

# Workshop Report

## Architecture of the Global System of Governance of Trade and Sustainable Development"

9 – 10 December 2002, Berlin

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TRADE  
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## **1 Introduction**

This report presents a summary of the issues raised and discussed during the SUSTRA Workshop on the Global System of Governance of Trade and Sustainable Development, as well as suggestions put forth by participants for further research in this area. The organisation of the paper follows the structure of the two-day conference, which was divided into sessions based on theme and culminated in working group discussions and presentations of discussion results.

## **2 DAY ONE: 9 DECEMBER 2002**

### **2.1 INTRODUCTORY SESSION**

(Presenters: Dr. Sophie Thoyer, Ecole Nationale Supérieur Agronomique de Montpellier, Department of Economy, Mr. Francois Lerin, Institut Agronomique Méditerranée)

After a brief welcome and some introductory remarks about the general aim of the workshop (to identify key issues for future research), the presentations and the ensuing discussions of the introductory session focused on the links between global governance and trade, placing particular interest on the role of Global Public Goods (GPGs) and human rights in this context. Concerning the first, it was noted that the current tendency (academia) to broaden the definition of GPGs adds, on the one hand, new aspects to the discussion of governance while bearing, on the other hand, the danger of over-stressing and thereby distorting as well as weakening the notion and use of GPGs. It was therefore suggested that GPGs meet certain criteria in order to be realistically applicable. Primarily, they must comply to the Samuelson principles, i.e. the neo-classical approach, to be competitive in relation to trade interests and to be effective. Apart from the issue of the allocation of resources, the question of legal protection was raised.

Because of the danger that the trade regime or trade interests might overrule MEA or other regimes, the protection of GPGs should be incorporated into an international charter. The coherence at domestic and international level (e.g. to resolve competition between GPGs), as well as their implementation, could be achieved through, e.g. the assignment of national agencies to each GPGs, a State representative comparable to an ambassador for the coordination on a national level, or officers for each GPG on an international level. Finally, some GPGs could be protected on the basis of existing human rights, e.g. the right to certain social and civil standards, access to safe and adequate food (Art. 11 ICESCR), access to effective jurisdiction as well as international responsibility, and the IMF and World Bank should

take this into account in their reconstructing programmes. Indeed, mechanisms should be developed to hold States accountable for their actions regarding GPGs (e.g. trade sanctions).

## **2.2 SECOND SESSION: *Strengthening the way the international sustainable development regime addresses trade policy***

(Chair: Mr. Richard G. Tarasofsky (Ecologic). Presenters: Mr. Laurence Tubiana, Institut du Developpment Durable et des Relations Internationales, Mr. Juan Carlos Vasquez, Secretariat of CITES, Mrs. Johanna Bernstein, Stockholm Environment Institut)

This session revolved around the issue of how international sustainable development can be strengthened vis-à-vis the trade regime. This involves a change in the existing trade regime as well as the MEA system. It was stated that a perceived imbalance between the international trade regime and MEA system hinders the pursuit of sustainable development. This perception is founded on several aspects. For example, in relation to the trade regime, the cost of opting-out is relatively low, and a cost-benefit analysis is therefore more likely to lead to an opting-out of a MEA in favour of trade policy activities. The benefit of opting-in a MEA produces no direct revenue and is uncertain in the short term, taking into account a considerable financial burden originating from an increasing number of obligations, e.g. after the WSSD. This must also be considered in the context of short term business gains as against long-term environmental gains. In addition, MEA dispute settlement as a mechanism of enforcement is not as effective as in the WTO, and there is a general reluctance of environmentalists to negotiate these. The inner structure within the MEA system is not hierarchical and any proposition to set up any kind hierarchy has always been strongly objected. Finally, each MEA only covers single environmental issues. The aim, as identified in the workshop, must therefore be to solve this overall unbalance without surrendering the advantages of the MEAs system with respect to the WTO regime. MEAs reveal, generally speaking, an advantage in the detection and recognition of a crisis. In a procedural respect they display greater fairness, since they are more open to participation of Non-State-actors and more transparent and also offer a higher degree of accountability.

One presentation focused specifically on the experience of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), in the context of UNEP's work on synergies and on trade. On the institutional plane the problem of "fragmentation" could be decreased by enhancing the synergies among the MEAs, as suggested by the UNEP initiative in 2001, and the WTO. These synergies could be intensified in the legal respect by "clustering" the activities of the MEAs rather than identifying their relation because, ultimately, MEAs are separate legal entities. The following fields of clustering have been identified at the

functional level (by bringing together various functions undertaken by secretariats of MEAs): capacity building, monitoring, mutual recognition of measures and cooperation as “technical partners”. This would reduce the risk of overlapping and increase effectiveness and policy coherence while reducing expenditure. It has also been suggested that the MEAs should be “clustered” at the program level (by bringing together MEAs dealing with related environmental issues, for which they are responsible for (e.g. Biodiversity, Chemicals, Regional seas ).

It has also been suggested to increase synergy and provide better policy coordination among existing and future MEAs, as the lack of coordination with other policy areas tends to induce overlap and can create potential conflict with the principles of other treaties. The synergy issue was also raised with regard to the WTO, reaching beyond the question of cooperation—for instance with the CTE—to concentrate on mechanisms to influence WTO policy and decision making. Although the WTO had put environmental concerns onto the Doha agenda, the standing of the MEAs should be strengthened by granting them observer status and encouraging States to join MEAs (1<sup>st</sup> step), to be followed by an internal analysis of specific trade obligations used to achieve the objectives of MEAs, thereby solving the relation to WTO rules (2<sup>nd</sup> step). Finally the effectiveness of trade measures should be examined, when producer and consumer states have different compliance incentives and elaborating possible reform steps (3<sup>rd</sup> step).

Finally, the question of legitimacy was discussed, including the issue of leadership and constituencies. It was noted that the WTO had a lack of transparency and participation, such that the acceptance of non-state actors and other groups (e.g. MEAs) in the trade policy and decision making process question the WTO's legitimacy. In this context, the role of the EU was discussed as well as whether it could take the lead in promoting environmental protection, since environmental leadership is essential.

Recent developments have shown that virtually the only initiatives enjoying true universal support are capacity building, on account of the still existing difficulties in the communication among States and among stakeholders. Some further development has taken place in international environmental governance in relation to international trade policy at WSSD: Chapter X of the Johannesburg Plan of Implementation, “Institutional Framework for Sustainable Development”, the UNEP IEG (Open-Ended Intergovernmental Group of Ministers on International Environmental Governance) conclusions and Chapter VI of the Monterrey Financing for Development Conference Governance-Related Outcomes. However, these developments are all rather modest. The problem of foremost concern was the question of the role of the developing countries in the agenda setting process as they often lacked the

necessary resources as well as the question how a more balanced North-South agenda could be achieved. Their role needs to be understood in the context of developing countries' fears and suspicions as regard implementation of the environmental pillar of sustainable development.

### **2.3 THIRD SESSION: *The WTO as an international institution that supports sustainable development***

(Chair: Mr. Laurence Tubiana. Presenters: Mr. Scott Vaughan, Carnegie Endowment for International Peace, Prof. Dr. Konrad von Moltke, Dartmouth College, Environmental Studies Program, Mrs. Beatrice Chaytor, University of London, Foundation for International Environmental Law and Development, Dr. Ingmar von Homeyer, Ecologic)

This session dealt with the procedure in the WTO. It brought up issues of evolution of the WTO agenda, the relationship between problem structure and institutions, the balance between law creation and interpretation and the challenges affecting interactions between MEAs and the WTO.

With respect to the WTO agenda, the contrast between "deepening" versus "broadening" the trade agenda. Reference was made to a recent article in *The Economist* (Zoellick, 7 Dec. 2002), which compares the United States approach to trade to that of the European Union, as exemplifying this debate. The United States is pushing to "deepen" the WTO agenda (i.e. going further with existing obligations) whereas the EU wants to "broaden" the WTO mandate (i.e. by extending WTO rules to new areas). It was noted that a significant crux in the discussion is the fact that it remains unclear precisely what is meant by the "broadening" of the trade agenda, and exactly how this may be achieved. The question also arose as to whether the WTO would be able to retain enough legitimacy to succeed with its original agenda, and what the implications of the (over)extension of the WTO mandate might be for the organization's overall effectiveness. For example, if the WTO extends its mandate to embrace social and environmental issues as well as investment, intellectual property rights and labor standards, it stands to lose legitimacy and effectiveness.

In addition to trade reform, there were also suggestions made for reform of the WTO's dispute settlement process, e.g. having WTO Appellate Body judges serve only one, extended term. It was noted that, if used creatively, provisions in the Dispute Settlement Understanding (DSU) could produce more positive outcomes for sustainable development, e.g. mediation. The dispute settlement mechanism (DSM) in general would also become more effective through transparency and a greater opportunity for wider participation.

The notion of institutional appropriateness was also addressed. An effective regime will result from a good fit; that is, the compatibility of the institution to the problem structure. As applied to the WTO, which effectively governs by the principle of comparative advantage (i.e. "any deal is better than no deal"), that the abilities of the organisation are immediately called into question whenever it delves into issue areas that are not ruled by comparative advantage, e.g. property rights and investment.

Just as the WTO is institutionally sparse, MEA regimes are institutionally rich. There is significant diversity among environmental regimes and their procedures, but the common denominators are precaution, transparency and participation. It was mentioned that an important factor affecting interactions between MEAs and the WTO is the plethora of challenges that arise from the implementation of unilateral measures. It has also been suggested that transparency and participation in MEAs can be compared to the mechanism of dispute settlement in the WTO. The current deliberations inside the US about whether to challenge the EU ban on GMOs indicates that a wide range of factors, separate from pure legal consideration but including the overall credibility of the trade regime, influence the decision about whether to bring certain cases in front of the WTO. The Beef Hormone case demonstrated that even a successful case does not always lead to a change in the behaviour of the offending party, while such cases can have spill-over effects onto the general public opinion that can undermine the legitimacy of the international trading system. As such, the role of strategic political considerations as well as the impact on public opinion and civil society on the dispute settlement process needs to be further researched.

#### **2.4 FOURTH SESSION: *Improving the interaction between the international sustainable development regime and the World Trade Organization***

(Chair: Dr. Ulf Jaeckel (Federal Environment Ministry). Presenters: Mr. Rupert Schlegelmilch, Delegation of the EC in Geneva, Prof. Robert L. Howse, The University of Michigan Law School, Mrs. Ludvine Tamiotti, WTO, Trade And Environment Division, Dr. Frank Biermann, Potsdam Institute for Climate Impact Research)

This session examined the relationship between the international sustainable development regime and the WTO. The focus was on what this interaction means in practice, and which institutional and substantive processes are involved.

From a legal perspective, it was suggested that in order to understand this relationship between MEAs and WTO law, one has to begin with the law of the WTO itself and how it

relates to the protection of the environment and environmental issues. One fundamental and divisive issue that the WTO faces in the trade and environment debate has been whether trade restrictions to protect the environment are even allowed under the law of the GATT/WTO system. It was noted that although an MEA is not a prerequisite for taking environmental action, the presence of one may inspire more confidence in the appellate body to justify environmentally-based trade actions.

On the one hand, the WTO was presented as being closed and perhaps even hostile to environmental concerns, and therefore it is possible that people involved with MEAs have been purposefully excluded from the negotiations process. On the other hand, it was said that WTO rules are not to be interpreted in "clinical isolation", and that difficulties often arise due to the fact that the international structure is made up of diverse environmental treaties—which have an equally diverse number of issues and interests involved—creates a complex and disorganised body of law. From this perspective the proliferation of courts is primarily seen as "system building" rather than fragmenting in its effect on international law. Proliferation is not entirely without risks, however, and therefore the process must be monitored in order to ensure consistency.

From a European perspective, the question of how to implement the results from Johannesburg brings up the notions of eternally sustainable trade and a General System of Preferences (GSP), which would provide additional incentives for protecting the environment. Corporate responsibility, sustainable impact assessment, technical assistance and capacity building are all issue areas for which Member States need to find ways to implement under WTO rules. From North-South perspectives, sustainable development is about equity—with this in mind, it is important to note who is setting international standards, and what standards are being set. The recent discussions on the establishment of environmental standards within WTO law are perceived by developing countries as unilateralism and even "eco-colonialism" on the part of industrialised countries. Thus, it was suggested that exporters in developing countries be helped to meet the standards through the provision of technical support and the creation of public-private partnerships. In keeping with this line of thought, it is necessary to formulate a system which applies accountability to standard setters on behalf of those people on whom the standards are being set. Reference was made to the latest ruling in the *Shrimp/Turtle* case, which concerned the extra-jurisdictional application of production standards, as a ruling that could potentially be used for influencing the environmental policies of developing countries for the interests of power countries. A reform of WTO law is needed to demarcate the line between environmentally-motivated trade restrictions in MEAs and those that are unilaterally imposed by states.

During the discussion, it was noted that unmanaged international environmental issues pose a threat to the trade regime, and when dealing with a management regime, one always encounters the problem of this interface. Mention was made of the possible implications arising from the WSSD; the terminology is "environmentally-friendly" goods and services, as opposed to simply "environmental" goods and services in the Doha Declaration. In response to the question whether there could be a system of compensation used effectively to achieve compliance, there was also a suggestion to develop a mechanism with which developing countries could express priorities (not only in defensive matters such as exemptions, but also in the agenda-setting).

It was suggested that conflicts between dispute settlement regimes could be avoided by the WTO seeking an advisory opinion of the International Court of Justice (ICJ). The Appellate Body could request such an opinion, as can non-parties to the conflict, which is not directly enforceable but might provide essential guidance from an impartial standpoint. Also discussed extensively were *amicus curiae* briefs and their compatibility with dispute settlement in the WTO. It was noted that since there is no consensus on *amicus* briefs within the WTO dispute settlement process, it is important for NGOs to continue to submit them. The eventual implementation of the *amicus* process would inevitably develop on a case by case basis, finding foundation in no small part through the interests expressed by those NGOs.

## **2.5 FIFTH SESSION:    *The potential of non-state actors to influence international institutions on trade and sustainable development.***

(Chair: Mr. Richard Tarasofsky (Ecologic). Presenters: Mr. Matthias Buck, University of Hamburg, Faculty of Law, Dr. Sebastian Oberthür, Ecologic, Mr. Ricardo Melendez Ortiz, International Center for Trade and Sustainable Development)

This session focused on the role of non-state actors in promoting their agendas in international fora relating to trade and sustainable development. In the past, research in international governance has almost exclusively focused on the intergovernmental component, identifying the ways in which intergovernmental institutions facilitate cooperation between nation states. The characteristics, capabilities and mechanisms of governance change when moving from the public to the private sphere. It is, however, difficult to discern the characteristics of non-state actors in order to provide a general definition. One criterion is the legal capability; non-state actors do not enjoy, unlike governmental organisations, the sovereignty to enact legally binding decisions due to the lack of legitimacy. They can, furthermore, be distinguished by their degree of organisation, their purpose (commercial vs. non-profit) and their field of activity which is retained by the political and legal space

accessible to them. This incapability to participate must not be mistaken as a disadvantage, however, since they are thus not restricted by the applicable rules; state actors, for instance, have the advantage of law setting ability but are restricted by rules while exercising it.

Another criterion to distinguish non-state from state actors is their motivation; their agendas are marked by a narrower and strictly purpose-related formulation. Finally, non-state actors display different mechanisms of governance by shaping preferences, building confidence and delineating the area of cooperative behaviour by means of market forces and availability of knowledge as well as mustering public support or criticism. Another issue was also raised, namely the ability of private international institutions to be effective in delivering public goods. These observations have some implications for research and policy action in respect of the formation and maintenance of international institutions, the consequences, public or private systems of governance and legal research.

The practice and participation of non-governmental organisations in international environmental governance has increased considerably over the last decades. To achieve greater transparency within these intergovernmental organisations, the session brought forward some options to enhance their role within the MEA regime by accreditation and access to information as well as access to meetings and active participation. It was stated that the accreditation and access to information should be given to all qualified NGOs, thus being enabled to participate actively in the meetings by means of distribution of documents. These possible entitlements might have to be restricted for reasons of the nature and the function of the body, the matter under consideration, and possible resource constraints. The burden of proof should be in that case on the side of those that want to introduce the restrictions. With regard to the process of participation in negotiations, it was deemed necessary to define clearly at which level it is worth improving NGO participation. It was also suggested that the proliferation of NGOs in international negotiations can generate a need for more institutions to manage their participation. Finally, it was recognised that there may be a problem of legitimacy and accountability of these new actors.

Another important topic concerned the contributions of non-state actors in ensuring the complementary relationship between trade and sustainable development. These were at first very limited as the former GATT regime did not accept NGOs since it had been developed from a mercantilist perspective. At the same time, MEA regarded trade provisions as something higher up in policy hierarchy. A turning point for the WTO came with the Shrimp/Turtle decision, when there was suddenly space for non-state actors to make their voices heard. In addition, the summit of Rio (1992) made the governments realise that without

the participation of the public, implementation is more difficult. In 1995 sustainable development was included in the Marrakech preamble to the WTO Agreement, as the Members moved from the linear thinking of income growth to the importance of ethical and social concerns. Art. 5, paragraph 2 of the Declaration recognises the importance of enhancing public understanding. As a consequence, considerations had to be made in view of a strategy to integrate non-state actors in the WTO system, primarily concentrating on policy makers and influencers rather than the general public because the former offer the necessary expertise for effective participation.

So far the access to information is still limited, since any government can demand it to be confidential. The same applies to the access to justice although a remarkable collaboration of a non-state actor and a Member State happened in the Sardines case, when Peru attached an amicus brief from the UK Consumer Association to their submission in the dispute settlement. But this case also shows that the participation of non-state actors remains to be the role of a consultant at national or regional level or regional and bilateral agreements although controversy could be felt among the participants in respect of their actual impact. Other examples were suggested in the case of Doha where cooperation between States and NGOs in the area of TRIPS and fisheries took place. Beyond this, there is very limited possibilities of participation in ad hoc symposia and informal briefings. One step towards more access to information is the latest WTO decision on publication of material on its website. The secretariat, however, justifies the general non-acceptance with the statement that "the WTO cannot be compared to other international bodies since its agreements are binding and enforceable" although there is ample evidence at international level (e.g. ECOSOC, OECD) to indicate that there is great benefit to the system to include the participation of non-state actors. In addition, there have been occasions when in practice NGOs and stakeholders obstruct one another.

In the ensuing discussion the greatest interest was shown in respect of the procedures of accreditation. It was regarded necessary that there must be definite criteria with regard to their academic expertise, accountability, equal entitlements and responsibilities while participating and a review and capture of the participating NGOs. At the end, a list of stakeholders should be compiled. As areas of research were defined: important linkage-possibilities for cross breeding, advantages of alliances with government actors and other bodies, particularly by the developing countries, analysing NGOs in the historical context and its benefit and costs and benefits of transparency, detailed in a more non-ideological fashion. The final comment was that the WTO is, in the end, an international agreement and should not be differently classified than other international agreements.

### **3 DAY TWO: 10 DECEMBER 2002**

#### **3.1 FIRST SESSION: *Leveraging the contributions of non-state actors in support of the global system of governance of trade and sustainable development***

(Chair: Mr. Ricardo Melendez Ortiz (International Center for Trade and Sustainable Development), Steve Bass, Isabelle Biagiotti, Sascha Müller-Kraenner, Charlotte Streck)

The purpose of this session was to examine what non-state actors actually do in their activities which either support or conversely do not support the institutions within the architecture of global governance. This is a subject area in which relatively little analytical work has been done.

There are several dilemmas that non-state actors face with the global system of governance. Among them are efficacy, coherence, adaptability, equity and legitimacy. There is also the significant challenge of whether the approach of a smaller, non-state actor is able to meet the issue-specific needs of the larger international groups. An example provided for this topic was the forestry sector - the global aims of forest governance, the interaction and impacts of non-state actors in the industry, and the need for forest certification as an enforcement mechanism to promote sustainability, transparency and effectiveness. Forest certification is necessary because of inaction of governments and relatively little compliance with global forest law. This encourages consumers and NGOs to seek alternatives, but the question remains whether certification is able to empower local/marginal groups in global affairs.

Another example of non-state actors is corporate actors, whose emergence is rapidly changing the realm of environmental governance. It was noted that we now observe new alliances between state and non-state actors (involving governments, NGOs and corporate actors). Since Johannesburg, state actors showed to be increasingly open to corporate proposals. The increase of partnerships between international institutions and corporate actors results from the decrease of public financing and the need for recognition for private actors. This trend may compel the UN to overvalue the relationships with business and pay less attention to non-state actors, who may as a result lose their legitimacy.

Additionally, the proliferation of non-state actors was mentioned as leading to a shift in the norms process; that is to say, a movement towards privatisation and thus to proliferation of norms. The dearth of regulation in many domains, combined with a laissez-faire approach of

governments (explained by the lack of legitimacy felt by governments to regulate corporate actors), leads to problems of control within the norms' structure. Two kinds of problems may arise from the privatisation of norms: a problem of legitimacy of these norms created and implemented by private actors and a problem of articulation with the national and international norms created and implemented by public actors. However, these processes are often encouraged by governments because they "fill a gap" in environmental or social law. Regarding the increase of corporate actors' participation in environmental governance, there is a need to assess what kind of rationality or motivation guides their action, what strategy they follow and what the consequences are for others actors in this arena. NGOs, public authorities and local governments may have to adapt their actions and learn to work together with corporate actors. Areas of research stemming from this subject area include examining the strength of motivation within firms to promote sustainable development, finding a new equilibrium to balance the problem of norms and to encourage cooperation among actors. Also, the necessary assessment of what kind of social control, transparency and responsibility the corporate actors will accept was set on the agenda, all in an effort to better understand what enables the corporate sector to support sustainable development.

Another group of non-state actors to whom much attention was given was Type II Partnerships, or public-private partnerships. The question was raised as to how to govern sustainable development partnerships, particularly those that – like Type II – were advocated in Johannesburg. The challenge that the sustainable development community faces is to ensure that implementation of WSSD targets is not left to actors and mechanisms which are lacking in accountability. It was noted that, because not all policy areas can be governed by international law, the idea behind Type II partnerships sprung from the need to bridge the gaps between governments and what has been agreed upon internationally, e.g. WSSD Plan of Implementation, soft law, and Millennium targets. In linking the discussion to international trade, it was mentioned that under GATS, many services that are being regulated are significant parts of the international trade agenda (i.e. water, health, energy, agriculture and biodiversity). This provides an interesting area for further research into the relationships among these new forms of organisation, trade and existing international law.

The notion of Type II partnerships has become increasingly relevant for environmental discussion, and it was pointed out that there is currently a weak system of international environmental governance. The system suffers from fragmentation, lack of coordination, limited political support and an overall unsatisfactory level of effectiveness. It was suggested that it is necessary to devise a new model of international governance that is no longer built on a top-down approach, but rather incorporates NGOs, citizen's movements, multinational

corporations and other non-state actors into the decision-making process by a concrete delegation of responsibility at the appropriate level.

Within this argument, Type II partnerships from WSSD are lacking sufficient criteria and a clear strategy, and the links between Type II partnerships and Type I outcomes were inadequately defined. The "ideal" partnership would have a tri-sectoral characterisation through the collaboration between governments, civil society and the private sector, and would be inclusive towards both the North and the South. It would integrate international, regional and local actors, and would most likely be organised in an informal or loosely structured framework. Most importantly, the ideal partnership would have to be flexible and responsive to opportunities for learning. But there is also a need for a framework for this partnership.

The discussion for this session focused on ways in which the contribution of non-state actors in public policy making can be leveraged. It also brought up the issue of networks versus networking. Networking is more difficult to capture analytically and really work with, and research has to focus therefore on ways in which non-state actors can facilitate the process by which they communicate and work together in order to increase efficiency and overall effectiveness.

## **3.2 SECOND SESSION: WORKING GROUP DISCUSSIONS AND RESULTS**

### **3.2.1 WORKING GROUP I: Improving the formal architecture on trade and sustainable development**

(Group Facilitator: Prof. Dr. Konrad von Moltke)

The research agenda for this topic was condensed under three primary thematic areas: legitimacy, effectiveness and linkages. With regard to the first, it was recognised that there are many more sources of legitimacy in practice than we are generally willing to acknowledge. For example, legitimacy could originate in formal, legal or procedural bases. It therefore becomes a challenge to encompass all – e.g. cultural, western vs. eastern – interests. It is difficult to find mechanisms through which legitimacy can be produced, particularly in the southern context, given that the states are diverse and have different perspectives and approaches to the international realm. It was noted that legitimacy and democracy are connected but *not* synonymous, and it is thus quite important in research to see where these elements interact. There are also various crosscutting issues under this theme, including the notion of subsidiarity, specifically fragmentation (as close as possible to the citizen) versus

universal norms and institutions. The governance role of private actors was also called into question.

The ultimate output of legitimacy is effectiveness, the second thematic area, which was combined during the course of the working group discussion with the third thematic area, that of linkages. One of the fundamental issues under this theme was the need for more substantial research on the problem structure of "institutions-fit" - that is, determining whether the scope of the institution is appropriate for the problem with which it is confronted. Other points of interest under this thematic umbrella were compliance, efficiency and cost effectiveness. It was also suggested that an area in which we can start thinking seriously about policy initiatives is compliance. Questions were raised as to how one can learn from the best practices of compliance structures both in and outside of the environmental context; how to recognise, validate and promote compliance procedures; as well as how compliance practices can be strengthened within the MEA context. Compliance was also discussed in the context of law, namely regarding how law can be defined so that it is not susceptible to differences of interpretation that could lead to a general distrust about how the law is applied. Subsidiarity was mentioned again under this thematic area, with reference to how institutions can be more efficient with the participation of fewer members. There was also the issue of societal feedback; that is to say, how it might be possible to forge different negotiating processes that would create space in which community interest would be reflected.

The working group discussion culminated in a multitude of issue areas being raised for potential research, though ultimately there wasn't sufficient time to flesh out detailed policy initiatives. It was suggested that the World Bank inspection panel could be analysed as a possible model for the way in which an institution handles participation and gives voice to people who are affected by legislation, because it has a very rule-based structure. Another possible research topic dealt with the issue of public-private partnerships producing norms, as this relates to the access of essential public services. This topic encompasses not only the trade and regional agendas, but also private law. With reference to the idea of collective preference, it was posited that, in terms of compliance, it must be determined how to recognise, validate and promote procedures. Ultimately, many interesting and important topics were addressed and debated, and the coherence of the first and second working group in their discussion summaries reflected a common understanding and set of goals among the participants for the overall subject of the conference.

*Recommendations for a policy agenda and policy interventions:*

### **3.2.1.1 Research**

- Examine the formal underlying problems that are undermining MEAs and are prohibiting developing countries from having a more active role in the decision-making processes and within the governance of MEAs.
- What would be the role of private norm setting actors that would help to set the WTO agenda relative to the Doha environmental goods and services?
- "Institutions-fit" – identify a robust analytical framework to approach the problem structure of institutions, and apply it to the economic market.
- In order to circumvent the distrust about interpretation of rules and how the law is applied, how can we define environmental law so that it's not susceptible to differences of interpretation?
- Because there has not yet been a systematic study of compliance and judicial reform, cases in which this issue has been relevant should be examined and used as springboards for suggestions for institutional reform.
- Identify the norms produced through public-private partnerships as relates to the issue of access to essential public services

### **3.2.1.2 Policy**

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| <ul style="list-style-type: none"><li>• Use the World Bank inspection panel as a model for a comparative study (rule-based structure)</li><li>• Strengthen the compliance process within the MEA context</li></ul> |
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## **3.2.2 WORKING GROUP II: Leveraging the contributions of non-state actors in support of global governance**

(Group Facilitator: Matthias Buck)

In the course of the discussion, the working group agreed on the following research agenda and policy interventions:

### **3.2.2.1 Concerning private initiatives and sources of influence**

The research should focus on:

- The motivations for companies to support global environmental governance, such as **profit making**, i.e. if companies can make money by following governance corresponding criteria, **risk protection**, i.e. public pressure (boycotts) or court cases and **incentives**;

- A **survey** to reveal the strategy that guides corporate actors' intervention in environmental governance;
- The understanding of the **sources of influence**, i.e. who influences the aforementioned risk profile, and to understand the economic, political and legal space of private initiative by mapping the different types of relationships and how they operate, markets, constituencies, evolution of shared consensus on international issues as well as trade unions and NGOs;
- The **assessment** of what kind of social control corporate actors will accept and the identification of who will be in charge of this assessment (NGOs, audit companies, governments). This is inextricably linked to the question of legitimacy and the different types of legitimacy, moral, judicial or political. It was also mentioned that there has been a shift of legitimacy from governments to NGOs and now from NGOs to corporate actors.

### **3.2.2.2 Concerning public participation and possible linkages**

Furthermore, the research identified with regard to public participation includes:

- An **assessment of the cost and benefits of public participation**, whether there is an optimal level for specific cases and institutions;
- The **understanding** of what an **efficient and equitable multi-stakeholder** process involves and what the contextual differences are, drawing from literature and comparative government studies. The working-group placed particular emphasis on a survey to show the benefits of participation as a strategy compared to other forms of influence. This includes the identification of linkages, assessing how public versus private institutions perform in monitoring and enforcement to give policy makers a perspective to maximise positive gains;
- The question whether **regulations** can be **privatised** or to what extent governments could use NGOs for specific governmental purposes;
- Research on the question of **deficiency or lack of linkages** between NGO processes that have evolved around specific issues was also set on the agenda.

### 3.2.2.3 Policy interventions

• **Necessity for a framework of international guiding principles on Type II Partnerships and a follow-up to identify the necessary universal references, considering:**

- The necessity for a concise typology, i.e. a definition of NGOs and Type II Initiatives;
- Their purpose to fill the gap between the rules/political objectives and implementation;
- To maintain the equilibrium within the partnerships;
- To ensure balanced participation in the standard-setting processes;
- To devise criteria to ensure that NGOs in public participation are legitimate as well as accountable;
- To strengthen the enforcement, e.g. contract fulfilment (also in non-signatory states), create an enabling environment and fight against corruption, e.g. through monitoring or dispute settlement (e.g. using EU or US courts);
- At the same time, to avoid over-regulation and over-bureaucratisation to leave room for innovation and flexibility;
- To ensure general applicability (in industrialised and developing countries);
- To identify perverse effects of initiatives (e.g. FSC certificates).

• **Strategic advice for Type II partnerships considering:**

- The identification of entitlements/empowerment to participation in international law, e.g. links between local and international governance to short-circuit national restrictions;
- The definition of task and approach (focusing on the *specific* gap of implementation addressed, e.g. gap of implementation or normative gap, as this determines the type of network or partnership that needs to be developed);
- The identification of instruments of participation and survey of the state of the art;
- Advice concerning agenda setting, expertise, media-handling and policy initiatives, including coalition building, interaction between public and private sector, where and when to influence and how to do this effectively;
- To make use of existing complementarities or synergies (e.g. between market space and international regulatory space or between different environmental regimes with regard to distributional impacts, such as costs and benefits and general risk profile);
- And to identify differences;
- In order to identify possibilities to institutionalise learning at research policy interface.