



Towards Coherent
Legal and Practical
Environmental
Approaches to
and Economic
MEA-WTO Linkages
Governance

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Executive Summary

Achieving sustainable development requires a coherent framework of global environmental and economic governance. Despite this need, little progress has been made in clarifying the relationship between the main elements of this architecture – Multilateral Environmental Agreements (MEAs) and the World Trade Organisation (WTO).

MEAs and the WTO each have a role to play in achieving sustainable development. MEAs provide co-operative frameworks to address the growing environmental problems facing humanity. The WTO is the pre-eminent political and legal institution at the international level responsible for liberalising trade and promoting predictable trading relations. Because the economy and the environment are inextricably related, MEAs and the WTO necessarily overlap in their coverage and address many of the same issues, parties, and products, albeit from differing perspectives.

Progress in clarifying the relationship between MEAs and the WTO remains limited. Discussions have focused on a narrow set of legal issues surrounding the relationship between WTO rules and trade measures in MEAs. They have focused on potential conflicts not synergies, and on theoretical not practical linkages, ignoring a range of possibilities for a more mutually supportive relationship between MEAs and the WTO. To achieve a more productive partnership, participants in this discussion must move away from existing polarised positions towards a common approach that promotes constructive co-operation among trade and environment officials.

Without co-operation, a mutually supportive relationship between environment and trade policies, rules and institutions cannot be assumed. Rather, it will only be realised through proactive attempts to identify overlaps, realise synergies, and reduce or avoid tensions between the two areas of policy. To date there has been no formal dispute between the WTO and MEAs. Nevertheless, the potential for incoherence between trade and environmental governance is real. In addition to the two notorious areas of potential dispute – the WTO-consistency of trade measures contained within MEAs, and of MEA measures regarding non-parties – a number of other concerns exist:

- Without proactive engagement by environmental policy-makers, the use and further development of the precautionary principle to address environmental problems in cases of scientific uncertainty, at both the national and international levels, could be limited through the trading system.
- Unless reformed, the system of intellectual property rights established by the WTO's Agreement on Trade Related Intellectual Property Rights (TRIPS Agreement) could undermine, rather than promote, efforts by some MEAs to conserve biological diversity and could inhibit efforts to transfer environmentally sound technologies.
- WTO rules on trade in services may intersect with key MEAs. Although these linkages remain largely unexplored, preliminary analysis suggests that the successful implementation of MEAs may be affected both by the liberalisation of services, and by WTO rules governing the trade in services.

Rather than decreasing, the potential for conflict may even have increased as a result of recent decisions by some countries not to join new environmental instruments, and through the ongoing negotiation of new trade obligations without adequate sustainability assessment.¹ Even without a formal conflict, uncertainty about the relationship between trade and environmental rules has the potential to “chill” the development of new environmental obligations, and to inhibit the implementation of existing agreements.

To clarify the relationship between MEAs and the WTO, governments should adopt a legal solution. A formal interpretation of WTO rules could, for example, clarify that MEAs and the WTO should each focus on their primary area of competence and pay appropriate deference to that of the other. It could also confirm that MEAs are best placed to determine the legitimacy of environmental objectives and the necessity of MEA-related trade measures. In addition to a legal clarification a number of practical measures can be taken to increase coherence between MEAs and the WTO, including:

- Assessing the environmental and developmental impacts (sustainability assessment) on trade rules and liberalisation can contribute to the development of policies that support sustainable development. The results of a sustainability assessment can also help governments negotiate trade agreements that promote their nation’s best interest from an economic, environmental and social perspective.
- Clarifying the relationship between new trade and environmental rules, including between existing MEAs and proposed future WTO liberalisation (such as in the areas of services, agriculture or investment) will contribute to a mutually supportive relationship.
- Encouraging the transfer of environmentally sound technologies by simultaneously implementing obligations in MEAs and the WTO’s TRIPS Agreement for the transfer and dissemination of technology to developing countries can help promote synergies.
- Building capacity and enhancing technical co-operation by working together in areas of over-lapping competence will increase the co-ordination between national trade and environment officials.
- Co-operating in the collection, management and sharing of trade and environment data collected by MEAs, UNEP and the WTO through studies, reporting and notification requirements, and review mechanisms, will provide a more integrated picture of the practical impacts of trade liberalisation and environmental protection, and of the linkages between them.
- Enhancing communication and co-operation between compliance, enforcement and dispute settlement mechanisms, and further strengthening enforcement of MEA rules, in order to prevent MEA-related trade and environment tensions from escalating into formal WTO disputes.

Achieving progress on these legal and practical approaches will require greater co-operation between trade and environment officials at all levels. The coming 12 months offer opportunities for making headway, including the WTO’s 4th Ministerial Conference in November 2001, and the World Summit on Sustainable Development in September 2002. At these and other relevant meetings, we urge policy-makers to consider the recommendations offered in this paper, and summarised below:

- *At the WTO's 4th Ministerial*, governments should formally agree on a legal interpretation of WTO rules clarifying that the use of trade- and trade-related measures in MEAs is consistent with WTO rules. They should also accept all pending requests for observer status by environmental institutions, and affirm that MEAs may serve as international standards for the purposes of WTO Agreements;
- *At the World Summit for Sustainable Development*, governments should reaffirm that MEAs and the WTO are equally valid bodies of law and that trade- and trade-related measures pursuant to MEAs are consistent with WTO rules. They should also identify mechanisms to ensure that trade liberalisation is paralleled by efforts to strengthen national and international environmental governance, and establish a formal process among environment, trade, and other officials, from governments, inter-governmental and non-governmental organisations, to examine the relationship between inter-national economic and environmental governance;
- *MEA Conference of Parties* should assess the potential impacts of existing and proposed future trade liberalisation on their area of competence; request observer status at relevant WTO bodies; provide the WTO with input in relation to future negotiations; minimise the chances of MEA-related trade disputes from being brought to the WTO by strengthening their compliance and dispute settlement mechanisms; and explore the development of an agreed set of principles to guide the use and future development of trade-related measures in MEAs.
- *The United Nations Environment Programme*, in pursuance of its Governing Council mandate, should expand its support to the MEA secretariats on trade and environment issues and convene an internal UNEP working group to examine and offer recommendations on the relationship between international environmental and economic governance, to help prepare for discussions at the WSSD.
- *MEA Secretariats* should establish an informal, ad-hoc working group of MEA and UNEP officials to examine common trade issues, explore synergies and tensions with the WTO, and develop a common understanding on the content and use of the precautionary principle.
- *At the national level*, governments should create new mechanisms or improve existing mechanisms that include a strong public participation component, to facilitate more systematic cooperation between national trade and environmental officials, to address both practical and legal linkages between MEAs and the WTO, and areas of synergy and areas of potential conflict.

I Introduction

The relationship between environmental and economic governance has been discussed for over a decade. The debate, however, has focused almost entirely on narrow set of legal issues surrounding the relationship between trade measures in MEAs and WTO rules. It has largely ignored a range of more practical linkages, including many that may yield synergies between economic and environmental governance. This paper explores the relationship between MEAs and the WTO and proposes both legal and practical approaches to resolving tensions and to enhancing synergies in order to maximise their joint contribution to sustainable development.

Given the fact that the economy and the environment are inextricably linked, MEAs and the WTO necessarily touch on the same subject matter, albeit from different perspectives. Existing linkages between MEAs and the WTO will inevitably evolve and deepen over time as new trade rules are negotiated, and as the international community responds to growing environmental challenges through new MEAs. Despite extensive knowledge of both MEAs and the WTO, and a growing literature on the relationships between the two areas, the most basic issue – that of the relationship between trade measures in MEAs and WTO rules – remains unresolved.

Although there has not yet been a formal WTO dispute involving an MEA, the potential for conflict is real – as illustrated by recent EU-Chile controversy over swordfish. An escalated dispute in that case could have led to competing trade and conservation cases being brought before the WTO and the International Tribunal on the Law of the Sea (ITLOS). This scenario, fortunately, was avoided by a last-minute settlement. Not only is the potential for conflict real, but it is increasing. Without careful management, the potential for conflict threatens to be aggravated by the decision by some countries to remain outside recent environmental instruments (such as the Biosafety and Kyoto Protocols), as well as the development of new trade obligations and new environmental obligations.

Even without a formal conflict, the consequences of continuing uncertainty are significant. As noted in the WWF Discussion Paper, *Trade Measures and Multilateral Environmental Agreements: Resolving Uncertainty and Removing the WTO Chill Factor*, uncertainty has the potential to “chill” new environmental negotiations, and inhibit the implementation of existing ones.² For example, concerns about “chilling” have hampered recent environmental negotiations including those on genetically modified organisms (GMOs) and persistent organic pollutants (POPs).

To date, progress has been limited in addressing the MEA-WTO interface. This is largely because discussions have focused on potential conflicts rather than synergies and on theoretical and legal linkages rather than concrete and practical linkages. While the potential for conflict remains, the growing interdependence between trade and environmental governance also presents opportunities to explore synergies. In this paper, we hope to move beyond the traditional debate towards a more integrated discussion about the interface between MEAs and the WTO. Such a discussion has the potential to contribute to a more harmonious relationship between international trade and environmental governance. We hope that such an approach will:

- Move away from the polarised, conflictive relationship that has existed in the past, and move towards more constructive engagement, while recognising that tensions still exist;
- Provide a foundation for improved co-operation between trade and environment officials, at both the national and international levels;

- Enhance the identification and realisation of synergies with resulting gains to environment, development and trade;
- Reduce the possibility that a ruling by a WTO dispute settlement panel will undermine measures taken pursuant to MEAs, threatening to generate more public outcry and further loss of credibility for the multilateral trading system; and
- Help to increase the strength and predictability of both systems and facilitate their development and implementation in ways that complement each other.

Realising these gains – through both legal and practical approaches – should be a priority for trade and environmental policy-makers. The coming year offers opportunities for progress. In particular, important discussions will occur at the WTO 4th Ministerial Conference in November 2001, and the World Summit on Sustainable Development (WSSD) in September 2002.

To help policy-makers prepare for these and other meetings, this paper begins by identifying some of the key linkages between MEAs and the WTO in light of recent developments and offers practical suggestions for future work. Section II discusses the respective roles of MEAs and the WTO, some of the unresolved MEA-WTO issues, and three recent proposals by WTO Members for reform. Section III notes the importance of a legal resolution to challenges at the MEA-WTO interface and examines a range of practical approaches for improving coherence between trade and environment policies, rules and institutions, by realising synergies and resolving tensions. Section IV concludes with some preliminary recommendations.

II The Relationship between MEAs and the WTO

Sustainable development requires that, among other things, environment and trade policies, rules, and institutions develop in a mutually supportive way. While the term “mutually supportive” is used often in international policy fora, this relationship cannot be assumed. A coherent and supportive system of international economic and environmental governance will only develop through meaningful attempts to identify overlaps, realise synergies and reduce or avoid tensions. A first step in this process is understanding the respective roles of MEAs and the WTO and identifying the main issues that arise where they meet.

A The role of MEAs

MEAs are agreements among governments that co-operatively address shared environmental problems. During recent years the importance and scope of MEAs has increased dramatically as the international community struggles to address increasing global environmental problems such as the spread of toxic pollutants, biodiversity loss, and global warming. There are now over 200 MEAs to co-ordinate the activities of states on issues related to environmental protection in an effort to achieve sustainable development.

MEAs address a broad range of international environmental issues. Among other things, MEAs identify co-operative solutions, create mechanisms to equitably share benefits and burdens, and limit the use of unilateral measures. Most generally, MEAs reflect a balance between the three pillars of sustainable development (environment, social, and economic) by applying integrated approaches to achieve their objectives.

MEAs also serve a number of functions. They create a forum for measuring and assessing the state of the environment and the processes affecting it (for example through scientific and assessment bodies). They establish frameworks for negotiating new obligations through Protocols and decisions of their Conferences of Parties (COPs). They provide guidance and assistance for implementation (for example through capacity building and COP recommendations). And they create mechanisms to enhance compliance and to resolve disputes. All this is done in the context of a broad package in which measures that affect trade are accompanied by other measures, such as financial and technical assistance to developing countries.

Central to many of these MEAs are trade or trade-related measures. Trade measures are an essential policy instrument in the toolbox of measures available to environmental negotiators; they are now used in over 20 MEAs. Trade measures in MEAs serve a number of purposes, including the regulation of trade in environmentally risky products (such as hazardous waste, and genetically modified organisms), discouraging unsustainable exploitation of natural resources (such as endangered species) and enhancing compliance with MEA rules. (See Box One) In addition to trade measures, MEAs include or require a variety of other measures that might affect trade and that may be covered by trade rules. These trade-related measures include, among other things, national policies and measures that affect trade or market access (such as subsidies or labelling schemes), obligations to encourage technology transfer, and measures related to risk assessment or prior informed consent.

Box One

Trade measures in MEAs serve a variety of purposes including:

- Discouraging the unsustainable exploitation of natural resources;
- Discourage environmentally harmful process and production methods;
- Creating market opportunities and incentives to use or dispose of a good in an environmentally sound manner;
- Preventing or limiting the entry of a harmful substance into a country;
- Encouraging producers to internalise the costs to the environment caused by their products or production processes;
- Preventing non-parties from exploiting lower environmental standards to gain unfair competitive advantages;
- Discouraging the migration of industries to countries with lower environmental standards;
- Reducing the incentives for countries to remain outside the agreement and become “free riders” who can benefit competitively from the absence of MEA standards;
- Controlling trade where it provides market incentives that threaten the environment; and
- Enhancing compliance with MEA rules.

B The role of the WTO

The WTO is the pre-eminent political and legal institution at the international level governing global trade. It provides a forum for negotiations on trade liberalisation and for adjudicating trade disputes. It is also the institution responsible for administering and enforcing the WTO agreements that bind the organisation’s 142 Members in three main areas – goods, services and intellectual property. Given the implications of trade for the environment and development, the WTO’s mandate is closely linked to issues of sustainable development. This is reflected in the WTO’s preamble, which refers to “the objective of sustainable development”, in many of its agreements (See Box Two), and in a number of specific provisions that refer explicitly to the environment or to plant, animal and human life or health.

A rules-based multilateral trading system has the potential to contribute to sustainable development in a number of ways. It can enhance access to markets by removing barriers to trade and eliminating protectionism. This is particularly important for a number of developing countries where access to developed country markets is an important part of their development strategies. It can protect smaller countries by creating a system of rules and enforcement that offers predictability and equity by reducing the extent to which powerful nations can impose their will on smaller countries unilaterally. Finally, the existence of clear rules and standards can increase transparency and reduce the extent to which producers have to comply with numerous, conflicting regulations.

Nevertheless, a rules-based trading system must take care to strike a balance between trade and environmental goals. In some cases, attempts to liberalise trade can conflict with the legitimate interests of national governments to retain full regulatory authority in the domestic realm to protect health, safety and the environment. Resolving these and other potential conflicts will require a balanced approach to trade and environment that can only be achieved if the WTO and MEAs exist in a truly mutually supportive relationship in which environmental policy makers are prepared to actively define and defend their jurisdiction in a way that parallels the trading communities’ defence of the long-standing rules and principles associated with liberalisation.

C Legal and Practical Challenges at the MEA-WTO interface

The rules established by MEAs and the WTO intersect in a range of areas. For example, WTO rules on trade in goods may cover the transboundary movement of genetically modified organisms, endangered species, hazardous waste, or persistent organic pollutants. WTO rules on intellectual property can affect biodiversity conservation. WTO rules to liberalise services, such as transportation, energy and other highly energy consuming services could affect climate change. The intersection between MEAs and the WTO gives rise to a range of legal and practical challenges.

Two issues in particular have been the subjects of long-standing discussion. The first is the issue of whether trade measures taken pursuant to MEAs are compatible with the WTO. The second is the issue of measures regarding non-parties to an MEA, which are designed to prevent benefits flowing from MEAs to non-parties that have incurred no corresponding obligation. In addition to these, a number of other trade and environment issues are emerging, which should be discussed in the context of MEAs, as they have the potential to affect the implementation of existing MEA rules, and the negotiation of new ones. These issues deserve consideration by officials in MEAs and at the WTO in conjunction with relevant stakeholders.

1 The WTO-compatibility of trade measures in MEAs

Despite the central role of trade measures in many effective MEAs, the relationship between trade measures in MEAs and WTO rules remains unclear. The potential for conflict between WTO obligations and the use of trade measures in MEAs has been explicitly acknowledged by WTO

Box Two

Relevant WTO agreements

GATT 1994 – sets out the basic principles – such as non-discrimination – that apply to the liberalisation of trade in goods.

Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) – imposes disciplines on the measures taken by WTO Members to protect against disease, pests and certain other threats to human, animal and plant life and health.

Agreement on Technical Barriers to Trade (TBT Agreement) – establishes disciplines on national standards and technical regulations taken by WTO Members, including certain environmental regulations and labelling schemes.

Agreement on Agriculture – establishes rules to liberalise trade in agricultural products. Negotiations are currently underway as part of the “built-in agenda” to further liberalise trade.

Agreement on Subsidies and Countervailing Measures – establishes disciplines on the types of subsidies WTO Members can provide. At one time the Agreement included flexible rules governing environmental subsidies. However, WTO Members failed to renew these in 1999.

Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) – establishes minimum standards for the protection and enforcement of intellectual property rights.

General Agreement on Trade in Services (GATS Agreement) – establishes rules and obligations for the liberalisation of trade in services, such as tourism, energy services, transportation, and education. Negotiations are currently underway as part of the “built-in agenda” to further liberalise trade and establish additional international disciplines.

Members.³ At the end of the Uruguay Round the WTO Committee on Trade & Environment (CTE) was established with a mandate to examine “the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements.” The CTE’s mandate also includes making, “appropriate recommendations on whether any modification of the provisions of the multilateral trading system are required.”

Over its seven years in operation, the CTE has made little progress regarding ways to strengthen and clarify the relationship between MEAs and the WTO. Moreover, despite proposals by a number of WTO Members to amend WTO agreements, the CTE has offered no recommendations to modify the rules of the trading system or other measures to address the tensions between the WTO and the use of trade measures in MEAs. As a result, a number of WTO agreements continue to raise questions about the use of trade measures in MEAs.⁴

Until greater legal certainty is achieved, the use of trade and trade-related measures in MEAs will likely remain underdeveloped and MEAs that include trade measures will be inadequately implemented. MEAs and the policy-makers responsible for them must take the initiative to develop frameworks for the use of trade measures in MEAs and co-operate with the WTO to establish an overarching framework to define and promote a long-term mutually supportive relationship.

2 MEA measures regarding non-parties

First and foremost, trade measures in MEAs exist to influence the behaviour of their parties. However, trade-related measures are often designed to influence the behaviour of non-parties as well. They provide a means to compensate against any competitive advantage gained by non-parties at the expense of parties taking on environmental obligations. Trade measures create incentives for non-parties to join MEAs and eliminate leakage by reducing the extent to which non-parties gain a competitive advantage by not joining.⁵ Such measures are often essential for maintaining the integrity of the MEA. However, the extent to which these measures are consistent with WTO rules is unclear, even in those cases where membership in an MEA exceeds membership in the WTO.

The potential for a WTO dispute between WTO Members, one of which is a non-party to the MEA, over a measure contained in an MEA has, arguably, increased. This argument is based on the decisions by some powerful States not to join key conventions such as the Convention on Biological Diversity, the Biosafety Protocol, the UN Convention on the Law of the Sea, or the Kyoto Protocol. While the WTO has stated a preference for multilateral solutions to environmental problems, it remains unclear whether trade measures involving non-parties to an MEA are consistent with the WTO.⁶

3 Applying the precautionary principle under MEAs

In addition to these two issues, there are a number of other issues that require careful consideration by environmental policy-makers and civil society. The precautionary principle is a cornerstone of many MEAs and of much national environmental policy. Nevertheless, it is not well regarded by the trade community. Indeed, there is a debate in some segments of the trade community about the role of, and limits to, the precautionary principle and how “science-based” WTO rules might be used to ensure that it does not inhibit trade.

The tension between the precautionary principle and trading interests is particularly evident in the interaction between the Biosafety Protocol and the WTO’s Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).⁷ On one hand, the Biosafety Protocol provides a framework to ensure that its parties can adopt precautionary measures to control the transboundary movement of living modified organisms. On the other hand, the SPS Agreement places constraints on the measures that WTO Members may take to do so.

This debate suggests that there is a risk that the WTO SPS Agreement could be used by some countries to interfere with the full implementation by others of the Biosafety Protocol. Without active involvement of environmental policymakers in the debate, the precautionary principle may be undermined. An enhanced dialogue between the trade and environment communities is necessary to ensure that in cases of scientific uncertainty the precautionary principle continues to be a legitimate tool to guide policies that will promote sustainable development.

4 Ensuring that intellectual property rights support the implementation of MEAs

Properly tailored, intellectual property rights can support the successful implementation of MEAs. If set at an appropriate level and administered under the right conditions intellectual property rights can, among other things, facilitate the transfer of environmentally sound technologies or provide incentives for the conservation of biological diversity. However, there is some concern that the system of intellectual property rights established by the WTO's TRIPS Agreement might undermine, rather than promote, these and other environmentally supportive goals.

Intellectual property rights are especially relevant to the United Nations' Convention on Biological Diversity (CBD) and in particular its regime on benefit sharing from genetic resources and its requirements to protect local and indigenous knowledge. These CBD objectives could be undermined by the provision in the TRIPS Agreement requiring WTO Members to provide intellectual property protection over certain genetic resources (Article 27.3(b)). The TRIPS Agreement requires the granting of intellectual property rights but includes no requirement to ensure that the benefits of genetic resources are shared with source communities and countries. Some developing countries have suggested amendments to the Agreement to address this problem, but these proposals have been opposed by a small number of more powerful WTO Members.

Similarly, some developing countries have raised the concern that the TRIPS Agreement may limit access to environmentally sound technologies. Although the Agreement includes "the transfer and dissemination of technology" as one of its key objectives (Article 7), it is unclear that its provisions promote this objective. Rather, some provisions in the Agreement might actually help to consolidate control over technology. India, for example, has noted that intellectual property rights have played a role in limiting its access to technology to implement the Montreal Protocol and, more generally, that the high cost of technologies imposes an undue burden on the economies in developing countries.⁸ In response to these problems, some developing countries have called for a new working party on technology transfer at the WTO.

It is essential that tensions between the TRIPS Agreement and MEAs are resolved, since they threaten to thwart the full development and implementation of the CBD and other environmental instruments. Arguably, the TRIPS Agreement, as the more general agreement on intellectual property rights, should be interpreted and applied in light of the CBD, which places intellectual property rights in a specific context. In addition, the CBD should continue to strengthen its work on ensuring a supportive relationship between intellectual property rights and biodiversity conservation.

5 Services and MEAs

WTO rules on trade in services – embodied in the General Agreement on Trade in Services (GATS) – may also intersect with objectives and rules of certain MEAs.⁹ Although these linkages remain largely unexplored, preliminary analysis suggests that the successful implementation of MEAs may be affected both by services liberalisation, and by GATS disciplines governing the trade in services. Services liberalisation may affect the implementation of MEAs in a number of ways. For example, liberalising tourism services may affect biodiversity (CBD); liberalising transportation or energy

services may aggravate global warming (United Nations Framework Convention on Climate Change); and liberalising waste management and disposal services may affect the transboundary movement and disposal of hazardous wastes (Basel Convention). Impacts on the operation of MEAs resulting from services liberalisation may be positive, negative or both. Regardless, potential impacts should be carefully examined by policymakers, if future services negotiations are to minimise negative impacts and maximise contributions to sustainable development.

New rules negotiated under GATS to govern trade in services may also constrain the domestic environmental policies and measures that are available to implement MEAs. For example, future disciplines to ensure that certain regulations related to services are “not more burdensome than necessary to ensure the quality of the service” (Article V.4) could result in a review of national measures to implement MEAs by the WTO’s dispute settlement mechanism. Such a review might entail addressing questions such as: What kind of regulations relating to carbon sequestration (for example, Clean Development Mechanism-related regulation of engineering, construction, installation, monitoring, accounting, testing, or consulting services) would be “not more burdensome than necessary” – according to the WTO?

To ensure that MEAs and the GATS are mutually supportive, governments should examine areas of overlap as part of the mandated assessment of the GATS. This assessment should be conducted with input from national environmental policy-makers and MEAs and should include avenues for public participation.¹⁰

6 Other issues

Two additional issues have been discussed as part of the broader trade and environment debate and are relevant to the discussion on the relationship between MEAs and the WTO.

The first of these is the discussion over “like-products” and “process and production methods” (PPMs). The WTO’s non-discrimination obligations prevent Members from discriminating between “like products”. The distinction between which products are “like” and “unlike” is important for environmental regulations, which often seek to distinguish between similar products on the basis of their environmental impacts. The question of whether an importing country can ban a product from an exporting country on the basis of how it is produced is unclear. In the past, GATT panels have not allowed such distinctions on the basis that they can potentially undermine trade and interfere with the sovereignty of exporting countries. On the other hand, many in the non-governmental community argue that governments should be able to discriminate between products on the basis of how they are produced in the exporting country.

While this issue has not arisen directly in the context of an MEA, it is relevant because it affects the types of rules that an MEA can employ to achieve its objectives. Indeed, a number of MEAs encourage states to consider environmentally sound processes, including those in foreign countries. For example, the Basel Convention prohibits certain waste exports unless disposal in the foreign country occurs in an environmentally sound manner. Despite recent decisions by the WTO’s Appellate Body, it remains unclear to what extent environmental measures based on the ‘process and production methods’ of imported products are consistent with the WTO.¹¹

A second issue is the impact of WTO rules on ecolabelling and related information-based measures. These measures are important instruments that can be applied to achieve environmental objectives. Moreover, they are encouraged or required by several MEAs.¹² The consistency of many such measures with WTO rules is unclear.¹³ This lack of clarity arises in particular from the WTO’s Agreement on Technical Barriers to Trade (TBT Agreement), which applies to technical regulations

including “marking and labelling requirements” (Annex 1). There is general agreement among Members of the WTO that the TBT Agreement applies to ecolabelling programmes that address product characteristics (as well as PPMs that are reflected in the finished product). However, there is no agreement that it also applies to labelling aimed at “non-product related PPMs” (ie, labelling related to how a product was produced). Likewise, the extent to which the TBT Agreement’s Code of Good Practice covers voluntary ecolabelling initiatives is unclear and the subject of dispute. In light of this, the scope of the TBT Agreement should be clarified. To the extent that any international oversight is needed, MEAs such as the CBD and the Framework Convention on Climate Change (FCCC), may offer a more appropriate framework for addressing issues of ecolabelling and related information based measures than the WTO.

D Recent developments and proposals

Discussions concerning the relationship between trade and environmental instruments must be considered in light of recent developments, a number of which have been positive. For example, the establishment at the WTO’s Ministerial Conference in Seattle of a working group on biotechnology, which could have interfered with the Biosafety Protocol negotiations, was averted. In addition, the negotiations of the Biosafety Protocol and the POPs Convention, both of which contain trade-related measures, have been successfully concluded. And UNEP and MEA Secretariats have become more engaged in interacting with the WTO to find synergies between the trade and environment agendas. However, within the WTO progress has been slow. The CTE has failed to develop political consensus on the relationship between WTO rules and MEAs. A number of papers have been submitted to the CTE, but discussions have not moved forward significantly. This is in part due to the position adopted by some developed countries that no formal WTO recognition of MEAs is required. Some developing countries also continue to fear that MEAs could interfere with trading opportunities.

Nevertheless, three recent submissions by WTO Members to the CTE merit particular comment. First is a paper submitted by Switzerland, which acknowledges the risk that national implementation of trade-related measures in MEAs may be declared WTO-incompatible by a WTO adjudication body.¹⁴ In response to this risk, the paper identifies two options: 1) amending GATT Article XX or adding Article V *bis* to the WTO Agreement to clarify WTO-MEA relationships; or 2) adopting an interpretative decision. Given the practical and political difficulties with the first option, Switzerland favours an interpretative decision. Such a decision would aim to ensure mutual support between MEAs and the WTO clarifying that each body of law should focus on its primary area of competence and pay appropriate deference to the competence of the other. Under this approach, the WTO would have competence to assess whether a trade measure is arbitrarily discriminatory or protectionist, while an MEA would have competence to determine the legitimacy of the environmental objective and the proportionality and necessity of any trade measures.¹⁵

The second submission is a paper offered by the European Community (EC), which identifies the need to confirm that the WTO and MEAs are equal bodies of law.¹⁶ It further proposes the development of mechanisms to accommodate specifically mandated measures in MEAs. For example, it suggests reversing the normal burden of proof in disputes so that those measures in MEAs would be presumed to be WTO-compatible unless they are shown to be otherwise. The paper also calls for strengthening the informal dialogue between MEAs and the WTO to prevent disputes from arising and for the WTO to develop, in co-operation with UNEP and MEA secretariats, a “code of conduct” on the use of trade measures in MEAs. This contribution from the EC raises a number of questions. For example, how will non-specific measures be dealt with? Is it appropriate for the WTO to take a lead in developing a “code of conduct”, or should this be undertaken within the specific context of each MEA? Further information is required before it will be possible to judge this proposal fully on its merits.

A third submission of note was made by New Zealand.¹⁷ This proposal encourages clear drafting of trade measures in future MEAs, as well as robust dispute settlement systems. It suggests that those proposing the use of trade measures in MEAs should first enter into bilateral consultations with affected parties in order to develop “first best” solutions to deal with the environmental problem (rather than trade measures). It further suggests the creation of an informal mechanism to explore the relationship between MEAs and the WTO. Such a mechanism would include the WTO, UNEP, MEA secretariats, NGOs, and industry. While greater co-operation among stakeholders is desirable, this contribution seems to be motivated by a desire to protect the trading system from the impact of MEAs rather than finding an accommodation based on synergies. The discussion of “first-” and “second-best” solutions is an oversimplification of the variety of, and rationale underlying, trade measures in MEAs. Indeed, a number of these trade measures address problems caused by trade. For example, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) employs trade measures to address trade-related threats to endangered species.

III Improving coherence between trade and environmental policies, rules and institutions

Each of the proposals discussed above acknowledges the importance of enhancing coherence between trade and environment policy, rules, and institutions. Increased *policy* coherence can help reduce the complexity of international negotiations; increased *rule* coherence can support smooth national implementation; and increased *institutional* coherence – for example in the area of capacity building – can help increase the effectiveness of MEA secretariats in support of the implementation of their respective agreements. This section identifies both legal and practical approaches to increasing coherence.

A Legal basis for clarifying the MEA-WTO relationship

Governments should take firm legal steps to clarify the relationship between MEAs and the WTO. Without stronger guidance, the relationship between WTO agreements and MEAs will remain unclear. This could inhibit the implementation of existing MEAs and the negotiation of new ones. It can also threaten to overburden the WTO's dispute settlement mechanism with cases that are better dealt with in the context of an MEA. Switzerland's proposal provides a legal basis for clarifying the relationship between MEAs and the WTO. An unambiguous statement or interpretative note by the WTO would be useful, not least because existing international rules on treaty conflicts fail to provide clear answers.

International law provides some guidance on treaties relationships. However, these rules are ambiguous and may lead to uncertain or conflicting results.¹⁸ In many cases, treaties do not themselves identify how a conflict should be addressed. For example, WTO agreements do not explicitly identify how they relate to MEAs. Nor do MEAs generally provide clear guidance on their relationship with the WTO.¹⁹ Similarly, other rules on treaty conflict provide little guidance. One such rule holds that where two treaties are on the same subject matter the 'later in time' treaty prevails over the one earlier in time. However, this rule does not appear to address the timing of a decision taken by the governing body of a treaty that creates a trade-related environmental measure and is therefore not helpful in this context.²⁰

Nevertheless, two additional principles of international law may be useful in clarifying the MEA-WTO relationship. The first is a rule of customary international law – *lex specialis* – whereby more specialised treaties prevail over more general ones. Trade-related measures taken pursuant to MEAs are often more specific than the general rules of the WTO (such as non-discrimination). In a number of cases MEAs apply specific measures to specific categories of products in specific contexts. Arguably, this principle lends considerable support to MEA provisions and could form an element of a legal accommodation between MEAs and the WTO.

A second relevant principle of international law is the presumption against conflicts, which has been applied by the WTO Appellate Body in a number of cases. Under this principle, WTO rules could be interpreted and applied in a manner that supports the implementation of MEAs. For example, most trade-related environmental measures in MEAs fall within the scope of the GATT general exceptions in Article XX(b) and (g), which should be interpreted in a manner that preserves consistency with MEAs. In addition, MEAs could operate as "international standards" to be referred to in the application of several WTO Agreements.

While these rules may offer some support for trade-related measures in MEAs, uncertainty remains. Unless governments provide clear direction, the WTO's dispute settlement mechanism – as opposed to negotiators acting on behalf of democratically elected governments – may be left to make important decisions about the coherence of international economic and environmental law. WTO Members should therefore adopt a legal clarification of WTO rules, in order to ensure coherence between the WTO and MEAs.²¹

B Practical approaches to enhancing MEA-WTO relationships

In addition to a legal clarification of the MEA-WTO relationship, there are a variety of practical steps that can be taken to enhance the relationship between MEAs and the WTO.²² These practical approaches arise at a number of points along the spectrum of designing, implementing and enforcing international trade and environmental law and policy, including: 1) undertaking sustainability assessments of the linkages between trade, environment and development; 2) negotiating the rules; 3) implementing the rules; and 4) setting up and using mechanisms for compliance, enforcement and dispute settlement.

1 Sustainability assessment – defining challenges and opportunities

A more detailed understanding of the impacts of trade liberalisation on the environment and development, and of environmental and social measures on trade, is urgently needed. In the trade context, sustainability assessments – *ex post* and *ex ante* – of the impacts of trade liberalisation and trade rules on the environment and development provides an important tool for building policy at national and international levels that supports sustainable development. The results of sustainability assessments can help policy-makers understand the potential impact of liberalisation and help them negotiate outcomes that represent their nation's best interests from an economic, environmental and social perspective. To best influence negotiations, sustainability assessments should be undertaken early enough in the process to allow for the modification of trade provisions or design appropriate environmental or social policies to accompany the trade measure or agreement. In particular, examination of how trade liberalisation affects environmental resources covered by MEAs – such as fisheries, forests and genetic resources – is required to help trade and environmental policy makers develop integrated policy packages that support a coherent relationship between MEAs and the WTO.

In addition to formal sustainability assessments, new mechanisms to promote co-operation and information sharing among MEAs and the WTO should help to increase coherence. MEAs and the WTO all compile extensive information on their respective systems. Efforts to combine this information, both in relation to specific issues and more generally about macroeconomic and environmental trends related to sustainable development could yield a clearer picture of trade and environment linkages, and help countries implement their obligations in the most effective and mutually supportive way.

2 Negotiation – ensuring that new rules and institutions are coherent

As trade and environmental rules and institutions continue to develop and evolve, the connections between them will deepen. Environmental rules and institutions will continue to develop as the international community grapples with growing environmental problems, and the WTO is negotiating new rules on agriculture and services with pressure from some WTO Members to broaden the negotiations.

Ensuring that these dual processes produce new rules that are consistent should be a primary focus for negotiators. A first step is to identify linkages between WTO and MEA negotiations. For example, linkages may exist between the WTO's negotiations on services negotiations and the Kyoto Protocol, Basel Convention, and Convention on Prior Informed Consent. Linkages may also exist between the WTO's negotiations on agriculture negotiations and the CBD. Ensuring that new rules and institutions are consistent, or at least coherent, will also require improved co-ordination among the trade and environment officials at national and international levels. To develop improved co-operation, MEAs should seek observer status at the WTO and provide input into the relevant committees.

Ultimately to promote coherence a clearer division of labour and competence between MEAs and WTO must be developed which builds on the strengths of each. It must also be based on a more systematic and long-term vision of the role of trade and environmental governance recognising that, where products involve risk to health or the environment, additional rules over and above those set out by the WTO could be required. This is reflected in international environmental agreements that apply a range of measures reflecting the risk associated with certain products. For example, some risky products are regulated using systems of prior informed consent. More dangerous products, such as hazardous waste, are generally subject to additional measures including trade restrictions or outright bans. Highly dangerous products, such as nuclear waste, are subject to strict liability regimes. Without these distinctions, a 'one-size-fits all' approach to trade could result in economic inefficiency, inequitable sharing of benefits and burdens, and/or irreversible environmental damage. To avoid these outcomes, MEAs play an important role in regulating the transboundary movement of products associated with actual or potential environmental damage.

Where clear linkages between MEAs and the WTO are identified they should be addressed to the extent possible under the constraints of multilateral negotiations. Countries should avoid the use of the legally imprecise "WTO savings clause", which could divert decisions over potential MEA/WTO conflicts to the WTO's dispute settlement system.²³

3 Implementation – ensuring coherent implementation of MEAs and the WTO

There are several areas where both the WTO and MEAs can be implemented in a synergistic way. These include:

- *Encouraging of the transfer of environmentally sound technologies.* Both MEAs and the WTO include obligations pertaining to technology transfer. For example, the WTO TRIPS Agreement has, as one of its objectives, to promote, "the transfer and dissemination of technology... in a

manner conducive to social and economic welfare” (Article 7). It further requires developed countries to establish incentives to promote “technology transfer to least-developed country Members” (Article 66.2). Likewise, the Basel Convention requires parties to “co-operate actively, subject to their national laws, regulations and policies, in the transfer of technology and management systems related to the environmentally sound management of hazardous wastes and other wastes.”²⁴ Concerns have been raised that the TRIPS Agreement may inhibit rather than promote the transfer of environmentally sound technologies. MEAs could provide a useful framework for WTO governments to implement both the objectives and specific provisions of the TRIPS Agreement.

- *Building capacity, and enhancing technical co-operation.* Both MEAs and the WTO include activities to build capacity and to provide technical co-operation. In areas of overlapping competence, co-operation may contribute to increasing the co-ordination between national trade and environment officials. Co-operation can also assist governments to implement overlapping obligations. For example, there are requirements in both MEAs (notably the Montreal Protocol and the Basel Convention) and the WTO (the TBT Agreement) to notify the respective bodies of certain new laws that are required by, or relevant to, the operation of those bodies.
- *Co-operating in the collection, management and sharing of data.* Data on trade and environment issues is collected by each of the MEAs, UNEP and the WTO. The MEAs each have detailed national reporting requirements as well as subsidiary and technical bodies that undertake studies relevant to issues at the interface of WTO and MEA rules. UNEP’s approach to integrated assessment is also an important tool for gathering data on the impacts of trade rules and trade liberalisation on environmental rules and environmental protection. The WTO collects information about the impacts of implementing WTO rules through studies, reviews and the Trade Policy Review Mechanism. Taken together, this information could provide a comprehensive overview of how trade liberalisation and environmental protection are functioning and of the linkages between them. The information could also help countries to better assess the environmental, social and economic implications of trade and environmental rules and institutions in relation to specific issues.²⁵

4 Compliance, enforcement and dispute settlement

Despite the potential for tension between compliance, enforcement and dispute settlement mechanisms in MEAs and the WTO, there is significant opportunity for a more supportive relationship.²⁶ Steps towards such a relationship include: increasing informal contact between secretariat staff responsible for dispute settlement; increasing the information flow between MEAs and the WTO’s dispute settlement mechanism; encouraging the use of experts from MEAs under the WTO’s formal expert review group procedure in Annex 4 of the WTO Dispute Settlement Understanding (DSU); and promoting expert participation in the WTO’s processes for alternative dispute settlement, which include good offices, conciliation and mediation.²⁷ Among other things, greater co-operation on trade and environment issues will help to prevent potential tensions from escalating into formal WTO disputes.²⁸

D Enhancing co-operation between trade and environment officials

Achieving progress on these legal and practical approaches will require greater co-operation between trade and environment officials at all levels. At the national level, realising synergies will yield more efficient implementation of both regimes, as well as the crafting of more integrated positions in international fora. Improved co-operation will, in many cases, require new national procedures and mechanisms including: more regular meetings between trade, environment and development ministries; inter-ministerial meetings ahead of major international meetings; ensuring national environmental reporting requirements include a trade element; and new inter-ministerial committees for policy integration between trade and environment. Interaction between officials should include mechanisms for consultations with relevant stakeholders.

At the international level, enhanced co-operation and co-ordination is required between trade and environment secretariats. The effort of UNEP, MEAs and the WTO secretariat is welcomed, however further progress is needed. For example, the formal applications of the CBD to become an observer at the WTO Committee on Agriculture and in the TRIPS Council have still not been granted, despite the CBD's legitimate interest in these areas.

The linkage between efforts at the national and international levels also presents opportunities for better co-ordination. Greater participation of non-trade officials should occur in multilateral trade discussions and negotiations, including the CTE. While trade officials often participate in national delegations to MEA negotiations, environment officials are rarely present at WTO negotiations.

E Counterbalancing the CTE – the contribution of MEAs and UNEP

While the WTO has undertaken extensive discussions on the trade and environment linkage, less discussion has occurred in the context of many MEAs. Redefining the trade and environment debate and ensuring that environmental issues are considered in future trade negotiations will require a concerted effort by environmental policy-makers to change this balance.

Among other things, MEAs should take greater initiative in seeking to create multilateral consensus on the relationship between their rules, and those contained in current and proposed WTO Agreements, with the goal of identifying synergies and avoiding potential conflicts. One disadvantage facing the environmental community is the lack of any single forum (to parallel the WTO's Committee on Trade and Environment) in which environmental policy-makers can collectively discuss MEA-WTO relationships from an environmental perspective. A first step towards addressing this deficit is to increase communication between MEA secretariats on shared trade issues, and to increase discussions on trade in MEA Conferences of Parties. In addition, to minimise the chances that environmental disputes are brought to the WTO, MEAs should continue their efforts with UNEP to strengthen their compliance and dispute settlement mechanisms.

IV Recommendations

In light of the analysis above, we offer the following recommendations for action at both the international and the national levels, and across a number of fora, including the WTO's 4th Ministerial, the World Summit for Sustainable Development, MEA Conferences of Parties, and the multilateral secretariats responsible for trade and environment:

At the WTO's 4th Ministerial, governments should:

- Adopt a legal interpretation of WTO rules (along the lines of the Swiss proposal) stating that MEAs and the WTO are equal bodies of law, that each should respect the competence of the other, and consequently, that MEAs, and not the WTO, should have primary competence to determine the legitimacy of the environmental objective pursued by national governments, and the proportionality and necessity of, MEA-related trade measures.
- Accept all pending requests for observer status by environmental institutions to WTO bodies, including those of UNEP and the CBD, as an initial step towards a more open and transparent trading system, and a mutually supportive relationship between MEAs and the WTO.
- Instruct the General Council to accept promptly all future requests by MEAs and/or UNEP for observer status in relevant WTO bodies, including the Committee on Trade and Environment, the Committee on Agriculture, the Council for Trade in Services, and the Council for TRIPS.
- Affirm that MEAs can provide international standards for the purposes of WTO Agreements such as the TBT and SPS Agreements.

At the World Summit for Sustainable Development, governments should:

- Encourage an appropriate division of labour and competencies between MEAs and the WTO, and affirm that both systems should support the three pillars – social, environmental and economic – of sustainable development. They should reaffirm that, in the first instance, MEAs are the preferable institution for defining trade-related environmental measures and for resolving conflicts regarding their use.
- Affirm that MEAs and the WTO are equal bodies of law, and that trade measures pursuant to MEAs are consistent with WTO rules. Governments should identify mechanisms to ensure that trade liberalisation is accompanied by parallel efforts to strengthen environmental governance, at both the national and international levels.
- Establish a process of meetings among environment, trade, and other officials, from governments, inter-governmental and non-governmental organisations, to examine the relationship between international economic and environmental governance, and to report back to the 12th WSSD meeting with recommendations.

In MEA Conference of Parties, governments should:

- Assess the relationships between existing and proposed future trade liberalisation and their area of competence, and provide input into relevant WTO deliberations.
- Provide the CTE – in the event it has a role in reviewing the environmental implications of future WTO negotiations – with input in relation to those negotiations that affect MEA's areas of competence (for example, depending on the MEA, services, intellectual property, agriculture, or industrial tariffs).
- Follow the lead of UNEP and the CBD, and request observer status at WTO bodies related to their areas of competence, in order to identify and promote synergies and avoid potential conflicts that may arise between current and possible future WTO disciplines, and MEAs (and measures to implement them).

- Explore possible synergies between WTO and MEA obligations relating to technology transfer; particularly the WTO TRIPS Agreement's binding obligations to provide incentives for technology transfer to least developed countries.
- Strengthen the compliance and dispute settlement mechanisms in MEAs, so as to minimise the chances of MEA-related trade disputes from being brought to the WTO.
- Further develop in co-operation with UNEP and on the basis of their experience in their respective systems, an agreed set of basic principles to guide the use and future development of trade-related measures in MEAs.

UNEP, in pursuance of its General Council Mandate, should:

- Examine in the context of discussions regarding global environmental governance, the relationship between environmental and economic governance, focusing on areas of potential synergy and tension between MEA rules and the rules of the WTO, and help to prepare recommendations for the WSSD on future mechanisms required to promote coherent development of economic and environmental governance.
- Convene an international group to examine and offer recommendations on the relationship between international environmental and economic governance, focusing on areas of potential synergy and tension between MEA rules, and the rules of the WTO. Such a group could parallel the existing Ad Hoc Group of Ministers on International Environmental Governance (established pursuant to UNEP Governing Council Decision 21/21) and help to prepare recommendations for the WSSD on future mechanisms required to promote coherent development of economic and environmental governance.

MEA Secretariats, to the extent compatible with their specific mandates, should:

- Establish, together with UNEP, an informal, ad-hoc working group of MEA and UNEP officials to examine common approaches under MEAs to issues relating to trade liberalisation and to the WTO. This body could undertake basic analysis of WTO-MEA linkages from an environmental perspective, and provide a mechanism for cooperating more coherently with the WTO secretariat.
- Cooperate, through the ad hoc working group, with UNEP and the WTO Secretariat to develop more effective mechanisms to share information developed by their respective mechanisms to provide comprehensive information, both in relation to specific issues, and more generally about macro-economic and environmental trends related to sustainable development; and explore the potential for realising other practical synergies with WTO in areas such as technology transfer, capacity building and technical cooperation.
- Develop, in cooperation with UNEP, a common understanding on the content and use of the precautionary principle, as it is defined in international environmental instruments and implemented through national measures, and its relationship with WTO rules such as the SPS Agreement.

At the national level, governments should:

- Create new mechanisms and strengthen existing mechanisms that include a strong public participation component to facilitate more systematic cooperation and coordination between national trade and environmental officials.
- Develop an agenda for co-operation that addresses the both practical and legal linkages between MEAs and the WTO, and both areas of synergy and areas of potential conflict.

Endnotes

- ¹ Sustainability assessments of trade measures and agreements are an important tool for integrating environmental and development concerns into trade and investment policies. See *Balanced process, balanced results – Sustainability Assessments and Trade*. Gland, Switzerland, October 2001.
- ² WWF Discussion Paper, *Trade Measures and Multilateral Environmental Agreements – Resolving Uncertainty and Removing the WTO Chill Factor*. Gland, Switzerland, November 1999.
- ³ See, Decision on Trade and Environment, adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994, in Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, GATT Doc. MTN/FA (15 Dec) 1993 reprinted in 33 I.L.M 136 (1994).
- ⁴ The extent of concern about the WTO-consistency of trade measures will depend on the kind of trade measure identified. At least four categories of measures may be identified. First are those measures that are multilaterally agreed and apply compulsorily between all parties to the Agreement. In these cases, a dispute would likely be best resolved in the context of the MEA, and may not default to the WTO.
- A second category includes those instances where the trade measure is such that Parties have the option of not adhering (eg an amendment to the treaty, such as that of the Basel Convention banning the transport of wastes from OECD countries to non-OECD countries – see <http://www.unep.ch/basel/pub/basics.html#quest>.) or of entering reservations (eg as in CITES listings of endangered species, so as not to be bound by the regulation or restriction of trade in those species). Would these trade measures be considered sufficiently multilateral for the WTO? So far, this remains unclear.
- A third and more difficult category for the WTO are “non specific” trade measures taken pursuant to MEAs. Several MEAs raise the possibility of parties taking trade-related measures to fulfil their objectives, without actually specifying these trade measures. This is consistent with the format of many MEAs, whereby obligations of result are stated, leaving parties the discretion to choose the most appropriate implementing measures. Examples of these measures may be found in the Convention on Biological Diversity (CBD) and the Framework Convention on Climate Change (FCCC). Article 8(l) of the Convention on Biological Diversity does not contain the term “trade”, but calls for the regulation of processes and activities that adversely affect biodiversity, which implicitly may include cases of international trade. In the case of the Framework Convention on Climate Change, a non-specific measure may be a border-tax adjustment aimed at offsetting any competitive disadvantage arising out of carbon taxes aimed at meeting that treaty’s emissions reduction targets. Another example might be the use of labelling schemes for products made from processes that emit low levels of greenhouse gases (See Article 3.5, which is the only article in the UNFCCC providing guidance on the use of trade-related measures).
- Finally, there are MEA trade measures that fall into a grey area somewhere between specific and non-specific measures. These are measures where some degree of multilateral approval under MEAs is discernible for taking non-specific measures. For example, Article XIV(1)(a) of CITES, allows Parties to take stricter domestic measures than those expressed in the treaty. This provision has been the basis for imposing collective sanctions against Italy and Thailand for breaching the treaty. Another example is Article 23(3) of the Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks authorises parties to adopt regulations
- ... to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of multilateral fisheries conservation and management measures on the high seas.
- This formulation suggests that Port States have considerable discretion in interpreting and applying this provision.
- ⁵ Examples of measures regarding non-parties include 1) the restrictions on trade with non-parties in ozone depleting substances in the Montreal Protocol on Substances that Deplete the Ozone Layer, and 2) the requirement of the Basel Convention on Hazardous Wastes that trade in waste can only occur with non-parties if a bilateral or regional agreement is concluded that provides for disposal in an environmentally sound manner.
- ⁶ Non-parties to an MEA may file a complaint in the WTO. In such a case, the WTO would be required to hear the dispute and to apply the WTO rules. Recent WTO cases have interpreted Article XX – especially the chapeau – as restricting the extent to which countries may use trade measures to pressure other countries to change their environmental policies. Indeed, the Appellate Body in the *Shrimp* case stated that, “the policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX.” (Paragraph 149). A softening of this stance may be evident by the latest ruling on the *Shrimp* dispute. In a complaint launched by Malaysia that the United States is not implementing the WTO *Shrimp* ruling, the WTO Panel stated:
- The Appellate Body Report [in the *Shrimp* case] found that, while a WTO Member may not impose on exporting Members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed comparable to its own...
- After recognising that such a requirement may result in a distortion of an exporting country’s environmental priorities, it stated that, “As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse” in such a situation. This may go some way in permitting MEA measures that are aimed at non-Parties. However, reliance on the vagaries of case law

will not provide sufficient legal security for MEAs. Rather, a clear political statement should be made that eliminates WTO disciplines on MEA trade measures aimed at influencing the policies of other countries. Such disciplines are inappropriate in cases where there is a multilateral consensus to address a global environmental problem. Debates over the design and use of such measures therefore needs to take place within the framework of the MEA concerned.

- 7 Concerns also arise in relation to invasive species, as they are addressed in ongoing discussions in the CBD. The solution may lie in Article 3 of the SPS Agreement, which expresses a presumption of consistency if a Member is applying international standards. Since the CBD is beginning a process to examine how to deal with invasive species, the SPS Committee should defer to it as the more specialised body to address these issues. Similarly, the SPS Committee should recognise that the Biosafety Protocol sets forth the “international standards” as regards the trans-boundary movement of living modified organisms.
- 8 See, Communication from India (WT/GC/W/147). See also Kumar N., *Technology Generation and Technology Transfers in the World Economy Recent Trends and Implications for Developing Countries*, United Nations University Discussion Paper Series, 1997; and The UNDP *Human Development Report 2000* (noting that “(i) it is estimated that industrialized countries hold 97% of all patents, and global corporations 90% of all technology and product patents”, p84.
- 9 As part of the multilateral trading system, the GATS builds on the basic principles of non-discrimination, market access, and transparency. However, unlike the GATT, the GATS adopts a so-called “hybrid approach” to these obligations. For example, the GATS disciplines on national treatment (Article XVII) and market access (Article XVI) only apply in the specific services sub-sectors and modes of supply that a Member agrees to liberalise. The other two of the GATS main disciplines, most favoured nation treatment (Article II) and transparency (Article III), by contrast, adopt the traditional GATT approach and apply generally to all services sectors.
- 10 Discussion on these issues is also underway in the CTE, where under Agenda item 9 the WTO Secretariat has been asked to conduct a literature survey on the environmental impacts of services liberalisation with a focus on tourism, transport, energy and the environmental services sector. While these efforts are to be welcomed, it is crucial to conduct a comprehensive assessment of trade in services and its liberalisation in the Council on Trade in Services (CTS), the main services negotiating body, to ensure that any results are adequately fed into the negotiating process.
- 11 The Appellate Body in both the *Shrimp and Asbestos* cases made statements relevant to the PPM debate. It seems from the *Shrimp* case, that Article XX will, in principle, permit PPM-based measures as long as these satisfy the requirements of Article XX. Similarly, the *Asbestos* ruling,

by providing more information on the test applicable to Article III:4, has encouraged some commentators to state that PPM measures are allowed under Article III. The extent to which this is true remains to be seen in future decisions. Nevertheless, the Appellate Body’s move to clarify WTO rules is to be welcomed.

- 12 For example, the Biosafety Protocol will likely require labelling of all products containing certain types of living modified organisms. The PIC Convention requires that certain listed chemicals and chemicals banned or severely restricted in a party’s territory are, when exported, subject to information requirements that ensure adequate information with regard to the risks and/or hazards to human health or the environment, taking into account relevant international standards (Article 14.2). In addition, exporting parties may require chemicals subject to their environmental or health labelling requirements in their territories, also be labelled when exported (Article 14.3).
- 13 The experience under the GATT/WTO with eco-labels is, at best, mixed. In the first *Tuna-Dolphin* case, the panel stated that labelling was permissible because it did not interfere with the right to sell, did not confer a government advantage, and applied to all countries. However, in 1992, considerable controversy erupted in the GATT Council as a result of legislation adopted in 1992 by Austria that required labelling of products produced from timber from tropical countries and established a voluntary quality mark for timber from sustainably managed forests. Malaysia and Indonesia, the two largest exporters of tropical timber, threatened trade retaliation in protest. Austria de-escalated the controversy by withdrawing the mandatory labelling requirement and by extending the voluntary programme to timber from all types of forests.
- 14 WT/CTE/W/139
- 15 In a later paper, Switzerland also suggests that the implementation of MEA trade-related measures could be subject to WTO scrutiny, to ensure that such measures do not constitute arbitrary or unjustified discrimination or a disguised restriction on international trade. See, WT/CTE/W/168.
- 16 WT/CTE/W/170.
- 17 WT/CTE/W/162.
- 18 See Article 31 of the Vienna Convention on the Law of Treaties.
- 19 A number of MEAs refer to the relationship with other international agreements. These provisions, however, often raise as many questions as they answer. The CBD, for example, suggests that rights and obligations under other rules of international law are not affected, unless their exercise “would cause a serious damage or threat to biological diversity” (Article 22(1)). The Cartagena Protocol, similarly, includes somewhat unclear preambular statements on the relationship between the Protocol and other international agreements.
- 20 For example, the Third meeting of the Conference of the

Parties of the Basel Convention decided to amend that Convention so as to prohibit the movement of hazardous waste from OECD countries to non-OECD countries. The Basel Convention amendment comes later than the adoption of the Uruguay Round, although the adoption of the Basel Convention itself, which contains other trade measures, precedes the Uruguay Round. Since the Vienna Convention on the Law of Treaties refers to a priority of “treaties”, rather than “measures”, the decision may not benefit from the “later in time” rule.

21 For further information on amendments required to encourage coherence between TRIPs and CBD, pls refer to WWF and CIEL’s Joint Discussion Paper on ‘Biodiversity and Intellectual Property Rights: Reviewing Intellectual Property Rights in light of the Objectives of the Convention on Biological Diversity’, March 2001.

22 See ‘Background note on improving synergies and mutual supportiveness of Trade and Environment Rules: the role of MEAs and UNEP’, presented at the UNEP sponsored meeting in collaboration with the MEAs, UN Palais des Nations, 23 October 2002.

23 The use of savings clauses in MEAs is a relatively recent development, and is now regularly promoted by countries that wish to preserve their right to challenge at the WTO. There are, however, a number of reasons to doubt their appropriateness. First, they fail to achieve the goal of reducing uncertainty; a single clause that affirms the integrity of existing international law cannot address the numerous and complex questions about how MEAs and WTO rules relate in specific instances. Second, savings clauses may deny MEAs equal status with WTO rules. In a dispute, a complaining party may use a savings clause to justify recourse to WTO dispute settlement procedures, rather than to those in a MEA. Third, savings clauses may limit the effective implementation and enforcement of the MEA. Questions of coherence with WTO rules have arisen during the implementation of a number of international agreements. Finally, by failing to precisely define the competencies of the WTO and MEAs, savings clauses may overburden the WTO with contentious non-trade issues.

24 Other MEAs also include provisions relating to technology transfer. Although the CBD process has not yet focused as extensively on the transfer of technology mandated by that Convention, it also provides an instructive reference to intellectual property rights. The CBD requires the transfer of technologies relevant to the conservation, sustainable use, and environmentally benign use of genetic resources. Article 16(2) calls for the transfer of technology to developing countries, on “fair and favourable terms, including on consensual and preferential terms where mutually agreed...” Recognising the potential of IPRs to affect how this obligation is fulfilled, Article 16 (2) goes on to state that:

In the case of technologies subject to patents and other intellectual property rights, such access and transfer shall be provided on terms, which recognise and are consistent with the adequate and effective protection of intellectual property rights.

Thus, the CBD may provide another framework for an approach to intellectual property rights in technology transfer that can operate in concert with the TRIPS Agreement.

25 There are a number of specific issues for which better coordination on data collection and management would yield mutually supportive outcomes. More systematic information is required to trade and products that are associated with environmental damage (such as domestically prohibited goods, hazardous chemicals, and endangered species). For example, the CITES Secretariat has expressed interest in coordinating with other international organisations in the collection and management of data concerning legal and illegal flows in the 4000 animal species and over 30,000 plant species listed under that convention. Co-operating with the WTO and other organisations to assess the implications of trade on wildlife would help CITES to achieve its goal of ensuring that international trade in specimens on wildlife does not affect the survival of species. The CITES Secretariat has also noted the need for MEA Secretariats to increase their comprehension of WTO rules, and to learn more about the economic dimension of environmental issues, and the potential negative effects that a deregulated trade system may have on the environment.

26 See, the joint UNEP-WTO paper entitled *Compliance and Dispute Settlement Provisions in the WTO and Multilateral Environmental Agreements*, (WT/CTE/W/189), at para. 116, (stating, “The latest discussions in the context of MEAs have emphasised a strengthening of compliance with international environmental law. Developing more elaborated compliance systems is considered important to fully implement international legal instruments. This would be one way to enhance the effective implementation of MEAs, and to prevent MEA-related disputes from arising in the WTO dispute settlement system. Another way to reduce potential tension between the two regimes, and enhance implementation of WTO Agreements by less well resourced developing countries, could be to put less focus on judicial settlement of disputes, and more on mediation and conciliation combined with technical assistance and capacity building for implementation. A combination of these options could help realise synergies and constitute an important source of enhanced mutual supportiveness between the trade and the environmental systems.”)

27 Article 5 DSU.

28 Increasing understanding of compliance and dispute settlement systems will benefit both trade and environment communities.

It is in the interest of both to ensure that MEA-related disputes remain out of the WTO, a point emphasised by the 1996 CTE Report to the Singapore Ministerial Conference. To the extent that disputes do arise, input by MEA secretariats into relevant WTO disputes will help panels fulfil their obligations to undertake an objective assessment of the matter (Article 11 DSU), and to clarify the provisions of WTO Agreements in accordance with customary rules of interpretation of public international law (Article 3 DSU).

Table of Acronyms

| | |
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| CBD | Convention on Biological Diversity |
| CITES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| COP | Conference of the Parties |
| CTE | Committee on Trade and the Environment |
| EC | European Community |
| FCCC | Framework Convention on Climate Change |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| IPRs | Intellectual property rights |
| MEAs | Multilateral Environmental Agreements |
| NGOs | Non-governmental organisations |
| OECD | Organisation for Economic Co-operation and Development |
| PIC | Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade |
| POPS | Persistent Organic Pollutants |
| PPMs | process and production methods |
| SPS | Agreement on the Application of Sanitary and Phytosanitary Measures |
| TBT | Agreement on Technical Barriers to Trade |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| UNEP | United Nations Environmental Programme |
| UPOV | International Convention for the Protection of New Varieties of Plants |
| WSSD | The World Summit on Sustainable Development |
| WTO | World Trade Organisation |



The Center for International Environmental Law (CIEL) is a non-profit organisation founded in 1989 to promote sustainable development and protect the global environment through strengthening international environmental law and policy.

With offices in Washington D.C. and Geneva, CIEL works with non-governmental organisations, governments, and international agencies to promote sustainable societies, to incorporate fundamental principles of ecology and justice into law, and to inform and train public interest environmental lawyers.

In addition to reforming international trade institutions, CIEL program areas aim at conserving biological diversity, preventing climate change, protecting the rights of individuals and community, reforming international financial institutions, and building capacity for public interest law.

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WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by:

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