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Discussion Paper¹

**The new EU approach to the WTO negotiations related to MEAs
(Para 31 (i) DDA), global governance and the need to address the
MEA-trade linkage in the UN-System**

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Summary

The WTO negotiations related to para. 31 (i) of the Doha Development Agenda (DDA)² that seek to clarify the relationship between WTO rules and the trade measures based on the rules of Multilateral Environmental Agreements (MEAs) are in stalemate. Moreover, the negotiation process within the WTO indicates that the final outcome is likely to weaken the

¹ This paper was researched and written by Dr. Stefanie Pfahl, Adelphi, Research Berlin. The content does not necessarily reflect the positions of Friends of the Earth Europe, Greenpeace and the members of the German Working Group on Trade of the Forum Environment & Development.

² The DDA comprises the negotiation agenda of the current WTO round of comprehensive trade negotiations launched 2001 in Doha, Qatar. The paragraphs 31 (i) to (iii) include for the first time provisions addressing aspects of environmental protection (see WTO 2001). Regarding the relationship between trade rules and MEAs the Doha Ministerial Declaration states: (31) With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question... (32) ... The outcome of ... the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

position of MEAs further rather than strengthen their provisions against WTO liberalization principles.

The EU therefore intends to shift the focus of the negotiations from the technical approach trying to define the trade measures and MEAs that would be covered by the negotiations to a more political approach of establishing an understanding of the interplay of two different systems of rules based on global governance principles. Although this is a welcome suggestion, a more detailed analysis shows that this line of negotiation within the WTO is unlikely to lead to an outcome that comprises a more general solution to the problem of giving appropriate priority to the legitimate concerns embodied in MEAs against the interests represented by the WTO.

Based on an overview of existing analysis regarding the relationship between WTO and MEA rules and principles of global (environmental) governance, the paper develops a new approach on how to solve this conflict outside the WTO. Since the mandate of the UN is much more appropriate to deal with such questions, the debate on the relationship between WTO rules and MEA trade-related measures should be moved to the UN-System. Current principles of public international law do not give sufficient guidance on how to deal with conflicts between international rule systems that promote different goals of public policy such as e.g. enhancing trade and protecting the environment. Therefore, the EU and other governments must take appropriate steps to initiate a discussion process within the UN-System that aims at drafting general, legally sound rules of solving conflicts between WTO and MEA measures.

Governments can do this either by pushing for a discussion in the CTE on how WTO rules can comply with MEA rules. Or, and this seems to be a more effective strategy, by initiating a discussion/negotiation forum or an official working group of interested governments either within UNEP or generally under UN auspices to address the clarification of the relationship between these different rule systems.

- The initiative can build on the existing work of the MEA secretariats and focus on how MEAs understand the trade linkage. In addition, it can highlight how MEA rules and procedures increase the general welfare of countries and point at the socio-economic benefits of improving environmental quality by the implementation of MEAs.
 - It can also outline the existing system of rules and conflict resolution procedures in various environmental policy areas in order to illustrate that there is no danger of promoting arbitrary and disguised protectionist measures.
 - Moreover, UNEP, or the EU, should initiate a joint working group of experts from international institutions that represent environmental, trade and development interests, looking at ways of establishing general principles and rules for how to solve conflicts between multilateral trade and environment provisions.
 - This working group could take different forms, depending on the political support:
 1. Create joint UNEP-MEA working group on trade. Such a group is already within the mandates of the MEA Secretariats and UNEP - which are requested
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by governments to enhance cooperation among each other and with other international organizations - and therefore does not require additional or new authorization. This could emerge from the existing UNEP informal process of facilitation or the Environmental Management Group initiated by UNEP in the context of the work on improving global environmental governance. Such a process can start immediately (given appropriate funding and impetus from governments), providing a useful first step towards more formal arrangements in the future.

2. With a view to ensure more political weight and the general acceptance of the deliberations and possible decisions of such an international working group may be enlarged to include representatives from MEA secretariats, the WTO secretariat and from WTO member states (trade as well as environment officials), UNCTAD, FAO, multilateral development agencies and civil society groups. The integration of UNCTAD, FAO and multilateral development agencies seems to be appropriate because they can contribute experiences regarding the developmental impacts and interests in the context of enhancing environmental protection and economic development at the same time.
- The working groups should be set up with the aim of reaffirming that MEAs and not the WTO have the primary competence to interpret the environmental objectives and the necessity of MEA related trade measures.

Introduction

With a paper submitted by the EU to the WTO Committee on Trade and Environment (see WTO 2004) called "The relationship between WTO-rules and MEAs in the context of the global governance system" (24 March 2004) - the EU Commission suggests shifting the focus of the environment related negotiations of the WTO Doha Development Agenda (DDA) (paras. 31 to 33) from a technical to a more political approach. This shift is based on the observation that these negotiations hardly made any progress and concentrated on technical issues such as what kind of agreements constituted MEAs, which trade obligations are to be considered, or how to define environmental goods. Thus, the negotiation agenda has been far from dealing with the basic underlying problem of clarifying the relationship between WTO rules and MEA provisions in a general and conceptual manner. Consequently, they do not promise to solve the underlying uncertainties about the legitimacy of MEA trade measures or prevent future conflicts between WTO and MEA rules.

Therefore, the EU paper suggests moving from the technical discussions towards the question of how to apply principles of global governance in order to find a common understanding for the legitimacy and application of trade measures in MEAs with a view towards strengthening international environmental governance. However, the concept of global governance remains somehow vague as the EU does not clearly spell out what it would like to achieve in the context of para 31 (i) negotiations. Hence, this submission is unlikely to trigger a lively debate on how to solve the issue of the clarification of the relationship between MEAs and the WTO.

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The following sections first summarize the EU proposal with regard to shifting the environment related negotiations towards focusing on global governance principles. As the EU refers to one of its previous submissions to the WTO Committee on Trade and Environment (CTE) that addresses the issue of governance principles in the context of clarifying the relationship between the WTO and MEAs, these ideas will also be presented. In addition, the potential solutions formulated in expert analyses on the interlinkages between the WTO and MEAs will be introduced in order to broaden the potential scope of governance principles that could be applied. The section that follows briefly introduces the global governance concept and lists some major principles of good policy making that have been developed within this approach. And finally, the last section attempts to link principles of global governance with the approaches of conflict resolution that have been developed in the WTO.

Summary and critique of EU paper

The EU suggestion to undertake a shift in the approach to clarifying the relationship between the WTO and MEAs (para. 31 (i) DDA, WTO 2001) could help towards making some real progress and moving away from a lengthy discussion of the scope and nature of trade measures to a political solution of the potential conflict between MEA and WTO rules. The EU proposes to refocus this debate on global governance principles in order to clarify the general relationship between MEAs and the WTO (EU 2004). To that end it refers to the Rio Principles that stress the need for cooperation, mutual supportiveness and common but differentiated responsibilities.

The EU paper refers to the EU submission to the CTE in March 2002 highlighting the importance of MEAs in addressing global environmental problems and their capability to integrate expert knowledge and civil society interests. Moreover this submission pointed out that WTO and MEA rules are equal bodies of public international law whose coherence with each other needs to be enlarged.

In its new paper the EU essentially revisits the point made in the earlier submission as examples for global governance principles that have been recognized by the WTO CTE earlier as well as the WSSD. The principles the EU particularly refers to are the following:

- The importance and necessity of MEAs.
- Multilateral environmental policy should be made within MEAs.
- The need for close cooperation and increased information flows at national and international levels between the international bodies in order to enhance the mutual supportiveness between international trade and environmental policies.
- MEAs and WTO are equal bodies of international law and need to give consideration to each others' rules to achieve mutual supportiveness.

Thus, the EU submission to the CTE spells out some important principles that are part of an international environmental governance system that could help to clarify the relationship between the WTO and MEA rules. In this context, it is crucial that the EU as WTO member points out that no hierarchy between WTO and MEAs can be established. According to the

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EU these are two equal bodies of international law. To that end, the EU stresses that the WTO dispute settlement panels/appellate bodies already acknowledged that WTO rules cannot be interpreted without taking into account other legitimate public policy goals like those embedded in MEAs. But the EU paper does not outline how the application of the governance principles to the negotiation issues under para. 31 (i) can contribute moving the negotiations forward. It also remains unclear as to how this approach can be grounded in a generally accepted mode of interaction or “conflict resolution” and how the spheres of competences of the WTO and MEA regimes ought to be separated. This ought to be clarified in order to avoid the watering down of MEAs as they are being negotiated because WTO rules and the looming threat of a dispute settlement procedure in fact chill the agreement on effective measures in MEAs as they potentially affect trade.

Previous analyses of the WTO-MEA linkages

The question which rules apply in cases where two bodies of rules affect each other remains unsolved. Although so far no dispute over a specific MEA trade measure has been brought to the WTO³, the question is relevant because MEA as well as WTO rules are likely to increase their regulatory scope in the future, thus more conflicts can be expected.

So far the WTO members clarified this question only in a very general manner by determining that WTO and MEA rules ought to be mutually supportive. But until the DDA no serious attempt was made to clarify what this actually means. Once the first disputes over the legitimacy of environmental measures affecting trade arose, a lively debate on the relationship between MEAs and subsequent trade measures aiming at the protection of environmental resources emerged. Yet, so far the debate within the WTO did not result in any decisions on how to define this relationship. Rather than aiming at a conceptual approach that allows for solving future conflicts, the negotiations focused on technical issues around questions such as what are MEAs, which of them are to be considered in the DDA, and which specific trade obligations are to be included in the negotiations. Currently, the majority of WTO members is only willing to discuss specific trade obligations foreseen in a limited number of MEAs. However, since many MEAs leave some leverage to their signatories as to how the goals of the MEA can be achieved, national measures can take the form of trade restricting measures even though these are not explicitly prescribed by the particular MEA. An appropriate example is the Framework Convention on Climate Change that promotes – among other aspects - energy efficiency. Specific national measures like supporting energy-efficient electrical equipment or restricting the use of greenhouse gas producing products and production measures might have trade restricting effects (see Santarius et al. 2004: 24f.). This aspect which is particularly relevant from an environmental point of view, because it touches upon the flexibility of governments to implement MEAs within the framework of their national environmental policies is not taken into account by the limited DDA-Agenda.

Independent analyses from experts of international law provide some valuable advice for how the WTO and MEA rules can be mutually supportive. In the following the major results of

³ The GMO dispute settlement case Argentina, Canada and United States against the European Union can be seen as a case / threat against the Biosafety Protocol. See e.g. Friends of the Earth Europe 2003 and Greenpeace International 2003.

this analysis and subsequent suggestions towards the clarification of the relationship between WTO and MEA rules will be briefly revisited.

Most commentators (see for example CIEL/WWF 2001, Mann/Porter 2003, Brack/Gray 2003) hold that a political solution to that question within the WTO has to be found because established principles of public international law with regard to treaty interpretation do not provide a conclusive solution. That is not to say that MEA rules should or could be interpreted according to WTO rules, but rather WTO members have to decide on procedures how to interpret WTO and MEA rules in case of conflicts over trade-related MEA measures and in which forum these interpretations are undertaken.

International law provides only little guidance on how to interpret the relationship between different international treaties. Most of the times the treaties themselves do not state how a conflict with other rules should be addressed (CIEL/WWF 2001: 15). The Vienna Convention on the Law of Treaties establishes a number of principles that apply to those parties that signed both treaties, for example that the younger treaty prevails over the older treaty or the thematically more specific treaty prevails over the more general treaty. But these rules are not really helpful in the context of defining the relationship between the WTO and MEAs. Even if we exclude the question of what happens when non-members or non-signatories are concerned, a look at the structure of the WTO and MEA treaty system illustrates that these principles do not really provide an answer. Both treaty regimes evolve over time, treaties are amended or reformed, thus the question of when a treaty was established becomes irrelevant. For instance, the GATT has been agreed long before most MEAs were established, however the WTO is younger than many of the most important MEAs such as CITES, the Montreal Protocol, the Basel Convention on transboundary shipments of hazardous wastes, and the Convention on Biological Diversity (CBD). The same goes for the differentiation according to the specificity of a treaty. How can one compare treaties in terms of their specificity when they regulate different policy fields. And the WTO comprises a number of specific treaties that may be in conflict with particular MEAs. In this context the potential conflict between the CBD with the WTO agreement on Trade Related Intellectual Property Rights (TRIPs) serves as a typical example.

Another principle of customary international law – the *lex specialis* – holds that the more specific treaty prevails over the more general treaty (Brack/Gray 2003: 19). This may be advantageous for MEAs, although it may be difficult to actually decide over the specificity if the treaties regulate different issues such as e.g. intellectual property rights and biodiversity conservation.

Interestingly, the relationship between WTO rules and other bodies of public international law was clarified to a certain extent by the WTO Appellate Body in a number of dispute settlement cases. It referred to a second relevant principle of customary international law, namely the presumption against conflicts (CIEL/WWF 2001: 15). In this context the development of WTO appellate body decisions has to be mentioned, because they increasingly consider MEA provisions in relation to natural resource protection. The two shrimp-turtle cases effectively led to a major reassessment of how the WTO treats environmental issues. In the first shrimp turtle case, it went as far as including the sustainable development notion of the preamble to the agreement establishing the WTO, as a tool to interpret the WTO agreements. The Appellate Body also stated that on the basis of

a general presumption against conflicts, WTO rules cannot be interpreted in “clinical isolation” of other rule systems and that the interpretation of rules should aim at the preservation of the consistency of these rules.⁴ Although this is a positive development from an environmental point of view, this development falls short of a general clarification regarding the question how MEA rules and other principles such as sustainable development ought to be considered in disputes.

In addition, WTO “savings clauses” in MEAs had been discussed as an instrument that may avoid conflicts. Savings clauses can be added to MEAs to ensure that the agreement’s provisions do not override existing obligations of the parties under other international agreements, for example the WTO agreements. But practice shows that these clauses also remain rather general and therefore they may be less of a tool to determine the substantive relationship between the parties, but rather serve as a reference point for their interpretation and to ensure that the treaties are not viewed in isolation from each other (Brack/Gray 2003: 30). Thus, due to the vagueness of such clauses, they do not really support solving the conflicts between trade rules and those aiming at environmental protection or provide a legally sound base for preventing environmentally damaging trade.

The largest potential for uncertainty is the question how to solve a dispute over MEA trade measures among WTO members when only one of the parties is a signatory to the MEA. This non-party issue becomes more relevant as actors like the United States decide not to sign important MEAs like the Kyoto or Cartagena Protocols or the PIC Convention (in force since 24 February 2004) and POPs Convention (in force since 17 May 2004). This particular problem is not tackled by the DDA as it explicitly excludes this question. But from an environmental policy point of view it is rather crucial, because it can undermine existing MEAs. It is not entirely clear whether MEA trade measures taken against non-parties impose obligations on the non-parties, or simply condition access to domestic markets (i.e. of the MEA parties). This question was essentially addressed in the shrimp-turtle case. The subsequent decisions seem to suggest that MEAs can help to emphasise that specific measures are not necessarily arbitrary or discriminatory, and probably the least trade-restrictive available to achieve a certain level of protection without constituting a disguised restriction of trade. Moreover, these decisions moved WTO law “into the broader community that international law is” (Mann/Porter 2003: 25).

Yet, it is clear that these general principals or trends are not a reliable basis for the clarification of the relationship of rules. The relative “opening” of the WTO dispute settlement towards the consideration of other public policy goals is a remarkable change in course, although it does not provide any certainty that MEA trade measures – in principle - are legitimate. But since this is case law it does not circumscribe a general strategy for how to solve future conflicts. Therefore, a political solution or decision on how to protect environmental and other public policy goals against trade interests needs to be found. And since the current limited DDA mandate falls behind what has already been achieved through the broader approach to the interpretation of the relationship between MEAs and WTO rules in the context of the dispute settlement, the question arises how a political solution could be found. Earlier suggestions like formulating an interpretive note or an unambiguous statement

⁴ See Appellate Body Report, United States Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted on 20 May 1996, DSR 1996:I, p. 18.

on the relationship between WTO rules and MEAs within the WTO have not yet been taken up by WTO members. Mainly because of some developing country government opposition and their fear of increasing trade barriers due to environmental requirements and a lack of a clear vision of the benefits of MEAs the discussion moved into stalemate.⁵

Therefore the paper by the EU Commission on how to move the environment related negotiations towards a more meaningful clarification of the relationship between WTO and MEA rules rightly stresses that the EU and other developed country members need to address the needs of developing countries. In addition, it also seems necessary that the benefits of MEAs and of the clarification of rules are conveyed more clearly and in a more convincing fashion.

A starting point is the comprehensive review of MEA trade measures undertaken by the WTO Secretariat (WTO 2003) that lists various reasons for trade-related MEA measures:

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

From a public policy view point, these are legitimate regulatory goals; some of them even aim at improving economic efficiency. The central question with regard to WTO rules is thus not, whether the goals contradict WTO rules, but how they are applied. GATT Art. XX quite clearly states that there can be legitimate reasons for constraining trade. The measures simply must not be arbitrary or an unjustifiable discrimination, it must be the least trade-

⁵ See the proposal by Switzerland at the WTO Committee on Trade and Environment, WT/CTE/W/139.

restrictive available and must not represent a disguised restriction of trade. Therefore, the focus lies on the way MEA measures are applied. Arguably these requirements are still very demanding, especially when it has to be demonstrated that international trade or international demand is the driver for environmentally harmful consequences. But as far as MEA based trade measures are concerned, the fact that a large number of countries agreed to trade measures as an effective instrument indicates that there were no less trade restrictive measures available. In addition, a number of concerns reflected in Art XX, such as arbitrariness or disguised trade restrictions, can also easily be ruled out for MEAs.

Since MEAs are normally negotiated in an open, transparent and more and more often in a participatory manner, the possibility of arbitrary trade measures that disguise protectionist (economic) interests is rather small. In the context of a legal analysis, it is more difficult to decide whether a specific measure constitutes an unjustified discrimination or whether less trade-restrictive measures are available. As far as the latter is concerned, this issue is directly linked to the effectiveness of a measure. Normally, due to a lack of competence in environmental matters, WTO panels or appellate bodies need to have outside expert advice to come to a conclusion whether a particular measure is sufficient to achieve a specific public policy or environmental goal. As far as the question of discrimination is concerned, the impacts of a measure on trading partners have to be analysed. Generally, WTO or GATT rules aim at creating a level playing field between trading partners, i.e. all parties should have to comply with equal trading rules in terms of technical standards or formal procedures etc. they need to adhere to. However, some trade measures in MEAs are clearly discriminatory, e.g. those of the Montreal Protocol allow trade in ozone depleting substances only among some members or establish quotas and prohibit trade with non-parties completely. In this case, the question whether this is a justified trade measure or not, comes down to asking whether the measures serve public policy goals that fall within the scope of the Art. XX exceptions. WTO dispute settlement panels and appellate bodies confirmed several times that the protection of natural resources indeed falls within the scope of these exceptions. In order to decide whether the discrimination is justified, one has then to examine whether it is also necessary. Although the WTO necessity test quite often represents a formidable obstacle for countries trying to argue that a specific trade impeding measure is justified, the fact that such measures had been agreed to in a multilateral forum must be taken as an argument for the general necessity of such a measure.⁶ Therefore, it can be argued that the WTO does not have the competence to judge over MEA related trade measures, especially since it cannot evaluate the environmental necessity of such a measure. This also implies that a political solution towards the resolution of the potential conflict between MEA related trade measures and WTO rules lies outside the WTO.

This line of argumentation provides some illumination as to which issues are relevant when clarifying the relationship between WTO and MEA rules. It can serve as a basis for a more general approach to clarifying the relationship between these two bodies of public international law. Now the question arises whether and how principles of global governance as suggested by the EU, can help to facilitate a further clarification of this relationship.

⁶ Due to limited space available, this paper does not elaborate upon the jurisdiction regarding the examination of Art. XX applicability.

Global governance as a political concept?

Since the EU suggests to resolve the current conflict between WTO and MEA rules by focusing on or applying governance principles the following section addresses some additional concerns. The EU paper cites a few principles of global environmental governance – the need for states to cooperate to protect eco-systems or the integration of environmental policies into development process - that emerged from earlier WTO deliberations as well as the UNCED negotiations. But the global governance concept encompasses a much broader base of general policy principles that could support the clarification of the relationship between the WTO and MEAs. Therefore, it needs to be clarified how these principles relate to the solution of conflict once different international systems of rules clash and how this would alter the process of conflict resolution. At the same time, the practical application of the global governance concept in this particular case suggests that the solution of the current problems cannot only be found within the WTO.

Indeed global governance is a term difficult to define. It has mainly been used to describe policy making processes rather than as a policy making concept. The term governance emerged from the observation that interactions between governments, but also between individuals or citizens and governments, underwent a fundamental change since the end of World War II. In addition, the rise of intermediary institutions for the facilitation of policy making processes on the international, regional, national and sub-national level also expresses the new quality of international and transnational relations. Transboundary and international relations became increasingly complex to manage once interdependence between countries and economies grew. New institutions had to be created to manage international relations and problem solving. This process also supported the rise of new actors such as lobby groups, citizen groups, businesses etc. that are able to influence decision making by providing information or mobilize political and financial support. The UN Commission on Global Governance defines the term “global governance” as follows: “Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative actions may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest. (...) At the global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations (NGOs), citizens’ movements, multinational corporations, and the global capital market” (Commission on Global Governance 1995: 2).

This is not the only general definition; others refer to governing processes that go beyond the policies of nation-states and their governments. With regard to international environmental policy the various multilateral and regional environmental agreements and negotiation processes like those related to the World Summit on Sustainable Development can be understood as major elements of global environmental governance. They contribute to a global system of environmental policy principles and rules. In this sense, global governance signifies the growing awareness of global common interests related to the survival of human beings as well as other species. In this framework foreign policy takes a normative orientation towards a global common good.

In this context the term “distributive governance” has been introduced as a concept that explores the growing interlinkages between different international legal regimes, i.e. the interlinkages between the WTO Trade Related Intellectual Property Rights (TRIPs) Agreement and the World Intellectual Property Organization (WIPO). It attempts to highlight how governance responsibilities are distributed among various institutions in order to achieve the optimum level of goal-attainment (see Abbott 2000: 65). The thematic and institutional linkage between the different rule systems exemplifies the horizontal distribution of governance. However, as the current insecurity about the relationship between WTO and MEA rules shows, this legal system is institutionally underdeveloped due to inconsistencies and a lack of enforcement. Indeed, in most issue areas, with the exception of the WTO, the international legal system is not strong enough to support and enforce multilaterally taken decisions.

Therefore, it has to be noted that the “global governance concept” as a political model has its limitations because it does not address how these processes can be designed in order to suffice basic conditions of democratic policy making. Although it refers to principles like democratization, reduction of disparities in development or poverty reduction as contributing to the improvement of the cooperative capabilities of nation-states (see Messner/Nuscheler 2000) it lacks an important normative dimension. It does not attribute enforceable rights to citizens to ask for or participate in the formulation of a variety of political options and the possibility to choose between different political approaches and projects.⁷

Global environmental governance and the DDA environment related negotiations

One important aspect of the current debate in the WTO on the relationship between WTO and MEA rules is the notion put forward by the EU that both rule systems are two equal bodies of law. Hence, it does not establish a hierarchy that places trade rules over MEA rules. At the same time, one can observe an increasing awareness regarding the problems of co-ordination and policy incoherence arising from growing interdependence in both rule systems. Obviously, the current international law system is not yet prepared to deal with conflicts between such different rule systems and therefore a political decision regarding the future management of such potential conflicts is necessary. This entails two further questions: On which rules or principles should this political decision regarding the relationship between WTO and MEA rest? And who should monitor the application of a potential decision on this relationship and decide in case of a dispute? In principle two pathways can be offered:

1. Finding a solution within the WTO-system by including some language on the relationship between WTO rules and those of a few specific MEAs;
2. Strengthening the position outside the WTO.

⁷ This also becomes clear in the context of the “good governance” concept promoted by the EU in order to improve its policy making processes, that lists a number of principles like openness, participation, accountability, effectiveness, coherence, and proportionality and subsidiarity (see EU Commission 2001: 10). Regardless the fact, that the application of these principles can increase the transparency of European policy making processes it can still be argued that it does not fundamentally change the technocratic approach, that still favours strong interest groups. “Good Governance” therefore hardly solves the problem of improving the participation of European citizens in a policy making process that increasingly has direct effects on their lives.

With regard to the first question, it has been pointed out above that the EU's proposal to refer to principles of global governance needs significant elaboration if it is to provide a way out of the technical and conceptually limited negotiations in the DDA context. But focusing on the DDA process is not an appropriate strategy, because most WTO members are – for various reasons – not interested in achieving any meaningful results on this negotiation topic. The best one can expect to come out of the negotiation is the inclusion of some “positive” MEA language that clarifies the situation for a few MEAs or a limited number of specific trade measures that the WTO members consider relevant. In addition, all negotiations mandated by the Doha ministerial conference are part of a "single undertaking", meaning that the negotiations are conducted as a single package and gains in one negotiating area may be balanced by concessions in other negotiating areas. The negotiations on the WTO/MEA relationship are therefore conducted in the context of “tit-for-tat” economic bargaining. Governmental positions on the relationship between WTO rules and specific trade obligations set out in MEAs may therefore easily be (mis)used as a bargaining chip to secure economic benefits in other negotiating areas (see Friends of the Earth International 2003).

However, in order to find a stable political solution that rests on a more systematic approach, the EU, other governments and societal actors promoting global environmental governance ought to initiate a debate on and a process for the clarification of the relationship between the WTO and MEAs outside the WTO. Only such an approach ultimately contributes to the strengthening of MEAs against the WTO. This approach takes a medium to long-term view of what should be achieved over the next years. The following sections briefly summarize the differences between a process that aims at a solution within the WTO and one that argues for a political discussion outside the WTO.

a) clarifying the WTO-MEA relationship within the WTO

The EU's reference to general principles emerging in the context of global environmental governance is important as a starting point for the clarification of the relationship between WTO and MEA rules. Yet, the EU needs to become more specific and explain how these principles can guide actual policy making and dispute resolution. For example by pointing out that these principles stress procedural and qualitative aspects of policy making that facilitate the accommodation of the interests of those that may be affected by the policies. Compared to the current practices in the WTO this would constitute a major step towards more transparency. The basic principles of openness, transparency, participation, accountability could be complemented by procedural elements as envisioned by the Aarhus Convention as the right to access to information to ensure effectiveness and coherence with other public policy goals. MEA rules already show more affinity to these principles than the WTO system. The EU should – without endorsing a continuing debate within the WTO - aim at including a reference to these MEA functions and work towards a confirmation by the WTO that:

- MEAs are independent bodies of international laws that are legally competent to solve disputes between WTO and MEA rules in a balanced and sustainable manner. That means, they allow for weighing the importance of different interests against each other, e.g. environmental vs. economic, and can provide sustainable solutions avoiding the protection of specific interests at the costs of others.

- MEAs ought to be the primary forum to solve disputes on trade-related measures. In order to provide this function, their compliance and dispute settlement mechanisms need to be strengthened.
- And as MEAs also define their relationship to non-parties, the treatment of non-MEA parties should be governed by the respective MEA rules regarding non-parties.

The possibility of a dispute arising over trade-related environmental measures within the WTO cannot be excluded and might be even higher with the new MEAs like the Biosafety Protocol, PIC Convention and POPs Convention. Therefore, it is of vital importance that the WTO dispute settlement process is reformed and takes account of the general principles of global governance. This entails:

- Dispute settlement panels and appellate bodies need to recognize customary norms of international law and the provisions of other multilateral treaties that address questions of the relationship between different bodies or principles of rules. A broader perspective taking into account provisions related to the environment, but also to human rights, social or health standards, can provide valuable insight into appropriate ways of balancing conflicting interests.
- The burden of proving that an environmental trade measure based on multilaterally agreed environmental rules is indeed discriminatory, arbitrary or a disguised restriction of trade has to be the responsibility of the complaining party.

And since governments agreed on specific multilateral rules to prevent environmental damages or improve environmental quality, **the WTO's "necessity test"⁸ must no longer be applied to MEA trade measures.** The need to abandon this specific necessity test method is a logical consequence of a revised approach to MEA trade measures. Because governments would not go through the strenuous process of agreeing them, if these measures were not necessary, therefore there is no reason why the necessity of these measures would have to be tested once again. This implies that the dispute settlement practice relating to GATT article XX, paragraphs (b), (d) and (g) and the application of the article XX chapeau has to be changed. This means, that the necessity tests are not applicable to MEAs and that the general trade measures of MEAs have to be accepted as necessary, i.e. if governments decide to prohibit production and trade in ozone depleting substances, because they agree that it is the only effective measure to restore the ozone layer, this trade measure must be considered necessary.⁹ Moreover, dropping the necessity test in case of MEAs does not mean one cannot examine the protectionist intent of a measure. This can still be assessed by examining whether for example domestic producers gain an economic advantage over foreign competitors with such a specific measure.

⁸ This "test" evolved as a legal instrument in the context of GATT and WTO dispute settlement procedures. After examining whether a specific measure formally falls within the scope of the various specific exceptions listed in GATT XX, the panels then proceed to examine whether the contested measure was indeed necessary or whether other less trade distorting measures could have been applied in order to achieve the same policy goal.

⁹ Only in cases where national governments take individual measures pursuant to a MEA provision, that differ in scope or procedures from these general measures, a necessity test might be appropriate to examine whether specific circumstances justify more stringent measures.

It is not unlikely that the WTO members will find consensus to agree on such a fundamental change in the understanding of the application of WTO rules and procedures. Possible solutions like an interpretative note on how to proceed in cases of conflicts between WTO provisions and MEA trade measures, or a general WTO reform seem not very realistic after the failure of the fifth Ministerial Conference in September 2003 in Cancun.

But even if such a reform is possible, it has to be cautioned that the WTO system is probably not capable of addressing a likely dispute over the legitimacy of MEA trade measures, especially if parties are involved that are not party to the MEA in question. The WTO has only the mandate (and the expertise) to judge a specific decision according to its trade impacts, but not according to its environmental necessity or effectiveness. The DDA negotiations provide an ample example for how environmental issues are becoming subject of all kinds of interests that degrade legitimate environmental concerns to a mere bargaining chip instead of addressing the fundamental problem of how to avoid or solve conflicts between two equal bodies of law. Therefore, an interpretive note by WTO members regarding the solution of conflicts between WTO and MEA rules – if at all feasible - might not really solve the problem and the EU and others ought to seek a solution outside the WTO.

b) Clarifying the WTO-MEA relationship by strengthening MEAs outside the WTO

The one-sided approach of the WTO to assessing the impacts of MEA trade measures indirectly answers the question who should monitor the application of a potential decision on this relationship and decide in case of a dispute. For various reasons – mandate, expertise, policy making traditions – the WTO is not the appropriate institution to achieve a balanced or better sustainable development outcome once different public policy goals are in conflict with each other. There have been numerous suggestions on how to create synergies between WTO and MEA rules (see for example Charnovitz 2003: 15ff.).¹⁰ The analysis above also shows that a clear and policy-oriented reference to global governance principles can facilitate a more balanced approach, not least because they are based on governance criteria that take procedural and qualitative aspects of policy making in different issue areas into account.

Since the mandate of the UN is much more appropriate to deal with such questions, the debate on the relationship between WTO rules and MEA trade-related measures should be moved to the UN-System. Basically two options exist:

- setting up an independent arbitration body or seek legal settlement through the Permanent Court of Arbitration and the Environment Chamber of the International Court of Justice (see Friends of the Earth International 2004: 4),
- initiating a discussion process within the UN-System that aims at drafting general, legally sound rules of solving conflicts between WTO and MEA measures

¹⁰ Charnovitz approaches the problem by making specific suggestion for promoting harmony between the trade and climate regimes by agreeing on international technical standards e.g. for energy efficiency, facilitating energy taxes, enhance market opportunities for environmental goods and services, reducing environmentally negative subsidies, safeguarding eco-labelling, improving coordination through observership, and integrating climate and trade bargaining (see Charnovitz 2003: 15ff.).

addressing the general problem of how to weigh the principles of different rule systems against each other.

The first option might be the creation of a transparent and open arbitration body under UN auspices similar to for example the United Nations Commission on International Trade Law (UNCITRAL) that mediates disputes arising in the realm of foreign direct investment. In recent years these independent arbitration mechanisms became more and more important as an instrument for conflict resolution that is firmly rooted in the principles of customary international law. First of all, they have been criticized as being intransparent and secretive. Thus, in case such a solution would be discussed in the context of WTO-MEA conflicts, the procedures and meetings would have to be public, transparent and open to the participation of stakeholders that will be affected by the decisions. Yet, even if we assume that a transparent arbitration body could solve arising conflicts in a more balanced way, it would not necessarily contribute to solving the initial problem of what to do, when two different, but equal systems of rules clash. Arbitration through a new body or the International Court of Justice is still case law, suggesting that in every new conflict the question whether environmental concerns can legitimately override trade concerns will be asked and tested once again.

Therefore, from an environmental perspective the second option will be more sustainable. It does not ask whether environmental concerns can override trade concerns, but what kind of general conditions ought to prevail or rather how the procedures and measures for legitimate trade measures must be designed. This discussion process could be moved to and/or initiated by UNEP. UNEP is not just the body that administers a number of important MEAs, but it also implemented a major project on international environmental governance including an analysis of MEA provisions, that could serve as a basis for discussion. Thus, UNEP or the UN-System is legitimate to address not only the relationship between the WTO and MEAs but also other trade and environment negotiations.

The current work of UNEP could be enhanced by establishing a more formal process between UNEP as facilitator and the MEA secretariats in order to discuss their relationship to WTO rules and negotiation issues. The main task should be to ensure coherence between WTO and MEA rules without compromising the environmental effectiveness as well as the important socio-economic and equity functions of MEA measures. This process would certainly enhance the understanding among MEAs of the relevance of the subject and the need to establish clear rules for solving conflicts. The results of this process could also enlighten the discussion within the CTE and reduce the scepticism of trade officials about the necessity and justification of trade related MEA measures.

Another option is the establishment of a working group or a commission under UN auspices that examines the relationship between WTO and MEA rules from a trade and environment perspective in order to establish clear rules for conflict arbitration. Such a body ought to comprise environment, trade and development experts. It could be created under one of the UN organs like the General Assembly or the Economic and Social Council. The drafting and implementation of an understanding regarding the relationship between WTO and MEA rules would be subject to the UN-rules for participation of NGOs and civil society. In addition, a

direct link to other institutions that are part of an evolving global governance structure could be established. At the same time, the mandate of such a body would be limited to the clarification of the relationship between two specific sets of international public law that also prevents the body from being taken hostage by other negotiation interests.

c) Next steps

The EU and other governments must take appropriate steps towards expanding the coherence among WTO rules and policies by including the consideration of the interaction with MEA rules. They can do this either by pushing for a discussion in the CTE on how WTO rules can comply with MEA rules. Or, and this seems to be a more effective strategy, by initiating a discussion/negotiation forum or an official working group of interested governments either within UNEP or generally under UN auspices to address the clarification of the relationship between these different rule systems. The section above outlined some of the necessary elements.

- The initiative can build on the existing work of the MEA secretariats and focus on how MEAs understand the trade linkage. In addition, it can highlight how MEA rules and procedures increase the general welfare of countries and point at the socio-economic benefits of improving environmental quality by the implementation of MEAs.
- It can also outline the existing system of rules and conflict resolution procedures in various environmental policy areas in order to illustrate that there is no danger of promoting arbitrary and disguised protectionist measures.
- Moreover, UNEP, or the EU, should initiate a joint working group of experts from international institutions that represent environmental, trade and development interests, looking at ways of establishing general principles and rules for how to solve conflicts between multilateral trade and environment provisions.
- This working group could take different forms, depending on the political support:
 1. Create joint UNEP-MEA working group on trade. Such a group is already within the mandates of the MEA Secretariats and UNEP - which are requested by governments to enhance cooperation among each other and with other international organizations - and therefore does not require additional or new authorization. This could emerge from the existing UNEP informal process of facilitation or the Environmental Management Group initiated by UNEP in the context of the work on improving global environmental governance. Such a process can start immediately (given appropriate funding and impetus from governments), providing a useful first step towards more formal arrangements in the future.
 2. With a view to ensure more political weight and the general acceptance of the deliberations and possible decisions of such an international working group may be enlarged to include representatives from MEA secretariats, the WTO

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secretariat and from WTO member states (trade as well as environment officials), UNCTAD, FAO, multilateral development agencies and civil society groups. The integration of UNCTAD, FAO and multilateral development agencies seems to be appropriate because they can contribute experiences regarding the developmental impacts and interests in the context of enhancing environmental protection and economic development at the same time.

- The working groups should be set up with the aim of reaffirming that MEAs and not the WTO have the primary competence to interpret the environmental objectives and the necessity of MEA related trade measures.

It is important that the EU pushes the subject, with a view of moving the discussion out of the narrow WTO negotiation context. In the medium term, the strengthening of MEAs through a process outside the WTO seems to be crucial, because it facilitates the introduction of general principles of international customary law and emerging principles of global governance. It will shift the perspective on the balancing of trade and environmental interests from a liberal trade focus to a more holistic and precautionary approach that takes account of other societal interests such as environmental protection and social development.

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