The Doha Round and Beyond: Towards a lasting relationship between the WTO and the international environmental regime

Alice Palmer and Richard Tarasofsky

CHATHAM HOUSE

FIELD
Foundation for International Environmental Law and Development

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Alice Palmer, FIELD

Richard Tarasofsky, Chatham House

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Chatham House, 10 St James's Square, London SW1Y 4LE
T: +44 (0) 20 7957 5700
F: +44 (0) 20 7957 5710
www.chathamhouse.org.uk

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EXECUTIVE SUMMARY

The vast majority of the world's governments have signed up to both the rules of the World Trade Organization (WTO) and to the major multilateral environmental agreements (MEAs). However, the relationship between these bodies of law is a troubled one. There are potential conflicts between the rules and procedures, as well as areas where more positive synergies between policy objectives have yet to be achieved. The net effect is legal and political uncertainty, impeding optimal global governance of both trade and environment objectives. In particular, as pressures grow to develop more stringent economic obligations to address global climate change problems, there is an increasing possibility of a damaging clash between the WTO and MEA regimes. This paper sets out options for avoiding these conflicts and building a positive relationship between international trade and environmental objectives.

After more than five years of trade negotiations under the Doha Round, there was little sign of progress in the talks on the WTO-MEA relationship under Doha Ministerial Declaration (DMD) paragraph 31(i). Although the Round was revived in January 2007, it is difficult to predict the implications for the WTO-MEA component of the negotiations. Even before July 2006, when the Doha negotiations were suspended, WTO Members were fundamentally divided over the scope of and approach to the 31(i) negotiations, and some campaigners for sustainable development had been calling for the 31(i) negotiations to be abandoned altogether because they feared a negative result. While WTO Members struggled with the WTO-MEA relationship inside the WTO, many of those same governments have continued in other international fora to agree to new MEA commitments that relate to trade policy without a clear understanding of how the design and implementation of those commitments are affected by WTO rules. This policy disconnect is problematic and must be addressed on multiple fronts.

The 31(i) negotiations do not have a high priority in the context of the wider WTO agenda. The Doha Round was intended to result in a ‘Single Undertaking’, whereby all Members assume commitments on all items under negotiation. The logic of bargaining under the Single Undertaking will make the 31(i) negotiations hostage to other issues in the Doha Round, if the Round is resumed. In addition, the 31(i) negotiations are subject to the competence and institutional constraints of the WTO: they are limited to the strict terms of the Doha mandate, which only addresses a part of the problem. There is no opportunity under this mandate to discuss the full range of issues relevant to the WTO-MEA relationship in a meaningful way that involves all relevant actors. Yet the WTO is the only forum where international negotiations on the WTO-MEA interface have been undertaken. So, even if the entire problem cannot be resolved under these negotiations, it is possible that they can set the basis for a new, more systematic, phase of negotiations. Such a new phase would involve analysing MEA issues throughout the WTO’s work on the trade in goods, services and intellectual property, and coordinating with other intergovernmental bodies mandated to deal with multilateral environmental policy and international trade, which also engage relevant stakeholders.

Trade measures are vital to the achievement of many MEA objectives. They create market incentives aimed at achieving environmental outcomes and disincentives aimed at free-riders. The types of trade measures permitted by MEAs vary considerably – ranging from outright bans to controls on labelling – and their legal relationship to the WTO rules is ambiguous. General international law and customary international law do not provide a complete framework for managing the relationship. WTO rules contain a number of provisions that could relate to MEAs, some of which have been tested through its dispute settlement system. For example, there have been WTO rulings that trade measures aimed at the way a product is produced can be justified and that harmful products are not 'like' non-harmful, but similar, products. However, given that the findings in one WTO dispute do not bind the arbitrators of subsequent disputes, it is always possible that future disputes may be decided differently. The September 2006 Panel Report in the *EC–Biotech Products* dispute demonstrates the ever-present confusion around the WTO-MEA relationship and the potential for interpretations of the WTO rules to undermine a 'mutually supportive' coexistence of trade and environmental policy. In addition, neither the WTO nor any other dispute settlement system has considered a direct challenge to an MEA trade measure in relation to WTO rules – although there was a near miss in the *EC–Chile Swordfish* dispute. It is possible that any future challenge, in the present framework, could lead to conflicting results in the respective WTO and MEA dispute settlement mechanisms. This policy and legal uncertainty will persist until clear political and legal action is taken to address it.

The WTO has been grappling with the WTO-MEA relationship since its founding in 1995. So far, it has not been able to come up with any operative solutions. Divergent views among Members as to the seriousness of the problem, and the range of solutions, have persisted throughout the WTO's work in this area. The most ambitious outcome to date was reached in 1996, in conclusions of the WTO Committee on Trade and Environment, but those results were vague and inconclusive, and did not entail any meaningful reform of the way the WTO relates to MEAs. The DMD contains a specific mandate on the WTO-MEA relationship, but this mandate was flawed from the outset in that it dealt only with part of the problem – arguably the easiest part dealing only with parties to MEAs – and precluded an outcome that would change WTO rules. Moreover, the 31(i) negotiations under the DMD have been bogged down, mainly over definitional issues. There are also some negotiations on other items under the DMD that could be relevant to the WTO-MEA relationship, such as intellectual property rights and dispute settlement, that are similarly deadlocked.

The relationship has also been considered outside the WTO, specifically in the context of the UN Environment Programme (UNEP) and in connection with specific MEAs, such as the Biosafety Protocol. So far, the results of UNEP's engagement have not led to normative change. Efforts to strengthen and make more coherent the decision-making process on environment within the UN may lead to bolder action on matters relevant to the WTO. But at present it is still too early to know whether this vision is politically feasible.

Table 1 sets out possible outcomes that could impact on the WTO-MEA relationship, within the WTO, the UN, or as a result of an inter-institutional initiative.

Table 1: Range of outcomes to improve WTO-MEA relationship

FUNCTION	OUTCOME	FORUM
Research & Analysis	Assessing impacts of WTO trade liberalization on achieving MEA objectives	WTO DMD 31(i), 33 or CTE post DMD; UNEP/MEAs; or Inter-institutional initiative
	Further documenting national experiences of trade and environment policy coordination	WTO DMD 31(i) or CTE post DMD; UNEP/MEAs; or Inter-institutional initiative
Information & Guidance	Endorsing existing elements of the WTO-MEA relationship	WTO DMD 31(i) or CTE post DMD; UNEP/MEAs; or Inter-institutional initiative
	Developing 'best practice' guide for design and implementation of MEA trade measures in a WTO-consistent manner	WTO CTE post DMD; UNEP/MEAs; or Inter-institutional initiative
Communication & Training	Granting MEAs observer status in WTO bodies	WTO DMD 31(ii)
	Enhancing information exchange between MEA and WTO secretariats and bodies	WTO DMD 31(ii); UNEP/MEAs; or Inter-institutional initiative
	Training and strengthening capacity e.g. training Members' representatives in Geneva and in national capitals on the MEA-WTO relationship	WTO DMD 33 or CTE post DMD; UNEP/MEAs; or Inter-institutional initiative
Law & Policy Recommendations & Reform	Exempting MEA trade measures from WTO rules	WTO DMD 30 or DSB/CTE post DMD
	Codifying legal principles on the MEA-WTO relationship	WTO DSB/CTE post DMD; UNEP/MEAs; or Inter-institutional initiative
	Creating new WTO body to address the MEA-WTO relationship in a systemic way throughout the WTO	WTO GC/CTE post DMD
	Creating new inter-institutional initiative, with multiple functions to improve WTO-MEA relationship	WTO GC/CTE post DMD UNEP/MEAs; and Other IGOs e.g. FAO, WIPO, UNCTAD
Design & Implementation	Creating mechanism for voluntary consultation to identify least trade-restrictive MEA measures before measures enter into force	WTO DMD 31(i) or CTE post DMD; UNEP/MEAs; or Inter-institutional initiative
	Strengthening compliance with MEA requirements	UNEP/MEAs
	Creating instruments to promote sustainable trade (e.g. principles and criteria for 'sustainability', tracking systems, and labelling)	UNEP/MEAs; or Inter-institutional initiative
Conflict Resolution	Requiring the sequencing of MEA and WTO disputes	WTO DMD 30 or DSB post DMD

It is difficult to be very precise in developing scenarios through which any of these outcomes might be realized in the revived Doha Round, given the complexities of WTO negotiations and the lack of movement in the UN. However, a number of possible influences on the political feasibility of these outcomes in a WTO setting can be identified. These include movement on agriculture and intellectual property rights, the desire to have a minimalist outcome, or the complete collapse of the Doha Round. Even if the Round collapses, this debate will continue in the WTO under the regular mandate of the Committee on Trade and Environment.

Ultimately, meaningful progress will be made only outside the confines of the DMD. Given the complex nature of the relationship, any lasting solutions ought to contain a strong political message that respects an appropriate division of labour between the WTO and MEA regimes based on core competencies. These solutions should also contain procedures for addressing the detail of the many specific interfaces between

the regimes. Such processes could be aimed at informing the policy processes and resolving conflicts through a neutral adjudicative forum.

Although UNEP can provide leadership in this area, if it is politically enabled, so too can the WTO. The current Director General of the WTO has called for a new 'Geneva Consensus', which would locate the WTO more closely with other elements of the international institutional architecture.[1] He has also stated that:

> ***it is undoubted that greater coherence between different bodies of international law, and in particular between the trade and environmental regimes, could lead to improved global governance.[2]***

Doing so effectively is likely to entail an innovative negotiation process, which will be open to considering comprehensive solutions in a credible and legitimate manner.

[1] Pascal Lamy, 'Humanizing Globalization', speech in Santiago de Chile, 30 January 2006, available at http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm, accessed on 28 July 2006.

[2] Pascal Lamy, Address to CSD-14, May 10, 2006, available at http://www.wto.org/english/news_e/sppl_e/sppl25_e.htm, accessed on 28 July 2006.

ABOUT THE AUTHORS

Alice Palmer is a Senior Adviser to the Foundation for International Environmental Law and Development (FIELD) where she works on issues concerning the promotion of environmental and sustainable development objectives within the global trade and finance framework. She previously specialized in the environmental aspects of corporate transactions as a lawyer in the United States and in Australia.

Richard Tarasofsky is head of the Energy, Environment and Development Programme at Chatham House, which carries out research on a wide range of topics relating to sustainable development. An international lawyer by training, he has been engaged in the interface between international trade policy and sustainable development for the last 15 years and has published widely in this area. Before joining Chatham House, he was a Legal Officer at IUCN (the World Conservation Union) where he led projects relating to the progressive development of international environmental law, such as biodiversity, desertification and climate change.

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1 INTRODUCTION

This paper sets out options for governments to clarify the relationship between the rules of the World Trade Organization (WTO) and multilateral environmental agreements (MEAs) in the light of the trade negotiations under the Doha Ministerial Declaration (DMD). More than five years into the Doha Round, there had been little sign of progress in the WTO negotiations on the WTO-MEA relationship under DMD paragraph 31(i). Indeed following a suspension of the negotiations in July 2006, there is a chance that the Doha Round will collapse in its entirety. In any event, WTO Members were fundamentally divided over the scope and approach to the 31(i) negotiations. Meanwhile, some campaigners for sustainable development have called for the 31(i) negotiations to be abandoned altogether.[3] They are concerned that because the 31(i) mandate is limited to MEA parties – excluding from the negotiations the thorny issue of MEA trade measures imposed against WTO Members that are not party to the MEA – an outcome under 31(i) could achieve very little and might only do harm to MEA interests. While WTO Members struggle with the WTO-MEA relationship in the context of the trade talks, their governments have continued in other international fora to agree to new MEA commitments without a clear understanding of how the design and implementation of those commitments are affected by WTO rules.

Against this background, Chatham House (The Royal Institute of International Affairs) and the Foundation for International Environmental Law and Development (FIELD), in association with the International Centre for Trade and Sustainable Development (ICTSD), and with the support of the Rockefeller Brothers Fund, undertook a project to identify options for governments to clarify the WTO-MEA relationship. Chatham House and FIELD have consulted with civil servants in governments and international organizations, campaigners, business representatives and academics, from the North and the South, to identify and discuss policy and legal options to ensure that the MEA-WTO interface is as constructive as possible. These consultations have been conducted by emailed questionnaires, through interviews, and at meetings in Geneva, London and at the WTO Ministerial in Hong Kong, all of which took place in the fourth quarter of 2005. In addition, the preliminary findings of this project were presented at a Chatham House Conference in February 2006 on 'The WTO and Sustainable Development: Prospects After Hong Kong'. This report draws on all of these consultations to explain the underlying issues and current state of play in and outside the WTO. It goes on to examine possible outcomes and the political scenarios that might achieve those outcomes. This analysis is limited to the WTO-MEA relationship at the global level – it does not consider regional trade issues or the relationship of national actions taken to implement WTO and MEA objectives. The report is primarily focused on seeking formal solutions that could be agreed politically between the governing bodies of the relevant international institutions.

[3] E.g. Friends of the Earth International, 'Don't let the WTO trade away the environment – Shift WTO Negotiations on Multilateral Environmental Agreements to the UN.', *Position Paper*, July 2003, available at http://www.foeeurope.org/publications/2003/MEAsFinalJuly2003.pdf, accessed on 1 August 2006.

The Doha Round was revived in January 2007. However, it is difficult to predict the consequences of this for the WTO-MEA negotiations. Even prior to the negotiations being suspended in July 2006, it was becoming increasingly apparent that, at best, only a modest outcome to the 31(i) negotiations on this issue was likely. For example, the most recent submission from the European Communities (EC), a key demandeur on reforming the WTO to better accommodate environmental issues, seemed less ambitious than its earlier positions.[4] Nonetheless, other Members might still seek to achieve a more ambitious outcome on DMD paragraph 31(i) if the negotiations are resumed. These Members, along with the EC and others, could also seek to address the wider issues around the relationship, either inside the WTO once the Doha Round is formally ended or outside the WTO in other international fora.

[4] Submission by the European Communities (EC) WTO Doc. TN/TE.W/68, 30 June 2006.

2 ELEMENTS OF THE WTO-MEA RELATIONSHIP

The WTO-MEA relationship is complex. It has political, legal and practical elements that intersect. This part of the paper sets out some background to the legal elements of the relationship.

An illustration: Chilean swordfish dispute

One 'true story' helps to illustrate where the WTO and MEA worlds might meet. In 2000, Chile and the European Community engaged in a battle over swordfish. Chile had banned the landing of swordfish in its ports in an apparent effort to conserve the species. The Spanish fleets argued that they were being unfairly denied access to Chile's ports, in violation of WTO rules. After failing to resolve the matter through diplomatic channels, the EC on behalf of Spain initiated dispute settlement proceedings against Chile in the WTO.[5] Chile promptly retaliated by issuing dispute settlement proceedings in the International Tribunal of the Law of the Sea (ITLOS) under a long-standing multilateral environmental agreement to which both Chile and the EC are parties: the UN Convention on the Law of the Sea.[6] Among other things, Chile asked the ITLOS to determine whether the EC's challenge to Chile's sovereign right and duty 'to prescribe measures within its national jurisdiction for the conservation of swordfish' was compatible with the Convention on the Law of the Sea (UNCLOS). The EC in turn asked the ITLOS to determine whether Chile's ban was in breach of the Convention.

The international legal community was finally presented with the very situation it had been anticipating for several years. If the two international tribunals had proceeded with the cases contemporaneously, they might have reached conflicting results because they would have applied different rules and norms to the same facts. The ITLOS might have found in Chile's favour, concluding that the trade measure was valid under the UNCLOS. Meanwhile, the WTO's Dispute Settlement Body (DSB) might have decided against Chile, finding the trade measure (purportedly pursuant to an MEA) to have been taken in violation of WTO rules. As it happened, diplomacy prevailed and a political agreement was struck, resulting in both disputes being suspended. Nevertheless, in seeking to understand the MEA-WTO issue it is instructive to consider the law and politics underlying the swordfish dispute.

2.1 Trade measures in MEAs

Trade measures taken pursuant to MEAs come in many forms. They include bans, quotas, labelling requirements or requests for information prior to export. It is estimated that around 10% of some 200 multilateral environmental agreements require or permit the employment of trade measures either to limit environmental harm or to encourage universal participation by denying benefits to non-parties.[7]

[5] *Chile – Measures Affecting the Transit and Importation of Swordfish,* WTO Doc. WT/DS193.

[6] International Tribunal for the Law of the Sea (ITLOS), *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community),* Case No. 7, available at http://www.itlos.org/start2_en.html, accessed on 30 July 2006. Note there is no standard definition of an MEA. See section 3.3.2 for a further discussion of this.

[7] See further WTO Secretariat, *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements*, WTO Doc. TN/TE/S/5/ Rev.1-WT/CTE/W/160/Rev.3.

Examples of MEAs that require or permit trade measures include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which provides for trade restrictions on identified endangered species; the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), regulating trade in ozone depleting substances; and the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention), controlling trade in hazardous waste. More recent MEAs containing trade measures include the Cartagena Protocol on Biosafety (Biosafety Protocol) concerning trade in certain genetically modified organisms (GMOs); the Rotterdam (PIC) and Stockholm (POPs) Conventions regulating the trade in certain chemicals. In addition, the UN Framework Convention on Climate Change and its Kyoto Protocol controlling greenhouse gas emissions may be further developed so as to include trade-related measures. As discussed in greater detail in section 2.6 below, some WTO Members distinguish between trade-related measures specifically mandated in an MEA (which they say are the only types of measures contemplated by the DMD term 'specific trade obligations' or 'STOs') and trade-related measures that purportedly serve the objectives of an MEA but are not expressly mandated by the MEA.

Trade-related measures are used in multilateral environmental agreements to:

- **Discourage the unsustainable exploitation of natural resources that are internationally traded;**
- **Discourage environmentally harmful process and production methods for goods and services that are internationally traded;**
- **Create market opportunities and incentives to use and dispose of a good in an environmentally sound manner;**
- **Prevent or limit the entry of a harmful substance into a country;**
- **Reduce the incentives for countries to remain outside the agreement and become 'free riders' which can benefit competitively from the absence of MEA standards; and**
- **Enhance compliance with MEA rules.[8]**

Accordingly, trade-related measures pursuant to MEAs not only have direct environmental consequences (e.g. preventing environmentally harmful emissions), but also often act to enhance the integrity of multilateral environmental agreements by providing incentives for universal participation and compliance. The Montreal Protocol, for example, imposes import restrictions on ozone-depleting substances (ODS) from countries that are not a party to the Protocol.[9] Indeed, a positive connection with the international trade regime is expected to be among the principal factors that will influence the further development of key MEAs, such as the climate change regime.

[8] M. Stilwell and R. Tarasofsky, 'Towards Coherent Economic and Environmental Governance. Legal and Practical Approaches to WTO-MEA linkages', *WWF-CIEL Discussion Paper* (Gland: World Wide Fund for Nature, 2001); and D. Brack and K. Gray, *Multilateral Environmental Agreements and the WTO*, Royal Institute of International Affairs/International Institute for Sustainable Development, September 2003, available at http://www.chathamhouse.org.uk/pdf/research/sdp/MEAs%20and%20WTO.pdf, accessed on 1 August 2006.

[9] Article 4.1.

2.2 WTO rules that are relevant for MEAs

MEA trade measures do not sit comfortably with several rules contained in the WTO Agreements. For example, rules in the General Agreement on Tariffs and Trade (GATT) and other WTO Agreements do not allow bans or quotas (e.g. GATT Article XI). The WTO rules also prohibit discrimination between the same (or 'like') products on the basis of country of origin (e.g. GATT Article III). Some WTO Agreements also impose strict parameters on the design and application of technical requirements such as labelling (e.g. WTO Agreement on Technical Barriers to Trade (TBT)). In some circumstances, WTO rules require trade measures to be backed up by a risk assessment (e.g. WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)).

There are exemptions to these rules. An environmentally related exemption common to many of the WTO Agreements allows trade measures taken to protect human, animal or plant life or health (e.g. GATT Article XX(b)). This exemption is, however, limited. To qualify for the Article XX(b) exemption, WTO arbitrators have stated that the trade measure will have to be the least trade-restrictive measure reasonably available to achieve the environmental objective in question.[10] In addition, under the introductory paragraph to Article XX, the trade measure must be applied in a manner that does not amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Another exemption can be found in GATT Article XX(g) for measures 'relating to the conservation of exhaustible natural resources'. Permitting a weaker nexus between the measure and its objective, GATT Article XX(g) is generally put forward to excuse environmental trade-related measures ahead of Article XX(b).[11] It is, however, not available under other WTO Agreements such as the TBT and SPS Agreements.

In summary, although some WTO rules might conflict with some MEA trade measures, there is scope to permit them under the WTO Agreements.

2.3 General legal principles governing the relationship between MEAs and the WTO

There are a number of general legal principles that govern the relationship between MEAs and the WTO, some of which have been codified in the Vienna Convention on the Law of Treaties (Vienna Convention). If WTO panels or the Appellate Body were faced with the situation in the *EC-Chile Swordfish* dispute, they would rely on international principles of treaty interpretation to adjudicate competing obligations in a WTO agreement and an MEA.

[10] In the context of GATT Article XX, 'necessary' has been interpreted by the WTO Appellate Body to mean a measure 'which entails the least degree of inconsistency with other GATT provisions' (*European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* Report of the Appellate Body adopted 5 April 2001, WT/DS135/AB/R (*EC-Asbestos*), para 171) or which is the 'least trade-restrictive' measure reasonably available to the WTO Member to achieve its objective (Malt Beverages, Report of the Panel adopted 19 June 1992, BISD 93S/206, para 5.52 and *Korea – Definitive Safeguard Measure on imports of Certain Dairy Products,* Appellate Body report adopted on 12 January 2000, WT/DS/98/AB/R para 163.)

[11] 'Necessary' in Article XX(b) has a higher threshold than 'relating to' in Article XX(b).

The Vienna Convention states that a treaty's terms must be read in good faith, in accordance with their ordinary meaning in their context, and in the light of the treaty's object and purpose.[12] There are several other rules governing the application of treaties which could have implications for the WTO-MEA relationship. For example, there is a general principle that where two treaties govern the same subject matter, they should be interpreted in a manner that avoids any conflict between their provisions.[13] If a conflict cannot be avoided, the Vienna Convention provides that the more recent treaty ('*lex posterior*') of the two applies as between parties to those treaties to the extent of any inconsistency.[14] However, where there are general and specific treaties governing the same subject matter, the specific treaty ('*lex specialis*') is deemed, as a general legal principle, to apply among parties to both treaties.[15]

However, these rules may raise more questions than they answer. For example, assessing which treaty is more recent is not straightforward. The GATT 1947 is older than most modern MEAs with trade provisions. However, it could also be argued that its content was reaffirmed by the Uruguay Round WTO Agreements in 1994. How should the decisions taken by MEA governing bodies that involve trade measures be dated? Is the date of the decision most relevant or the date of the treaty? How do you date treaty amendment? Similarly, the *lex specialis* rule is indeterminate. Which treaty is more specialized: the WTO TRIPS Agreement, which contains detailed rules on intellectual property rights (IPRs), or the Convention on Biological Diversity, which contains a general reference to IPRs but detailed rules on genetic resources to which the IPRs would apply?

The Vienna Convention also states that parties to a treaty are bound to comply with the treaty commitments in good faith ('*pacta sunt servanda*').[16] However, even where a state has signed, but not yet ratified a treaty, it must refrain from doing anything that might 'defeat the object and purpose of [that] treaty'.[17] Accordingly, if by seeking to enforce WTO commitments an MEA party is not acting in good faith, or a signatory to an MEA is frustrating the objective of the MEA, it may be violating the Vienna Convention. The same, of course, holds true in relation to WTO obligations that may

[12] Article 31. See also Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the 1994 Marrakesh Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf ('*DSU*'), Article 3.2.

[13] *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel adopted 23 July 1998, WT/DS54/R; WT/DS55/R; WT/DS59/R; WT/DS64/R, para 14.28, states 'we recall first that in public international law there is a presumption against conflict'.

[14] See Vienna Convention, Article 30(3). Note that, under *General Interpretative Note to Annex 1A* of the *WTO Agreement*, in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails.

[15] The interpretative maxim '*lex specialis derogat lex generali*' has been described as a general principle of international law (see e.g. ITLOS, *Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures*, Cases Nos 3 and 4 (27 August 1999), para 123). In the WTO context, it has been discussed in connection with the GATT 1994 and other 'specific' WTO Agreements; see e.g. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel adopted 5 April 2001, WT/DS135/R, para 8.17; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body adopted 25 September 1997, WT/DS27/AB/R; and *EC Measures Concerning Meat and Meat Products (EC-Hormones)* Complaint by the US, Report of the Panel adopted 13 February 1998 WT/DS26/R/USA.

[16] Vienna Convention, Article 26. See also *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, Report of the Appellate Body WT/DS58/AB/R ('*US-Shrimp I*'), para 158.

[17] Vienna Convention, Article 18.

not be fully implemented on account of an MEA requirement. In that case an MEA party could be accused of not acting in good faith in respect of its WTO commitments.

Ultimately, the Vienna Convention and general principles of treaty interpretation do not provide a full basis for ensuring a positive WTO-MEA relationship.

2.4 Relevant WTO jurisprudence

WTO disputes are decided on a case-by-case basis, and the findings in one dispute do not govern subsequent disputes (no precedent or '*stare decisis*'). However, WTO Members and arbitrators may, and often do, look to the findings in past disputes for guidance on how to interpret WTO commitments.

To date, no GATT panel or WTO arbitrator has produced findings in a dispute over a trade measure taken pursuant to an MEA. As noted above, the *EC-Chile Swordfish* dispute (arguably over an MEA-related trade measure) was suspended following a diplomatic settlement to the conflict. Nevertheless, several WTO disputes have reached findings that would be relevant to the implementation of MEA trade measures. Findings in disputes concerning the meaning of 'like products', and the interpretation of environmentally related exemptions, are of particular relevance. Other disputes addressing the relationship between WTO rules and other international laws are also pertinent to the MEA-WTO relationship. WTO disputes relevant to the MEA-WTO relationship include *US-Shrimp I* and *II*, *EC-Hormones*, *EC-Asbestos*, *Mexico-Soft Drinks* and *EC-Biotech Products*.

The *US-Shrimp I* dispute concerned a US ban on the import of shrimp that had been caught without using a device to prevent the incidental capture of turtles. That dispute confirmed earlier findings in the *US-Gasoline* dispute which had emphasized that the WTO agreements must 'not to be read in clinical isolation from public international law'.[18] The Appellate Body emphasized the relevance of 'sustainable development' to the interpretation of WTO rules[19] and used several multilateral environmental agreements to inform its reading of the parties' WTO commitments.[20] Efforts to engage in negotiations for a multilateral environmental agreement were also relevant to the arbitrators' assessment of whether a measure can be justified under GATT Article XX.[21] In a subsequent enforcement proceeding (*US-Shrimp II*), the revised US ban was found to fall within one of the GATT exemptions.[22] The Appellate Body's findings made it clear that a trade measure based on process and production methods – namely, how the shrimp was harvested – could be justified under WTO rules.[23]

[18] *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body adopted 20 May 1996, WT/DS2/AB/R 1996 WL 227476 (W.T.O.) ('*US-Gasoline*').

[19] US-Shrimp I, para 129.

[20] US-Shrimp I, para 130, 132, 168.

[21] US-Shrimp I, para 166.

[22] *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 by Malaysia*, Panel Report and Appellate Body Report, adopted on 21 November 2001, WT/DS58/AB/RW ('*US-Shrimp II*').

[23] US-Shrimp II.

In *EC-Asbestos*, a French ban on white asbestos was found to be consistent with WTO rules. Importantly, the WTO's Appellate Body found that the health impact of a product was relevant to an assessment of whether one product is 'like' another.[24] The Members of the Appellate Body also confirmed an earlier ruling that where a measure's objective reflects universally held values, the measure is more likely to qualify for a WTO exemption.[25]

In the *EC-Hormones* dispute, the WTO's Appellate Body considered the 'precautionary principle' – one of the pillars of modern environmental policy found in several MEAs. According to the 'precautionary principle', where there is a threat of serious or irreversible damage, the lack of full scientific evidence should not be used as a reason for postponing action to prevent environmental degradation.[26] The Appellate Body found that the 'precautionary principle' is reflected in provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, although the principle could not be invoked to excuse a violation of the SPS Agreement.[27]

The finding in *EC-Hormones* on the relevance of the precautionary principle to the SPS Agreement has been confirmed by the Panel in the *EC-Biotech* case.[28] The *EC-Biotech* dispute concerned a challenge to the EC process for approving biotech products for sale in the European Union. The Panel found that the EC had violated SPS requirements to process applications without 'undue delay' and to base SPS measures on risk assessments. In the course of its analysis, the Panel found that international agreements, including MEAs, can be used to inform the interpretation of WTO rules although it did not consider the precautionary principle or two MEAs – the Convention on Biological Diversity and the Biosafety Protocol – relevant to its analysis in that dispute.[29] The Panel's findings are a setback for a coherent understanding of the relevance of international law to the interpretation and application of WTO rules, but the European Union has decided not to appeal to the Appellate Body.

Finally, the Appellate Body's relatively recent findings in the *Mexico-Soft Drinks* case could have important implications for any future dispute concerning a conflict between an MEA trade-related measure and WTO rules. In that dispute, Mexico argued that the WTO had the discretion to decline to hear a dispute, and that it should exercise its discretion in this instance, because the dispute concerned the parties' commitments under another international agreement – the North American Free Trade Agreement (NAFTA). Alternatively, Mexico argued that its measure was exempted from WTO rules under GATT Article XX(d) which permits measures 'necessary to secure compliance with laws or regulations'. Mexico maintained that the challenged measure was necessary to secure compliance with the NAFTA.

[24] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body adopted 5 April 2001, WT/DS135/AB/R ('*EC-Asbestos*').

[25] EC-Asbestos, at para 172, citing *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* Report of the Appellate Body adopted on 10 January 2001, WT/DS161/AB/R; WT/DS169/AB/R, ('*Korea-Beef*') para 164.

[26] See e.g. Principle 15 of the 1992 Rio Declaration on Environment and Development.

[27] *EC Measures Concerning Meat and Meat Products (Hormones)* Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998 ('*EC-Hormones*').

[28] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* WT/DS 291, 292 and 293, available at http://www.tradeobservatory.org/library.cfm?refid=78475 ('*EC-Biotech*'), accessed on 31 July 2006.

[29] EC-Biotech.

In *Mexico-Soft Drinks*, the Appellate Body found that once the WTO's jurisdiction has been validly established, a WTO panel may not decline to exercise it, even where the defendant in this case described the WTO claims as 'inextricably linked' to dispute settlement proceedings before another international tribunal.[30] It said that it was not the WTO's function to ascertain compliance of WTO Members with other international treaties.[31] However, the Appellate Body emphasized the limited scope of its finding, expressing 'no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it'.[32] With respect to Mexico's alternative argument, the Appellate Body found that Article XX(d) concerned measures to secure compliance with *domestic* laws or regulations – not to secure compliance with international laws.[33]

In sum, the WTO jurisprudence provides some useful guidance on how the WTO DSB might act in the face of a WTO challenge to an MEA measure. However, the jurisprudence does not fully settle all aspects of the relationship to MEAs and, as there is no rule of precedent or '*stare decisis*' in the WTO, future disputes may be decided differently.

2.5 The problem of WTO Members not party to MEAs

There might be WTO disputes about the trade-related aspects of MEAs between the parties to those MEAs. This was the case in the *EC-Chile Swordfish* dispute: both the EC and Chile were parties to UNCLOS and Members of the WTO. However, WTO Members that are not parties to a given MEA might also complain to the WTO about any adverse trade impacts of MEA measures applied to their exporters. They could argue that a measure taken under a treaty that they have chosen not to adhere to is infringing their WTO rights. The unilateralist approach to foreign policy presently employed by the largest economic power in the world – the United States – heightens the risk of such a WTO claim, for example, in relation to the Biosafety Protocol or the Kyoto Protocol – two significant MEAs to which the US is not a party.

The non-party issue is a particularly challenging problem because by not participating in the MEA, the MEA non-party has not consented to altering its WTO obligations through the terms of a subsequent agreement. The flexibility in the WTO treaties to exempt MEA trade measures could still apply to trade measures affecting non-parties to an MEA. However, it might be more difficult to justify an MEA trade measure under the WTO rules where it is applied against an MEA non-party.[34]

2.6 'Non-specific' trade measures

Another difficulty in the MEA-WTO relationship involves MEA trade measures that are 'non-specific'. These measures are taken by parties to achieve the objectives of the

[30] *Mexico – Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R, Appellate Body report, dated 6 March 2006 ('*Mexico-Soft Drinks*') paras 46, 49, 51, 53-4, 57.

[31] Mexico-Soft Drinks, para 56.

[32] Mexico-Soft Drinks, para 54.

[33] Mexico-Soft Drinks, para 69.

[34] See Vienna Convention, Article 30(4).

MEA, but are not expressly laid out in the MEA. These measures can occur in cases where the MEA in question contains 'obligations of result' (e.g. Kyoto Protocol Article 2.1) which allow parties the discretion to select the precise measures they take to fulfil their MEA obligations. Non-specific trade measures may also occur where the MEA allows parties to take stricter domestic measures to implement an MEA (e.g. CITES) than specified in the treaty. Or a party may take unilateral trade measures to enforce a treaty (e.g. US legislation to enforce the International Whaling Convention).[35] The legal status of all of these important measures in a WTO context is unclear.

2.7 Different approaches to dispute settlement and compliance

Generally speaking, MEAs seek to facilitate compliance and participation through political means or market-based incentives – partly because it leads to a more effective result for the environment, and partly because they do not generally have the kind of political and economic leverage that could force compliance with dispute settlement findings.[36]

In contrast, WTO rules are enforced through an active dispute settlement system backed up by economic sanctions. At first instance, WTO disputes are generally adjudicated by a panel of trade experts. Although they often consult with scientific experts or international organizations with expertise relevant to a given dispute, panellists often have had difficulty grappling with complex scientific and legal issues. The recent decision of the Panel in the *EC-Biotech* case illustrates the problems encountered in disputes requiring non-economic analysis. The report, excluding annexes, is over 1,000 pages long and was finalized more than three years after the dispute was initiated. The analysis is laboured, and several matters at issue in the dispute remain unresolved. For example, the Panel addressed the application of the SPS Agreement but declined to reach conclusions on the application of the TBT Agreement to those aspects of the challenged measures not covered by the SPS Agreement. This means that the challenged measures found to violate the SPS Agreement might still be valid for the purposes of the TBT Agreement. Moreover, the Panel did not find it necessary to determine whether biotech products are 'like' their conventional counterparts, which leaves important questions about 'like products' unresolved.[37]

Although some WTO cases so far may have been favourable to environmental priorities, the prospect of a WTO panel overseeing a dispute over an MEA trade-related measure, with no mandate or expertise to assess the legitimacy of an MEA measure, is problematic. The WTO has no inherent expertise on environmental issues and therefore may place trade liberalization priorities at the forefront in a conflict with environmental provisions. This is unsatisfactory from an environmental policy perspective and will only increase the incoherence in global governance.

[35] Fishermen's Protective Act (Pelly Amendment), 22 U.S.C. §§ 1971-1979, 27 August 27 1954, as amended 1968, 1972, 1976-1981, 1984, 1986-1988, 1990, 1992 and 1995.
[36] See further WTO doc. WT/CTE/W/191.
[37] EC-Biotech, paras 7.3405 and 8.3 respectively.

Past WTO cases might give us some confidence that multilaterally agreed restrictions on trade can be readily justified under WTO rules. Conflict of norms and conflict of jurisdictions is a well-travelled path in international law, and the WTO Appellate Body has the potential to manage any conflict between MEA trade measures and WTO rules in a 'mutually supportive' manner.[38] However, a level of uncertainty remains, especially given that there has been no direct ruling on this. Moreover, what may seem mutually supportive from the perspective of a WTO panel may not seem mutually supportive from an MEA or environmental policy perspective. We do not know if future panels or the Appellate Body will follow their findings in past disputes (as there is no rule of '*stare decisis*'). Nor do we know how conflicts in an MEA context will be resolved, since conflicts are usually dealt with through diplomatic discussion and they are, therefore, more vulnerable to political compromise than they would otherwise be under judicial scrutiny.

2.8 The 'chill effect'

The legal ambiguity and technical complexity around the MEA-WTO relationship can be exploited to prevent or compromise the negotiation or implementation of trade measures in an MEA context. Environmental regulators can be stopped in their tracks, and told that the agreements they are seeking to develop or implement violate WTO rules. This is known as the 'chill effect'. Evidence of the 'chill effect' is largely anecdotal. The impact of WTO rules on negotiations for the Biosafety Protocol are, however, well documented: agricultural commodities were subject to less rigorous trading rules than other GMOs and efforts to have clear provisions addressing the relationship to other international agreements were relegated to the preamble in ambiguous form.[39] Moreover, parties to the Biosafety Protocol may find they have difficulty implementing the agreement against economically powerful non-parties, such as the United States, which may emphasize the predominance of their WTO entitlements.

[38] See e.g. J. Pauwelyn, *Conflict of Norms in Public International Law: How the WTO Relates to other rules of International Law* (Cambridge University Press, 2003); G. Marceau, 'A Call for Coherence in International Law', *Journal of World Trade* 33 (1999): 87-152.

[39] A. Palmer, B. Chaytor and J. Werksman, 'Interactions between the World Trade Organization and International Environmental Regimes', in Sebastian Oberthuer and Thomas Gehring, eds, *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (Cambridge, MA: MIT Press, 2006).

3 STATE OF PLAY IN THE WTO NEGOTIATIONS

The MEA-WTO relationship has been at the heart of discussions in the WTO's Committee on Trade and Environment (CTE) since its inception in 1995. Specifically, the CTE was mandated 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 (MEAs); and the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs.'[40] In the years that followed, many of the WTO Members represented in the CTE maintained that there was no inherent conflict between MEAs and WTO rules and that, if there were, it would be resolved in a mutually supportive way, within existing rules and frameworks. Other Members have proposed reforms aimed at greater clarity. They believe there is a potential conflict between WTO rules and MEAs that might subvert MEA objectives by inappropriately impeding the implementation of MEAs or overly constraining the design of MEA trade measures. Members in favour of reform have put forward proposals ranging from suggested amendments to the substantive and procedural rules themselves, to the introduction of processes designed to facilitate MEA and WTO harmony. The demandeurs of reform have, for the most part, comprised the European Communities (EC) and other European Members while several developing-country Members have resisted reforms seen as opening the door to veiled protectionism in Northern markets.

3.1 The 1996 Report of the CTE to the WTO Ministerial Conference at Singapore

Despite its original mandate, the CTE failed to reach consensus on how to address the issue of potential conflicts between WTO rules and MEAs in time to make recommendations for reform to the Ministerial Conference in Singapore in 1996. Instead, the CTE prepared a report containing anodyne statements about the mutually supportive nature of trade and environment policies and rules.[41] The report was adopted only after the Chair declared that no WTO rights or obligations would be altered.[42] In its report, the CTE stated in relevant part that:

> ***The CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both.* (para. 171)**
>
> ***Adequate international cooperation provisions, including among them financial and technological transfers and capacity-building, as part of a policy package in***

[40] Decision on Trade and Environment adopted by Ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh on 14 April 1994, available at http://www.wto.org/English/tratop_e/envir_e/issu5_e.htm, accessed on 30 July 2006.

[41] Singapore Report of the Committee on Trade and Environment, 12 November 1996, WT/CTE/1.

[42] WTO, Note by the Secretariat. Report of the Meetings Held on 30 October and 6-8 November 1996, WTO Doc. WT/CTE/M/13, 22 November 1996.

MEAs are important and can be indispensable elements to facilitate the ability of governments, particularly of developing countries, to become Parties to an MEA and provide resources and assistance to help them tackle the environmental problems which the MEA is seeking to resolve and thus to implement the provisions of the MEA effectively, in keeping with the principle of common but differentiated responsibility. **(para 173)**

Trade measures based on specifically agreed-upon provisions can also be needed in certain cases to achieve the environmental objectives of an MEA, particularly where trade is related directly to the source of an environmental problem. They have played an important role in some MEAs in the past, and they may be needed to play a similarly important role in certain cases in the future. **(para 173)**

A range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to MEAs. That includes the defined scope provided by the relevant criteria of the 'General Exceptions' provisions of GATT Article XX. This accommodation is valuable and it is important that it be preserved by all. **(para 174(ii))**

Policy coordination between trade and environment policy officials at the national level plays an important role in ensuring that WTO Members are able to respect the commitments they have made in the separate fora of the WTO and MEAs and in reducing the possibility of legal inconsistencies arising. **(para 174(vi))**

In order to enhance understanding of the relationship between trade and environmental policies, co-operation between the WTO and relevant MEAs institutions is valuable and should be encouraged. **(para 175)**

While WTO Members have the right to bring disputes to the WTO dispute settlement mechanism, if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA. Improved compliance mechanisms and dispute settlement mechanisms available in MEAs would encourage resolution of any such disputes within the MEA. **(para 178)**

The CTE recognizes the benefit of having all relevant expertise available to WTO panels in cases involving trade-related environmental measures, including trade measures taken pursuant to MEAs. Article 13 and Appendix 4 of the DSU provide the means for a panel to seek information and technical advice from any individual or body which it deems appropriate and to consult experts, including by establishing expert review groups. **(para 179)**

The CTE's Report to the 1996 Singapore Ministerial Conference encourages a mutually supportive approach to the implementation of MEA and WTO rules, recognizing the value of multilaterally agreed environmental policy reflected in MEAs and seeking to respect the competencies of the respective MEA and WTO systems. In the main, the Report states the obvious. Its rhetorical, largely non-contentious, observations are the product of a political compromise that was not ultimately endorsed through a formal decision or declaration of the WTO Membership. The statements in the CTE Report are, however, a further iteration of some basic principles that could inform WTO Members and arbitrators in their management of the WTO-MEA relationship.

3.2 The Doha mandate

The principal provision in the Doha mandate concerning the WTO-MEA relationship is paragraph 31(i). However, as discussed below, outcomes to the negotiations and discussions under other Doha provisions could also impact on the WTO-MEA relationship.

3.2.1 DMD Paragraph 31(i): MEAs and WTO rules

The Doha Ministerial Conference presented an opportunity for the European Communities and some Members sympathetic to the EC's position to raise the CTE discussion on the WTO-MEA relationship to the level of negotiations. After a late-night tussle to reach agreement on the Doha agenda, it was agreed under paragraph 31(i) of the Doha Ministerial Declaration to begin negotiations on the normative relationship between WTO rules and MEAs.

In particular, paragraph 31(i) of the WTO's Doha mandate calls for negotiations on *'the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)'.*

The scope of the negotiations is, however, expressly limited to the applicability of existing WTO rules to MEA parties and shall not prejudice the WTO rights of any Member that is not a party to the MEA in question (DMD para 31(i)). A further qualification of paragraph 31(i) states that the outcome 'must not add to, diminish or alter the balance of the rights and obligations of Members under existing WTO agreements, and must take into account the needs of developing and least-developed countries' (DMD para 32).

It would appear that the compromises needed to get agreement on paragraph 31(i) resulted – either by design or by default – in an extremely narrow and insufficient mandate in at least three respects:

(1) Carved out from the mandate's scope is the more contentious issue of MEA trade measures applied to non-parties;
(2) Depending on how Members choose to interpret the phrase 'specific trade obligations', it would appear that only those trade measures expressly required by an MEA – as opposed to those that might be permitted or implied from the MEA's

objective – will be caught by the negotiations;
(3) Significantly, the qualifying statement that the negotiations shall not prejudice or alter existing WTO rights and obligations presumably rules out any negotiated amendment to the WTO rules or any other outcome that would alter the legal status quo – for better or for worse.

3.2.2 Other DMD paragraphs relevant to the WTO-MEA relationship

Elsewhere in the Doha mandate, negotiations and discussions were agreed on a number of issues relevant to the WTO-MEA relationship. **DMD paragraph 31(ii),** a sister to paragraph 31(i), provides for negotiations on WTO-MEA institutional relations in the area of MEA observer status and information exchange. Discussions in the regular CTE meetings under **DMD paragraph 32(ii)**, and in the TRIPS Council under **DMD paragraph 19**, are addressing the issue of the relationship between the WTO's TRIPS Agreement and a long-standing MEA, the Convention on Biological Diversity. Also in the regular CTE meetings, Members have been documenting technical assistance and capacity-building in the field of trade and environment to developing countries, and sharing their experience of national-level environmental review, in accordance with **DMD paragraph 33.** Negotiations under **DMD paragraph 30** to clarify the WTO's Dispute Settlement Understanding could also have important implications for the MEA-WTO relationship if they issue any instructions on how arbitrators of disputes should deal with the relationship between WTO rules and other international laws.

3.3 The Doha Round negotiations

Consistent with – and presumably as a function of – the slow progress with the Doha Round overall, there have been very few developments in the negotiations in the CTE Special Sessions on the WTO-MEA relationship. The negotiations under paragraph 31(i) have been divisive and aimless. Even the relatively innocuous issue of granting MEA secretariats observer status in WTO negotiations and regular meetings of all WTO bodies relevant to MEA issues under Doha paragraph 31(ii) has not been agreed.[43]

Since the first meeting in 2002, CTE Special Sessions have focused largely on the desirability, scope and process of the paragraph 31(i) negotiations, giving limited attention to substantive questions regarding possible outcomes to the negotiations. Until the Hong Kong Ministerial in December 2005, 17 WTO Members had made 33 written submissions or communications to the CTE and many others had made oral interventions during the course of CTE Special Session meetings. In a separate annex to this paper is a list of the Members, their written submissions and their oral interventions.

3.3.1 The negotiators

The somewhat artificial political dynamics in the WTO have pitted the EC, its European neighbours, Switzerland and Norway, and some other Organization for Economic Cooperation and Development (OECD) countries against several developing-country Members wary of efforts to accommodate MEA trade measures under WTO rules. This

[43] Some WTO Members have argued that observer status in the CTE and other WTO bodies relevant to MEA issues cannot be addressed until after broader issues associated with observer status in WTO bodies in general have been resolved. A particular controversy has revolved around the proposal of granting the League of Arab States observer status at the WTO.

North-South tension in the CTE persists despite the fact that, in multilateral environmental fora, it is often developing countries that support strong trade measures in MEAs. In an MEA context, it is often developing Southern governments that have significant environmental interests to protect and that need the cadre of multilaterally agreed trade measures to ensure that they can protect those interests in the light of their limited economic or political leverage in international relations. The Southern interest in maintaining the integrity of MEAs is reflected, for example, in proposals put forward by India, Brazil and other countries rich in biodiversity seeking to amend the TRIPS Agreement to reflect requirements of the Convention on Biological Diversity.[44] Although some of the developing-country proponents of a CBD-styled TRIPS amendment have raised this issue in the CTE Special Session discussions as an example of the WTO-MEA relationship, it has not yet generated strong support for an ambitious outcome to the DMD 31(i) negotiations among developing-country WTO Members.

An apparent like-minded approach of some Members such as the US and Australia has led to a 'third' force in the paragraph 31(i) negotiations. This third force maintains that the near absence of any WTO challenges to MEA trade measures is evidence of a well-functioning mutually supportive WTO-MEA relationship. Their emphasis is on procedural coordination among institutions responsible for trade and environment policy rather than any substantive outcome to the negotiating mandate. The approach taken by these countries appears to be consistent with a general scepticism of multilateral environmental policy and their desire to preserve their immunity as non-parties to some significant MEAs from multilateral 'anti-competitive' environmental commitments.

3.3.2 Scope: definitions of 'MEA', 'STOs' and 'set out'

Members' submissions to the CTE Special Sessions on the scope of the 31(i) mandate have so far focused on the meaning of terms in the mandate such as 'multilateral environmental agreements' (MEAs), 'specific trade obligations' (STOs) and 'set out in'.

Concerning the meaning of 'MEAs', Members have debated several issues. Some have considered the extent of participation – must it have universal franchise? Others have considered geographical scope – when is a 'regional' environmental agreement an MEA? Some have focused on the agreement's objectives – what objectives amount to 'environmental objectives'? Others have questioned whether an agreement must be 'in force' or whether MEAs that have been approved but are not yet in force are covered by the negotiations. The proposals have identified several MEAs to illustrate their points, including many of the MEAs listed above in section 2.1: CITES, the Montreal Protocol, the Basel Convention, the Biosafety Protocol and the Rotterdam (PIC) and Stockholm (POPs) Conventions.

On the meaning of 'specific trade obligations', we have seen Members debate whether the negotiations concern only those trade measures expressly mandated by an MEA or whether they also extend to trade measures permitted by the MEA or implied from its object and purpose. On the meaning of 'set out in', CTE participants have considered

[44] See e.g. WTO Doc. IP/C/W/356 and Add.1.

whether the negotiations are limited to specific trade obligations contained in the MEA or also include specific trade obligations contained in ancillary or subsequent instruments, such as decisions of the MEA's governing body.

3.3.3 Approach: from concepts to national experiences and back to concepts?

With respect to the approach to the negotiations, Members advocated so-called 'top-down' and 'bottom-up' modalities.[45] A 'top-down' approach supported the development of concepts to be applied to specific cases, as advocated by Japan, the European Communities and Switzerland. A 'bottom-up' approach preferred to start by identifying specific examples and developing concepts based on those examples. This approach was promoted by several Members, including Australia and the US. Some members suggested that the two approaches were not mutually exclusive and could be pursued together, although many have embraced the 'bottom-up' approach with submissions that identify 'specific trade obligations' in relevant MEAs and document their national experiences of coordinating trade and environment policy towards mutually reinforcing ends.[46] In 2005, Colombia made an oral intervention emphasizing that an endorsement of national policy coordination would not be a sufficient response to the mandate in sub-paragraph 31(i). It said that the outcome to the negotiations must ensure mutual supportiveness between WTO rules and MEAs.[47] The EU has also observed that while coordination starts at the national level, international coordination is needed to prevent a conflict between MEAs and the WTO from arising in a multilateral setting.[48]

3.3.4 Outcomes: form and content

In its proposals to the CTE Special Sessions, Switzerland and the EC have been two of the few Members to put forward proposals on the possible form and content of a negotiated outcome under paragraph 31(i). Switzerland has summarized views previously expressed by Members in the regular work programme of the CTE as falling under three categories: (1) leave the issue to be settled by the dispute settlement mechanism; (2) amend Article XX of the GATT 1994 by introducing a reference to the environment; (3) adopt an interpretative decision.[49] Switzerland supported the adoption of an interpretative decision. Proposals from Chinese Taipei and Japan also supported an interpretative decision setting out the basis upon which specific trade obligations in MEAs would be deemed consistent with the WTO rules.[50] In June 2006, the EC submitted a 'Proposal for a Decision of the Ministerial Conference on Trade and Environment'.[51] In its preamble, the draft decision recognizes and reaffirms several of the conclusions of the CTE's 1996 Singapore Report and then asserts that the following principles govern the MEA-WTO relationship: mutual supportiveness, no subordination,

45 See World Trade Organization, Committee on Trade and Environment, Report by the Chairperson of the Special Session of the Committee on Trade and Environment to the Trade Negotiations Committee, 'Trade and Environment Negotiations: State of Play' TN/TE/7, 10 July 2003, for this and subsequent points.

46 See e.g. WTO Docs, Submission by Hong Kong China TN/TE/W/28; Submission by United States TN/TE/W/40; Submission by AustraliaTN/TE/W/45; Submission by EC TN/TE/W/53; Submission by SwitzerlandTN/TE/W/58.

47 WTO Doc., TN/TE/R/11.

48 Summary Report of the Twelfth Meeting of the Committee on Trade and Environment in Special Session, 7-8 July 2005, TN/TE/R/12, 14 September 2005, Paragraph 5.

49 WTO Doc., Submission by Switzerland TN/TE/W/4.

50 WTO Docs, Submission by Chinese Taipei TN/TE/W/11 para 15, Submission by Japan TN/TE/W/10, para 16.

51 Submission by the EC, WTO Doc. TN/TE/W/68, 30 June 2006.

deference and transparency. To give effect to these principles, the draft Decision calls for the granting of observer status, upon request, to MEAs by relevant WTO bodies, and deference to the expertise of MEAs on relevant points by those bodies and by WTO panels and the Appellate Body examining issues that relate to an MEA. Several WTO Members questioned specific aspects of the proposal and were of the view that the proposal exceeded the terms of the mandate.[52]

3.3.5 Elsewhere in the Doha Round

Throughout the course of the 31(i) negotiations, several Members have drawn attention to the relationship between the negotiations under paragraph 31(i) and other parts of the Doha agenda. Notably, negotiators have made links to the paragraph 31(ii) negotiations on MEA information exchange and observer status, as well as to discussions in the CTE regular sessions under DMD paragraph 32(ii) and in the TRIPS Council under DMD paragraph 19 on the relationship between the TRIPS Agreement and the Convention on Biological Diversity. Members have also made links between paragraph 31(i) and the negotiations under paragraph 31(iii) on the liberalization of environmental goods and services[53] – although until the suspension of the Doha talks those negotiations had been overshadowed by the broader Doha negotiations around the liberalization of industrial goods and services.

At one stage in the negotiations, paragraph 31(ii) had been identified by some WTO Members as a candidate for an early outcome of the Doha negotiations.[54] Since then, however, Members have progressed no further than suggestions to formalize the existing forms of information exchange with MEA secretariats.[55] No consensus has been reached on the attendance of MEA secretariats as 'observers' to meetings of WTO bodies, with some Members suggesting that CTE discussions must await the outcome of general discussions on observer status in the General Council and Trade Negotiations Committee[56] while others have called for the 31(ii) negotiations to be revived.[57] While several MEA secretariats have already been granted observer status in regular CTE meetings and ad hoc invitations have been issued to them to attend CTE Special Sessions (CTESS) for negotiations, several observer status applications from MEAs to the CTE and to other WTO bodies, such as the TRIPS Council, remain

[52] Environmental Aspects of the Negotiations, Note by the Secretariat, WT/CTE/W/243, 27 November 2006, Paragraph 93.

[53] Negotiations on Environmental Goods, Proposal by Uruguay, 15 May 2006, JOB(06)/144; The CTE Special Sessions have agreed that their negotiations on environmental goods and services should be handled in the context of the broader negotiations on services and market access under DMD paragraphs 15 and 16 respectively (see further the reports on the environmental aspects of the negotiations on services WT/CTE/GEN/11/Suppl.1 and market access WT/CTE/GEN/9/Add.1-TN/MA/7/Add.1) Without 'prejudging' the outcome of those broader negotiations, the CTESS has undertaken 'technical' work to identify 'environmental goods and services' (see further reports on work of CTESS, e.g. TN/TE/16 and TN/TE/15; for concerns expressed by some Members about 'prejudging' the outcome of the broader negotiations, see TN/TE/R/12, para 108, TN/TE/R/13, para 72, TN/TE/R/14 para 54).

[54] ICTSD, Doha Round Briefing Series, February 2003, available on http://www.ictsd.org/pubs/dohabriefings/doha9-trade-env.pdf, accessed on 31 July 2006.

[55] See Existing Forms of Cooperation and Information Exchange between UNEP/MEAs and the WTO Doc. TN/TE/S/2/Rev.1.

[56] Some WTO Members have argued that observer status in the CTE and other WTO bodies relevant to MEA issues cannot be addressed until after broader issues associated with observer status in WTO bodies in general have been resolved. Observer status in the General Council and Trade Negotiations Committee is governed by Annex 3 of the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council (WT/L/161). As noted above, a particular controversy has revolved around the proposal of granting the League of Arab States observer status at the WTO.

[57] E.g., Japan (TN/TE/R/11) said it was not clear why MEA observer status had been linked to general principles of observership.

outstanding.[58] It should be noted that to seek observer status in the WTO, UNEP and MEA secretariats require a mandate from their governing bodies.[59] The content and parameters of the mandate play an important part in determining the nature of the contributions that can be made by UNEP and MEAs.

In the CTE regular sessions under DMD paragraph 32(ii) and in the TRIPS Council under DMD paragraph 19, Brazil, India and other WTO Members rich in biodiversity have called for a TRIPS amendment requiring (1) disclosure in patent applications of the source of the country of origin of the biological resource and the traditional knowledge used in the invention and (2) evidence of prior informed consent and of the fair and equitable sharing of benefits derived from the patent.[60] Also, in the context of the 31(i) negotiations, Brazil has identified the need for the TRIPS Agreement to be amended to reflect objectives of the Convention on Biological Diversity as a very specific example of how WTO rules could be made compatible with MEAs.[61]

In the negotiations on dispute settlement under DMD paragraph 30, the US has called for a discussion on how to 'improve flexibility and Member control in WTO dispute settlement', suggesting that Members might want to consider how they can provide 'additional guidance' to WTO adjudicators during the course of disputes.[62] The US has invited WTO Members to examine 'the relationship between the function served by the WTO dispute settlement system […] and public international law other than customary rules of interpretation'. In particular, the US has asked if 'it is appropriate for a panel or the Appellate Body to refer in a report to public international law other than customary rules of interpretation?'. The US has also asked, 'where an agreement is silent on an issue, is it appropriate for a panel or the Appellate Body to "fill in the gap" in the agreement text?'[63] Responses to the US's questions concerning the role of international law and the extent of the WTO arbitrators' interpretative powers could have significant implications for how an MEA trade measure is examined under WTO rules.

58 *International Intergovernmental Organizations: Observer Status in the Committee on Trade and Environment* WTO Doc. WT/CTE/INF/6/Rev.2.

59 See e.g. re CBD: Third Ordinary Meeting of the Conference of Parties to the Convention on Biological Diversity, Buenos Aires, Argentina 4–15 November 1996, Decision III/17, requesting the Convention Executive Secretary to apply for observer status in the WTO's CTE, http://www.biodiv.org/convention/cops.asp#; *see* also UNEP/CBD/COP/4/24 (3 April 1998) confirming that the request for CTE observer status was made and granted.

60 See e.g. WTO Doc.IP/C/W/356 and Add.1.

61 WTO Doc., TN/TE/R/12.

62 WTO Doc., TN/DS/W/74; TN/DS/W/82 and addenda and corrigenda for this and subsequent points.

63 WTO Doc., TN/DS/W/74.

4 STATE OF PLAY IN THE UN SYSTEM

Outside the WTO, some possibilities for enhancing the relationship between the WTO and MEAs have emerged in the UN context.

4.1 UNEP's work on WTO/MEAs

UNEP has a fundamental interest in ensuring that MEAs are implemented as effectively as possible. This is because many MEAs were developed under United Nations Environment Programme (UNEP) auspices, as the most effective instruments to address the collective environmental challenges at stake.

UNEP has been engaged on trade issues since the 1970s, when it became involved in the development of CITES. Discussions around more general trade issues arose many times in the Governing Council.[64] Following the adoption of Governing Council Decision 18/3 in 1995 on Globalization and the Environment,[65] UNEP established a unit to work on the relationship between trade and environment. This mandate has enabled a range of activities, including policy development, capacity-building, assessment of impacts of trade liberalization, and the development of economic instruments to achieve environmental objectives. Much of this is relevant to the implementation and further development of MEAs. UNEP's Environment and Trade Branch (ETB) has also specifically tackled the relationship between MEAs and the WTO.

ETB has been engaged in supporting MEA implementation, which includes promoting synergies between the WTO and MEAs. According to the UNEP website, this work aims to:

- Enhance synergies and reduce potential conflicts between MEAs and the WTO;
- Build confidence and trust between trade and environment officials to ensure the development of mutually supportive trade and environment policies; and
- Maintain the existing balance of rights and obligations within MEAs to preserve opportunities for future environmental instruments to include trade-related measures.[66]

Significant work carried out by UNEP on this issue included convening a series of meetings between 1999 and 2002 on the relationship between WTO and MEAs, focused primarily on enhancing synergies and avoiding conflicts between regimes and helped raise the profile of these issues in the run-up to the Doha Ministerial.[67] The

[64] See e.g. UNEP, Report of 5th Governing Council Session, para 434, 1977, available at http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=65&ArticleID=1261&l=en, accessed on 28 July 2006; and UNEP, Report of 15th Governing Council Session, para 48, available at http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=71&ArticleID=841&l=en, accessed on 28 July 2006.

[65] Available at http://www.unep.org/gc/gc18-report.doc, accessed on 28 July 2006; for the most recent mandate see UNEP Doc. GC 21/14.

[66] Available at http://www.unep.ch/etb/areas/promMEAimp.php, accessed on 18 July 2006.

[67] UNEP, 'Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization', available at http://www.unep.ch/etb/events/Events2002/pdf/Synthmea2002jan.pdf, accessed on 28 July 2006. See also 'Multilateral Environmental Agreements and the WTO: Building Synergies', UNEP Briefs on Economics, Trade and Sustainable Development, May 2002, available at http://www.unep.ch/etb/publications/etbBriefs/UNEPMEA.pdf, accessed on 28 July 2006.

meetings brought together secretariats from MEAs, governments and NGOs. Although it was not a consensus-building process, a number of key messages emerged, including:

- **The desire to obtain observer status for MEA secretariats in relevant WTO bodies;**
- **Working together to avoid trade and environment disputes and ensure that efforts to resolve current disputes draw on environmental expertise;**
- **Enhanced information flow between the two regimes; and**
- **Joint efforts between UNEP, WTO, and MEAs to build capacity on implementing international agreements.**

This work contributed significantly to raising the profile of these issues which ultimately led to having them included in the DMD.

UNEP also participates as an observer in regular CTE meetings, including the WTO-MEA negotiating sessions, on an ad hoc basis, and cooperates in several activities with the WTO Secretariat, such as capacity-building in developing countries.[68] In recent years, UNEP-ETB has sought to encourage national coherence of trade and environment policies and measures, particularly through assessment of trade-related environmental policies. It is also assisting on national implementation of MEA measures both through its work on economic instruments and more recently through two initiatives implemented in partnership with MEA secretariats – CBD (trade and biodiversity) and CITES (wildlife trade policy reviews).[69] At the multilateral level, UNEP-ETB convenes informal meetings between MEAs at the margins of the CTESS negotiations to discuss issues of common concern, and has recently released two papers for comment relevant to these issues: (1) examining MEA trade-related measures; (2) drawing links between MEA technology transfer provisions and the WTO Environmental Goods and Services (EGS) negotiations.[70]

In the broader framework of UNEP's work, the UNEP Programme for the Development and Periodic Review of Environmental Law, adopted in 2001,[71] contains several provisions relating to the relationship between MEAs and the WTO. In the section on the avoidance and settlement of international disputes, the Programme calls for an examination of 'the relationship between dispute settlement systems in international environmental agreements and those in other international regimes, including regimes relating to trade and investment'.[72] Paragraph 14(c) calls for an analysis of the relationship between intellectual property rights and the conservation of biological diversity, in the context of preventing or resolving conflicts between MEAs and international trade rules. Furthermore, Section 18 is devoted to the topic of trade, and seeks to secure environmental protection objectives in international trade, investment and financial laws and policies in order to achieve sustainable development and the appropriate balance between trade and environmental objectives. It seeks to achieve

[68] Available at http://docsonline.wto.org/DDFDocuments/t/TN/TE/S2.doc, accessed on 28 July 2006.

[69] See e.g. UNEP ETB, 'Enhancing National Capacities to Assess Wildlife Trade Policies in Support of the Convention on International Trade in Endangered Species of Wild Fauna and Flora: Background Document'.

[70] See e.g. UNEP ETB, 'Trade-Related Measures and Multilateral Environmental Agreements' and MEA Experience in Identifying and Facilitating the Transfer of Technology – What Insights Can Be Drawn for the WTO EGS Negotiations?', drafts June 2006.

[71] UNEP GC 21/23, February 2001.

[72] See para 4(d). See further WTO doc. WT/CTE/W/191.

this by encouraging further the complementarity and mutual supportiveness of measures relating to environmental protection and international trade, investment and finance.

Specific actions called for under the Programme include the following:

> **(a) Identify and promote, through collaboration among governments, relevant organizations and civil society, legal instruments that integrate in a complementary and mutually supportive manner:**
> **(i) Environmental and trade laws and policies;**
> **(ii) Environmental and investment laws and policies;**
>
> **(b) Identify and promote, through collaboration among governments, relevant organizations and civil society: (i) Modalities for financing measures designed to resolve environmental problems, taking into account the linkage between environmental degradation and poverty; (ii) Economic and fiscal instruments for environmental protection and resource management;**
>
> **(c) Conduct studies to identify means of promoting optimal coherence between obligations under environmental and trade-related international agreements;**
>
> **(d) Promote and facilitate common international approaches to environmental problems as a means of anticipating and avoiding potential unilateral actions that could lead to environment and trade disputes;**
>
> **(e) Encourage the resolution of trade disputes within the appropriate fora in ways that ensure the full and effective consideration of relevant environmental concerns and information, as well as transparency and public participation;**
>
> **(f) Assist in developing the methodology for, and promote the implementation of, environmental impact assessments of investment and trade liberalization policies, particularly through capacity-building in developing countries and countries with economies in transition;**
>
> **(g) Collaborate with private and public financial institutions, including export credit agencies, in the further development of guidelines and standards with respect to environmental impact assessment, public participation and environmental protection, for investments in developing countries.**

So far, this Programme has focused more on the development of economic instruments and on compliance with MEAs, rather than the relationship between WTO and MEAs.[73]

Despite the level of engagement that UNEP has had on these issues, and the broad

[73] See 'State of the environment and contribution of the United Nations Environment Programme to addressing substantive environmental challenges', in *Report of the Executive Director to the 23rd UNEP Governing Council, 2005*, available at http://www.unep.org/GC/GC23/documents/GC23-3-Add3.doc, accessed on 28 July 2006.

mandate it has from the Governing Council, its impact on global policy has been limited – either on the WTO or in the development of clear, politically significant messages that would emanate from UNEP. Some reasons for this include the relative weakness of UNEP, insufficient financial resources, as well as insufficient political consensus within UNEP on issues relating to trade and environment.

4.2 A new international organization on the environment or a strengthened UNEP?

Many have suggested that a new international organization on the environment, or a strengthened UNEP, could be a more powerful interlocutor with the WTO on behalf of MEAs. A number of options have been mooted over the years, including that of creating an International Environmental Organization (IEO),[74] a World Environment Organization (WEO),[75] a Global Environmental Organization (GEO),[76] or a UN Environment Organization (UNEO),[77] which would, *inter alia*, interact with the WTO as an equal. The argument goes that UNEP, in its present status as a 'programme', rather than as an 'organization', does not have sufficient political clout to take the actions needed to reverse the deterioration of the global environment. This is because UNEP lacks resources, cannot effectively coordinate environmental actions in the UN, and is sometimes considered to have a North–South imbalance in favour of Northern interests.[78] It is argued that an organization with such clout would have greater legitimacy, a stronger mandate, and more financial security than UNEP has at present.[79]

However, the creation of a WEO, or a UN Environment Organization, has failed so far to garner sufficient political support, especially among developing countries.[80] Regardless of its political appeal, such a project is riddled with enormously complex practical challenges causing many within the environmental policy community to question its ultimate utility.[81] The discussions on this continue, although there might be more momentum around the idea of a strengthened UNEP, rather than the creation of a new body. However, even this requires significant action to be taken at the international level, such as a new UN General Assembly (UNGA) resolution.
One major initiative in this direction was the establishment of an Open-ended

74 Geoffrey Palmer, 'New ways to make international environmental law', *American Journal of International Law* 96 (1992): 259.

75 Frank Biermann, 'The case for a World Environment Organization', *Environment* 42 (2000): 23–31. See also Frank Biermann and S. Bauer, eds, *A World Environment Organization: Solution or Threat for Effective International Environmental Governance?* (Aldershot, UK: Ashgate, 2005).

76 Daniel Esty and Maria Ivanova, *Making International Environmental Efforts Work: the case for a Global Environmental Organization* (Rio de Janeiro: Yale Center for Environmental Law and Policy, 2001).

77 German Advisory Council on Global Change (WGBU), *World in Transition: New Structures for Global Environmental Policy* (London: Earthscan, 2001).

78 Nils Meyer-Ohlendorf and Markus Knigge, 'Potential benefits for developing countries – Design options for a UNEO', *Ecologic*, 2005, available at http://www.ecologic.de/download/projekte/200-249/221-01/221-01-report.pdf, accessed on 28 July 2006.

79 See generally, S Charnovitz, *A World Environment Organization*, 2002, available at http://www.unu.edu/inter-linkages/docs/IEG/Charnovitz.pdf, accessed on 25 June 2006.

80 Compare Council of the European Union, 'Renewed EU Sustainable Development Strategy', 9 June 2006 http://register.consilium.europa.eu/pdf/en/06/st10/st10117.en06.pdf, accessed on 1 December 2006, which states: 'Member States and the Commission should cooperate to promote the EU position on transforming the UN Environment Programme (UNEP) into a UN specialised agency or UNEO, based in Nairobi with a strengthened mandate and stable, adequate and predictable financing'.

81 See e.g. A. Najam, 'The case against a new international environmental organization' *Global Governance* 9 (2003): 367–84; K. von Moltke, 'The Organization of the Impossible', 2001, available at http://www.iisd.org/pdf/trade_organization_of_the_impossible.pdf, accessed on 4 July 2006.

Intergovernmental Group of Ministers to undertake a comprehensive policy-oriented assessment of existing institutional weaknesses as well as future needs and options for strengthened international environmental governance.[82] This work was carried out, but divisions among the participants proved to be too great to permit any significant reform by the time of the World Summit on Sustainable Development (WSSD) in 2002. The main achievement was the agreement to create an indicative scale of assessment, which sets out a non-binding formula for the financial contributions to be made by governments, aimed at providing UNEP with some financial stability.

Subsequently, discussions continued on strengthening UNEP, in particular around proposals for UNEP's membership to be universal.[83] Those countries in favour of universal membership of UNEP see it as a means of strengthening UNEP to provide better political guidance and have more effective decision-making. However, this proposal still does not have sufficient support for acceptance to be assured. Moreover, the debate has now been superseded by wider discussions around UN reform and promoting system-wide coherence, which are discussed in section 4.3 below.

Even if the political momentum is generated to strengthen the international institutional framework for the environment, it is still unclear how it would relate to the individual MEAs and how in reality it could act as a counterweight to the WTO. A massive re-codification of international environmental law might be needed to achieve an ambitious level of centralization of the different MEAs. Even if this could happen, there is no empirical basis to demonstrate that the lack of coordination of international environmental policy has caused the reluctance of some WTO Members to engage meaningfully with UNEP or MEA Parties to address ambiguities in the WTO-MEA relationship.[84]

4.3 Strengthening coherence in environmental decision-making in the UN system

The need to strengthen the coherence in environmental decision-making in the UN system has been on the international agenda for many years, and can be traced back to one of the original purposes of UNEP.[85] Strengthened coherence might enable MEAs to take more initiative on the trade-related aspects of their agendas. Several initiatives have taken place to achieve greater coherence.

In 1999, the Environmental Management Group (EMG) was created to achieve greater systemic coherence around environmental matters. It was established under UNGA Resolution 53/242 for the purpose of enhancing UN system-wide inter-agency cooperation.[86] The Terms of Reference indicate that the EMG is entrusted with two main responsibilities:

- Provide an effective, coordinated and flexible UN system response and facilitate

[82] UNEP Governing Council Resolution 21/21 (adopted on 9 February 2001) on International Environmental Governance.

[83] UNEP Executive Director, 'Synthesis of views of Governments concerning the question of universal membership of the Governing Council/Global Ministerial Environment Forum', UNEP Doc. UNEP/GCSS.VIII/INF/6, 15 March 2004.

[84] See S. Charnovitz (2002), supra n. 79.

[85] See UNGA/XXVII/2997.

[86] See para 5, UN Doc. A/RES/53/242, 10 August 1999.

joint action aimed at finding solutions to important and newly emerging specific issues of environmental concern;
• Promote inter-linkages and information exchange, and contribute to synergy and complementarity across the UN system.[87]

In 2005, the EMG secretariat was strengthened. It has tackled some issues on the UN agenda such as sustainable procurement and harmonization of national reporting requirements in MEAs, but has yet to consider any issues related to the interface between WTO and MEAs.[88]

At the political level, the Malmo Declaration, which emerged from the first Meeting of the Global Ministerial Environment Forum in 2000, stated (Paragraph 3):

***The evolving framework of international environmental law and the development of national law provide a sound basis for addressing the major environmental threats of the day. It must be underpinned by a more coherent and coordinated approach among international environmental instruments.*[89]**

In 2004 and 2005, France initiated an ad hoc working group on strengthening international environmental governance. The 2005 World Summit Outcome called for exploration of a coherent institutional framework and a more integrated structure to achieve, *inter alia*, the following: more efficient environmental activities in the UN system, enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, and better integration of environmental activities in the broader sustainable development framework.[90] As a result, two follow-up processes are taking place. One is a high-level panel, convened by the UN Secretary-General, on system-wide coherence in the areas of development, humanitarian assistance and the environment, which reported its recommendations to the 2006 session of the UN General Assembly.[91] Among the recommendations was a call for international environmental governance to be strengthened and made more coherent and for UNEP to be upgraded.[92] The panel also called on the Secretary-General to commission an independent assessment of the current UN system of international environmental governance in order, *inter alia*, to provide a basis for further reforms. The terms of reference for this panel include exploring how the UN system can best exercise its comparative advantages with international partners.[93] The second follow-up process is an informal consultation being held by the UN General Assembly on system-wide coherence regarding environmental activities.[94]

[87] Available at http://www.unemg.org/download_pdf/emgtor.pdf, accessed on 28 July 2006.

[88] Available at http://www.unemg.org/index.php, accessed on 28 July 2006 for information on EMG activities.

[89] Adopted by the Global Ministerial Environment Forum – Sixth Special Session of the Governing Council of the United Nations Environment Programme, Fifth plenary meeting, 31 May 2000.

[90] See para 169, UN General Assembly Resolution 60/1, 2005 World Summit Outcome.

[91] UN Department of Public Information, 'Secretary-General announces formation of new high-level panel on UN system-wide coherence in areas of development, humanitarian assistance, environment', 16 February 2006, available at http://www.un.org/News/Press/docs/2006/sgsm10349.doc.htm, accessed on 28 July 2006.

[92] 'Delivering as One', Report of the Secretary-General's High-Level Panel, advanced unedited version, 9 November 2006.

[93] Available at http://www.un.org/events/panel/html/page2.html, accessed on 28 July 2006.

[94] See UNEP, 'UN Reform. Implications for the Environment Pillar,' UN Doc. UNEP/DED/040506, 4 May 2006.

5 POSSIBLE OUTCOMES OF THE DOHA ROUND

There are a number of possible outcomes of the Doha Round relevant to the WTO-MEA relationship. These outcomes could result from different WTO mandates, in a range of forms and at different times:

- **DMD Mandate:** Negotiated outcomes clarifying the WTO-MEA relationship might emerge from the negotiations under paragraph 31(i), but they might also result from negotiations and discussions under other provisions of the Doha Ministerial Mandate, such as paragraph 31(ii) (MEA observer status and information exchange) or other decision-making powers of the WTO.
- **Form:** Outcomes on the WTO-MEA relationship in the WTO might take the form of a non-legally binding but influential political statement or an interpretative clarification agreed under Article IX of the Agreement Establishing the WTO. An amendment to or waiver of the WTO rules would arguably overstep the 31(i) mandate because the mandate does not permit any change to existing WTO rights or obligations.
- **Time:** There are also possible WTO outcomes that could be resolved during the Doha Round or could set the basis for future work in this area.

Some of the possible 31(i) outcomes could be characterized as representing the current state of law and policy relevant to the WTO-MEA relationship (the 'status quo'). Others could be viewed as effecting changes that improve the ability of WTO Members to accommodate MEA trade measures and avoid WTO-MEA conflicts. These are set out below, in detail. They should not be considered as mutually exclusive of action that could be taken in the UN or other international bodies.

5.1 Maintaining the 'status quo'

WTO Members – motivated by different convictions or interests – might agree that an outcome under paragraph 31(i) that does no more than maintain the legal status quo would be the preferred outcome to the negotiations.[95] Some WTO Members might consider the narrow 31(i) mandate to be incapable of delivering any meaningful outcome on the WTO-MEA relationship. Other Members might be convinced that that there is no inherent conflict – or, if there is, that the current rules and procedures are already well equipped to balance the WTO-MEA relationship. Further still, some Members might be concerned that the mandate opens the door for the political process to undo or undermine the 'progressive' – yet contested – approach taken so far in WTO disputes. They might fear that any outcome under paragraph 31(i) that does more than maintain the status quo could create an opportunity for the WTO's politicians to rein in the WTO's judicial branch to the detriment of MEA implementation and sound legal principles. For all of these Members, an outcome under 31(i) that maintains the status quo might be viewed as inevitable, appropriate or desirable.

[95] *Cf* 'MEAs and WTO Rules – Proposals Made in the CTE from 1995-2002', TN/TE/S/1 (23 May 2002), available on ttp://docsonline.wto.org/DDFDocuments/t/tn/te/s1.doc) (*'CTE Proposals 1995-2002').*

5.1.1 'Doing nothing'

Some respondents to the project questionnaire suggested that the legal status quo could be maintained by deciding to 'do nothing' under DMD paragraph 31(i). The practical difficulty with 'doing nothing' under DMD paragraph 31(i) is that the mandate exists, and should be addressed; it is a feature of the 'single undertaking' nature of WTO negotiations that Members are not allowed to pick and choose among issues on the negotiating agenda. Some respondents to the project questionnaire observed that it would be counter-intuitive for trade negotiators not to deliver something on all of the Doha items, including paragraph 31(i). In any event, it was suggested, a good negotiator would never give anything away without getting something in return, even if it is under another agenda item of the Doha Round.

5.1.2 Endorsing existing elements of the WTO-MEA relationship

Other respondents to the project questionnaire suggested that the legal status quo could be maintained through a brief statement endorsing existing elements of the WTO-MEA relationship, similar to the conclusions reached by the CTE for the purposes of the WTO's Singapore Ministerial Conference in 1996.[96] This outcome would contain generic statements about the WTO-MEA relationship – in contrast to a comprehensive and formal codification of the law contemplated in the outcome described below in section 5.2.4. The EC's June 2006 'Proposal for a Decision of the Ministerial Conference on Trade and Environment' is, to some extent, an endorsement of the existing elements of the WTO-MEA relationship.[97] As indicated earlier, this proposal met with some criticisms from other WTO Members.[98] Some of the more sceptical respondents to the project questionnaire suggested that a modest statement, endorsing uncontroversial elements of the WTO-MEA relationship, could be a useful face-saving exercise for the proponents of WTO reform to better accommodate MEA trade measures. In their view, it might be preferable to find a compromise, where negotiators can be seen to do something without doing too much. However, others pointed out that if any outcome truly did no more than endorse the status quo, it might have limited value and might only add yet another layer of confusion to the MEA-WTO relationship. The principal difficulty with this proposal is that Members would not necessarily agree that the Singapore conclusions reflect the consensus in today's political context.

5.1.3 MEA observer status and information exchange

Agreeing to maintain the status quo as a result of the DMD paragraph 31(i) negotiations would not necessarily be the end to the WTO dialogue relevant to the MEA-WTO relationship. There is, for example, still scope for an outcome on DMD paragraph 31(ii) (MEA observer status and information exchange) if the negotiations are resumed. Indeed, some respondents to the project questionnaire supported a strong outcome on the Doha Round negotiations under paragraph 31(ii) as an important procedural precursor to avoiding any conflict between MEAs and WTO rules. As noted above in section 3.3.5, the content and parameters of the mandate from the governing bodies of UNEP and MEAs to seek WTO observer status play an important

[96] See above, section 3.1.

[97] Submission by the EC, WTO Doc. TN/TE/W/68, 30 June 2006.

[98] See WTO Doc. TN/TE/16, supra n. 53.

part in the nature of the contributions that can be made by their secretariats in WTO meetings. Moreover, an endorsement of the status quo would not preclude CTE regular sessions from continuing with their discussion of the WTO-MEA relationship as part of their regular work programme after the conclusion of the Doha Round – unencumbered by the limitations of DMD 31(i) as to non-parties. The training and capacity-building initiatives in the area of trade and environment that have been documented in the CTE under DMD paragraph 33 could also continue.

5.2 Improving the MEA-WTO relationship

In contrast to the advocates for maintaining the status quo, some respondents to the project questionnaire suggested that it was important to agree on an outcome under DMD paragraph 31(i) that improves the MEA-WTO relationship. Paragraph 31(i) is one of the few mandates, and the CTE is one of the few WTO bodies, that provide a platform for a better understanding among WTO Members of the need to accommodate environmental policy in the application of WTO rules. Failing to effect change as a result of the 31(i) negotiations could weaken the already slow momentum of the political discussion on the WTO-MEA relationship, leaving the rules vulnerable to misapplication by future WTO arbitrators when they are next asked to assess the WTO compatibility of a Member's environmental trade measure. Some ambitious outcomes could, it was suggested, be achieved within the parameters of the narrow 31(i) mandate. Other outcomes could be considered as part of a process for reform that could be initiated under paragraph 31(i) and undertaken after the conclusion of the Doha Round.

5.2.1 Exempting MEA trade measures from WTO rules

Prior to the Doha mandate, WTO Members had discussed several ways in which MEA trade measures could be exempted or partially exempted from WTO rules. A common suggestion had been to provide 'immunity' for MEA trade measures under GATT Article XX and equivalent provisions in other WTO Agreements.[99]

A narrow exemption within the scope of DMD paragraph 31(i) could excuse trade measures among MEA parties taken pursuant to specific trade obligations in specified MEAs. A broad exemption negotiated, for example, under DMD paragraph 30 could excuse all trade measures taken pursuant to MEAs. The exemption could be absolute, or, like the existing sub-paragraphs in GATT Article XX, it could remain subject to the qualifications in the introductory paragraph to GATT Article XX requiring all measures to be applied in a manner that does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The exemption could expressly list the MEAs, or the specific trade obligations in MEAs, that it would cover. This so-called 'positive' list approach has been taken, for example, in the North American Free Trade Agreement.[100] It is difficult for a positive list to provide for MEAs yet to be negotiated in the future or which might enter into force in the future. An alternative form of exemption that could provide for future MEAs

[99] See *CTE Proposals 1995-2002*.
[100] 32 I.L.M. 289 (1993), Article 104.

would be to set out agreed criteria for the types of MEAs, the types of trade obligations or the types of trade measures that would be covered by the exemption. Many of the issues that have been raised in the 31(i) negotiations on the scope of the mandate – the meaning of MEA, STOs, and 'set out in' an MEA – would also need to be agreed for the purposes of an exemption. There is a possibility that a WTO exemption would create a presumption that any MEAs, MEA trade obligations or MEA trade measures not covered by the exemption are inconsistent with WTO rules. Accordingly, any exemption singling out for immunity specified MEA trade measures among parties would need to make it clear that it was not intended to prejudice the implementation of any other MEAs or measures that have not been expressly identified.

Yet another variation on the proposal to exempt MEA trade measures from WTO rules relates to the so-called 'burden of proof'. Under WTO exceptions, such as GATT Article XX, the Member defending a measure has the evidentiary burden of persuading the arbitrators that the challenged measure qualifies for the exemption. Some proposals to accommodate MEA trade measures have suggested reversing the burden of proof under GATT Article XX.[101] By reversing the burden of proof for MEA trade measures, the WTO Members would be requiring Members that complain that an MEA trade measure violates one the primary WTO rules – such as the ban on quotas under GATT Article XI – to be required to show also that it does not qualify as an exception under Article XX.

An exemption for MEA trade measures could take several forms. It could be created through an express amendment to GATT Article XX and equivalent provisions in other WTO Agreements. For example, some have suggested that a new paragraph could be inserted into GATT Article XX or that existing sub-paragraph XX(b), and its equivalent in other WTO Agreements, could be expanded. An exemption could also be effected through an interpretative decision. In the past, it has been suggested that MEA parties could exempt MEA trade measures under a waiver.[102] In the case of reversing the burden of proof, it could be possible to effect this change through rules of procedure to be applied by WTO arbitrators.

If the exemption is to be a narrow one agreed within the parameters of DMD paragraph 31(i), it is questionable which, if any, of these forms could be agreed without altering the balance of the rights and obligations of Members under existing WTO Agreements. There has been some suggestion that a reversal of the burden of proof could be achieved through a change in the procedural rules, and would, therefore, not alter substantive rights.[103]

A broad exemption for all MEA trade measures might appeal to those who would like to see all of the so-called 'trade and' issues removed from WTO scrutiny. Others might be concerned that it could be used as a way of forcing MEA-compliance on countries that are not a party to the MEA. In any event, while it might be theoretically possible to negotiate an interpretative decision under DMD paragraph 30 that provided

101 See e.g. *CTE Proposals 1995-2002*.
102 Ibid.
103 See e.g. Statement by Switzerland TN/TE/W/32.

immunity to MEA trade measures, it is highly unlikely that Members would be willing to introduce this issue into their debate on the rules for dispute settlement. The DMD paragraph 30 discussions are already riddled with contested proposals and if Members have failed to address broader concerns about the MEA-WTO relationship in the CTE, there is no reason to imagine that Special Sessions of the Dispute Settlement Body would be more successful in reaching consensus. Ultimately, WTO Members will always want to maintain some level of scrutiny over trade measures that impact on their exports – regardless of whether or not they are authorized by an MEA.

5.2.2 'Best practice' guide for design and implementation of MEA trade measures

While an express exemption might 'cure' any MEA-WTO conflict, some Members have suggested that conflicts can be prevented by designing and implementing MEA trade measures in a manner that is consistent with WTO rules.[104] They maintain that the near absence of WTO disputes over MEA trade measures to date is indicative of the successful accommodation of WTO rules by MEAs. One outcome from the exchange of national experiences under DMD paragraph 31(i) could be a 'best practice' guide for Members on how to design and implement MEA trade measures in a WTO-consistent manner.[105] Some Members have suggested that flexibility to adopt the least trade-restrictive measure under an MEA helps to avoid WTO conflicts, and that measures with a 'scientific' foundation are more likely to be consistent with WTO rules.[106] Other Members have identified certain procedures – such as intra-governmental coordination among departments responsible for trade and environment policies, or public information and participation in the governmental decision-making procedures that design and implement the national measures taken pursuant to MEAs – which can also prevent MEA-WTO conflicts.[107]

A 'best practice' guide or code of conduct prepared by the WTO Members could be used by governments in their negotiation and implementation of MEAs. It could also be used by WTO arbitrators in their assessment of an MEA trade measure under GATT Article XX and equivalent provisions in other WTO agreements. The guide could be developed as an outcome to the negotiations under DMD paragraph 31(i) or under DMD paragraph 30 (dispute settlement), or as part of the regular work programme of the Committee on Trade and Environment after the conclusion of the Doha Round.

A significant objection to the development by the WTO of a best practice guide for the design and implementation of MEA trade measures is that it would be beyond the competence and expertise of the WTO Members. It might lead to a bias towards trade interests at the expense of MEA objectives. Some respondents to the project questionnaire suggested that if a best practice guide were developed, it should be developed by UNEP and MEA parties independently of, or in consultation with, the WTO.

[104] See e.g. Submission by United States, TN/TE/W/40. See also Submission by Australia, TN/TE/W/45, paras 29-30.

[105] See *CTE Proposals 1995-2002.*

[106] See e.g. Submission by Australia, TN/TE/W/45.

[107] WTO Submission by Hong Kong, China, TN/TE/W/28; Submission by United States, TN/TE/W/40; Submission by Australia, TN/TE/W/45; Submission by the EC, TN/TE/W/53; Submission by Switzerland, TN/TE/W/58.

5.2.3 Improved understanding of multilateral environmental policy and rules

WTO Members are undertaking many initiatives on a voluntary and informal basis aimed at improved understanding of multilateral environmental policy and rules among trade officials. Several of these initiatives, including training and capacity-building in the area of trade and environment, have been documented in the CTE under DMD paragraph 33 and are undertaken in joint projects of UN bodies and non-governmental organizations.[108] If formalized and backed up by the necessary financial support, these initiatives could promote a better understanding among Members of the MEA-WTO relationship. A better understanding of the relationship could help to avoid conflicts and minimize any adverse impacts of WTO rules on MEA design and implementation.

Possible outcomes aimed at improved understanding include:

- **facilitating information exchange between MEA secretariats and relevant WTO bodies by, for example, formalizing the practice of MEA information sessions held 'back-to-back' with CTE meetings, and institutionalizing better information systems, such as an electronic database of MEA trade measures based on the document that is already produced by the WTO Secretariat;[109]**
- **allowing MEA secretariats to attend all meetings of WTO bodies that deal with matters that impact on the implementation of those MEAs as observers, calling on them where appropriate to provide information to WTO Members and permitting them to make interventions and submissions for consideration by the WTO Members;[110]**
- **increasing participation of environmental policy-makers in WTO processes;**
- **training Members' representatives in Geneva and in capital on the MEA-WTO relationship;**
- **assessing the impact of WTO rules and procedures on the design and implementation of MEAs.**

These outcomes might be negotiated or discussed under various parts of the DMD agenda. Procedures for MEA information exchange and observer status could be negotiated under DMD paragraph 31(ii). Increased participation of environmental policy-makers, training on the MEA-WTO relationship, and an assessment of the impact of WTO rules and procedures on MEA design and implementation could be discussed as part of the CTE's discussions under DMD paragraph 33 (environmental reviews), or after the conclusion of the Doha Round as part of the CTE's regular work programme.

5.2.4 Codifying basic principles on the MEA-WTO relationship

The possibility of codifying basic general principles on the MEA-WTO relationship has been anticipated by proposals submitted by the EC and Switzerland with some support

[108] See Secretariat briefing WTO doc. WT/CTE/M/41, Annex 1, UNCTAD Submission, WTO doc. WT/CTE/GEN/19 and 21 and corrigendum) and UNEP Submission, WTO doc. WT/CTE/GEN/17).; see further UNCTAD-FIELD and FIELD Capacity-building http://r0.unctad.org/trade_env/test1/openF1.htm, http://www.field.org.uk/tisd_4.php and UNEP-UNCTAD Capacity-building Task Force, http://www.unep-unctad.org/cbtf/, accessed July 2006.

[109] See e.g. 2002 Environmental Database, WTO Doc. WT/CTE/EDB/2.

[110] Note that this assumes an appropriate mandate from the MEA parties to their secretariats, discussed in section 3.3.5 above.

from other Members. The EC has identified what it terms 'global governance principles'.[111] Switzerland has suggested that at least three principles already govern the MEA-WTO relationship: no hierarchy between MEAs and WTO rules, mutual supportiveness, and deference between the trade and environment regimes in accordance with their relative degree of specialization.[112] Some Members have also outlined criteria that guide their MEA negotiators in designing trade-related provisions in MEAs: e.g. public interest, non-discrimination, proportionality and transparency (Switzerland). Other criteria proposed include using trade measures only when alternative measures would be ineffective in achieving the environmental objective; selecting the trade measures that are no more trade-restrictive than necessary to achieve that objective; and ensuring that these measures do not constitute arbitrary or unjustifiable discrimination (Canada).[113]

Other existing principles governing the MEA-WTO relationship could be drawn from a range of sources described in earlier sections of this paper. For example, the WTO's Dispute Settlement Body has articulated certain principles and developed practices that would be relevant to the MEA-WTO relationship (see e.g. section 2.4 above). The Singapore Report might be yet another source for existing principles (see e.g. section 3.1 above). In addition, recognized principles of international law could also be highlighted (see e.g. section 2.3 above).

The potential purposes of codifying such general principles include providing a reference to WTO arbitrators in the event of a dispute, or providing general guidance to WTO Members in their design and implementation of trade measures to achieve MEA objectives. A reiteration of existing general principles on the MEA-WTO relationship could take the form of an interpretative understanding as an outcome to DMD paragraph 31(i). This outcome would be more comprehensive, formal, and binding than a statement endorsing existing elements of the WTO-MEA relationship described above in section 5.1.2. They could also be described in an information note or handbook prepared at the Members' request by the WTO Secretariat, in consultation with relevant institutions such as UNEP and MEA Secretariats and experts, either during or after the Doha Round, as part of the WTO Secretariat's regular functions.

There are, however, likely to be political disagreements about the specific content of existing principles, such as the relevance of public international law in the interpretation of WTO rules.[114] These disagreements may reflect political positions that have been or should be negotiated in the relevant MEA forum, or that are better addressed by experts in a dispute settlement context. There may also be fundamental policy differences: one respondent to the project questionnaire suggested that there are inherent differences in trade and environment policy, which would mean that MEA implementation cannot, by the very nature of what it is trying to achieve, necessarily be 'mutually supportive' of trade policy and the rules that reflect it. For any Member

[111] WTO Doc. TN/TE/W/53, TN/TE/W/68.

[112] WTO Doc. TN/TE/W/61.

[113] WTO Docs TN/TE/W/58 and TN/TE/R/11 respectively.

[114] Note, for example, the divergent arguments put forward by the US in the EC-Biotech case, and the US submissions to the DSU concerning the relevance of public international law, see WTO Doc. TN/DS/W/74 and TN/DS/W/82 and addenda and corrigenda.

concerned that a political negotiation of principles might lead to an unfavourable result for the implementation of MEAs, an attempt to reach consensus on existing principles on the MEA-WTO relationship would not be desirable.

5.2.5 WTO consultation to identify least trade-restrictive MEA measures

In CTE discussions prior to the Doha Round, some WTO Members had supported a proposal to create a voluntary consultation process whereby WTO Members seeking to enact MEA trade measures would consult with the WTO Membership to agree on the least trade restrictive measure before it is implemented.[115] If a WTO dispute ensued over the trade measure agreed through the consultation process to be the least trade-restrictive measure available to achieve the MEA objective, the WTO arbitrators could be required to defer to the consultation outcome in deciding whether it was necessary to achieve its objective for the purposes of GATT Article XX(b) and equivalent provisions in other WTO Agreements. The voluntary consultation process would be a variation of the existing mandatory requirements for WTO Members to consult with each other when preparing, adopting or applying technical regulations. For example, under Article 2.5 of the WTO Agreement on Technical Barriers to Trade (TBT), WTO Members might discuss the WTO consistency of an MEA trade measure which might be presumed not to create an unnecessary obstacle to international trade (assuming an MEA is considered to be an 'international standard'). Under TBT Article 2.9, a proposed measure that was not in accordance with an MEA would have to be notified and discussed with WTO Members. A voluntary consultation process to identify the least trade-restrictive MEA measure prior to its being implemented would, in effect, extend the process anticipated in Article 2.9 of the TBT Agreement to measures that are in accordance with an MEA. The voluntary consultation process could be informed by the kind of 'best practice' guide contemplated in section 5.2.2 above and could be agreed within the terms of the DMD paragraph 31(i) mandate provided it were limited to MEA parties.

Some WTO Members might oppose a voluntary consultation process to identify least trade-restrictive MEA measures prior to implementation on the basis that it would increase WTO scrutiny of MEA implementation and overstep WTO competence. Even if the consultation were voluntary, the less politically powerful WTO Members could be compelled to engage in consultation outside the MEA context in which the measures have been proposed. This could lead to undue influence of trade policy on MEA trade measures, making them so unrestrictive of trade that they failed to meet their multilaterally agreed environmental objective. These Members might consider MEA fora to be the most appropriate host for consultations on MEA implementation.

5.2.6 Requiring the sequencing of MEA and WTO disputes

In its 1996 report to the Ministerial Conference in Singapore, the CTE encouraged WTO Members to resolve disputes over MEA trade measures in accordance with the dispute settlement mechanisms set out in the relevant MEA.[116] WTO Members could go one step further and expressly require WTO Members to exhaust all options for resolving disputes over MEA trade measures under MEA dispute settlement procedures before

[115] See *CTE Proposals 1995-2002.*

[116] See section 3.1 above.

initiating a dispute in the WTO. Advocates of this outcome maintain that MEA parties are best placed to scrutinize the effective implementation of MEAs. It is also only MEA parties that can authoritatively determine whether a measure has in fact been validly taken pursuant to an MEA – a determination which would have to precede any assessment of MEA trade measure under GATT Article XX and its equivalent in other WTO Agreements. This outcome would, however, depend on there being effective dispute settlement procedures available under the MEA (see section 2.7 above).

MEA dispute settlement could be made the first port of call for adjudicating MEA trade-related disputes by an amendment to the WTO's Understanding on Dispute Settlement, or to the rules of procedure agreed by the WTO Members meeting as the Dispute Settlement Body. If it were limited to MEA parties, this outcome could be agreed under DMD paragraph 31(i). A less restrictive and more appropriate negotiating mandate for this outcome might be DMD paragraph 30, although it is unlikely that WTO Members would be willing to introduce this issue into the negotiations on dispute settlement and it is even less likely that WTO Members that are not party to a given MEA would be willing to commit themselves to MEA avenues for addressing conflicts with non-parties. Alternatively, the Dispute Settlement Body could consider this matter after the conclusion of the Doha Round as part of its regular work programme.

5.2.7 Requiring WTO arbitrators to seek advice from MEA authorities

WTO arbitrators could be required to seek and follow advice from MEA authorities in the course of disputes. MEA secretariats could be mandated by their governing bodies to provide any relevant advice. When assessing an MEA trade measure under GATT Article XX and its equivalent in other WTO Agreements, WTO arbitrators would need to consider whether the challenged measure was in fact taken pursuant to a multilateral process. As explained in section 2.4 above, if the challenged measure is a genuine MEA trade measure, it is more likely to reflect an objective of universal value which would be relevant to an assessment of 'necessity'. A multilateral process is also relevant to a finding that a challenged measure does not amount to arbitrary or unjustifiable discrimination. Under current WTO rules, WTO arbitrators may seek advice from MEA bodies on the question of whether a challenged measure has been validly taken pursuant to an MEA.[117] However, without an express requirement for WTO arbitrators to seek and follow the advice of an MEA body authorized to determine whether a given measure is a valid MEA trade measure, WTO arbitrators might make assessments on MEA compliance that were beyond their area of competence.

WTO arbitrators could be required to seek and follow advice from MEA authorities in the course of disputes as an outcome to the DMD paragraph 31(i) negotiations. A less restrictive and more appropriate negotiating mandate for this outcome might be DMD paragraph 30, although WTO Members might not be willing to introduce this issue onto the dispute settlement agenda at this stage in the negotiations. Alternatively, the CTE or the Dispute Settlement Body could consider this matter after the conclusion of the Doha Round as part of its regular work programme.

[117] DSU Art. 13 and working procedures.

5.2.8 CTE continues the broader examination of the WTO-MEA relationship

Under its regular work programme before the commencement of the Doha Round, the CTE had been charged with examining a broad set of issues concerning the WTO-MEA relationship – including the vexed question of MEA non-parties.[118] After the conclusion of the Doha Round, the CTE will continue its broader examination of the WTO-MEA relationship under Items 1 and 5 of its original work programme unless Members consider it desirable to change the CTE's work programme.[119] Despite the fact that the broader discussions failed to reach any consensus, they have been an important platform for Members to air their concerns and to build a better understanding of the issues among trade officials. Without some basis for ongoing examination of the WTO-MEA issue in the WTO, some Members might be concerned that trade officials in the WTO would become less sensitive to multilateral environmental considerations and that future conflicts would be more likely to arise in the future.

Some Members might support ongoing WTO discussion of the MEA-WTO relationship but they might be less convinced that the old mandate was the right starting point or that the CTE was the right WTO body to host the discussion. The old mandate is arguably too vague and unwieldy and some might feel that the CTE lacked political leverage to effect change. The 31(i) negotiations might present an opportunity to agree a new and specific agenda for discussion in a WTO body mandated to address the MEA-WTO question in a more systemic way – throughout the WTO's work on the trade in goods, services and intellectual property – and in coordination with other intergovernmental organizations mandated to deal with multilateral environmental policy and international trade. Avenues for WTO engagement with other international organizations are discussed in section 7 below.

[118] See *CTE Proposals 1995-2002.*

[119] Note that regular CTE meetings have been asked to consider whether the CTE's work programme should be reviewed and revised.

6 POSSIBLE OUTCOMES NEGOTIATED IN THE UN SYSTEM

As no formal negotiations on the relationship between the WTO and MEAs are taking place outside the WTO, any discussion on specific outcomes negotiated outside the WTO must be rather speculative. Nonetheless, it is possible, on the basis of past experience, to identify and assess a number of possibilities.

6.1 Strengthening MEA dispute settlement

One way to improve the MEA-WTO relationship would be to strengthen MEA dispute settlement provisions so as to offer a viable alternative to dispute settlement in the WTO. At present, the International Court of Justice (ICJ) or arbitration tend to be the venues for dispute settlement identified in MEAs. Part of the problem is that these dispute mechanisms rely on the consent of both parties to the dispute to have the dispute heard, which make them less powerful than the WTO Dispute Settlement Body (DSB). Secondly, there has never been a dispute directly about international trade policy in the ICJ, which probably reflects the conscious decision of the international community to set up specialized and exclusive dispute settlement mechanisms in the GATT and WTO. Therefore, it would be difficult, both legally and politically, to move trade policy disputes away from the WTO: any dispute concerning the WTO rules must be submitted to the WTO's Dispute Settlement Body. Thirdly, unlike the WTO, the ICJ does not usually award penalties that have monetary consequences and there is no built-in procedure to ensure compliance with its rulings.

Strengthening dispute settlement in MEAs could involve making dispute settlement compulsory upon the instigation by one party, as well as a clear establishment of what remedies could be ordered. Doing so would involve changes in the treaties, which could be effected by amending them or perhaps by a new umbrella agreement that would apply to all MEAs. An umbrella agreement would be very ambitious, and complex, especially if not all MEA parties joined it. Negotiating amendments in individual treaties might be easier, but a fundamental question is whether such amendments would actually achieve much, given that most MEAs are facilitative in nature, where compliance has a higher priority than inter-state dispute settlement.

6.2 Strengthening compliance with MEA requirements

Strengthening compliance in MEAs could also help to avoid trade-related disputes going to the WTO, in cases where non-compliance by a party encourages other parties to adopt trade-related measures in response. This could be linked to the financial mechanisms, such as the Global Environment Facility (GEF), established to provide support based on the principle of 'common but differentiated responsibilities'.[120] Some trade-related MEAs, such as the Montreal Protocol, have compliance mechanisms, which were designed by their Conferences of Parties. There has been some recent

[120] Principle 7, Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992), UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992.

momentum, fostered by UNEP, to further develop such mechanisms in other MEAs.[121] Ultimately, the design and implementation of compliance mechanisms or other measures will entail amending either the treaties or decisions by the Conferences of Parties.

6.3 Designing trade measures to be supportive of WTO rules

MEAs could ensure that trade measures under their agenda are developed, designed and implemented with a view to their being supportive of WTO rules, e.g. GATT Article XX. This would appear to be the intention expressed in several recent treaties although compromise language has led to competing statements, such as the preamble to the Biosafety Protocol.[122] MEA parties, acting through their governing bodies or secretariats, or through UNEP, could then develop guiding principles or document best practice to encourage the use of least trade-restrictive trade measures at the stage of national MEA implementation.

Experience to date suggests that MEA parties tend to be cautious in designing trade measures to be included in MEAs. Increasingly, MEA negotiations where trade issues are on the agenda are attended or monitored by trade ministry delegates; in addition, the WTO Secretariat often attends such negotiations as an observer.[123]

As noted above (section 5.2.5), some WTO Members have in the past supported a proposal to create a voluntary consultation process whereby WTO Members seeking to enact MEA trade measures would consult with the WTO Membership to agree on the least trade-restrictive measure before it is implemented.[124] Possible concerns that such an initiative would increase WTO scrutiny of MEA implementation and overstep WTO competence could be addressed if MEAs and UNEP, together with appropriate stakeholders, were to host the voluntary consultation process.

One conceptual difficulty with such an *ex ante* approach is that it presupposes determinations in the abstract of what the WTO rules would require in a given situation. It is not possible to anticipate with certainty how MEA provisions emerging from an MEA- or UNEP- led determination will be assessed by the WTO DSB, which focuses on the application to such provisions in specific fact situations.

[121] See e.g. UNEP, 'Envisioning the Next Steps for MEA Compliance and Enforcement, A High-Level Meeting on Compliance with and Enforcement of Multilateral Environmental Agreements', 21-22 January 2006, Colombo, Sri Lanka, and the Agreed Chair's Summary of that meeting available at http://www.unep.org/dec/docs/Agreed_Chairman_Summary1.doc, accessed on 28 July 2006. [122] See e.g. 9th recital of the Preamble, which states, *inter alia*, '…Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development…,', followed in subsequent recitals with 'Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements, Understanding that the above recital is not intended to subordinate this Protocol to other international agreements'.

[123] See e.g. lists of observers, including representatives from the WTO Secretariat, in Biosafety Protocol negotiations: Report of the Fifth Meeting of the Open-Ended Ad Hoc Working Group on Biosafety, UNEP/CBD/BSWG/5/3, 3 September 1998, p. 3; Report of the Sixth Meeting of the Open-Ended Ad Hoc Working Group on Biosafety, UNEP/CBD/ExCOP/1/2, 15 February 1999, p. 3; Report of the Extraordinary Meeting of the Conference of the Parties for the Adoption of the Protocol on Biosafety to the Convention on Biological Diversity, UNEP/CBD/ExCOP/1/3, pp. 6 and 21.

[124] See *CTE Proposals 1995-2002.*

6.4 Assessing the impacts of WTO trade liberalization on achieving MEA objectives

MEAs could undertake assessments of the impacts of WTO trade liberalization on the achievement of MEA objectives. A reverse analysis of the impact of MEA trade measures on international trade liberalization might also be useful, particularly if such impacts were viewed in terms of the overall goal of the WTO Agreements, to improve human welfare. Ideally, this would involve an internationally credible process that would carry out *ex ante* and *ex post* assessments that would inform both WTO and MEA negotiations. Such an exercise could, perhaps, be done in the context of the Global Environmental Outlook reports. UNEP ETB has developed methodologies for integrated assessment of trade liberalization,[125] and the Convention on Biological Diversity (CBD) work programme on agricultural biodiversity calls for an assessment of the impact of trade liberalization in that area.[126] In addition, some WTO Members have carried out impact assessments (see section 5.2.3 above). There are, however, disputes over the methodologies undertaken[127] and, more importantly, there is no mandate to link this in a concerted fashion to specific WTO negotiations proposals or outcomes.

6.5 Promoting sustainable trade

MEAs could become more proactive in promoting sustainable trade. Instruments that could be adopted include principles and criteria that define what 'sustainable' means in that context, tracking systems to ensure compliance with any trading regime, and labelling to inform consumers that products are sustainable. Such instruments would need to be adopted by MEA governing bodies. They are already in place for some specialized MEAs that focus explicitly on trade, such as CITES, the Basel Convention on the Transboundary Movement of Hazardous and Other Wastes, and the Montreal Protocol on Substances that Deplete the Ozone Layer, and are constantly evolving. However, without considerable and sustained political momentum, it would be more difficult for such instruments to be adopted by the more general MEAs, such as the CBD, which does not contain specific obligations relating to trade.

6.6 Codifying the basic principles on the WTO-MEA relationship

Through UNEP, MEAs could take the initiative in identifying the existing legal principles underlying the WTO-MEA relationship. These could be expressed in a declaration or perhaps even a decision of the Global Ministerial Environment Forum. One vehicle for developing such a declaration could be activities carried out under the Montevideo

[125] See e.g. UNEP's 'Manual on Integrated Assessment: Maximizing the net development gains of trade-related policies', May 2002, available at http://www.unep.ch/etb/publications/etbBriefs/UNEPAssess.pdf, accessed on 30 July 2006. For a description of UNEP's work in this area see also, available at http://www.unep.ch/etb/areas/IntTraRelPol.php, accessed on 30 July 2006.

[126] See Decision VI/5 of the CBD Conference of Parties on Agricultural Biological Diversity and CBD, Note by Executive Secretary, 'The Impact of Trade Liberalization on Agricultural Biological Diversity: A synthesis of assessment frameworks', UNEP/CBD/COP/7/INF/15, 18 December 2003; see also UNEP, ETB, 'Integrated Assessment of Trade-Related Policies and Biological Diversity in the Agriculture Sector: Background Document', June 2005.

[127] See, e.g. 'A "Critique" of the EC's WTO Sustainability Impact Assessment Study and Recommendations for Phase III, commissioned from Sarah Richardson of Maeander Enterprises Ltd on behalf of the following organizations: Oxfam GB, WWF-European Policy Office, Save the Children, and ActionAid', available at http://www.oxfam.org.uk/what_we_do/issues/trade/wto_sustainability.htm, accessed on 31 July 2006.

Programme III. It has also been suggested that the International Law Commission (ILC) could also come up with a set of principles, since ILC membership usually consists of highly respected international lawyers.[128] The ILC inputs recommendations, often in the form of draft articles, to the UN General Assembly. These draft articles can form the basis of text which states then negotiate into legally binding rules. In principle, the ILC could either consider proposals from other UN bodies to progressively develop relevant international law or it could decide on its own to codify this law.[129] At its fifty-fourth session, in 2002, the Commission decided to include the topic 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law' in its programme of work, which could have resonance for the WTO-MEA relationship. So far, the ILC has established Study Groups to consider the topic in greater detail.[130] The success of either institutional route – UNEP or the ILC – will ultimately depend on the political will of states to actually codify the results in a forum outside the WTO. In the case of the ILC, a previous foray into international economic law, was an attempt to codify most-favoured-nation clauses. Beginning work in 1967, the ILC succeeded in preparing draft articles by 1978. In 1991, however, the UN General Assembly declined to codify them.[131]

[128] S. Pfahl, *Is the WTO the Only Way? Safeguarding Multilateral Environmental Agreements from International Trade Rules and Settling Trade and Environment Disputes Outside the WTO,* Briefing Paper (Adelphi Consult, Friends of the Earth Europe, and Greenpeace, 2005).

[129] Articles 17 and 18 of the Statute establishing the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

[130] See, e.g. 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law', Report of ILC Study Group, 13 April 2006, A/CN.4/L.682.

[131] UN General Assembly Decision 46/416 of 9 December 1991.

7 INTER-INSTITUTIONAL INITIATIVES AND ALTERNATIVE VENUES

At present, some coordination between MEA and WTO secretariats exists, but it is limited. The WTO Secretariat participates in MEA negotiation meetings, but only a few MEAs are permitted to attend regular meetings of the CTE. Despite requests by some MEAs for observer status at the WTO negotiations under paragraph 31, only a select few have been invited on an ad hoc basis to attend the CTE meetings (see section 3.3.5 above). At the operational level, there is some cooperation between UNEP and the WTO, e.g. UNEP participating in WTO training sessions. Other international economic institutions have engaged on these issues but have tended to address the issue within the perspective of their own institution.[132]

MEA secretariats could seek to enable more coordination with the WTO, for example through applying (or in some cases re-applying) for observer status at relevant WTO bodies, such as the TRIPS Council, and seeking to carry out joint events with the WTO Secretariat. They could also seek to make the MEA information sessions in the WTO more meaningful exchanges on policy options. Some of this could be covered by an expanded memorandum of understanding between UNEP and the WTO. The outcome of the DMD paragraph 31(ii) negotiations would also have an impact on the prospects for wider MEA observer status in the WTO negotiations (see section 5.1.3 above). However, one limitation to this approach is that secretariats are ultimately the servant of the parties. This means that coordination at the secretariat level will go only as far as the parties permit; wider policy changes will need to be made by the parties themselves.

A more ambitious level of coherence could be established by inter-institutional initiatives that involve the WTO, the UN system and other relevant intergovernmental bodies. The idea behind this is that no single institution has the legitimacy or competence to handle the WTO-MEA interface on its own. Inter-institutional initiatives could feed into, or directly involve, the WTO and other international bodies, including MEAs. So far, however, there has been very little research into what such inter-institutional initiatives might look like or how they would operate in practice and, to date, no government has formally advocated these ideas.

In principle, there are a number of functions that such initiatives or alternative bodies could perform, such as collecting and analysing data on the impacts of WTO measures on achieving MEA objectives, and vice versa; making policy recommendations to WTO and MEAs aimed at avoiding conflicts and maximizing complementarities; and resolving conflicts.

For example, an inter-institutional initiative aimed at improving WTO-MEA coordination could be a joint WTO-UNEP liaison forum, to address general issues or specific areas on an issue or sector basis, possibly involving UNCTAD, the World Intellectual Property Organization (WIPO) or the FAO, where appropriate, as well as relevant MEAs.

[132] E.g. OECD, Trade Measures in MEAs (Paris: OECD, 1999).

In the mid-1990s, IUCN and IISD mooted the idea of creating a Standing Conference on Trade and Environment.[133] This Conference was meant to be composed of international organizations that had environmental responsibilities, as well as NGOs and independent experts. Its purpose was to review policy objectives and proposals, and to formulate practical recommendations aimed at the WTO and other international processes.

Several respondents to the project questionnaire proposed moving the WTO examination of the MEA-WTO relationship, and any disputes that might arise over MEA trade measures, to an independent intergovernmental forum. Some advocated a neutral forum, some advocated a bipartisan forum, some identified existing organizations competent to serve such functions, and some called for a new forum to be created.

However, it was widely recognized by the respondents to the project questionnaire that any attempt to devolve WTO discussions on the MEA-WTO relationship to an independent intergovernmental forum would be more successful if it had the blessing of the WTO Membership. It was therefore suggested that one possible outcome to the DMD paragraph 31(i) negotiations could be an instruction to the CTE, or to a newly created working group, to work with other intergovernmental organizations to explore possibilities for moving the WTO examination of the MEA-WTO relationship, and any disputes that might arise over MEA trade measures, to an independent intergovernmental forum.

[133] A Standing Conference on Trade and Environment: A Proposal by the International Institute for Sustainable Development (IISD) and IUCN - The World Conservation Union, available at http://www.iisd.org/pdf/scte03.pdf, accessed on 30 July 2006.

8 INFLUENCES ON ACHIEVEMENT OF OUTCOMES IN THE SHORT TERM

The previous sections have outlined possible outcomes of negotiations on the WTO-MEA relationship both inside and outside the WTO. This section will attempt to outline some drivers and factors that might influence the likelihood of these outcomes being achieved. Since there has been so little political movement on this relationship over the past ten years (i.e. little experience to draw from), an incomplete negotiation agenda at present, and a wide range of outside influences on any WTO-MEA specific outcomes, it is not possible to make any confident predictions or construct robust scenarios. Nonetheless, the section below attempts to locate the various options within the current political realities, so as to give a sense of what could happen in the short term.

8.1 Inside the WTO

At present there are vast differences of views among WTO Members on the WTO-MEA relationship. It is therefore difficult to envisage a very robust normative outcome of the DMD paragraph 31(i) negotiations if they are resumed. Indeed, the outlook at present is for an extremely modest normative or procedural outcome, if there is to be any outcome to the Doha Round at all. In addition, given the past record of negotiations on paragraph 31(i), and indeed in the CTE prior to the Doha Round, it would appear more likely than not that any outcome on paragraph 31(i) will depend on offers and concessions made against other items on the DMD agenda. This is a normal occurrence in WTO negotiations, given the nature of the single undertaking.

What follows is a set of factors that could influence the WTO membership to agree an outcome to the Doha negotiations if they are resumed.

8.1.1 Some movement in the negotiations on agriculture

Prior to the suspension of the Doha Round, the EC was being pressed for major concessions on agriculture liberalization from many countries, including the United States, Brazil, India and many other developing countries. The EC is also the most powerful economic actor to seek an ambitious outcome on paragraph 31(i). Were the EC to agree to concessions on agriculture, it might therefore seek to exact, as a price, concessions from others on 31(i). The EC's latest submission on WTO-MEAs may signal its willingness to accept a procedurally-based outcome on this issue, rather than a more fundamental normative shift. These factors offer the most favourable scenario for ambitious normative results on paragraph 31(i). In principle, several of the outcomes described in previous sections of this paper would be possible in these circumstances.

There are several drivers that might enable such a result. One is the extent to which the EC is under domestic pressure from European environmental NGOs to come up with a strong outcome on paragraph 31(i). Within the agriculture negotiations, it might depend on how much the EC will perceive the need to make concessions.

Another possible driver is the extent to which the EC and others succeed in modifying the Amber and Green Boxes in the Agreement on Agriculture, that might enable links with the Convention on Biological Diversity (CBD), which has a work programme on agricultural biodiversity.[134]

There are two possible major obstacles to this outcome. One is that some key countries, such as the United States, have not come out in favour of a strong normative outcome on paragraph 31(i) – and indeed may ultimately resist agreement on such an outcome. Since the US is arguably less in need of further agricultural liberalization than other WTO Members, it might prefer no movement on agriculture if it exacts too high a price in terms of a 31(i) normative outcome. Another possible obstacle is that developing countries might also resist a strong outcome, even in the context of EC concessions on agriculture, out of fear that MEAs will intrude too much on trade policy, thereby restricting their exports.

8.1.2 Little movement on IPRs in TRIPS leads developing countries to enhance the CBD through a solid outcome on para 31(i)

India, Brazil and the African Group (which includes all African Members of the WTO) have been calling for a modification or interpretation of the TRIPS Agreement so as to ensure more protections against misappropriation of genetic resources and traditional knowledge. As discussed in section 3.3.5 of this paper, key instruments for achieving this objective are obligations that applicants for patents disclose the origin of genetic resources used in their inventions, provide evidence of prior informed consent of the source country and provide evidence that there has been a sharing of benefits with the source country. The EC has indicated its willingness to consider such measures, while the United States and Australia are so far opposed.[135] Given that movement on these issues is unlikely, India, Brazil and the African Group might link up with the EC to push on paragraph 31(i), as a way of ensuring that their objectives on intellectual property rights (IPRs) are met.

The outcome that would best achieve this result would be to exempt MEA trade measures from WTO rules (including the TRIPS Agreement), which could enable the CBD to become the international forum where this issue is decided. Such an outcome could also be built upon to also encompass other MEAs, were WTO Members so inclined – though it is unlikely to be agreed in the context of the Doha Round.

The drivers that might enable this outcome include the (lack of) speed of movement on the TRIPS/CBD negotiations (under paragraph 19),[136] perhaps as bargaining chips in the disputes over geographic indications. Also, the WIPO negotiations on a development

[134] See e.g. Secretariat of the Convention on Biological Diversity (2005), The Impact of Trade Liberalization on Agricultural Biological Diversity: Domestic Support Measures and their Effects on Agricultural Biological Diversity.

[135] See e.g. ICTSD, 'Access, Benefit Sharing and Intellectual Property Rights', *COP-8 Biodiversity and Trade Briefing*, available at http://www.trade-environment.org/output/infoxch/COP8_ICTSD_ABS.pdf; ICTSD, 'No Consensus on TRIPS Agreement Amendments', *Bridges Monthly*, June-July 2006, available at http://www.iprsonline.org/resources/docs/Pages%20from%20BRIDGES10-4-%20TRIPS%20Amendment.pdf, accessed on 30 July 2006.

[136] See e.g. 'Members Step Up Demands on GI Extension, Disclosure as Stalemate Continues', *Bridges Weekly Digest*, 21 June 2006, available at http://www.ictsd.org/weekly/06-06-21/story5.htm, accessed on 30 July 2006.

agenda,[137] and the CBD negotiations on the international regime on access to genetic resources,[138] would have a bearing. An additional driver might be the extent to which the EC is open to, or even encourages, such demands from developing countries.

However, there are a number of obstacles to this kind of outcome. First and foremost is the opposition of the United States and Australia to such disclosure requirements, and indeed to outcomes that would allow MEAs to override WTO provisions. Secondly, there has to date been no consistent push from developing countries which, in principle, ought to be the main demandeurs.

Given that perhaps the most ambitious normative outcome to 31(i) (i.e. an MEA exemption) would be necessary to achieve this result on IPRs, it seems rather unlikely that it can be achieved in the present negotiations.

8.1.3 Some movement on paragraph 31(ii)

An outcome on paragraph 31(ii), on information exchange and observer status, could have important implications for the WTO-MEA relationship, and could help to generate momentum towards an outcome on 31(i). An ambitious resolution on DMD paragraph 31(ii) could enable substantive synergies between the two regimes. The logic of this outcome might reinforce the need for at least a basic affirmation of the relationship between the two regimes, such as endorsing basic principles. At this point, there have been very few submissions by WTO members on this agenda item, and only from OECD countries.[139] Most of the submissions have urged the granting of observer status to MEAs, although the submission from the United States also urges other forms of interaction on a two-way basis.[140] At this point, it would appear that the discussions on this have not met with principled resistance; they seem rather to be held hostage to a wider systemic dispute over the admission of the Arab League as an observer to the WTO.[141] Therefore, at this point, it does not appear that an ambitious outcome on this agenda item will be agreed, and hence it is unlikely that any momentum will be generated to influence progress on 31(i). On the contrary, it might be that an outcome on 31(ii) would be seen as a face-saving outcome that could be an alternative to movement on 31(i).

8.1.4 Desire to have some minimalist outcome so as to give some closure

Since no ambitious agreement on WTO-MEAs is in reach in the present negotiations, Members might conclude that this issue cannot be resolved for the foreseeable future, and seek instead to come up with an outcome that saves the face of the demandeurs, without creating a major change in the rules. Such an outcome could include

[137] See, IP Watch, 'WIPO Development Agenda Talks End With No Agreement For Now', 30 June 2006, available at http://www.ip-watch.org/weblog/index.php?p=346&res=800&print=0, accessed on 30 July 2006.

[138] See CBD COP Decision VII719, Access and benefit-sharing as related to genetic resources (Article 15), available at http://www.biodiv.org/decisions/default.aspx?dec=VII/19, accessed on 30 July 2006.

[139] See EC, 'Continued Work under Paragraph 31(ii) of the Doha Declaration', WTO Doc, TN/TE/W/66, 15 May 2006; EC, 'Continued Work Under Paragraph 31(ii) of the Doha Declaration', WTO Doc. TN/TE/W/66, 30 April 2003; Switzerland 'Information Exchange and Observer Status', WTO Doc. TN/TE/W/30, 30 April 2003; EC, 'MEAs: Information Exchange and Observer Status-the European Communities', WTO Doc. TN/TE/W/15, 17 October 2002; United States 'Contribution of the United States on Paragraph 31(i) of the Doha Ministerial Declaration', WTO Doc.TN/TE/W/5, 6 June 2002.

[140] See United States WTO Doc. TN/TE/W/5.

[141] See above, section 3.3.5. See also M. Halle, 'Trade and environment: Looking beneath the sands of Doha', *JEEPL 2: 2006*, pp.107–16.

procedural outcomes on improved understanding the MEA policy and rules, along with instructions on how the regular CTE should proceed with its continued deliberations, since its mandate continues until the Members decide to change it. It could also include relatively vague statements of principle and procedure, as suggested by the 30 June 2006 EC submission on paragraph 31(i).[142]

The reasons for this might include the lack of priority that this issue has *vis-à-vis* other controversies in the DMD, the fundamental differences of views, as well as the limited mandate to address only some of what is a large and complex topic.

The main opponents to such an outcome might be those Members who have been pushing for a strong normative outcome. They might not be satisfied with a negligible outcome, although they might seek to ensure that the instructions to the regular CTE are robust.

8.1.5 Doha Round collapses

The chances of the Doha Round completing intact – i.e. on all aspects of its agenda – are not currently favourable; at the time of writing, the negotiations have been restarted after their suspension in July 2006.[143] This is on account of the many contentious issues, primarily around agriculture and market access for industrial goods. However, the debate on this issue will disappear. Even if the Round collapses with no outcome, then the CTE regular session mandate on MEAs would continue until action was taken to vary or end that part of its original work programme.

8.2 Outside the WTO

As indicated above, no negotiations are happening outside the WTO on the WTO-MEA relationship. Therefore, the influences on the relationship that can come from outside the WTO will tend to be diffuse and, other than direct actions by MEAs, will depend on decisions and actions that are not likely to be taken in the near future owing to an apparent lack of political will.

8.2.1 MEAs continue or accelerate the development of trade measures

It is entirely foreseeable that certain MEAs will continue, or even accelerate, the development of trade measures. It is likely that those that have already ventured into this area, including CITES, the Biosafety Protocol and MEAs relating to chemicals (PICs and POPs), will continue to evolve. The development of such measures is already part of established traditions in these MEAs and there is little reason to think that this would abate. It may be that parties to the Kyoto Protocol will begin to consider the use of trade measures to offset competitive disadvantages from a more stringent second commitment period, although this would not happen for some years.[144]

[142] Proposal for a Decision of the Ministerial Conference on Trade and Environment, WTO Doc. TN/TE/W/68.

[143] See e.g. BBC, 'World trade talks set to restart', BBC News website, 27 January 2007, http://news.bbc.co.uk/1/hi/business/6304907.stm.

[144] R. Tarasofsky (2005), *The Kyoto Protocol and the WTO*. Available at http://www.chathamhouse.org.uk/pdf/research/sdp/KyotoWTOdec05.doc, accessed on 30 July 2006.

The obstacles to such a development would tend to lie within the specific policy contexts and political configurations. Thus the development of trade measures in the climate regime may become increasingly attractive to some parties, but would be such a significant break from the status quo that considerable political energy would probably be required. A strengthened UNEP, or a UNEO, might help provide some momentum in this direction. If, however, trade measures could be further developed in the climate and biodiversity MEAs, then wider impacts emanating from these important treaties could be anticipated.

It is difficult to predict the impact of such measures on the WTO. An accumulation of such measures might trigger more attention to the problem by the WTO. The likelihood of a dispute in the WTO could also increase.

8.2.2 A strengthened UNEP asserts itself on the WTO-MEA relationship

The drivers of a strengthened UNEP asserting itself on the WTO-MEA relationship are likely to be the result of momentum deriving from several sources: reform of the UN system, increasing numbers of MEAs beginning to tackle important trade issues, or the EMG beginning to tackle issues relating to international trade. It might be possible for such a strengthened UNEP to interface more assertively with the WTO, both in terms of sending messages about the relationship, and in seeking to interact more intensively with the WTO Secretariat. This could prompt the WTO to respond more assertively – the substance of such a response would be dependent on how consistent governments were in both UNEP and the WTO.

However, the main obstacle to this is the difficulty UNEP would face, given the diversity in the membership and the interests involved, in making forceful normative statements on the WTO-MEA relationship, although it is arguable that the present mandate allows them to do so. Countries have arguably decided, through the Doha mandate in 31(i), that the WTO should be the forum in which at least part of this issue is negotiated and discussed for the time being. Any attempt to take these discussions outside the WTO will be met with resistance by countries that do not want to see duplication or counter-productive outcomes.

8.2.3 A UNEO is established and seeks to redefine the WTO-MEA relationship

There are two possible general drivers for a UNEO being established and redefining the WTO-MEA relationship. First, concern might develop that environmental issues are not being addressed with sufficient power under the current institutional structure (i.e. UNEP). Secondly, in the context of overall UN reform, it might become appropriate to elevate the status of UNEP. The implications of such a development might prompt efforts by the WTO to become more proactive in seeking a constructive resolution to any WTO-MEA conflicts – this could be a result of the WTO not wanting to be perceived as undermining another international organization.

However, as indicated above, there is currently insufficient political appetite to create a UNEO – neither driver seems powerful enough yet. And even if a UNEO is established,

it is far from apparent that it would succeed in having a strong mandate in relation to international trade.

8.2.4 Other action within the UN

In the quest for greater systemic coherence within the UN, or even for greater assertiveness on policies relating to international trade, UN reform could strengthen the way MEAs relate to the WTO. However, not only is it still very unclear what such UN reform might look like, there remains limited appetite to undertake meaningful reform of the UN, as evidenced by the 2005 World Summit. It should also be noted that environmental issues tend to have a lower priority in the UN than issues relating to development or security. Therefore, it is difficult to consider important results from such endeavours to be very feasible unless links can be drawn between them and the environment.

9 WHERE TO FROM HERE?

Although the arguments are complex, and the political realities very uncertain, the authors of this paper are of the view that the relationship between the WTO and MEAs presents systemic challenges to both regimes that need to be corrected through a clear solution with both political and legal significance. Failure to head off a clash would be damaging for both the trade and environment regimes; both would be weakened by a serious conflict. But both are being undermined by the present ambiguity. Since Agenda 21 calls for both environmental protection and trade liberalization, the damage to both regimes is a setback to achieving sustainable development.

However, the quest for appropriate and effective solutions is far from straightforward. There are dilemmas about what the optimal solutions are, whether they ought to be pursued inside the WTO or outside, and whether they should be sought within the short term (e.g. the Doha Round) or in the longer term. There are no straightforward solutions that seem politically feasible at the moment.

However, all this is hampered by the current politics of the WTO-MEA negotiations in the WTO. The WTO Committee on Trade and Environment negotiations were deadlocked between those Members (mainly EC and Switzerland) that wanted an outcome that improves the WTO-MEA relationship, and those that preferred no substantive outcome (US, Australia, many developing countries). The current debates essentially shift between stale rehashes of fundamental debates that have been a feature of the WTO discussions since 1995 or involve haggling over the definition of the mandate or sharing information on national experiences. On top of all this, these negotiations do not have a very high priority in the WTO, which makes them ultimately hostage to other issues in the Single Undertaking if the Round is resumed. Yet the WTO negotiations are the only meaningful international negotiations on the WTO-MEA interface, which means that they are subject to the competence and institutional constraints of the WTO: the negotiations are limited to the Doha mandate and there is no opportunity to discuss meaningfully the wider issues in a manner that involves all stakeholders.

Nonetheless, the current mandate does present an opportunity to either entrench some basic principles or at least set the basis for future negotiations or discussions. This opportunity should not be missed. If the Round as a whole proceeds, the 31(i) negotiations should not be abandoned unless it becomes clear that the only agreement would be one that places MEAs at a disadvantage in relation to WTO rules. Then no agreement would be preferable.

Ultimately, meaningful progress can be made only outside the confines of the DMD. Given the complex nature of the relationship, solutions ought to contain a strong political message that respects an appropriate division of labour between regimes based on core competencies. Solutions should also contain procedures to consider in detail the many specific interfaces between the regimes. Such processes could be

political, and could be aimed at informing the policy processes and resolving conflicts through a neutral adjudicative forum.

UNEP can, in principle, provide leadership in this area, provided it is given the political resources. The new Executive Director has called for environmental policies to be put at the heart of economic decision-making.[145] The WTO too can provide leadership. The current Director General has recently called for a new 'Geneva Consensus', which would align the WTO more closely with other elements of the international institutional architecture.[146] He has also stated that:

> ***it is undoubted that greater coherence between different bodies of international law, and in particular between the trade and environmental regimes, could lead to improved global governance.***[147]

Achieving this coherence is likely to entail an innovative negotiation process, which will be open to considering comprehensive solutions in a credible and legitimate manner. And it must set the basis for a long-term engagement on complex policy agendas, rather than quick fixes. This calls for an open participatory process that involves the WTO, UNEP, MEAs, and possibly other international actors, such as UNCTAD and the multilateral development banks, and other stakeholders.

The building blocks for such a process could be based on the overlaps between the WTO and the UN in possible outcomes discussed earlier in this paper. These include at least three elements:

(a) research and analysis on the impacts of WTO measures on achieving MEA objectives, and vice versa;
(b) making policy recommendations to the WTO and MEAs aimed at avoiding conflicts and maximizing complementarities, such as codifying basic principles and institutional frameworks to advise on designing trade measures;
(c) resolving conflicts in a manner that is credible to both environment and trade policy-makers.

[145] UNEP Press Release, 'Time to Make Environment and Economics Team Players', 15 June 2006, available on http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=480&ArticleID=5299&l=en, accessed on 1 August 2006.
[146] P. Lamy, 'Humanizing Globalization', speech in Santiago de Chile, 30 January 2006, available at http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm, accessed on 28 July 2006.
[147] P. Lamy's address to CSD-14, May 10, 2006, available at http://www.wto.org/english/news_e/sppl_e/sppl25_e.htm, accessed on 28 July 2006.

ANNEX I: ABOUT CHATHAM HOUSE AND FIELD

Chatham House is one of the world's leading organizations for the analysis of international issues. It is membership-based and aims to help individuals and organizations to be at the forefront of developments in an ever-changing and increasingly complex world. The Energy, Environment and Development Programme (EEDP) of Chatham House seeks to advance the international debate on energy, environment and development policy and to influence and enable decision-makers – governments, NGOs and business – to take well-informed decisions that contribute to achieving sustainable development. Independent of any actor or ideology, we do this by carrying out innovative research on major policy challenges, bringing together diverse perspectives and constituencies, and injecting new ideas into the international arena. The EEDP's work is divided into three key areas: international governance of environment and development; energy – security and development; and business and sustainable development. The Programme works with business, government, academic and NGO experts to carry out and publish research and stimulate debate on international issues in these three thematic areas.

The Foundation for International Environmental Law and Development (FIELD) is a registered UK charity founded in London in 1989 to enable disadvantaged countries, activists and communities to gain access to environmental justice through the rules and institutions of international law. FIELD's vision is a fair, effective accessible system of international law that protects the global environment and promotes sustainable development. FIELD has three core programme areas: (1) Biodiversity and Marine Resources; (2) Climate Change and Energy; and (3) Trade, Investment and Sustainable Development. FIELD undertakes rigorous research and analysis in each of these three areas to provide advice, advocacy and training for developing countries and public interest organizations on international environmental law. The results of FIELD's research are disseminated through publications, presentations, briefings and policy papers. Wherever possible, FIELD provides assistance for free, deriving income chiefly from foundation grants, governmental institutions and individuals.

ANNEX II: TABLE OF ABBREVIATIONS AND SHORT FORMS

Basel Convention	Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal
Biosafety Protocol	Cartagena Protocol on Biosafety
CBD	Convention on Biological Diversity
Chatham House	Royal Institute of International Affairs
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CTE	Committee on Trade and Environment
CTESS	Committee on Trade and Environment (Special Session)
COP	Conference of the Parties
DDA	Doha Development Agenda
DMD	Doha Ministerial Declaration
DSB	Dispute Settlement Body
DSU	WTO Understanding on Dispute Settlement
EC	European Communities
EGS	Environmental Goods and Services
EMG	Environmental Management Group
ETB	Environment and Trade Branch
FAO	UN Food and Agriculture Organization
FIELD	Foundation for International Environmental Law and Development
GATT	General Agreement on Tariffs and Trade
GC	Governing Council
GEF	Global Environment Facility
GMOs	Genetically Modified Organisms
ICJ	International Court of Justice
ICTSD	International Centre for Trade and Sustainable Development
IISD	International Institute on Sustainable Development
ILC	International Law Commission
IPRs	Intellectual Property Rights
ITLOS	International Tribunal of the Law of the Sea
IUCN	The World Conservation Union
MEA	Multilateral Environmental Agreement
Montreal Protocol	Montreal Protocol on Substances that Deplete the Ozone Layer
MOP	Meeting of the Parties
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
PIC	[Rotterdam Convention on] Prior Informed Consent
POPs	[Stockholm Convention on] Persistent Organic Pollutants
SPS	Sanitary and Phytosanitary Measures
STOs	Specific Trade Obligations

TBT	**Technical Barriers to Trade**
TRIPS	**Trade-Related Aspects of Intellectual Property Rights**
UN	**United Nations**
UNCLOS	**United Nations Convention on the Law of the Sea**
UNCTAD	**UN Conference on Trade and Development**
UNEO	**United Nations Environment Organization**
UNEP	**United Nations Environment Programme**
UNGA	**United Nations General Assembly**
VCLT	**Vienna Convention on the Law of Treaties/Vienna Convention**
WEO	**World Environment Organization**
WIPO	**World Intellectual Property Organization**
WSSD	**World Summit on Sustainable Development**
WTO	**World Trade Organization**

ANNEX III: TABLE OF TREATIES

1946
International Convention for the Regulation of Whaling (Washington) 2 December 1946, in force 10 November 1948; 161 UNTS 72 (as amended 1956, 338 UNTS 336) **(International Whaling Convention)**

1947
General Agreement on Tariffs and Trade (Geneva) 30 October 1947, not yet in force; 55 UNTS 194 (in force provisionally since 1 January 1948 under the 1947 Protocol of Application, 55 UNTS 308) **(GATT)**

1969
Vienna Convention on the Law of Treaties (VCLT) 23 May 1969, in force 27 January 1980, 8 ILM 689 (1969) **(1969 Vienna Convention)**

1973
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington) 3 March 1973, in force 1 July 1975; 993 UNTS 243 (**1973 CITES**); Protocol (Bonn), 27 June 1979, in force April 1987. Protocol (Gaborone), 3 April 1983, not in force

1983
Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region (Cartagena de Indias) 24 March 1983, in force 11 October 1986; 22 ILM 240 (1983) **(Cartagena Oil Spills Protocol)**

1982
United Nations Convention on the Law of the Sea (Montego Bay) 10 December 1982, in force 16 November 1994; 21 ILM 1261 (1982) **(1982 UNCLOS)**

1987
Protocol on Substances that deplete the Ozone Layer (Montreal) 16 September 1987, in force 1 January 1989; 26 ILM 154 (1987) **(Montreal Protocol)**

1989
Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel) 22 March 1989, in force 1992; 28 ILM 657 (1989) **(Basel Convention)**

1992
North American Free Trade Agreement (Washington, Ottawa, Mexico City) 17 December 1992, in force 1 January 1994; 32 ILM 289 (1993) and 32 ILM 605 (1993) **(NAFTA)**

Convention on Biological Diversity (Rio de Janeiro) 5 June 1992, in force 29 December 1993; 31 ILM 822 (1992) (Biodiversity Convention)

1994

Uruguay Round Agreements (Marrakesh) 15 April 1994, in force 1 January 1995, 33 ILM 1994.

Agreement Establishing the World Trade Organization

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

Agreement on Technical Barriers to Trade (TBT Agreement)

Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

1997

Protocol to the United Nations Framework Convention on Climate Change (Kyoto) 11 December 1997, in force 16 February 2005; 37 ILM 22 (1998) (1997 Kyoto Protocol)

1998

Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam) 10 September 1998, UNEP/FAO/PIC/CONF/5, in force 24 February 2004

2000

Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal) 29 January 2000, in force 11 September 2003, 39 ILM 1027 (Biosafety Protocol)

2001

Convention on Persistent Organic Pollutants (Stockholm) 22 May 2001, in force 17 May 2004, 40 ILM 532 (2001) (2001 POPs Convention)