

**NEGOTIATIONS UNDER PARAGRAPH 31(I) OF THE
DOHA MINISTERIAL DECLARATION**

Submission from New Zealand¹

Paragraph 31(i)

I. SUMMARY

1. This paper compiles existing information on trade provisions in the Basel Convention, the Montreal Protocol and CITES, as well as existing information regarding WTO rules that have been suggested as being relevant to these Agreements. In assembling this material on specific agreements the aim is to offer a more practical focus for discussion on the relationship between WTO rules and specific trade obligations in MEAs and on the applicability of those rules as among parties to the MEA in question.

II. INTRODUCTION

2. Paragraph 31(i) of the Doha Ministerial Declaration calls for negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements. The negotiations are limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question.

3. In initial meetings of the Committee in Special Session a range of ideas have been put forward on how the negotiations might proceed. There now appears to be a widely held view that an examination of individual MEAs, identification of specific trade obligations in those MEAs and identification of the relevant WTO rules would provide a useful building block for the process, though differences exist on how terms such as “multilateral environmental agreement” and “specific trade obligation” should be defined for these purposes.

III. EXAMINATION

4. The Committee already has material available in the form of the Secretariat’s *Matrix of Trade Measures Pursuant to MEAs* (WT/CTE/W/160.Rev.1). That paper includes summary information on trade provisions in 14 MEAs and provides a useful starting point for an examination of the “specific trade obligations” contained within various MEAs. The Secretariat paper was, however, originally produced in a different context and for a different purpose (it does not seek, for example, to identify relevant WTO rules) and fuller information on some aspects would be useful.

¹ This submission is without prejudice to New Zealand's rights and obligations under the WTO Agreement.

5. Some additional material is available from past discussion papers that have addressed the question of relevant WTO principles and rules. This paper compiles information in respect of three of the MEAs examined in the WTO Secretariat matrix that have also been the subject of analysis by the OECD. For each agreement it seeks to assemble in a single document available factual information relevant to the paragraph 31(i) negotiation, as well as information on WTO rules identified in the OECD analyses as potentially relevant to the trade provisions in the MEA. In addition information on membership criteria has been included. In summary, for each MEA covered here the following material compiled from the Secretariat matrix and the OECD studies is provided:

- Title of the agreement and its objective. Details of any subsidiary instruments (additional protocols etc).
- Status of the main agreement and of any subsidiary instruments (date of adoption, whether or not the instrument has entered into force, date of entry into force, requirements for entry into force).
- Membership criteria.
- Membership of the main agreement and any subsidiary instruments, including details of (a) parties (b) states which have signed but not yet ratified.
- Trade-related provisions within the MEA.

Note: “trade-related provisions” is a broader term than “specific trade obligations”. The particular provisions included under this heading are taken directly from the listing of “trade-related measures” in the Secretariat’s matrix and the inclusion of a provision should not be taken as indicating a New Zealand view on whether it is a “specific trade obligation” as that term is used in paragraph 31(i) of the Doha declaration.

- WTO rules. Identification of existing WTO rules that may be relevant to application of trade measures provided for in MEA.

Note: For the sake of simplicity this section simply reproduces relevant information from OECD studies undertaken on specific MEAs in recent years. Although those studies were undertaken in a broader context than the current negotiation (they address non-party issues and non-specific trade measures, for example), their identification of certain WTO principles and provisions potentially relevant to MEA trade measures may nevertheless provide a useful focus for discussion at the Special Session. With this in mind, this section of the annexed MEA summaries quotes portions of the OECD analyses for Members’ reference. The inclusion of a particular WTO rule in this section or any accompanying quoted observations should not be taken as indicating a New Zealand position on its relevance to measures taken under the MEA at issue.

IV. CONCLUSION

6. A number of delegations have expressed interest in using an examination of the type outlined in paragraph 3 as the basis for subsequent work aimed at identifying any issues or problems in the application of specific trade obligations. Future elements in this work could include comment from Members on experience with the implementation of trade provisions in MEAs and input from MEA secretariats on the same question.

I. BASEL CONVENTION

FULL TITLE

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

DATE OF ADOPTION

22 March 1989, Basel

ENTRY INTO FORCE

5 May 1992

OBJECTIVE

This treaty strictly regulates the transboundary movements of hazardous wastes. Parties are obliged to ensure that such wastes are managed and disposed of in an environmentally sound manner.

MEMBERSHIP CRITERIA

The Convention is open to membership by all States and by political and/or economic integration organisations (Articles 21 and 22).

ANY SUBSIDIARY INSTRUMENTS

Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal: the 'Ban Amendment' is a decision made at COP 2 to ban movement of hazardous waste headed for final disposal and for recovery from Annex VII countries (Parties and other States which are members of the OECD, EC, Liechtenstein).

22 September 1995, Geneva *Not yet in force*

Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal: the Protocol has been adopted and opened for signature. The Protocol will enter into force once 20 Parties ratify it. This Protocol is to provide for a comprehensive regime for liability, as well as adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes, including incidents occurring because of illegal traffic.

10 December 1999, Basel *Not yet in force*

MEMBERSHIP

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

Parties: 152 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Albania	France	Nigeria
Algeria	Gambia	Norway
Andorra	Georgia	Oman
Antigua and Barbuda	Germany	Pakistan
Argentina	Greece	Panama

Armenia	Guatemala	Papua New Guinea
Australia	Guinea	Paraguay
Austria	Guyana	Peru
Azerbaijan	Honduras	Philippines
Bahamas	Hungary	Poland
Bahrain	Iceland	Portugal
Bangladesh	India	Qatar
Barbados	Indonesia	Republic of Korea
Belarus	Iran (Islamic Republic of)	Republic of Moldova
Belgium	Ireland	Romania
Belize	Israel	Russian Federation
Benin	Italy	Saint Kitts and Nevis
Bhutan	Japan	Saint Lucia
Bolivia	Jordan	Saint Vincent and the Grenadines
Bosnia and Herzegovina	Kenya	Samoa
Botswana	Kiribati	Saudi Arabia
Brazil	Kuwait	Senegal
Bulgaria	Kyrgyzstan	Seychelles
Burkina Faso	Latvia	Singapore
Burundi	Lebanon	Slovakia
Cambodia	Lesotho	Slovenia
Cameroon	Libyan Arab Jamahiriya	South Africa
Canada	Liechtenstein	Spain
Cape Verde	Lithuania	Sri Lanka
Chile	Luxembourg	Sweden
China	Madagascar	Switzerland
Colombia	Malawi	Syrian Arab Republic
Comoros	Malaysia	Thailand
Costa Rica	Maldives	The Former Yugoslav Republic of Macedonia
Cote d'Ivoire	Mali	Trinidad and Tobago
Croatia	Malta	Tunisia
Cuba	Mauritania	Turkey
Cyprus	Mauritius	Turkmenistan
Czech Republic	Mexico	Uganda
Democratic Republic of the Congo	Micronesia (Federated States of)	Ukraine
Denmark	Monaco	United Arab Emirates
Djibouti	Mongolia	United Kingdom of Great Britain and Northern Ireland
Dominica	Morocco	United Republic of Tanzania
Dominican Republic	Mozambique	Uruguay
Ecuador	Namibia	Uzbekistan
Egypt	Nauru	Venezuela
El Salvador	Nepal	Viet Nam
Estonia	Netherlands	Yemen
Ethiopia	New Zealand	Yugoslavia
European Community	Nicaragua	Zambia
Finland	Niger	

States which have signed but not yet ratified: 3 (as listed on the UN Treaties website – <http://untreaty.un.org>):

Afghanistan	United States of America	Haiti
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Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

Parties: 32 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Andorra	Gambia	Saint Lucia
Austria	Germany	Slovakia
Bulgaria	Luxembourg	Spain
China	Malaysia	Sri Lanka
Cyprus	Netherlands	Sweden
Czech Republic	Norway	Trinidad and Tobago
Denmark	Panama	Tunisia
Ecuador	Paraguay	United Kingdom of Great Britain and Northern Ireland
Estonia	Portugal	United Republic of Tanzania
European Community	Qatar	Uruguay
Finland	Romania	

Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal

Signatories: 13 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Chile	France	Switzerland
Colombia	Hungary	The Former Yugoslav Republic of Macedonia
Costa Rica	Luxembourg	United Kingdom of Great Britain and Northern Ireland
Denmark	Monaco	
Finland	Sweden	

TRADE-RELATED PROVISIONS (as taken from the Convention only; any trade provision from subsidiary instruments have not been included)

Article 4

- Article 4.1(a): Parties can exercise their right to ban import of hazardous waste;
 Article 4.1(b): Parties are obliged to prohibit export of covered waste to Parties that have banned such imports;
 Article 4.1(c): for wastes not specifically prohibited by the importing state, Parties will prohibit export of wastes if importing country has not consented in writing to the specific import;
 Article 4.2(e) a Party shall prevent the export of hazardous waste if it has reason to believe that the waste will not be managed in an environmentally sound manner;
 Article 4.5: prohibits trade in covered waste with non-parties (no imports/exports); exception Article 11 - non-parties can trade in hazardous waste if transboundary movements are subject to another appropriate bilateral/multilateral or regional agreement;
 Article 4.6: exports of hazardous waste prohibited for disposal in the area of 60° south latitude (Antarctica);
 Article 4.7: packaging, labelling and transport requirements for hazardous wastes;

Article 6: The state of export must obtain prior informed consent from the importer;
Article 8: There is a duty to re-import if waste cannot be disposed of in an environmentally sound manner.

WTO RULES

The OECD in 1998 completed a study under the title *Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*. In a discussion on the relationship between the Basel Convention and the multilateral trading system the study identifies and discusses ‘some relevant WTO principles’ (pages 36-39), excerpts of which are quoted below. For the full text of the OECD study Members should refer to document COM/ENV/TD(97)41/FINAL (available on the OECD website at <http://www.oecd.org>)².

GATT Article 1 – General Most Favoured Nation Treatment

“Article 1 of GATT 1994 requires that with respect to (*inter alia*) all rules and formalities in connection with importation and exportation, any advantage, favour, privilege or immunity granted by any WTO member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other WTO members.

The question would therefore arise as to whether a country, in implementing its obligations under the Basel Convention, could find itself denying another WTO member Most Favoured Nation treatment. The restriction on trade with non-Parties, and the proposed Annex VII/non-Annex export ban, could give rise to this situation.

...

If a measure taken under the Basel Convention was considered to be inconsistent with the MFN principle, the question would then arise as to whether the trade restriction would nevertheless be justified in the WTO under a relevant exception ...”

GATT Article XI – General Elimination of Quantitative Restrictions

“GATT Article XI states that no prohibitions or restrictions other than duties, taxes or other charges shall be applied to imported or exported products ... In effect, export and import bans are prohibited.

Therefore, the question could arise as to whether the provisions in the Basel Convention that concern an export or an import ban would be consistent with GATT Article XI. It is essential that this Article, as others, be considered in conjunction with the general exceptions to the basic principles.”

GATT Article XIII – Non-discriminatory Administration of Quantitative Restrictions

“This Article concerns import and export licensing, prohibitions and quotas, and requires that like products coming from, or going to, all countries be treated in the same way. Would the prior informed consent procedures be considered as import and export licensing under this Article? Similar issues concerning non-discrimination could arise under this Article as arise under Article I with respect to the distinctions

² Full reference is <http://www.oecd.org/EN/documents/0,,EN-documents-358-nodirectorate-no-4-no-24-no-no-2,00.html>

made between Annex VII and non-Annex VII countries, and the distinction made between Parties and non-Parties.”

GATT Article XX – General Exceptions

“The GATT provisions accommodate trade restrictions in the pursuit of environmental protection under certain circumstances.

...

To fall under Article XX, an action taken needs to satisfy the conditions laid down in the chapeau and one of the paragraphs of Article XX. Paragraph (b) and (g) above would seem to be the most relevant with respect to the Basel Convention.

A preliminary question of approach however would arise. Given that the Basel Convention is also a reflection of the views of the international community, it is not clear how far a WTO Panel would inquire into the specific requirements of Article XX in the case of a trade measure taken under the Convention.”

II. MONTREAL PROTOCOL

FULL TITLE

Montreal Protocol on Substances that Deplete the Ozone Layer

DATE OF ADOPTION

16 September 1987, Montreal

ENTRY INTO FORCE

1 January 1989

OBJECTIVE

The Montreal Protocol develops a regime that limits the release of ozone-depleting substances (ODS) into the atmosphere.

MEMBERSHIP CRITERIA

The Protocol is open to membership by all States and by regional economic integration organisations (Articles 16 and 17).

ANY SUBSIDIARY INSTRUMENTS

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer: the ‘London Amendment’ established a Multilateral Fund for incremental costs.

Date of Adoption: 29 June 1990, London
Entry into Force: 10 August 1992

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer: the ‘Copenhagen Amendment’

Date of Adoption: 25 November 1992, Copenhagen
Entry into Force: 14 June 1994

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer adopted by the Ninth Meeting of the Parties: the ‘Montreal Amendment’

Date of Adoption: 17 September 1997, Montreal
Entry into Force: 10 November 1999

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer: Under the Protocol, HCFCs are to be phased out in developed countries by 2030 and in developing countries by 2040. The ‘Beijing Amendment’ to the Protocol will also ban trade in HCFCs with countries that have not yet ratified the Copenhagen Amendment (1992), which introduced the HCFC phase out. The Beijing Amendment also requires developed countries to freeze the production of HCFCs in 2004 at 1989 levels (measured as the average of consumption and production levels) and developing countries to do so in 2016 with a similar baseline of 2015. Production of 15 per cent above baseline will be permitted to meet the "basic domestic needs" of developing countries. In addition, the production of a recently developed ozone-depleting chemical, (bromochloromethane, which is a controlled substance in a newly created Group III of Annex C) is to be completely phased out in all countries by 1 January 2002.

Date of Adoption: 3 December 1999, Beijing
Entry into Force: 25 February 2002

MEMBERSHIP

Montreal Protocol on Substances that Deplete the Ozone Layer

Parties: 183 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Albania	Ghana	Panama
Algeria	Greece	Papua New Guinea
Angola	Grenada	Paraguay
Antigua and Barbuda	Guatemala	Peru
Argentina	Guinea	Philippines
Armenia	Guyana	Poland
Australia	Haiti	Portugal
Austria	Honduras	Qatar
Azerbaijan	Hungary	Republic of Korea
Bahamas	Iceland	Republic of Moldova
Bahrain	India	Romania
Bangladesh	Indonesia	Russian Federation
Barbados	Iran (Islamic Republic of)	Rwanda
Belarus	Ireland	Saint Kitts and Nevis
Belgium	Israel	Saint Lucia
Belize	Italy	Saint Vincent and the Grenadines
Benin	Jamaica	Samoa
Bolivia	Japan	Sao Tome and Principe
Bosnia and Herzegovina	Jordan	Saudi Arabia
Botswana	Kazakhstan	Senegal
Brazil	Kenya	Seychelles

Brunei Darussalam	Kiribati	Sierra Leone
Bulgaria	Kuwait	Singapore
Burkina Faso	Kyrgyzstan	Slovakia
Burundi	Lao People's Democratic Republic	Slovenia
Cambodia	Latvia	Solomon Islands
Cameroon	Lebanon	Somalia
Canada	Lesotho	South Africa
Cape Verde	Liberia	Spain
Central African Republic	Libyan Arab Jamahiriya	Sri Lanka
Chad	Liechtenstein	Sudan
Chile	Lithuania	Suriname
China	Luxembourg	Swaziland
Colombia	Madagascar	Sweden
Comoros	Malawi	Switzerland
Congo	Malaysia	Syrian Arab Republic
Costa Rica	Maldives	Tajikistan
Cote d'Ivoire	Mali	Thailand
Croatia	Malta	The Former Yugoslav Republic of Macedonia
Cuba	Marshall Islands	Togo
Cyprus	Mauritania	Tonga
Czech Republic	Mauritius	Trinidad and Tobago
Democratic People's Republic of Korea	Mexico	Tunisia
Democratic Republic of the Congo	Micronesia (Federated States of)	Turkey
Denmark	Monaco	Turkmenistan
Djibouti	Mongolia	Tuvalu
Dominica	Morocco	Uganda
Dominican Republic	Mozambique	Ukraine
Ecuador	Myanmar	United Arab Emirates
Egypt	Namibia	United Kingdom of Great Britain and Northern Ireland
El Salvador	Nauru	United Republic of Tanzania
Estonia	Nepal	United States of America
Ethiopia	Netherlands	Uruguay
European Community	New Zealand	Uzbekistan
Fiji	Nicaragua	Vanuatu
Finland	Niger	Venezuela
France	Nigeria	Viet Nam
Gabon	Norway	Yemen
Gambia	Oman	Yugoslavia
Georgia	Pakistan	Zambia
Germany	Palau	Zimbabwe

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer: the 'London Amendment'

Parties: 163 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Algeria	Grenada	Paraguay
Antigua and Barbuda	Guatemala	Peru
Argentina	Guinea	Philippines
Australia	Guyana	Poland

Austria	Haiti	Portugal
Azerbaijan	Honduras	Qatar
Bahamas	Hungary	Republic of Korea
Bahrain	Iceland	Republic of Moldova
Bangladesh	India	Romania
Barbados	Indonesia	Russian Federation
Belarus	Iran (Islamic Republic of)	Saint Kitts and Nevis
Belgium	Ireland	Saint Lucia
Belize	Israel	Saint Vincent and the Grenadines
Benin	Italy	Samoa
Bolivia	Jamaica	Sao Tome and Principe
Botswana	Japan	Saudi Arabia
Brazil	Jordan	Senegal
Bulgaria	Kazakhstan	Seychelles
Burkina Faso	Kenya	Sierra Leone
Burundi	Kuwait	Singapore
Cameroon	Latvia	Slovakia
Canada	Lebanon	Slovenia
Cape Verde	Liberia	Solomon Islands
Chad	Libyan Arab Jamahiriya	Somalia
Chile	Liechtenstein	South Africa
China	Lithuania	Spain
Colombia	Luxembourg	Sri Lanka
Comoros	Madagascar	Sudan
Congo	Malawi	Sweden
Costa Rica	Malaysia	Switzerland
Cote d'Ivoire	Maldives	Syrian Arab Republic
Croatia	Mali	Tajikistan
Cuba	Malta	Thailand
Cyprus	Marshall Islands	The Former Yugoslav Republic of Macedonia
Czech Republic	Mauritius	Togo
Democratic People's Republic of Korea	Mexico	Trinidad and Tobago
Democratic Republic of the Congo	Micronesia (Federated States of)	Tunisia
Denmark	Monaco	Turkey
Djibouti	Mongolia	Turkmenistan
Dominica	Morocco	Tuvalu
Dominican Republic	Mozambique	Uganda
Ecuador	Myanmar	Ukraine
Egypt	Namibia	United Kingdom of Great Britain and Northern Ireland
El Salvador	Nepal	United Republic of Tanzania
Estonia	Netherlands	United States of America
European Community	New Zealand	Uruguay
Fiji	Nicaragua	Uzbekistan
Finland	Niger	Vanuatu
France	Nigeria	Venezuela
Gabon	Norway	Viet Nam
Gambia	Oman	Yemen
Georgia	Pakistan	Zambia
Germany	Palau	Zimbabwe
Ghana	Panama	
Greece	Papua New Guinea	

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer: the ‘Copenhagen Amendment’

Parties: 141 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Algeria	Greece	Peru
Antigua and Barbuda	Grenada	Philippines
Argentina	Guatemala	Poland
Australia	Guyana	Portugal
Austria	Haiti	Qatar
Azerbaijan	Honduras	Republic of Korea
Bahamas	Hungary	Republic of Moldova
Bahrain	Iceland	Romania
Bangladesh	Indonesia	Saint Kitts and Nevis
Barbados	Iran (Islamic Republic of)	Saint Lucia
Belgium	Ireland	Saint Vincent and the Grenadines
Belize	Israel	Samoa
Benin	Italy	Sao Tome and Principe
Bolivia	Jamaica	Saudi Arabia
Botswana	Japan	Senegal
Brazil	Jordan	Seychelles
Bulgaria	Kenya	Sierra Leone
Burkina Faso	Kuwait	Singapore
Burundi	Latvia	Slovakia
Cameroon	Lebanon	Slovenia
Canada	Liberia	Solomon Islands
Cape Verde	Liechtenstein	Somalia
Chad	Lithuania	South Africa
Chile	Luxembourg	Spain
Colombia	Madagascar	Sri Lanka
Congo	Malawi	Sudan
Costa Rica	Malaysia	Sweden
Croatia	Maldives	Switzerland
Cuba	Marshall Islands	Syrian Arab Republic
Czech Republic	Mauritius	Thailand
Democratic People’s Republic of Korea	Mexico	The Former Yugoslav Republic of Macedonia
Democratic Republic of the Congo	Micronesia (Federated States of)	Togo
Denmark	Monaco	Trinidad and Tobago
Djibouti	Mongolia	Tunisia
Dominican Republic	Morocco	Turkey
Ecuador	Mozambique	Tuvalu
Egypt	Netherlands	Uganda
El Salvador	New Zealand	Ukraine
Estonia	Nicaragua	United Kingdom of Great Britain and Northern Ireland
European Community	Niger	United States of America
Fiji	Nigeria	Uruguay
Finland	Norway	Uzbekistan
France	Oman	Vanuatu
Gabon	Pakistan	Venezuela
Georgia	Palau	Viet Nam
Germany	Panama	Yemen
Ghana	Paraguay	Zimbabwe

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer adopted by the Ninth Meeting of the Parties: the ‘Montreal Amendment’

Parties: 84 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Antigua and Barbuda	Guyana	Romania
Argentina	Haiti	Saint Kitts and Nevis
Australia	Hungary	Saint Lucia
Austria	Iceland	Samoa
Azerbaijan	Iran (Islamic Republic of)	Sao Tome and Principe
Bahrain	Italy	Senegal
Bangladesh	Japan	Seychelles
Bolivia	Jordan	Sierra Leone
Bulgaria	Kenya	Singapore
Burundi	Latvia	Slovakia
Canada	Lebanon	Slovenia
Cape Verde	Luxembourg	Solomon Islands
Chad	Madagascar	Somalia
Chile	Malaysia	Spain
Congo	Maldives	Sri Lanka
Croatia	Micronesia (Federated States of)	Sweden
Czech Republic	Monaco	Switzerland
Democratic People’s Republic of Korea	Mongolia	Syrian Arab Republic
Djibouti	Netherlands	The Former Yugoslav Republic of Macedonia
Egypt	New Zealand	Togo
El Salvador	Niger	Trinidad and Tobago
European Community	Nigeria	Tunisia
Finland	Norway	Tuvalu
Gabon	Palau	Uganda
Georgia	Panama	United Kingdom of Great Britain and Northern Ireland
Germany	Paraguay	Uruguay
Grenada	Poland	Venezuela
Guatemala	Republic of Korea	Yemen

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer: the ‘Beijing Amendment’

Parties: 38 (as listed on the UN Treaties website – <http://untreaty.un.org>)

Bulgaria	Japan	Samoa
Burundi	Jordan	Sao Tome and Principe
Canada	Luxembourg	Seychelles
Chile	Madagascar	Sierra Leone
Congo	Malaysia	Slovakia
Croatia	Maldives	Somalia
Czech Republic	Micronesia (Federated States of)	Spain
Democratic People’s Republic of Korea	Netherlands	Sweden
European Community	New Zealand	Switzerland
Finland	Norway	The Former Yugoslav Republic of Macedonia
Gabon	Palau	Togo

Guatemala	Panama	United Kingdom of Great Britain and Northern Ireland
Hungary	Saint Lucia	

TRADE-RELATED PROVISIONS

Article 4:

The measures are directed against non-parties. These include³:

- (a) Control of trade in ODS with non-parties:
 - (i) Annex A substances: import from non-parties banned from January 1990, export banned from January 1993;
 - (ii) Annex B substances: import and export banned from August 1993 for non-parties to the London Amendment;
 - (iii) Annex C – Group II - HBFCs: import and export banned from June 1995 for non-parties to the Copenhagen Amendment.
 - (iv) Annex C Group I hydrochlorofluorocarbons (HCFCs): import and export ban with non-parties to the Beijing Amendment from 1 January 2004.
 - (v) Annex C Group III: Import and export ban with non-parties to the Beijing Amendment within one year from the date of entry into force of the Beijing Amendment.

WTO RULES

The OECD in 1997 completed a study under the title *Experience with the Use of Trade Measures in the Montreal Protocol on Substances that Deplete the Ozone Layer*. In a discussion on the relationship between the Montreal Protocol and the multilateral trading system the study identifies and discusses ‘some relevant WTO principles’ (pages 29-32) excerpts of which are quoted below. For the full text of the OECD study Members should refer to document OCDE/GD(97)230 (available on the OECD website at <http://www.oecd.org>).

GATT Article 1 – General Most-favoured-nation treatment

“Article 1 of GATT 1994 requires that with respect to (*inter alia*) all rules and formalities in connection with importation and exportation, any advantage, favour, privilege or immunity granted by any WTO member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other WTO members.

...

The question may arise as to whether a country, in implementing its obligations under the Montreal Protocol, could find itself denying another WTO member Most Favoured Nation treatment. The restriction on trade with non-Parties could theoretically give rise to this situation ...

³ A full summary is contained in the Secretariat’s Matrix at pages 20-23.

If a measure taken under the Protocol was considered to be inconsistent with the MFN principle, the question would then arise as to whether the trade restriction would nevertheless be justified in the WTO under a relevant exception ...”

GATT Article III – National Treatment

“Once imported products have crossed the border, Article III of the GATT requires imported and domestic ‘like products’ to be treated the same way with respect to internal regulations and taxes. Various forms of regulations and taxes on ODS have been used by Parties to help meet the consumption and production phase-out commitments. If they applied differently to imported than to domestic products, there could be a violation of Article III. There is no evidence that this has been the case so far. Again, as with Article I even if this was the case, Article XX would then need to be considered ...”

GATT Article XI – General Elimination of Quantitative Restrictions

“GATT Article XI states that no prohibitions or restrictions other than duties, taxes or other charges shall be applied to imported or exported products ... In effect, export and import bans are prohibited.

Therefore the question could arise as to whether the Montreal Protocol Article 4 import and export bans, or import or export bans instituted by national Governments as part of their policy measures to meet the consumption and production limits, would be consistent with GATT Article XI. It is essential that this Article, as others, be considered taking into account the general exceptions....”

GATT Article XIII - Non-discriminatory Administration of Quantitative Restrictions

“This Article concerns import and export licensing, prohibitions and quotas, and requires that like products coming from, or going to, all countries be treated in the same way. Similar issues concerning discriminatory import prohibitions could arise under this Article as arise under Article I with respect to the distinctions made between Parties and non-Parties.”

WTO Agreement on Technical Barriers to Trade Agreement

“One of the WTO Agreements, the TBT Agreement may also apply to technical regulations used by national governments to implement the Montreal Protocol obligations ... Paragraph 2.2 of the Agreement requires that technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective. Environmental protection is listed in this paragraph as a legitimate objective.”

GATT Article XX – General Exceptions

“The GATT provisions accommodate trade restrictions in the pursuit of environmental protection under certain circumstances.

To fall under Article XX, an action taken needs to satisfy the conditions laid down in the chapeau and one of the paragraphs of Article XX. Paragraphs (b), (d) and (g) ... would seem to be the most relevant.”

III. CITES

FULL TITLE

Convention on International Trade in Endangered Species of Wild Fauna and Flora

DATE OF ADOPTION

3 March 1973, Washington

ENTRY INTO FORCE

1 July 1975

OBJECTIVE

An international treaty to protect wildlife against over-exploitation and to prevent international trade from threatening species with extinction.

MEMBERSHIP CRITERIA

The Convention is open to membership by all States (Articles 19 and 20).

ANY SUBSIDIARY INSTRUMENTS

Amendment to Article XI of the Convention

Date of Adoption: 22 June, 1979, Bonn
Entry into Force: 13 April 1987

Amendment to Article XXI of the Convention

Date of Adoption: 30 April 1983, Gaborone
Not yet in force

MEMBERSHIP

Convention on International Trade in Endangered Species of Wild Fauna and Flora

Parties: 160 (as listed on the CITES website – <http://www.cites.org>)

Afghanistan	Gambia	Paraguay
Algeria	Georgia	Peru
Antigua and Barbuda	Germany	Philippines
Argentina	Ghana	Poland
Australia	Greece	Portugal
Austria	Grenada	Qatar
Azerbaijan	Guatemala	Republic of Korea
Bahamas	Guinea-Bissau	Republic of Moldova
Bangladesh	Guinea	Romania
Barbados	Guyana	Russian Federation
Belarus	Honduras	Rwanda
Belgium	Hungary	Saint Kitts and Nevis

Belize	Iceland	Saint Lucia
Benin	India	Saint Vincent and the Grenadines
Bhutan	Indonesia	Sao Tome and Principe
Bolivia	Iran (Islamic Republic of)	Saudi Arabia
Botswana	Ireland	Senegal
Brazil	Israel	Seychelles
Brunei Darussalam	Italy	Sierra Leone
Bulgaria	Jamaica	Singapore
Burkina Faso	Japan	Slovakia
Burundi	Jordan	Slovenia
Cambodia	Kazakhstan	Somalia
Cameroon	Kenya	South Africa
Canada	Kuwait	Spain
Central African Republic	Latvia	Sri Lanka
Chad	Liberia	Sudan
Chile	Liechtenstein	Suriname
China	Lithuania	Swaziland
Colombia	Luxembourg	Sweden
Comoros	Madagascar	Switzerland
Congo	Malawi	Thailand
Costa Rica	Malaysia	The Former Yugoslav Republic of Macedonia
Cote d'Ivoire	Mali	Togo
Croatia	Malta	Trinidad and Tobago
Cuba	Mauritania	Tunisia
Cyprus	Mauritius	Turkey
Czech Republic	Mexico	Uganda
Democratic Republic of the Congo	Monaco	Ukraine
Denmark	Mongolia	United Arab Emirates
Djibouti	Morocco	United Kingdom of Great Britain and Northern Ireland
Dominica	Mozambique	United Republic of Tanzania
Dominican Republic	Myanmar	United States of America
Ecuador	Namibia	Uruguay
Egypt	Nepal	Uzbekistan
El Salvador	Netherlands	Vanuatu
Equatorial Guinea	New Zealand	Venezuela
Eritrea	Nicaragua	Viet Nam
Estonia	Niger	Yemen
Ethiopia	Nigeria	Yugoslavia
Fiji	Norway	Zambia
Finland	Pakistan	Zimbabwe
France	Panama	
Gabon	Papua New Guinea	

States which have signed but not yet ratified: 1 (*as listed on the CITES website – <http://www.cites.org>*):

Lesotho		
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Amendment to Article XI of the Convention

Parties: 124 (as listed on the CITES website – <http://www.cites.org>)

Antigua and Barbuda	Germany	Paraguay
Argentina	Greece	Peru
Australia	Grenada	Poland
Austria	Guinea-Bissau	Qatar
Azerbaijan	Guyana	Republic of Korea
Barbados	Iceland	Republic of Moldova
Belarus	India	Romania
Belgium	Indonesia	Russian Federation
Belize	Iran (Islamic Republic of)	Rwanda
Bhutan	Ireland	Saint Kitts and Nevis
Botswana	Italy	Saint Lucia
Brazil	Jamaica	Saint Vincent and the Grenadines
Brunei Darussalam	Japan	Sao Tome and Principe
Bulgaria	Jordan	Saudi Arabia
Burkina Faso	Kazakhstan	Senegal
Burundi	Kenya	Seychelles
Cambodia	Kuwait	Sierra Leone
Canada	Latvia	Slovakia
Chad	Liechtenstein	Slovenia
Chile	Lithuania	South Africa
China	Luxembourg	Suriname
Comoros	Madagascar	Swaziland
Cote d'Ivoire	Mali	Sweden
Croatia	Malta	Switzerland
Cuba	Mauritania	The Former Yugoslav Republic of Macedonia
Cyprus	Mauritius	Togo
Czech Republic	Mexico	Trinidad and Tobago
Denmark	Monaco	Tunisia
Djibouti	Mongolia	Turkey
Dominica	Morocco	Uganda
Ecuador	Myanmar	Ukraine
Egypt	Namibia	United Arab Emirates
El Salvador	Nepal	United Kingdom of Great Britain and Northern Ireland
Equatorial Guinea	Netherlands	United States of America
Eritrea	New Zealand	Uruguay
Estonia	Niger	Uzbekistan
Ethiopia	Nigeria	Vanuatu
Fiji	Norway	Viet Nam
Finland	Pakistan	Yemen
France	Panama	Yugoslavia
Gabon	Papua New Guinea	Zimbabwe
Georgia		

Amendment to Article XXI of the Convention

Parties: 66 (as listed on the CITES website – <http://www.cites.org>)

Antigua and Barbuda	Fiji	Peru
Argentina	Finland	Philippines
Australia	France	Portugal
Austria	Germany	Rwanda
Barbados	Ghana	Saint Kitts and Nevis
Belgium	Grenada	Saint Lucia
Belize	Iceland	Senegal
Bhutan	India	Seychelles
Bolivia	Ireland	Slovakia
Botswana	Italy	Slovenia
Brazil	Liechtenstein	Spain
Brunei Darussalam	Luxembourg	Sri Lanka
Burkina Faso	Malawi	Sweden
Canada	Mali	Switzerland
Chile	Mauritius	Togo
China	Monaco	Trinidad and Tobago
Congo	Morocco	Uganda
Croatia	Netherlands	United Kingdom of Great Britain and Northern Ireland
Cyprus	New Zealand	Uruguay
Denmark	Niger	Uzbekistan
Eritrea	Norway	Venezuela
Estonia	Paraguay	Zimbabwe

TRADE-RELATED PROVISIONS

Article II: CITES regulates trade in endangered species by defining conditions under which import and export permits may be issued. The conditions are differentiated according to a classification system based on three appendices of protected species.

Article III: Appendix I includes all species threatened with extinction which are or may be affected by trade. Trade in these species is subject to particularly strict regulation through both import and export permits which may be issued only in exceptional circumstances.

Article IV: Species in Appendix II may become threatened with extinction unless their trade and the trade in species that resemble them is subject to strict regulation; trade in Appendix II species is regulated by the issue of export permits which are subject to both a finding of non-detriment and legal acquisition. In Appendix II, the granting of import permits is not a condition (except for some countries with stricter measures under Article XVI).

Article V: Appendix III covers species identified by an individual Party as being subject to regulation within its jurisdiction and for which it requests the cooperation of other Parties in the control of trade.

Article VI: Regulates permits and certificates for import and export permits required under Articles III, IV and V.

- Article VII: Lists the Exemptions and Other Special Provisions Relating to Trade. This Article provides all the exceptions to the prohibitions of trade in endangered species listed in the three appendices.
- Article VIII: Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation of the Convention.
- Article XIV: Allows for Parties to take stricter domestic measures. Appendix II does not require an import permit but many OECD countries have instituted a system of import permits for trade in certain species and in some instances, with species listed in Appendix III.

WTO RULES

The OECD in 1997 completed a study under the title *Experience with the use of trade measures in the Convention on International Trade in Endangered Species (CITES)*. In a discussion on the relationship between CITES and the multilateral trading system the study identifies and discusses 'Key provisions under GATT 1994' (pages 50-51), excerpts of which are quoted below. For the full text of the OECD study Members should refer to document OCDE/GD(97)106 (available on the OECD website at <http://www.oecd.org>)⁴.

GATT Article XI - Obligations relating to quantitative restrictions

"It would appear that, in the case of import and export permits and re-export certificates to regulate trade in Appendix I-III species, including the prohibition or restriction of trade for 'primarily commercial purposes' in Appendix I species, as required by relevant CITES Articles, these are measures for which the obligations of GATT Article XI.1 concerning quantitative restrictions may be relevant. The same would appear to be the case for measures considered to be enforcement measures taken pursuant to Article VII.1 or 'stricter domestic measures' referred to in Article XIV, irrespective of whether the measures were applied to Parties or non-Parties."

GATT Articles I and XIII - Non-discrimination obligations

"Articles I and XIII of the GATT could be relevant also to measures taken to implement CITES. Pursuant to these Articles, there are obligations to treat 'like' products in the same way, no matter what their country of origin. For instance, Article XII permits application of (otherwise legitimate) quantitative import restrictions to the product of one Party only if the restriction is applied also to the 'like products' of other parties."

GATT Article XX - General Exceptions

"The preceding provisions may also be considered in conjunction with Article XX. Under this 'General Exceptions' Article, trade measures that would otherwise be inconsistent with the GATT may be applied in defined circumstances. This is subject also to the general requirement that the measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

⁴ Full reference is <http://www.oecd.org/EN/documents/0,,EN-documents-358-nodirectorate-no-4-no-24-no-no-2,00.html>

....

It would appear that at least XX(b) (regarding measures necessary to protect human, animal or plant life or health), and XX(g) (covering measures relating to the conservation of exhaustible natural resources) would be potentially relevant.

...

There would seem to be little purpose in speculating further on how these provisions would apply in relation to hypothetical situations. This is all the more so given that, as a practical matter, CITES has been ratified by most WTO members.”
