade and the environment area. These delays stem partly from technological constraints, in the wide sense of the term, such as the time it takes to exchange messages, to travel, etc. But limitations of the human cognitive capacity clearly add to both the time and the administrative resources that are required, since it requires time to draft and to evaluate proposals, to consult with capitals, etc.

The literature on incomplete contracts has highlighted several ways of reducing contracting costs: Contractual bindings can be rigid rather than conditioned on changes in the economic environment, an example being tariff bindings that apply irrespective of changes in demand and supply conditions. The agreement may also lack bindings, and instead leave discretion over certain policies to the parties; for instance, the GATT leaves discretion over domestic instruments to the Members. In addition, contractual provisions may be expressed vaguely in order to save negotiators the time required to draft more complete instructions for future adjudicators. All these means of saving on contracting costs imply that the agreement becomes incomplete in various ways.

A central idea in this paper is that separation of negotiations offers an additional way of saving on contracting costs. In particular, negotiations over a single, complete agreement that comprises both trade and environment would obviously be extremely

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25 It seems conceivable that areas that are more complex in the sense explained above not only take longer time to negotiate, but may also be associated with higher risk of breakdown. An additional form of benefit from separation of agreements may then be reduced risk of breakdown of negotiations.

26 This is denoted the “writing costs” approach in the literature on the foundations of incomplete contracts, and dates back to Dye (1985), at least.

27 Horn, Maggi and Staiger (2010) suggest how rigidity and discretion in the GATT can be understood from a contracting cost perspective.


29 Other reasons why contracts may be incomplete that have been pointed to in the literature on the foundations of incomplete contracts include the difficulty to verify to third parties (such as adjudicators) contingencies that a contract should be conditioned on, and the inability of the parties to foresee all relevant contingencies. The main critique against the “writing costs” approach is that it is sometimes unclear whether the magnitude of the contracting costs are important enough to explain the observed incompleteness of contracts. This critique seems less relevant in the present application.
costly. By negotiating separate agreements in the two policy areas the parties more quickly conclude the negotiations. It will likely also save on administrative resources, since resources will not have to be spent on the coordination across issues. Of course, the cost savings come at a price: the parties have to forego any benefits from coordination, such as those pointed to in Section 3.1. The Appendix provides a simple example that illustrates how the pure “combinatorics” of handling a large number of different potential agreements may make it exceedingly costly to have a single agreement covering both trade and the environment.

The significance of the time factor for the formation of international agreements is vividly illustrated by the experiences in the GATT/WTO negotiation rounds. There has been a marked tendency for the rounds to take increasingly longer time to conclude, and at the same time, the agreements have become more and more complex, both in terms of the issues addressed, as well as the number of participants involved in the negotiations. The Tokyo Round negotiations took six years to complete, the Uruguay Round negotiations took approximately eight years, and now the Doha round negotiations are in their 10th year, and currently looks bound to fail. Although it can be debated whether each round has been more complex than the preceding round, it seems clear that the overall trend has been towards increasingly more complex negotiations, in terms of both subject matter, the nature of issues discussed, and the number of participants. It seems highly plausible that this general increase in complexity explains the increasing time it takes to conclude the rounds. The increasing time that I required in order to implement the agreement is clearly a significant source of costs for Members.

It is harder to assess the magnitude of the administrative costs that would be required to negotiate a single agreement on trade and the environment. What is clear though is that the costs would be extremely large. Already the negotiation of the WTO Agreement in the Uruguay Round stretched the negotiating capacity of many developing countries to the limit, and some claim beyond it.

While it is almost a triviality to state that negotiations take more time the more complex they are, it is much more difficult to point to the exact reasons why the separation of negotiations allows the parties to reach agreement faster. While a lot of research has been devoted to understanding the role of cognitive limitations for e.g. the design of contracts, there is no generally accepted formal approach to describing this often emphasized phenomenon. Furthermore, existing attempts are typically highly abstract, and typically wrought with conceptual problems. There is therefore no readily available model for us to use to illustrate the complexity issue.

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30An example of how the benefits of parallel negotiations are exploited is the Doha Round negotiations, some 30 different negotiations run more or less in parallel. It would quite obviously take significantly longer to conclude the round if these different issues had to be negotiated sequentially. But there is an important difference between conducting parallel negotiations within the WTO, and separating trade and environment negotiations: in the WTO, once the separate negotiations have been gone far enough to crystallize the points of disagreement, negotiations move to a higher level and are then conducted across issues. Ultimately, there is a single undertaking that specifies all the legal significance of all parts of the agreement. The parties can then make trade-offs between areas, allowing them to at least partly exploit the type of coordination gains that were pointed to above.

31 See e.g. Segal (1999).
Finally, there are of course many ways in which negotiations could be separated. For instance, one could in principle have one agreement on the most important issues on the trade side for some parties, combined with the most important issues on the environmental side for other parties, in order to have a “high stake” agreement, and then let remaining issues be addressed in other agreements. In order for our theory to be plausible, it should also propose a plausible reason why there is a trade-environment divide. What then explains the particular form of separation that has been chosen?

A first important factor is the possibility to *save fixed costs by merging bindings of certain categories of bindings*. For instance, an agreement on a tariff binding requires a significant amount of supportive obligations concerning customs valuation procedures, import licensing etc. These supporting rules would have to be negotiated separately for each agreement, but could be used across tariff lines within an agreement. But they would for the most part not be useful in an environmental agreement. Similarly, each agreement that binds e.g. the use of ozone-depleting substances requires rules concerning measurement, verification, etc., but these rules could be applied with little adjustment to a large number of different substances. But they would not be of much use for a tariff agreement.

A second factor that plausibly adds to explains the trade/environment divide is that *the costs for negotiating exchanges of concessions are likely to be lower, the more similar they are*, since this seems to ease the comparability of potential concessions (although it

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32To illustrate the type of problems that arise, note that we have argued that the countries rationally decide to separate negotiations in order to avoid having to identify different cross-issue coordination gains. But how can they know what they are foregoing due to the separation without already having identified the possible outcomes of a negotiation over a single agreement? Our reasoning shares this feature with most other attempts to formalize some notion of either bounded rationality, or complexity cost, when the parties take their limited understanding of the situation into account. To quote Tirole (2009, p. 263): “...parties are unaware, but aware that they are unaware.”
should be said that the exact mechanism is unclear). This feature is accentuated the more specialized is the knowledge that is required for the negotiations.

To conclude, although formal models are still largely missing, it seems highly plausible that the costs in terms of administrative resources and delays, of negotiating and implementing an agreement that encompasses both trade and the environment, are too large for such a grand agreement to be viable.

### 3.4 Using MEAs to Fill Gaps in the WTO Agreement

In the above we have identified two reasons why countries have separate agreements in the trade and the environment areas, despite the advantages that a single agreement would yield. We would now like to explain, in light of these reasons for separation, why there are gaps in the respective agreements that make it possible to draw on one agreement when adjudicating under the other. Unfortunately, this second step is much harder to take than the first. From an economic theory point of view, we are concerned with simultaneous occurrence of contractual incompleteness in related contracts. We are not aware of any theory that would help us to identify the manner in which such contractual incompleteness of the WTO Agreement could be addressed in an efficiency-enhancing way by drawing on MEAs. We therefore have to be speculative when drawing inferences for this issue based on the explanations for separation expounded above.

To fix ideas, we will discuss in terms of an example. A domestically produced product competes with an imported product that is identical to the domestic product from the buyers’ point of view. The importing country levies a consumption tax that it claims aims

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33 To illustrate, consider the following pair of offers:

**Offer 1A:** “We will lower the tariff on motor vehicle seats by 13% if you lower the tariff on snow skis by 15%.”

**Offer 1B:** “We will reduce emissions of the substance CH2FCl4 by 80% if you reduce emissions of the substance C2H2F3Cl by 75%.”

Compare these with the following pair of offers:

**Offer 2A:** “We will lower the tariff on motor vehicle seats by 13% if you reduce emissions of the substance C2H2F3Cl by 75%.

**Offer 2B:** “We will lower the tariff on snow skis by 15% reduce emissions of the substance CH2FCl4 by 80%.”

It seems highly plausible that Offers 1A and 1B would be more easily evaluated than Offers 2A and 2B: the suggested concessions in the tariff reduction offer can be evaluated in terms of e.g. how much export sales of skis will increase compared to how much import-competing producers of motor vehicle seats will reduce their sales. Similarly, the costs and benefits of the two proposed reductions of emissions of the ozone-depleting substances in offer can be compared. However, it is much less clear how to compare the market access gains in say skis and the costs and benefits of having to reduce C2H2F3Cl. (The two products are defined at the 6-digit Harmonized System level -- motor vehicle seats being HS 9401.20 and snow skis being HS 9505.11 -- which is the level at which tariff bindings are bound in the WTO Agreement. And the two substances are among the ozone-depleting substances that are controlled through the Montreal Protocol (Annex C)).

34 In terms of the example in the previous footnote, a negotiator, or more plausibly, the negotiator’s Ministry of Commerce, may have a certain understanding of the economic and political trade-offs that are involved if market access in motor vehicle seats is exchanged for market access for skis. But they will have little idea about the nature of trade-offs that are involved with regard to the substances C2H2F3Cl and CH2FCI4. Similarly, the experts negotiating bindings of these substances, or their backing agencies, may understand their national environmental impact, and the costs that concessions would involve. But they have no understanding of the considerations determining the evaluation of tariff proposals.
at targeting heavily polluting production processes. This scheme imposes a tax of $X per ton of emissions of certain substances that are emitted during the production of the product, but only applies to production processes that emit more than $Y$ tons per unit of output. This tax scheme is hence de jure origin neutral. But it so happens that the domestic production process emits less than $Y$ tons, while more than $Y$ tons are emitted in production of the imported product. Hence, only the imported product is burdened with the tax – the tax could be held hence to be de facto discriminatory. Both countries are WTO Members. They are also signatories of an MEA that regulates emissions of greenhouse gases. It stipulates that the environmental problem should be combatted, but does not specify the specific policies that should be used to achieve this. Suppose that the exporting country files a complaint to the WTO, arguing that the taxation of the imported product violates Art. III.2 GATT. What could be the role of the MEA in this WTO dispute?

Necessary for the measure to violate Art. III.2 GATT is that the products are like, or directly substitutable or competitive. We focus for simplicity on the likeness criterion. As we discuss at length in Horn and Mavroidis (2004), and in Grossman et al (2011), a common approach is to claim that likeness is “determined in the market place.” On this interpretation, we can establish a violation of Art. III.2 GATT, since the products are “like” (being identical from consumers’ point of view), and since only the imported product is burdened with a tax. The dispute would then move to Art. XX GATT: to be granted an exception under this provision, the importing country must demonstrate that the challenged measures do not constitute “disguised protection,” but are instead “necessary to protect plant, animal or human life or health,” or that they are “related” to the preservation of a natural resource. An alternative, but perhaps less likely approach to evaluate the compatibility of the measure with Art. III GATT would be that the policy context is also deemed to matter for the degree of likeness, as suggested by the AB reports in EC – Asbestos and Dominican Republic – Import and Sale of Cigarettes. Panel35 However, regardless of the chosen path, the judge is highly likely to have to address the question of whether the measure does not overly burden the imported product, given its environmental significance. Panel

### 3.4.1 If Separation is for Strategic Reasons

As explained above, one plausible reason for the separation of cooperation into trade and environmental agreements is the strategic benefits this may yield for some countries. While the current structure of international agreements can in our view partly be explained by strategic considerations, the models we have drawn on do not as they stand explain gaps in agreements. Most of this literature considers situations where is full information. It would in such settings normally be beneficial for the parties to negotiate all aspects of their interaction, in which case there would not be any gaps to fill by drawing on other agreements. It is possible though, that gaps could be explained by some form of strategic use of information asymmetries, but we are not sure how plausible such explanations would be.

35 If the Panel finds an Art. III GATT violation, the case could still move to Art. XX GATT.
It still seems however, as if strategic considerations for separation could be important, even if we cannot rely on them to explain the incompleteness of the agreements. For instance, strategic rationales may explain why exporting country may not agree to have an environmental provision in the trade agreement: the importing country may use this as a legitimate rationale to restrict imports of the product under such an agreement. The exporting country could still accept an obligation regarding the substance in an MEA, for instance if it expects that the MEA would not have legitimacy under the trade agreement, and would not be enforced in other ways. Alternatively, it may intend to meet its obligation through the reduction of some other substance that is not emitted in production for exports. What the strategic rationale for separation does not explain however, is why the trade agreement does not explicitly exclude the possibility to draw on MEAs. Hence, such an approach does not explain why a situation may arise where one agreement could somehow be used for adjudication under the other agreement.

In the example, it may or may not be desirable from joint efficiency perspective to allow the importing country to maintain the import restriction. But if in a dispute a Panel were to accept the importing country’s measure on the basis that both countries in the MEA have accepted the need to reduce emissions of the substance contained in the imports, the distribution of the surplus between the parties may be affected to the advantage of the importing country (depending on what decision it would otherwise make). If so, it would seem to violate the balance of rights and obligations to the detriment of the exporting country under the WTO Agreement.

The more general observation is hence that if strategic considerations explain why the agreements are separated, there is a clear risk that the outcome of the negotiations would be seriously affected, if adjudicating bodies were to let the verdict in a trade dispute be importantly affected by provisions in the MEA that were deliberately left outside the WTO by some party.

3.4.2 If Separation is to Save Contracting Costs

Our alternative explanation for the separation of agreements, and for the incompleteness of the agreements, builds on the existence of contracting costs. How should MEAs be dealt with in WTO adjudication in such an instance? Because of the contracting costs, WTO Members would then have refrained from working out the relationship between obligations in the two sets of agreements, and furthermore, having done this without leaving any guidance to judges concerning if and how to take account of MEAs when adjudicating WTO disputes. Superficially, it may seem as if it would not add much to contracting costs to include a provision stating the relevance of the MEA for WTO adjudication. However, the inclusion of such a provision may have far-reaching consequences if it means that the trade obligations are to be interpreted in light of the MEA. The reason for the separation of agreements – to save on costs by abstaining from negotiating the relationship between trade and environmental obligations – hence suggests that the judge may face a difficult task when seeking to determine what is in the joint interest of the parties.
3.4.3 Why MEAs Could Still Be Relevant

Our conclusion above is thus that both two sets of explanations for the separation of agreements that we have identified suggest that WTO judges should be very cautious when using MEAs in WTO disputes: if separation is for strategic reasons, some party have deliberately caused the separation in order to benefit, and if the separation is for contracting cost reasons, the parties themselves have refrained from working out the exact relationship between the agreements. Does this mean that MEAs should be completely irrelevant in WTO disputes? In our view, no, there are ways in which they could serve a useful role. It is not easy to delineate exactly what this role is, but perhaps one could here distinguish between letting MEAs impose disciplines on WTO members, and to use MEAs as sources of factual information.

For instance, assume that a complaining country argues that the substances that the importing country targets through a contested measure are actually harmless, and that they are simply used as a pretext to tax imports. Of course, the WTO Agreement does not specify whether the targeted substances are harmful, or whether they are more or less harmful than other substances. There is in this sense a gap in the WTO Agreement. But the MEA may contain information on this: it is a specialized agreement, addressing more or less directly the question of the danger of various substances (even though formally it is not lex specialis). Hence, WTO judges can obtain information concerning the nature of the combatted substances from MEAs.

Note also that the judge would on this interpretation not import obligations that are imposed through the MEA – emissions reductions, say – but would only draw information concerning factual circumstances from the agreement. This is not a trivial legal point, but indeed the key legal and policy issue across sceptics who discourage use of MEAs and therefore deserves some additional explanation: The VCLT points to certain elements that help interpret the WTO contract, that is, to the sources of law of the WTO: the AB could, for example, use an MEA to make the point that sea turtles are an exhaustible natural resource, that can be protected by virtue of Art. XX(g) GATT. In similar scenarios, the AB is not applying an MEA provision in a dispute between two WTO Members that could or could not be participants to the MEA; it uses the MEA to interpret Art. XX(g) GATT. A distinction thus can legitimately be made between application and interpretation of a treaty provision, and the point here is that even if we conclude that MEAs are no WTO source of law and cannot thus be applied in the context of a WTO dispute, they might still be relevant as interpretative tools of specific WTO provisions.36

We thus, believe that it should be possible to draw on a MEA in a dispute even if there is an incomplete overlap of the respective memberships, and even if not all parties to the dispute are signatories to both agreements. What matters is the nature of what is being incorporated from other agreements.

Finally, an important factor when evaluating MEAs is the credibility of the information that is being imported. The more signatories there are, the more likely it seems that

whatever is agreed upon, reflect a general understanding. This is an extra reason why the multilateral feature of MEAs is important.

4 Conclusions

There is a fairly widespread view among the legal profession that awaiting action by WTO Members, MEAs should be made increasingly relevant in WTO law through adjudication. The starting point of this study has been the treatment of MEAs in WTO law and case-law. We observed a lack of regulation and (probably) because of this lacunae, a certain diffidence on behalf of the WTO adjudicating bodies to resolve this issue. We applauded the attitude in US – Shrimp where the judge left it open to decide on a case-by-case basis when to have recourse to MEAs and in this paper we tried to explain when recourse should be made in future practice.

In our view, the reasons for the separation of agreements, and for the gaps in the separate agreements are fundamentally important to understand before deciding on how to proceed. We have here taken a first step toward such an analysis. Needless to say, although we have tried to draw on economic theory in our analysis, core parts of the reasoning lack formal underpinnings. But the steps we have taken point toward the following main conclusions:

- There are a number of advantages with a single agreement: it allows exchange of concessions across trade and environment areas; it allows for the saving of fixed costs; and it may enhance enforcement possibilities. There must therefore be significant benefits from separation for the parties not to form a single agreement. Drawing on the economic literature on bargaining structures and on contracts, we can identify two broad reasons for separation: strategic benefits to certain parties, and savings of contracting costs. While strategic reasons may explain separation of agreements, they do not seem to explain why separate agreements would have gaps. The analysis would therefore need to be extended to allow for any firmer conclusions, to the extent this is possible. But we tentatively conclude that to the extent that the separation is driven by strategic reasons, the case-law path would have to be trodden with great caution: on this interpretation, some of the parties have intentionally kept the MEA outside the WTO. The judge is thus in clear danger of undoing this balance if short-circuiting the two agreements.

- Contracting costs may explain both separation of agreements in general, and the trade/environment divide. They may also explain incompleteness of agreements, although as far as we know, the theory does not shed direct light on how to view the relationship between parallel incomplete agreements. But it seems safe to conclude that in cases where countries have failed to sort out the relationship between obligations in their two sets of agreements, judges face a very hard task if trying to identify solutions that would be in the long run interest of all countries.

- Recourse to MEAs should be restricted to obtaining factual information that will help the judge better evaluate the legal canons embedded in WTO law.
To conclude, with regard to the role of MEAs for adjudication under the WTO Agreement, legislators’ silence should speak volumes to WTO judges.
References


APPENDIX I

A Simple Illustration of Why Costs May Increase Rapidly in the Complexity of Negotiations

The following extremely simple example illustrates one possible mechanism behind the rapidly increasing costs for large agreements. While it does not as such explicitly model cognitive limitations, it may give a feeling for possible consequences of such limitations.

Let there be two countries, A and B. Country A imposes a tariff (denoted \( t_A \)) and an environmental abatement level \( (e_A) \), and country B similarly controls a tariff \( t_B \) and an abatement level \( e_B \). Each of the two tariffs and the two environmental instruments can take on either a high (\( H \)) or a low (\( L \)) value. As discussed above, we assume that negotiating agreements require administrative resources, as well as calendar time, and that both are costly to countries.

If there are separate negotiations for a TA and a MEA, there are four possible exchanges of concessions in the trade negotiation:

\[
\begin{align*}
& (t_{AL}, t_{BL}) ;
& (t_{AL}, t_{BH}) ;
& (t_{AH}, t_{BL}) ;
& (t_{AH}, t_{BH})
\end{align*}
\]

Similarly, there are four possible exchanges of concessions in the environmental negotiation:

\[
\begin{align*}
& (a_{AL}, a_{BL}) ;
& (a_{AL}, a_{BH}) ;
& (a_{AH}, a_{BL}) ;
& (a_{AH}, a_{BH})
\end{align*}
\]

With simultaneous negotiations of trade and environment offers, each of the four tariff offers above can be combined with each of the four possible environment offers. Hence, in this case there are a total of 16 possible exchanges of concessions.

Consider first the direct benefit from separation of negotiations in the form of a faster implementation of cooperation. To this end, suppose each possible exchange of concessions takes one month to identify and to evaluate. With a single agreement, 16 man-months would have to be spent negotiating, in order to identify and evaluate the 16 possible trade-cum-environment offers. It is not clear to what extent these man-months have to be spent sequentially. But it seems plausible that it would require longer calendar time than the 8 months that the parallel negotiations of the two separate agreements would need. Hence, the separate negotiations should be concluded more rapidly than the simultaneous negotiation.

Turning to savings of administrative resources with separation, note that with a single negotiation there are 16 different exchanges of concessions that need to be identified and evaluated in order to completely characterize the options available to the parties. But with separate negotiations there only four exchanges of concessions in each of the negotiations, or eight in total. This reduction stems from the assumption that in the case of parallel negotiations, the tariff offers and the environment offers are evaluated independently of each other.
There are thus gains in terms of both quicker implementation, and reduced expenditures on administrative resources from the separation. But as noted above, this comes at the cost having of not being able to strike some deals where the parties make concessions in one area, in order to get something more valuable in return in the other area.