



“The Relationship between MEAs and WTO Rules”

**Seminar to raise awareness of trade issues in civil society
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**“Relationship between MEAs and the WTO:
Where are the negotiations heading?”**

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Introduction

The goal of establishing a positive relationship between World Trade Organization (WTO) rules and Multilateral Environmental Agreements (MEAs) has been on the international agenda for more than a decade (see, e.g. Agenda 21 adopted in 1992). It arose out of a fear in the environmental policy community that the reasoning of a GATT panel in the infamous Tuna Dolphin (Mexico v. United States) case, in 1991, threatened the rapidly developing international architecture of environmental protection. Despite a considerable amount of attention in official intergovernmental processes – such as the WTO, UN General Assembly Special Session on Rio + 5, and the World Summit on Sustainable Development (WSSD) – as well as various civil society processes and activities, the debate about the appropriate parameters of this relationship persists without resolution. In the meantime, there have been no direct challenges in the WTO to any MEA measures. Sceptics therefore ask – is there really a problem?

In this short paper, I will seek to argue that there is indeed a problem that does need to be addressed. However, the current opportunity for doing so, namely the Doha Development mandate, is fundamentally flawed: it will not lead to fundamental change, and at best, it will not represent a step backwards.

The Problematique is not just theoretical

Several trends indicate that there is now an increased likelihood of actual conflict between WTO and MEA rules landing at the Dispute Settlement Body (DSB) of the WTO. This is evident from some recent "near misses": the Swordfish and GMOs cases. In the Swordfish dispute, proceedings in the Tribunal of the UN Convention on the Law of the Sea and the WTO Dispute Settlement Body (DSB) over essentially the same set of facts may have led to differing interpretations of the same instruments, or even contradictory rulings (i.e. permissibility of the trade restriction under one instrument, and the incompatibility with the other). In the complaint of the US, Canada and Argentina against the EC's GMO regulation, currently before the WTO, the applicable MEA -- the Biosafety Protocol to the Convention on Biological Diversity -- is not part of the dispute because it was not in force at the material time. However, had it been in force, there is little doubt that arguments relating to the Biosafety Protocol would have been made, and potentially ruled upon by the DSB. Indeed, the recent Sardines (Peru v. European Communities) case shows that WTO will not hesitate to interpret provisions in other instruments -- in that instance a standard set by the *Codex Alimentarias*. Thus, there is little reason to think that the DSB would shy away from interpreting an MEA provision, if an issue relating to the MEA was before it.

Another factor in all this is the expansive WTO mandate, which has evolved from focussing exclusively on trade in goods, and now encompasses trade in services, intellectual property rights, and even government procurement policies. This widening heightens the risk of collision with MEAs. By the same token, there is an increase in the amount, and type, of trade measures being developed in MEAs. These include trade restrictions on specific items (e.g. recent POPs and PIC Conventions), labelling requirements (e.g. Biosafety Protocol), as well as the possible development of rules relating to intellectual property rights in the Convention on Biological Diversity. Finally, there is the evident reluctance of US to join MEAs, including those with trade measures. This unilateralist tendency of one of the largest economic powers in the world heightens the risk that it may complain that its WTO rights are being infringed by an MEA with trade measures.

Therefore, we are right to be concerned about the problematic relationship between these two bodies of law and to seek to find solution. After all, a WTO DSB ruling that undermines an MEA would be disastrous for both regimes. The MEA might be weakened, and the potential backlash

against the WTO might be hugely damaging for it. More positively, without a clarification of the relationship, it will be difficult to maximise opportunities for collaboration and reinforcement of potential synergies between WTO and MEA objectives (e.g. reduction of environmentally harmful subsidies).

It is politically important to find an effective clarification even if jurisprudence becoming more favourable to accommodating non-WTO imperatives. For example, the Shrimp Turtle and Shrimp Turtle Implementation cases have applied GATT Article XX in a manner that does allow states considerable policy space to develop trade measures for environmental reasons, within limits to prevent abusive trade protectionism. These measures may be unilateral, and while States need to try to get multilateral consensus, there is no WTO requirement that these efforts succeed. In addition, the "necessity" test in Korea Beef and Asbestos cases, which is applied under GATT Article XX(b), now includes a public interest element – which again increases the policy space available to States to take trade measures for environmental purposes. Furthermore, in the Shrimp Turtle case, the WTO DSB made use of MEAs and other bodies of law to interpret relevant WTO provisions. Finally, several WTO cases have helped to clarify the role of the precautionary principle, and the use of labelling, for environmental and health purposes. However, despite these important rulings, there is no doctrine of *stare decisis* in WTO, which means that the Appellate Body may adopt different approaches in the future. A strong political statement would impede this.

In addition, there are consistent reports of anecdotes that the threat of WTO conflict chills the development of international and national environmental measures -- this trend is worrisome, and indicates that the subtleties of the true legal relationship between trade and environment – as informed by the recent jurisprudence – have not filtered through to the wider policy making communities. Thus, only a strong political message will help overcome this chill.

What we should be aiming for?

The objective of any clarification should be an accommodation based on the principle of legal equality between both bodies of law. Taking the principles established in treaty law (i.e. Articles 31 of the Vienna Convention on the Law of Treaties) and customary international law (e.g. *lex specialis*), a legal hierarchy between these regimes cannot be established. Therefore, it is necessary for such an accommodation to include the following principles:

- **Complementarity of treaties** -- based on the principle of cumulation, the flexibilities inherent in the governing treaties should be used to maximise complementarities to ensure that all obligations can be complied with concurrently. In addition, there is a need for mechanisms and procedures that ensure maximum concrete synergies in support of sustainable development and avoidance of conflict. Furthermore, a principle of deference be applied, to allow each regime to focus on its core competencies. This would help ensure that disputes be heard in the appropriate bodies.
- **Division of labour based on respective core competencies.** MEAs should have the latitude to develop appropriate trade measures as part of a broader package of environmental, financial and technical measures. WTO has a role to play in encouraging market access and preventing abusive trade protectionism
- **Neutrality of adjudicative forum** – in cases of conflict, i.e. where fulfilling one obligation would mean violating another, adjudication should take place in a neutral forum, such as the International Court of Justice, which is not by its nature, beholden to any one legal regime.

Doha mandate woefully inadequate

Paragraph 31 of the Doha Mandate provides the current negotiating mandate on the relationship between WTO rules and MEAs:

“With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA secretariats and the relevant WTO Committees, and the criteria for the granting of observer status”

There are several problems with this mandate. The first is that it is very limited. It only addresses a small piece of the problematic and will not be an adequate basis for a comprehensive approach outlined in Section 3 of this paper. In so doing, on the "easier" situation of specific trade measures in MEAs. This is the "easier" problem, because of the general international law maxim to interpret treaty obligations that relate to each other so as ensure as far as possible their conformity, unless doing so is excluded by the terms or wording of any of the obligations involved. In the case of the WTO rules, virtually all instruments (e.g. GATT Article XX, Article 27.2 of TRIPS, TBT and SPS Agreements) provide flexibility that could potentially allow for many, if not most, MEA norms that are specifically provided for. Despite this relative simplicity from a legal perspective, the political negotiations in the WTO on this issue are completely bogged down. Even the rather innocuous issue of granting MEA secretariats observer status in WTO committees (a practice already existing in the CTE) has not been agreed – due to the unconstructive political dynamics in the WTO.

The more difficult issues in the WTO – MEA relationship are not addressed by this mandate, and therefore would remain even if the current negotiations were concluded successfully. These include the use of MEA trade measures that affect non-parties to those MEAs, where those MEA non-parties are members of the WTO. This is a particularly challenging problem because by not participating in the MEA, the MEA non-party has not implicitly consented to altering its WTO obligations. This is not to say that the flexibilities just noted above in the WTO treaties would not apply to trade measures affecting MEA non-parties, but that this may be a higher legal hurdle than in the case of trade measures between MEA parties. The second key difficulty involves MEA trade measures that are "non-specific". These measures are taken individually by parties in order to achieve the objectives of the MEA. They can occur in cases where the MEA in question contains obligations of result – e.g. Convention on Biological Diversity or UN Framework Convention on Climate Change – which allow parties the discretion to select the precise measures they take to fulfil those obligations. Another possibility for non-specific trade measures to occur is where the treaty allows parties to take stricter domestic measures to implement a MEA (e.g. CITES). A further scenario is where a party takes unilateral trade measures to enforce a treaty (e.g. US legislation to enforce the International Whaling Convention).

However, as mentioned above, the debate in the WTO Committee on Trade and Environment (CTE) has not successfully addressed even its limited mandate concerning MEAs. It has mainly been focussing on definitional questions relating to "specific trade measures", which have proven very controversial. Thus, it is very unclear what the feasible substantive solutions might

be. Indeed, not all the options being presented will truly enhance the integrity of a mutually supportive relationship between MEAs and WTO.

These options include:

- Amendment of WTO Agreements to accommodate MEAs
- Interpretative understanding for how WTO rules can be interpreted to accommodate MEAs
- Granting a WTO Waiver of MEA obligations
- Positive lists of qualifying MEAs that are deemed WTO compatible.
- criteria for assessing trade measures in MEAs to assess their compatibility with WTO obligations.

However, even though various WTO Members have posited these solutions at various times,, none have adequately provided a comprehensive vision of a synergistic WTO-MEA relationship. In other words, many of the wider, and deeper, issues remain to be adequately addressed.

In addition to the substantive issues, there are considerable problems with the Doha process. Firstly, the negotiations are only taking place in the framework of the WTO – thus they risk being institutionally unbalanced (both in terms of having just one entity take steps to determine the relationship with other entities, and also in that only the national trade officials will effectively be engaged). Secondly, the lack of transparency and participation, especially disputes over MEA observer status question (and continued denial of regular observer status) diminishes the credibility of any result that the WTO may come to. Thirdly, there is a certain peril of bargaining under WTO's "single undertaking" on complex questions of legal principle, particularly in a political context where there is a lack of trust and confidence. This structure tends to produce negotiation results, but is completely agnostic as to the quality of the results. Fourthly, the political logic of WTO process is that some countries feel obligated to argue one way about trade-related environmental issues, even though officials from the same countries are pushing different positions in other international contexts.

Conclusions: where are the negotiations heading?

Although perhaps the push to resolve the WTO/MEAs issue comes from the environmental community, no one in that policy community was arguing for it to be addressed in the manner reflected in the Doha Mandate. Indeed, the present concerns of environmental community are real – the collapse of the Cancun Ministerial demonstrated the risks of including environment into trade negotiations. At best, Cancun was a lost opportunity for at least some modest progress on observer status issue for MEAs. However, more substantively, it revealed how low a priority environment was for trade negotiators.

However, despite misgivings of environmental community, the current negotiations are too important not to try to find a positive solution, recognising that this is only a partial one. Indeed, abandoning the WTO negotiations without the creation of alternative processes is also risky – would increase instability in both WTO and MEAs. Thus, a hard look at the appropriate process needs to be taken, and alternatives developed for the present issues, as well as the more difficult, longer term ones. Such a process needs to involve more than just the WTO (target: international community as a whole) and it ought to create a real dialogue involving both

regimes and stakeholders. Furthermore, MEAs need to take steps to take the initiative on the trade-related aspects of their instruments, and not wait for the WTO to set the agenda. They must also accelerate and deepen their work on dispute settlement and compliance, so as to make it more systemic in order to address trade challenges.

In addition, more analysis needed of concrete options to resolve the problematic, because each of the options will have important impacts on the further development and implementation of both MEAs and the WTO. Although some analysis of the options has been done, the full implications of their design and application have not yet been comprehensively assessed.

Finally, the importance of ground level work on the interface between WTO and MEAs should not be forgotten. Policy coherence at national level is essential for a constructive relationship between trade and environment rules. This calls for an enhanced understanding of the actual impacts on the ground. To this end, there is a need for more capacity building, sustainability impact assessments, etc, which need the support of international institutions and funders.