

The Big Chill: The WTO and Multilateral Environmental Agreements*

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If sustainable development is about the integration of economic and environmental goals, then there seems to be a significant lack of integration between the preeminent global governance structures set up to manage trade and environment respectively.

The international trade regime has evolved into one of the most powerful and influential multilateral regimes in the world today in terms of its ability to attract members (with the lure of expanding markets) and discipline them. The legal norms in the World Trade Organization's (WTO) trade agreements are backed up by powerful sanctions (which include trade retaliation) and a sophisticated dispute resolution mechanism accompanied by a rapidly developing jurisprudence that is unequalled in other international regimes.

In contrast, multilateral environmental agreements (MEAs), and international environmental law generally, provide a more fragmented form of governance that lacks the coherence, reach, financial backing and organizational structure of the WTO.¹ Most MEAs typically work in accordance with the voluntarist tradition of international law and proceed on an *ad hoc*, issue-by-issue basis by inducing cooperation and generally avoiding punitive sanctions and courts.² Judged in terms of size and teeth, we might regard the WTO as a large tiger and MEAs as a ragged collection of small cats. The irony is that in the one area where certain MEAs do possess effective sanctions (i.e. trade restriction), they remain vulnerable to legal challenge in the WTO.

One of the central points of dispute in the trade and environment debate is how conflicts between the international trade regime and international environmental regimes should be managed. Conflict between overlapping international regimes is not a novel problem, but it is often a contentious one. What makes the overlap between the trade and environment regimes politically con-

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1. Guruswamy 1998, 2.

2. See, for example, Bodansky 1999, 598 and von Moltke 1997. One exception to this claim is the United Nations Convention on the Law of the Sea (UNCLOS) which creates a binding system of adjudication and dispute resolution that confers upon the International Court of Justice (ICJ) jurisdiction and authority to hear trade and environment disputes in certain circumstances (for a discussion, see Guruswamy 1998).

tentious from an environmental point of view is that trade rules appear to have the upper hand. In disputes brought before the WTO, trade restrictive environmental measures must be shown to be compatible with the basic WTO legal norms or else fall within the WTO's environmental exemptions, which are strictly interpreted in ways that maximize their compatibility with trade norms. Once the measure is shown to fall within the exemptions, it must be shown that it is necessary to protect the environment, that it is the least trade restrictive measure compared to any alternatives, and that the measure does not arbitrarily discriminate against any WTO member or form a disguised form of protection for local industry.³ And increasingly in MEA negotiations, there is a political expectation that parties demonstrate that proposed measures are compatible with trade norms or are the "least trade restrictive" option available. The WTO Secretariat is free, by request, to attend and observe MEA negotiations.

In contrast, there is no comparable right of parties to MEAs to challenge trade rules in MEA fora for being inconsistent with the requirements of MEAs, and no corresponding set of punitive remedies under MEAs that are comparable with trade retaliation.⁴ The context of dispute resolution is quite different in MEAs. Whereas WTO parties engage in bilateral disputes over the interpretation of particular trade agreements, MEAs tend to deal with noncompliance by means of a flexible set of incentives and disincentives; these are generally much more cooperative and less punitive than under the WTO.⁵ Nor is there any reciprocal political expectation that WTO members demonstrate in trade negotiations that trade rules are consistent with the objectives, principles and legal norms of particular MEAs, such as the climate change convention, or that they are "the least environmentally damaging" from a range of potential options. While the WTO Secretariat is free to observe MEA negotiations whenever it wishes, MEA Secretariats must seek permission and WTO members have frequently vetoed their attendance as observers in trade negotiations.

This somewhat lop-sided state of affairs lends support to the claim by critical international theorists that the WTO rules form a particularly important element in a "disciplinary neoliberal" form of governance over state and

3. These last two requirements have their source in the chapeau to Article XX. The necessity test arises from Article XX(b), which refers to measures "necessary to protect human, animal or plant life or health" while Article XX(g), which applies to measures "in relation to conservation of exhaustible resources" has been interpreted as requiring a reasonable connection between the measure and the goal of conserving the resource. See WTO Appellate Body Report on US—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (April 29, 1996); WTO Appellate Body Report on European Communities – Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R (March 12 2001) and WTO Appellate Body Report on United States Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (October 12 1998) (hereafter *Shrimp Turtle* 1998). All three reports are available at http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm.
4. Parties to MEAs may pursue noncompliance against other parties via the procedures of the relevant MEA, but these are generally much less punitive (with the exception of UNCLOS—see note 3). So the point is not that parties to MEAs have no rights to ensure compliance, merely that they are not *comparable* to the rights of WTO members.
5. Although recourse to the International Court of Justice is often provided it has never been used. See Brack and Gray 2003, 28–29.

nonstate actors, with the effect in this case of undermining international and national efforts towards more concerted environmental protection. According to Stephen Gill, “disciplinary neoliberalism” (which he traces to a particular Anglo-American model of capitalist development) is increasing the power of investors relative to other members of civil society, both nationally and transnationally.⁶ The conclusion of the Uruguay Round of multilateral trade negotiations in 1994 saw a considerable expansion in the range and scope of trade agreements. The general worry is that the expanding scope of trade agreements will work to restrict the potential scope of MEAs and make them less effective than they would otherwise be. The particular worry is that trade restrictions in MEAs will become increasingly vulnerable to challenge in the WTO or else increasingly self-censoring and limited. As a consequence, environmental non-government organizations (ENGOS) have stepped up their critique of the global trading rules, arguing that they are primarily concerned with the effect of environmental policies on trade, but not the effect of trade policies on the environment. Against these arguments, skeptics argue that environmental concerns are exaggerated.⁷ There have been no formal legal challenges in the WTO against an MEA (although one has been threatened),⁸ and recent WTO jurisprudence (i.e., the *Shrimp Turtle* cases) has moved towards a more generous interpretation of the environmental exemptions in the WTO rules and a greater recognition of international environmental law in interpreting WTO law.

This paper evaluates these claims and counterclaims and concludes that the expanding reach of the WTO’s trade agreements does serve to cramp the scope and operation of MEAs, albeit in subtle rather than direct ways. I begin by briefly outlining the advantages of trade restrictive measures in MEAs and explaining the original basis of the environmentalists’ objection to the existing trade rules in terms of their relationship to MEAs. I then take stock of the efforts within the WTO to address the MEA issue, principally through the work of the WTO’s Committee for Trade and Environment (CTE), and show how the political stalemate within this committee gives cause for serious environmental concern, notwithstanding the *Shrimp Turtle* cases.

I conclude that the state of play between the global trading regime and MEAs may be characterized in terms of a “Big Chill” that rests on three, interrelated developments.⁹ Together they provide fuel to the environmental argument that institutional reform is required to give freer rein to MEAs. First, increasing international awareness of vulnerability to a WTO challenge has given rise to a conservative or “cool” implementation of trade restrictive obligations under ex-

6. Gill 1995, 4.

7. This view is also promulgated on the WTO’s website at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm (accessed 19 September 2003).

8. The swordfish dispute between Chile and the EU threatened to escalate into a formal legal clash when the EU looked to the WTO dispute settlement procedure whereas Chile looked to the International Tribunal on the Law of the Sea, established under UNCLOS. However, the matter was settled.

9. The idea of the Big Chill is drawn from WWF 1999, which refers to the “chill factor.” Ken Conca (2000, 488) also adopts similar language.

isting MEAs to avoid the threat of legal challenge. Second, increasing international awareness of this vulnerability is having a chilling effect on ongoing multilateral environmental negotiations, which are becoming increasingly self-censoring in terms of trade restrictions.¹⁰ Third, the major international effort to address this problem within the WTO's Committee on Trade and Environment (CTE) has become almost "frozen," with minimal scope for any creative political resolution of the tensions within the WTO's primary environment forum in the foreseeable future. Finally, I review some of the major reforms that have been proposed and assess the political prospects of new institutions of "disciplinary environmentalism" designed to counterbalance the WTO and give MEAs freer rein.

The Advantages of Trade Restrictions in MEAs

There are around two hundred major multilateral environmental agreements (MEAs) in existence in the world today. Around twenty of the most recent and most significant treaties dealing with global environmental problems include trade restrictive measures to address transboundary and global ecological problems.¹¹ The most successful MEA in the world today—the 1987 Montreal Protocol—has imposed stringent trade restrictive measures on both parties and non-parties to the agreement. The Protocol not only restricts trade in ozone depleting substances but also restricts trade in *products* (refrigerators, aerosol products and air conditioners) that *contain* such substances. Extending these trade restrictive measures to non-parties has provided a powerful incentive for states to join the Protocol. Restricting the market access of states outside the Protocol addresses the free rider problem and provides disincentives for industry to relocate their facilities to the territories of nonparties. There are now less than a dozen countries that have not joined the suite of ozone treaties.¹² The trade restrictive measures contained in these treaties have played a major role in reducing the production and consumption of ozone depleting substances throughout the world, which have been shown to cause damage to the stratospheric ozone layer and to the health of living organisms, including humans. More generally, trade restrictive measures have been found to be successful in discouraging free riding, encouraging compliance and generally improving the coverage of MEAs.¹³

Numerous other MEAs rely on specific trade restrictions to achieve their environmental goals, although few have been as successful as the Montreal Protocol in terms of gaining the support of most states, and in achieving such rela-

10. Conca 2000, 488. Debate over compatibility with WTO rules served to disrupt the negotiation of the Cartagena Biosafety Protocol as well as the negotiation of the Stockholm Convention to reduce the production and release of persistent organic pollutants (POPs), such as DDT and PCPs.

11. See the WTO site at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm (accessed 19 September 2003).

12. According to the Ozone Secretariat of the United Nations Environment Program, only 11 states have not ratified the Ozone treaties. See <http://www.unep.org/ozone/countries-not-ratified.shtml> (accessed 23 May 2003).

13. OECD 1999.

tively impressive outcomes.¹⁴ Some MEAs include trade restrictions as options rather than compulsory measures. Most MEAs, however, specify objectives, goals and targets and confer considerable discretion on parties concerning implementation. Under these circumstances some parties may decide that trade restrictions are the best means to fulfill their obligations. For example, although there are no specific provisions for trade sanctions in the 1997 Kyoto Protocol, parties trading under carbon trading schemes set up under the Kyoto Protocol might wish to exclude trade in carbon credits with non-parties as a means of punishing outsiders and defectors, and/or inducing and rewarding cooperation.¹⁵

Of these three categories—specific trade obligations, specific but optional trade obligations, and non-specific trade obligations—the last is the most contentious from the point of view of the WTO. However, from an environmental point of view, the more important issue is deciding which measures may ensure the most effective and efficient implementation of the objectives of the MEA. The types of measures that might be used range from import and export bans to less restrictive measures such as prior informed consent procedures for the movement of certain goods, labeling requirements, border tax adjustments or other forms of domestic support for green industries. The issue of whether all or only some parties to the MEA apply the measures should be relevant only insofar as it may have a bearing on the effectiveness of the measure in ensuring compliance by offsetting the economic costs of treaty compliance, inducing more parties to join and/or to preventing defection.

Yet these measures are potentially vulnerable to challenge under the WTO rules by a WTO member that is not a party to the relevant MEA, although a legal challenge is most likely in relation to optional and non-specific trade obligations rather than specific trade obligations.¹⁶

14. These include the Convention on International Trade in Endangered Species 1973, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste 1989, the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the Cartagena Protocol on Biosafety 2000, negotiated under the United Nations Convention on Biological Diversity 1992. As I show below, more recent MEAs—such as the Biosafety Protocol and the Stockholm Convention on Persistent Organic Pollutants (POPs)—have been negotiated “under the shadow” of the WTO.

15. For a more general discussion, see USCIB 2002. According to Brack and Gray (2003, 11, footnote 17 and 21), most commentators consider emission reduction units a financial instrument rather than as goods or services and therefore would not fall under the WTO agreements, although this view is not universally shared. In any event, one can still envisage other circumstances whereby Kyoto Protocol parties might want to discriminate against non-parties or discriminate in favor of parties in order to fulfill their emission reduction obligations under the Protocol.

16. For example, it is not clear whether border tax adjustments implemented as a means of offsetting the costs of a carbon tax would qualify under the environmental exemption provision of Article XX of the General Agreement on Tariffs and Trade (GATT) or Article 14 of the General Agreement on Trade in Services (GATS) concerning non-discrimination. Similarly, assuming emission credits are defined as services, then restricting trade in emission credits could violate Article 1 of the GATS as well as the more general most favored nation principle. For a more detailed exploration of the compatibility of the Kyoto Protocol and the WTO, see Brewer 2002.

The Problem of Overriding Trade Rules

The basic trade principle of nondiscrimination under the General Agreement on Tariffs and Trade (GATT), encapsulated in the most favored nation and national treatment rules, obliges parties to treat all imports from another GATT party no less favorably than they treat any imports from any other party while also treating all imported products no less favorably than “like products” that are produced domestically. The upshot is that any environmental restriction (such as a ban, a quota, a licensing arrangement or even a labeling requirement) that discriminates against the imports of a GATT party vis-à-vis others prima facie offends these rules unless it can be brought within the environmental exemption provisions of the GATT in Article XX.¹⁷ This article had traditionally been interpreted quite narrowly and, in the aftermath of the infamous *Tuna Dolphin* decisions,¹⁸ has been a major bone of contention for ENGOs. Indeed, the *Tuna Dolphin* decisions have been central to claims by ENGOs that the global trading rules systematically undermine efforts towards international and national environmental regulation. In particular, the so-called PPM (production and process methods) rule applied in those cases made it more difficult for states to pursue “disciplinary environmentalism” by using trade measures (whether unilaterally or pursuant to the general provisions of a MEA) to punish foreign corporations for using environmentally unfriendly PPMs or to induce more environmentally friendly methods. The rulings of the Appellate Board (AB) in the *Shrimp Turtle* cases (discussed below) have largely overruled the *Tuna Dolphin* cases, with significant implications for the environmentalist critique.¹⁹ Yet the questions concerning the application and scope of the PPM rule and the general environmental exemptions in Article XX of the GATT, have nonetheless continued to remain bones of contention in the *political* negotiations of the WTO, creating a hiatus between the rule-making and rule-adjudicating arms of the WTO.

The Committee on Trade and Environment

At the conclusion of the Uruguay round of trade negotiations in 1994 the status of trade restrictive measures in MEAs vis-à-vis the GATT remained uncertain and the existing international public law on the resolution of conflict between overlapping treaties was not particularly helpful.²⁰ A Working Group on Environ-

17. The exemptions allow members to take measures to protect human, animal or plant life or health (Article XX(b)), as well as measures designed to conserve exhaustible natural resources (Article XX(g)), provided “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade” (chapeau Article XX).

18. See GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594 (1991); United States—Restrictions on Imports of Tuna, June 16, 1994, available in 1994 WL 907620, para. 5.19.

19. For commentaries, see Charnovitz 2002; DeSombre and Barkin 2002; Howse 2002; and Brack and Gray 2003.

20. The Vienna Convention on the Law of Treaties provides that where two treaties address the

mental Measures and International Trade (EMIT) that had initially been set up in 1971 (which had been dormant for twenty years) had already been revived in November 1991 to explore the trade-environment interface under the GATT.²¹ The continuing tensions between trade and environment were acknowledged at the Marrakech meeting in April 1994 to sign off on the Uruguay Round, and a more formal Committee for Trade and Environment (CTE) was established.

Although the CTE emerged against a background of widespread environmental protests, legal uncertainty and the increasing prominence of global environmental problems in the wake of the Earth Summit in 1992, it would be misleading to suggest that environmental concerns were the only reasons for its establishment. As Gregory Shaffer points out, another objective was “to submit environmental regulatory developments to greater GATT scrutiny and control.”²² These twin, and somewhat contradictory, objectives had already surfaced in the EMIT and they reflect persistent differences among the members—particularly between developed and developing countries.²³

The CTE’s initial brief was to identify the relationship between trade and environmental measures in order to promote sustainable development, and to make appropriate recommendations with regard to rules that might enhance the positive interaction between trade liberalization and environmental protection. The Marrakech meeting also identified 10 specific items for the CTE to examine, including (most prominently) the relationship between the trading system and MEAs (item 1) and the relationship between the dispute settlement procedures of the trading system and those of MEAs (item 5). The CTE, which is open to all members of the WTO, began its work in January 1995.

At the same time, the founding documents establishing the WTO—unlike the original GATT—acknowledged environmental concerns and the objective of sustainable development. In addition, a number of new trade agreements also contained environmental exemptions.²⁴ In all, the new agreements reflected a greater awareness of the potential clash between environmental regulations and trade liberalization. Yet the new raft of trade agreements also served to extend

same subject matter, the later treaty shall prevail. However, this does not apply to a non-party to the later treaty. Moreover, both MEAs and the trade agreements are constantly changing, which considerably complicates the application of the Vienna Convention. The Vienna Convention on the Law of Treaties, 1969, Article 30(3); 1155 UNTS 331, 339. For a more general discussion see Brack and Gray 2003, 27–28.

21. See Trade and Environment Division 1999, 4.

22. Shaffer 2002, 85.

23. Shaffer 2002, 84–85.

24. For example, Article 14(b) of the General Agreement on Services (GATS) provided an exemption similar to Article XX of the GATT, and environmental exceptions were recognized in the Agreement on Technical Barriers to Trade (TBT) 1994, and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Certain kinds of “one-off” subsidies are also permitted for environmental protection in accordance with specific environmental programs. See the Agreement on Agriculture, Annex 2 (Domestic Support: the Basis for Exemption from the Reduction Commitments), Article 12 and the Agreement on Subsidies and Countervailing Measures, Article 8.

the scope of WTO supervision of environmental measures that might restrict free trade.²⁵

The Doha Development Round

In the period between its first meeting in early 1995 and its report to the Singapore Ministerial Meeting in 1996, the CTE managed two rounds of analysis of the ten items on its agenda. However, the CTE's Singapore Report was a cautious document that merely reported on the general discussions that had taken place, and the differences of view among the members of the CTE.²⁶ Notwithstanding numerous proposals put forward by members, the CTE made no recommendations for any modifications to the WTO rules in relation to any item on its agenda. Despite the efforts of the so-called green *demandeurs* (led by the EU), the majority of members generally believed that the environmental exemptions in the current WTO rules were able to accommodate environmental concerns.²⁷ The CTE also expressed concern that MEAs should extend the application of trade restrictive measures to non-parties. Although it suggested that better policy coordination between trade and environmental concerns at the national level could avoid disputes at the international level, it upheld the right of WTO members to challenge trade restrictive measures in MEAs in the WTO and it expressed confidence in the existing WTO dispute resolution procedures (noting that panels were free to call for environmental experts where necessary).²⁸ The Report was endorsed by the Trade Ministers, and the CTE was directed to continue working under its Marrakech mandate.²⁹

However, it was not until the fourth ministerial conference at Doha in Qatar that the CTE was given a specific negotiating mandate. The Doha Ministerial Declaration (adopted 14 November 2001) conferred a specific mandate to conduct negotiations on

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 (paragraph 31(i)).

Paragraph 31(ii) also instructed members to negotiate on procedures for regular information exchange between the Secretariats of relevant MEAs and the relevant WTO Committees, and the criteria for granting observer status. The Doha

25. Nissen 1997, 4.

26. CTE 1996.

27. A useful summary of the "Singapore Consensus" is provided in CTESS 2002.

28. CTE 1996; and Trade and Environment Division 1999, 15.

29. In subsequent meetings, the CTE organized its work program into clusters including market access (items 2, 3, 4 and 6), and the multilateral environmental agenda (including MEAs) and the WTO (items 1, 5, 7 and 8).

Declaration went on to provide (in paragraph 32) that the negotiations carried out under, *inter alia*, para 31 shall be compatible with the open and non-discriminatory nature of the multilateral trading system and shall not add to or diminish the rights and obligations of Members under existing WTO agreements.

The Ministers also directed the CTE to identify rules that needed to be clarified in relation to a range of other matters³⁰ but the specific negotiating mandate was confined to MEAs (including information exchange with MEA Secretariats and developing criteria for observer status), trade barriers on environmental goods and services, and fisheries subsidies.³¹ While most of the issues listed in paragraph 32 of the CTE's brief are also covered by other WTO committees (e.g. ecolabeling is dealt with by the Committee on Technical Barriers to Trade, fisheries subsidies are handled by the Subsidies Committee), the issue of MEAs emerged as the one key area where the CTE had sole negotiating authority.

The various qualifications attached to the Doha negotiating mandate have effectively enabled the CTE to side-step the two areas where conflicts between the WTO and MEAs are most likely to arise: the case of conflicts between parties and non-parties to MEAs, and the case of nonspecific trade obligations. By explicitly preserving the rights of WTO members to bring legal actions under the WTO dispute resolution procedures, the opportunity for changing the trade rules or negotiating a new agreement to exempt MEAs from future WTO challenge was effectively ruled out. Moreover, the deliberations within the CTE under paragraphs 31(i) and (ii) have been such that, even if these three issues were left open, no progress would have been made.

For example, a strong division has emerged between those members (e.g. US, Australia and many developing countries) seeking a highly restrictive interpretation of "specific trade obligation" (STOs) and the green *demandeurs* (EU, Norway, Switzerland, Poland) who have defended a more generous interpretation to give more flexibility to MEAs. This is also reflected in a division over whether to examine the STOs in a small handful of MEAs that are currently in force (e.g. the Montreal Protocol, the Basel Convention and CITES) on a case by case basis and those members who prefer a more "conceptual approach" that develops criteria that can cover amendments to existing MEAs and the negotiation of new MEAs. Similarly, there is disagreement over whether the phrase "set out in multilateral environmental agreements (MEAs)" in paragraph 31(i) should be restricted to the Articles of the MEA or extended to include decisions made by the Conference of the Parties that might modify or clarify how parties are to fulfill their obligations, or create new institutional mechanisms to this end. The weight of opinion currently favors the more restrictive interpretation

30. These were market access (particularly for developing countries), trade related aspects of intellectual property, synergies between trade liberalization and environmental protection, and ecolabeling (paragraph 32).

31. Fisheries subsidies are covered in paragraph 28.

on all of these issues.³² The CTE has spent considerable effort poring over existing MEAs and developing a matrix of STOs that might be upheld—but considerable disagreement remains as to which should qualify within the meaning of the Doha mandate. The most optimistic scenario is a basic consensus on the most obvious STOs in three to six of the major MEAs currently in force. However, members who are not parties to these MEAs retain their right to challenge the MEAs in the WTO.

The CTE negotiations have largely resulted in a stalemate between a minority of WTO members who have sought clear and explicit rules to exempt MEAs from WTO challenges and those who oppose any further environmental compromise of the trade rules (the majority of other members). Notwithstanding the looming 1 January 2005 deadline for the conclusion of the Doha work program, there is no thawing of relations in sight. At the failed WTO Ministerial Meeting in Cancun, Mexico in September 2002, the MEA issue, and broader environmental concerns, were considerably overshadowed by major disagreements over agricultural subsidies, developing country access to cheaper generic medicines, and the so-called “Singapore issues” (investment, competition, trade facilitation and transparency in government procurement). The regular session of the CTE produced a report to the Cancun Ministerial Conference on paragraphs 32 and 33 of the Doha Ministerial Declaration, but the summary report of the meeting of the special session of the CTE in May 2003 dealing with the negotiating mandate in paragraph 31(i) had already showed no signs of any breakthrough for Cancun.³³ The unsigned draft Ministerial text at Cancun makes no mention of the relationship between WTO rules and MEAs and merely takes note of progress made in the CTESS, without calling for any speedy resolution of the issues.³⁴ The only crumb offered to environmentalists in the draft related to the procedural question of observer status.

Information Exchange and Observer Status

Even the seemingly innocuous Doha mandate concerning the granting of observer status to MEA Secretariats has been the subject of a major deadlock. The general rule has been that members may agree to admit observers in trade negotiations, but that any member may veto proposals. So far, only intergovernmental organizations have been admitted, not NGOs. As the WTO General Council has put it, “there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.”³⁵

32. These debates are canvassed in CTESS 2003.

33. CTE 2003a; and CTESS 2003.

34. WTO 1996; and *Bridges Daily Update on the Fifth Ministerial Conference*, Issue 5, 14 September 2003, p. 6.

35. WTO 1996. However, NGOs may seek permission to attend ministerial conferences, the WTO’s web-site has been upgraded for general public access and annual public symposia have been organized by the WTO Secretariat in Geneva.

To date, the admission of observers has been dealt with in an *ad hoc* manner, and has mostly been thwarted in recent times by larger geopolitical differences between member states. This was set in train when the Arab League's application for observer status was blocked by the US and Israel on the ground that the Arab League's Charter calls for a trade boycott of Israel.³⁶ The upshot has been that applications for observer status by other intergovernmental organizations have been blocked by states sympathetic to the Arab League (such as Egypt and Malaysia).

This has directly affected the work of all WTO Committees. The CTE sought to step around this impasse by holding informal information sessions between officials from WTO member ministries of trade and environment and the secretariats of certain MEAs, including UNEP which itself hosts a number of MEAs.³⁷ However, this agreement remained shaky against the background of the continuing broader impasse on the observer question in WTO, which can only be resolved at the level of the Trade Negotiations Committee and the General Council.

Prior to Cancun, these ad hoc, informal arrangements had not settled into a regular practice, they only applied to CTE special sessions in view of the importance of the environmental negotiating mandate to MEAs, and many members (particularly developing countries) remained resistant to the presence of MEA secretariats.³⁸ No agreement was reached on the question of observers at the CTE's post-Cancun meeting, held in 30–31 October 2003. Nonetheless, the revised draft Ministerial text accepted the EU's demands that MEA Secretariats, UNEP and UNCTAD be allowed to attend as observers during the negotiations.³⁹

What is striking about the observer issue is the disparity in the observer rules between the WTO and MEAs. The WTO Secretariat is free to participate at MEA meetings and conferences of the parties merely by expressing an interest in attending, whereas attendance at WTO meetings by the Secretariats of MEAs has been regularly blocked.⁴⁰ According to *Friends of the Earth International*, the US has, in the past, blocked access by the CBD Secretariat to WTO negotiations that bear upon CBD concerns, such as the Agreement on Trade Related Intellectual Property Rights.⁴¹ So while WTO officials, and commercial interests, are increasingly represented at MEAs, there has been no systematic reciprocation at WTO

36. ICTSD 2003a, 23.

37. This began in November 2002 and continued in February 2003. See *Bridges Weekly Trade News Digest* 6 (39), 14 November 2002, 1; and *Bridges Weekly Trade News Digest* 7 (6), 19 February 2003, p. 1. The MEAs comprise the Basel Convention on the Transboundary Movement of Hazardous Waste, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, The Convention on Biological Diversity, the Montreal Protocol on Ozone Depleting Substances, the International Tropical Timber Organization and the UN Framework Convention on Climate Change).

38. *Bridges Weekly Trade News Digest* 7 (6), 19 February 2003, p. 1.

39. *Bridges Daily Update on the Fifth Ministerial Conference*, Issue 5, 14 September 2003, p. 6.

40. *Bridges Weekly Trade News Digest* 6 (39) 14 November 2002, p. 2; and Greenpeace 2002, 19.

41. FOEI no date, 4.

meetings for MEAs, least of all ENGOs—a development that further confirms the hiatus in the respective reach and power of the trade and environmental regimes.⁴² The (unsigned) draft Ministerial Text at Cancun provides only a modest tilt towards redressing this balance.

A New Green Era after Shrimp Turtle?

It is against this broad background of political stalemate within the CTE that the decision of the AB in the *Shrimp Turtle* cases needs to be examined. In the first *Shrimp Turtle* case in 1998, a US law that placed an embargo on the import of shrimp caught without turtle excluder devices (designed to prevent the incidental kill of sea turtles) was challenged in the WTO by India, Malaysia, Pakistan and Thailand. Although the AB upheld the WTO panel's ruling against the US, it acknowledged that the existence of an international treaty protecting a certain endangered species could, *prima facie*, bring it within the Article XX(g) exemption in the GATT as a legitimate environmental purpose.⁴³ However, it held that the US measures were applied in a way that was unjustifiably discriminatory under the chapeau to Article XX. The US had negotiated an agreement with Caribbean nations but had failed to accord the same treatment to the South East Asian shrimp exporters. The US measures were also found to be too rigid, they disregarded the conditions prevailing in the countries in Asia (which were given less time to comply than Caribbean countries), and the US had not taken sufficient steps to seek a multilateral solution to the problem with the Asian countries.⁴⁴ The AB also decided that the measures must be flexible and allow a reasonable phase-in time for the importers. The US took steps to redress these problems and the US law was subsequently upheld in 2001 by the AB following a further appeal by Malaysia.⁴⁵ In the second case, it was also found that the US could maintain its unilateral embargo because it was engaged in bona fide efforts to negotiate a multilateral solution. Thus the trade restriction was upheld even before the MEA was concluded.

Some commentators have considered that the *Shrimp Turtle* case has effec-

42. von Moltke 1997.

43. *Shrimp Turtle* 1998.

44. The Appellate Board in the *Shrimp Turtle* 1998 case ruled that, to fall under the Article XX environmental exemptions of the GATT, the measure in question must fit within one of the specific exceptions under Article XX *and* be applied in a manner that is consistent with the chapeau to Article XX (namely, that the application of the measure must not give rise to an arbitrary or unjustified discrimination nor act as a disguised form of protection for local industry). The AB found that the US law had gone too far in seeking to specify how other nations should manage their shrimp fishers by stipulating that they should pass laws that required the use of turtle excluder devices. It suggested that instead of stipulating the fishing technologies to be used, the law should merely set out the objectives and leave it to the parties to decide what technologies and management practices might best meet the objectives.

45. WTO Appellate Body Report on United States Import Prohibitions of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/AB/RW (October 22, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm (hereafter *Shrimp Turtle* 2001).

tively solved the WTO/MEA conflict since the AB has now indicated that bona fide trade restrictions in a MEA will be upheld (as well as interim measures pending the negotiation of an MEA).⁴⁶ The Article XX environmental exemptions in the GATT have been construed to include the reasonable regulation of species that have been classified as endangered under an MEA. Indeed, it could be argued that, in the aftermath of this decision, the negotiating mandate of the CTE on MEAs is now largely redundant.

Although it cannot be denied that the *Shrimp Turtle* case has provided a much more generous interpretation of the environmental exemptions in the WTO rules and has shown its preparedness to acknowledge MEAs when interpreting the WTO's environmental exemptions, it is too hasty to suggest that the WTO/MEA tensions have been resolved by this decision. Indeed, there are at least four reasons that point to the persistence of these tensions.

First, the rights of WTO members to challenge trade restrictive measures taken pursuant to MEAs remains intact. Indeed, these rights have been explicitly preserved in the formulation of the narrow negotiating mandate of the CTE under paragraphs 31 and 32 of the Doha Declaration—a sign that sends a strong political signal that these rights remain more important to most states than ensuring the full and effective implementation of MEAs. WTO members who are not parties to MEAs do not wish to be subjected to environmentally-directed trade measures to which they have not consented;⁴⁷ and even WTO members who are parties to MEAs do not wish to be subjected to unilateral trade measures designed to meet MEA objectives in circumstances when they are not specifically mandated by MEAs. Moreover, as the number of WTO parties and the scope of the trading rules expand, along with the number of MEAs, the probability of inter-regime conflict and therefore legal challenge in the WTO will inevitably increase.⁴⁸ While disputes are unlikely to arise between parties to MEAs that contain specific trade obligations, the question of the status of non-specific trade measures and nonparties remains highly contentious. Needless to say, the narrow negotiating mandate under Doha has also severely limited the options that may be considered by the CTE.

Second, the dispute resolution process of the WTO still remains the more powerful mechanism for the resolution of trade and environmental conflicts (when compared to the enforcement provisions of MEAs).⁴⁹ If a WTO member were to launch a WTO challenge against a trade restrictive measure in a MEA,

46. DeSombre and Barkin 2002.

47. Under the Vienna Convention on the Law of Treaties a state should not be subjected to the obligations of an international treaty to which it has not given its consent, so prima facie, a WTO member that is not a party to an MEA should be free of any MEA obligations. However, it is not entirely clear whether a trade restriction applied under a MEA against a non-party actually creates any obligations. See Brack and Gray 2003, 31–32.

48. Nissen 1997, 10.

49. In its report to the Singapore Ministerial Conference, the CTE argued that if there is a dispute *between* parties to an MEA, that those parties should be encouraged to use a dispute settlement resolution in MEA's (CTE 1996). However, this does not resolve the problem of non-parties to the MEA who wish to uphold their rights under the WTO.

then the question of the compatibility of the two regimes is decided by the dispute settlement proceedings of the WTO rather than the MEA (or an independent body). The AB thus stands as the final arbiter of the meaning of the relevant MEA obligations; it decides what evidence and what advice to take into account.⁵⁰ Put another way, the parties to MEAs do not have the ultimate authority to decide when trade rules should be waived in the interests of more effective global environmental protection. Within the WTO, it must be shown that the environmental trade restriction is nondiscriminatory, necessary to protect the environment, and the least trade restrictive—matters that are difficult to judge in advance of any specific conflict.⁵¹ As it happens, the AB in *Shrimp Turtle* interpreted the GATT environmental exemptions in ways that sought to give scope to MEAs; it sought to reconcile the two bodies of international law rather than declare that one has priority over the other. This decision is to be welcomed. Nonetheless, there are many aspects of the Article XX exemptions that remain uncertain. For example, it is unclear whether the AB will require a territorial connection between the living resource to be conserved under Article XX(g) and the state applying the restrictive measure.⁵²

Third, the political impasse within the CTE demonstrates that WTO politics lags well behind WTO jurisprudence, a fact that may have a chastening effect on future AB rulings and points to more general tensions between the political and judicial arms of the WTO. Indeed, the CTE deliberations raise questions about the legitimacy of the judicial arm of the trading regime when it is patently out of step with the rule-making body. This is obviously not something environmentalists would wish to encourage, since the highest judicial arm of the WTO has proved to be the most promising site for the insertion of widely recognized international environmental legal norms into the trade regime. The members of the AB (unlike the panels) are not narrow trade specialists but rather respected international lawyers with a wide purview of public international law, including international environmental law. Nonetheless, if the members of the WTO plainly cannot agree to take the reasonably non-controversial step of exempting specific trade obligations in major MEAs from WTO disciplinary measures, then the WTO rule-interpreting body may decide in the future not to interpret the law too creatively in this area. Despite the emergence of a *de facto* WTO jurisprudence, panels decisions and AB reports are not formally binding in the sense of the common law doctrine of precedent.⁵³ As Switzerland put it in a submission to the CTE, the panels and the AB merely determine disputes between the

50. The AB decided in *Shrimp Turtle* that WTO dispute settlement panels may accept *amicus* briefs from NGOs or other interested parties.

51. Trebilcock and Howse 1995, 338.

52. Howse 2002, 502. In the *Shrimp Turtle* case, the US domestic law was designed to protect a *shared* living resource (in this case endangered sea turtles) and the AB did not seem to be detained by the extra-territorial reach of the US law.

53. However, with the move from a diplomatic model of dispute settlement under the old GATT to a rule based model under the WTO, many commentators have called for the reform of the Dispute Settlement Understanding to incorporate the doctrine of *stare decisis* (see, for example, Chua 1998 and Bhal 1999).

parties in specific cases and “it is not their task to set general abstract rules Most importantly, the relationship between the WTO and MEAs is not merely a legal question, but a politically sensitive issue which has to be addressed in negotiations rather than in the dispute settlement mechanism.”⁵⁴

Should the CTE finally reach agreement under its Doha mandate in relation to specific trade obligations between the parties, it might have the effect of limiting the AB’s response to WTO/MEA disputes to situations when both disputants are parties to the MEA. As Mann and Porter point out, this would reduce the scope for the AB to draw on MEAs when interpreting WTO rules more generally, which would reduce its ability to seek greater consistency between international trade law and international environmental law.⁵⁵

More generally, despite the AB rulings in the *Shrimp Turtle* decisions that the US could apply non-discriminatory process measures to protect a shared living resource, many academic observers, WTO members and even the WTO website continue to maintain that PPM measures are illegal, whether applied as part of unilateral or multilateral trade restrictions.⁵⁶ For example, the influential trade economist Jagdish Bhagwati has criticized the AB’s rulings in the *Shrimp Turtle* cases for reversing long standing jurisprudence on the PPM issue and he has suggested that it should stick to interpreting law rather than creating it.⁵⁷ Despite efforts by international lawyers to “debunk the myth of illegality”⁵⁸ in relation to PPMs, many WTO delegates also continue to enlist the distinction in their political deliberations within the WTO.⁵⁹ The fact that the two *Tuna Dolphin* panel reports were never actually adopted by the US, that they were decided prior to the establishment of the WTO (which introduced environmental objectives into its preamble), and that they have been largely overruled appears not to dent the force of the arguments and negotiating tactics of many WTO delegates (especially from developing countries) who seek to resist the insertion of stronger environmental norms into WTO agreements. AB rulings do not appear to resolve these deeper political tensions.

Finally, a highly conspicuous feature of many of the most significant MEAs (such as the Basel Convention, the Convention on Biological Diversity and its Cartagena Biosafety Protocol, and the Kyoto Protocol) is the lack of US support. This lends credence to the persistent concern among ENGOs that the US may be moved to exercise its rights under the WTO to thwart any trade restrictive measures applied against it pursuant to those MEAs that it has chosen not to support. This is most likely in relation to non-obligatory trade measures (i.e., when individual parties take it upon themselves to implement their treaty obligations

54. CTE 2000b, 2.

55. Mann and Porter 2003, 25–26.

56. Charnovitz 2002.

57. Bhagwati 2000.

58. Charnovitz 2002.

59. The most prominent example is the effort to revive the PPM rule to resist ecolabeling. See CTE 2003a, 9; and *Bridges Weekly Trade News Digest* 7 (25), 10 July 2003 (Lead Stories).

by means of trade restrictive measures) but might also conceivably apply to specific trade obligations that have been negotiated in MEAs. For example, in a recent submission before the CTE special session, the US argued that Article 16.1 of the Biosafety Protocol could not be considered a “specific trade obligation” within the Doha negotiating mandate under paragraph 31(i).⁶⁰ This Article obliges parties to “establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified in the risk-assessment provisions of this Protocol associated with the use, handling and transboundary movement of living modified organisms.”⁶¹ In short, the US, supported by Australia, has argued that only those MEA provisions that impose a trade obligation on parties in clear and direct terms should form part of the CTE’s negotiating mandate. Provisions that leave it open to parties to opt for trade measures to fulfill their treaty obligations should remain open to WTO challenge (with the clear implication that any risk assessment procedures implemented under Article 16.1 that impeded trade would be vulnerable to US challenge).

It is no small irony here that while, in the past, the US had emerged as the major environmental defender in the most publicized GATT/WTO disputes (such as the *Tuna Dolphin* and *Shrimp Turtle* litigation) it looks set to emerge in the future as a primary anti-environmental plaintiff. Although these observations remain speculative, the current signs are that a US challenge is a real prospect. I suggest below that this is most likely in the area of biosafety but it might arise in relation to the Kyoto Protocol should a party decide to meet its Kyoto targets by adopting trade restrictive measures against the US. The fact that the US has not played an active role as green *demandeur* in the CTE lends further support to these claims.

Biosafety and the Threat of a WTO Challenge

The growth of the modern biotechnology industry carries benefits as well as risks, and these risks have been a matter of increasing disquiet by ENGOs and broader publics (although much more in Europe than the US). In the absence of conclusive scientific evidence concerning the risks to humans, animals and plants associated with the transplantation of genes from one species to another, much of the heated political debate about biosafety regulation has turned on evidentiary questions: who should bear the burden of proof, and by what standard? The Cartagena Biosafety Protocol 2000, negotiated under the UN Convention on Biological Diversity 1992, represents the international community’s first major attempt to resolve these questions in relation to the transboundary movement of living modified organisms (LMOs) by adopting a risk averse ap-

60. CTESS 2003, 3.

61. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Texts and Annexes, Montreal, 2000.

proach in cases of scientific uncertainty. The Protocol has now received the requisite number of ratifications and it came into force on 11 September 2003.⁶²

The Biosafety Protocol places restrictions on the transboundary movement, transit, storage and handling of certain LMOs that are intended to be released into the environment, in order to protect biodiversity and/or human health. The Protocol provides for risk assessment, risk management, transparency, import regulations and Advanced Informed Agreement (AIA) procedures before transboundary movements of the relevant LMOs can take place. In particular, it enables the party of import to conduct a risk assessment of such LMOs prior to granting import approval.⁶³ LMOs destined for contained use, or intended for direct use as food, feed or processing, are exempt from the AIA procedure (Articles 6 and 7.3) and are subject to less onerous provisions, and pharmaceuticals are exempted from the Protocol altogether (see Article 5).⁶⁴ In both cases, however, the Protocol requires the parties to apply the precautionary principle in the case of scientific uncertainty (Articles 1, 10(6) and 11(8)).⁶⁵ This principle is included in the Rio Declaration on Environment and Development and has increasingly appeared in international and national legal instruments and strategies. The Protocol, which effectively serves to restrict the free flow of trade in certain LMOs, may be applied against both parties and non-parties. In effect, it enables all parties to the Protocol to scrutinize, and where necessary prevent, restrict or control, movements of certain LMOs into their respective territory.

However, trade in the products and methods of the biotechnology industry is also governed by a number of WTO Agreements, the most significant of which is the Agreement on the Application of Sanitary and Phytosanitary Measures (known as the SPS Agreement). This Agreement enables parties to restrict or regulate trade in order to protect human, animal and plant safety, provided such measures can pass the usual tests concerning nonarbitrariness, nondiscrimination and least trade restrictiveness. The provisions of the SPS Agreement extend to LMOs. However, the SPS Agreement covers a smaller range of risks than the Protocol and includes a wider variety of products (e.g. it includes pharmaceuticals).⁶⁶

The Cartagena Biosafety Protocol 2000 is illustrative of the increasingly

62. See the Biosafety Protocol Homepage at <http://www.biodiv.org/doc/press/pk-bs-01.asp> (accessed 24 February 2003).

63. The party of import generally carries the risk assessment, although it may require the exporter to carry it out at its cost (Article 15(3)).

64. While agricultural commodities containing LMOs are exempt from the direct notification procedures under the AIA provisions, there is still a requirement that information be posted in the biosafety clearing house concerning decisions to authorize domestic use of LMOs used for food, feed or processing that may be subject to transboundary movements. Importing parties may still scrutinize such LMOs under their own domestic procedures, and this may include the application of the precautionary principle under Article 11.8.

65. The Protocol does not seek to interfere with the right of states to enact further domestic regulations on GMOs.

66. For a more detailed analysis, see Qureshi 2000, 848–849.

problematic relationship between the trade rules and MEAs in three significant respects. First, the five year negotiations on the Protocol were somewhat fraught and, in February 1999 in Cartagena, Colombia they collapsed as a result of disagreement over the relationship between the proposed provisions of the Protocol and the WTO rules. As one UNEP officer put it, "... a number of countries were re-using the arguments that WTO rules prevented this moving forward."⁶⁷ The Miami group, made up of major exporters of biotechnology and agricultural products (US, Canada, Australia, Argentina, Chile and Uruguay), was the main group opposing any tight restrictions on trade in LMOs. The Miami group sought to make the Protocol subservient to WTO disciplines in relation to trade in agricultural commodities containing LMOs and it succeeded in ensuring that less stringent requirements applied to such commodities. Opposing the Miami groups was the "Like-Minded-Group" made up of the European Union and a coalition of developing countries, which argued that the Protocol should not be compromised by WTO rules.⁶⁸

The upshot of these tensions in the negotiations is that the trade restrictive provisions of the Protocol were less forceful and extensive than they might have been. As Hutchison puts it, "[t]he Cartagena Protocol is a treaty that may be too self-conscious of its relationship with international trade law," preventing the adoption of a more radical or extensive precautionary approach.⁶⁹ The tensions are also reflected in the contradictory preamble to the Protocol, which seeks to recognize the existing rights of WTO members while also not subordinating the Protocol to other international agreements.⁷⁰ The Cartagena Biosafety Protocol provides strong evidence that the "long shadow of the WTO" is having a disciplinary effect on the negotiating phase of MEAs, irrespective of whether a legal dispute erupts in the future. Attempts to ensure that MEAs are "mutually supportive" with the WTO remain lopsided, in the sense that trade rules are increasingly invoked to restrict the scope and operation of MEAs, but the objectives and provisions of MEAs do not appear to have much influence in trade negotiations.

Second, despite this self-censoring process, the Biosafety Protocol still sits uneasily alongside the WTO's agreements, particularly the SPS Agreement, which was negotiated at the conclusion of the Uruguay round in 1994. The Biosafety Protocol overlaps with the SPS Agreement in significant ways and the trade measures in the Protocol have been described as "the leading candidate" for a WTO dispute.⁷¹ In particular, the risk assessment provisions of the Protocol

67. Interview with UNEP officer, May 2002.

68. For a full account of the negotiations, see Bail, Falkner and Marquard 2002.

69. Hutchison 2001, 32.

70. "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." See the Biosafety Protocol text at <http://www.biodiv.org/biosafety/protocol.asp> (accessed 24 February 2003).

71. Brack, Falkner and Goll 2003.

operate on the basis of somewhat different evidentiary rules than the WTO's SPS Agreement. The Protocol enables the importing party to apply the precautionary principle when carrying out its own risk assessment prior to the import of LMOs. The SPS Agreement also allows countries to set their own standards but provides that measures to ensure food safety and to protect the health of animals and plants should be based as far as possible on the analysis and assessment of objective and accurate scientific data. Moreover, such measures should be applied only to the extent necessary to protect human, animal or plant life or health, and they should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail. The SPS Agreement also encourages states to base their national measures on the international standards, guidelines and recommendations developed by WTO member governments in other international organizations.⁷² It remains unclear whether the Protocol would be accepted as a "standard" for the purposes of the SPS Agreement. The SPS agreement only permits the precautionary principle to be applied on an interim basis while a risk assessment is being conducted (Article 5(7)) whereas the Biosafety Protocol contains no such restriction (nor any requirements for periodic review).

The overlap between the Protocol and the SPS Agreement combined with different evidentiary rules and approaches to risk management, have sown the seeds for future controversy. As of February 2004, 87 countries have ratified the Protocol, including the European Union.⁷³ However, this leaves a large number of potential WTO challengers (particularly among the Miami group) who may seek to uphold the less restrictive provisions of the SPS Agreement against the relatively more cautious provisions of the Protocol.⁷⁴ Neither the US nor Australia are parties to the Protocol.

The likelihood of a dispute is not idle conjecture given that the US is a major producer and exporter of GM products and anxious to remove restrictions to its export markets. Moreover, strong differences have already emerged between the US and the EU over questions of food safety, with the US displaying increasing frustration with what it sees as a complicated and time-consuming structure of product authorization by EU members (which effectively provided a de facto embargo on the development and testing of GM crops in Europe since 1998).⁷⁵ After a period of frustrated diplomacy, in May 2003 the US and Canada (with the support of Monsanto and later a number of other states)⁷⁶ officially initiated

72. For a detailed overview, see Qureshi 2000.

73. For up-to-date information on ratification see the Biosafety Protocol website at <http://www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=dt> (accessed 24 February 2004).

74. CTE 2003b, 26.

75. Under the existing structure a number of EU states joined together since 1998 to block all new product authorizations for a range of GM products imported from the US. Only US soy, which was approved prior to 1998, has been allowed entry.

76. Argentina, Peru, Columbia, Mexico, New Zealand, Australia, India, Brazil and Chile have since joined the US and Canadian challenge. As Brack, Falkner and Goll note (2003, 8) some of these countries have imposed GM moratoriums—which is somewhat bizarre.

proceedings in the WTO against the European Union's de facto moratorium on the grounds that it violates a number of WTO trade agreements, including the SPS Agreement.⁷⁷ The EU moratorium has since been lifted with the adoption of two new regulations in July 2003, which simplify and streamline the authorization procedures for GMOs released into the environment and for GM food and feed. However, the regulations remain stringent, particularly in the areas of traceability and labeling. Although the challenge by the US and its co-complainants continues, it is not clear whether it will run its full course.⁷⁸

This US challenge does not involve the Biosafety Protocol, and the decision in *Shrimp Turtle* suggests that the AB might uphold the Cartagena Protocol if a dispute was brought before it. Nonetheless, there is no guarantee, and growing US frustration is likely to have an extremely chastening effect on parties to the Protocol, who must now conduct their risk assessments of US products containing LMOs under the watchful eye of vigilant US trade representatives. The US has applied considerable pressure to other WTO members to support its WTO challenge. For example, the US responded to Egypt's refusal to join the challenge by suspending proposed free-trade talks concerning a possible US-Egypt Free Trade Agreement.⁷⁹ Moreover, US frustration in its failure to find markets for its GM products is likely to grow. Even impoverished African nations, such as Zambia, have been unwilling to accept unsold US GM food that has been recycled by the US as food aid under the World Food Program.⁸⁰

Options for Reform

The US is not the only obstacle to promoting environmental norms within the WTO. Many developing countries fear that bringing environmental norms into the WTO will weaken their comparative advantage and restrict their market access.⁸¹ These arguments have a particular potency in the light of the ongoing failure of the US and the EU to provide any significant reductions in their levels of agricultural protection.⁸² Whether stronger environmental norms will emerge

77. The other agreements claimed to be infringed are the Agreement on Technical Barrier to Trade (TBT), the General Agreement on Tariffs and Trade (GATT) and the Agricultural Agreements. See Brack, Falkner and Goll 2003, 8. Although the Protocol exempts agricultural commodities containing LMOs from the AIA procedure (as noted above), it does lay down a mandatory identification scheme that extends to agricultural commodity imports that may contain LMOs. It is unclear whether this provision constitutes a technical barrier to trade under the WTO's TBT Agreement.

78. If it runs the full course, including an appeal to the AB, it may take until mid 2005 before it is resolved. See Brack, Falkner and Goll 2003, 8. The EU's new regulations impose quite stringent requirements in relation to tracking and labeling, which will have a significant effect on the US and other GM exporters.

79. Brack, Falkner and Goll 2003, 8.

80. "Continued pressure against Zambia on GM Food," *Afrol News*, at http://www.afrol.com/News2002/zam009_gmo_foodaid3.htm, accessed 23 February 2004.

81. See also Williams 2001; and Shaffer 2002.

82. In the lead up to the Cancun Ministerial, the US and EU proposed a framework for a joint approach on the agricultural question that included further cuts in agricultural subsidies, but

within the WTO is therefore likely to turn on the ability of greener states (such as those within the European Union) and ENGOs to persuade developing countries (which make up the majority of WTO members) that they will not be unfairly disadvantaged by the inclusion of more extensive environmental qualifications within the WTO rules. As a green *demandeur*, the EU is more likely to win the support of developing countries and the Cairns group on environmental reform by offering significant reductions in its own farm subsidies. Such package deals seem the most likely way in which the political impasse within the CTE and the broader WTO may be broken.

Against this political background, a number of options for reform on the MEA issue have been mooted. Some commentators consider that an amendment to Article XX of the GATT to the effect that trade restrictions under MEAs should prevail would provide the best long term solution to the tension.⁸³ A provision of this kind can be found in NAFTA, although it is confined to only three specified MEAs.⁸⁴ However, such reforms would still leave open the question of non-specific trade obligations and the question of non-parties. Duncan Brack has proposed a new WTO Agreement that specifically deals with the MEA question as an alternative to an amendment to Article XX.⁸⁵ Such an approach is defended on the ground that it would be much more focused on the specific MEA issue and not be so side-tracked by some of the broader environmental controversies surrounding the meaning and scope of Article XX.

Proposals arising from CTE members at various stages have included maintaining the status quo, amending Article XX of the GATT to exempt STOs in MEAs, granting waivers, issuing non-binding guidelines, providing less stringent tests for MEAs in WTO disputes, reversing the burden of proof, creating voluntary consultative mechanisms and promoting mutual supportiveness and deference between the WTO and MEAs.⁸⁶ Switzerland has proposed a creative resolution which calls for a division of responsibility between the WTO and the MEA in terms of their general competence, based on the principles of no hierarchy, mutual supportiveness and deference. Thus the WTO should determine questions concerning arbitrary or unjustifiable discrimination and disguised protection, and the relevant MEA should be given "the sole responsibility of determining environmental objectives and for choosing the means, instruments, mechanisms and measures necessary to achieve these objectives."⁸⁷ Switzerland

these proposals were rejected at Cancun by the new G22. See *EC and US Propose a Framework for a Joint Approach on Agricultural Questions in WTO*, EU Institutions Press Release, 14 August 2003, DN:IP/03/1160.

83. For example, Nissen 1997; and Guruswamy 1998.

84. Article 104 of NAFTA provides that trade restrictions in CITES, the Montreal Protocol and Basel Convention shall prevail in case of inconsistency with NAFTA, with the proviso that the Party's compliance measures under the MEAs are "the least inconsistent" with the other provisions of NAFTA.

85. Brack 1999, 294–96.

86. This list is not exhaustive—see CTESS 2002.

87. See CTE 2000a, 2; 2000b.

has suggested that the adoption of an interpretive decision by the WTO members along these lines would provide a simple and effective means of reducing conflict and creating greater certainty.⁸⁸ It would mean that trade measures in MEAs would benefit from a presumption of WTO conformity.

The general view of most ENGOs is that parties to MEAs should be free to adopt trade measures if these are the best means of fulfilling the environmental objectives of the treaty (and for some, this should apply irrespective of whether trade restrictive measures are expressly stipulated in the MEA).⁸⁹ Moreover, parties should be free to do this in order to protect their own environment as well as the environment beyond their jurisdiction, including the global commons. However, there are no signs of any convergence within the CTE around even modest compromises such as the one proposed by Switzerland.

The political obstacles in the way of greening the WTO from the inside have prompted many environmental sympathisers to argue for the creation of a World Environmental Organization (WEO) or Global Environmental Organization (GEO), to balance the disciplinary power of the WTO.⁹⁰ In the absence of any significant overhaul of the environmental governance system in three decades, many consider it is high time for institutional reform.⁹¹ UNEP has served as the primary international institution responsible for environmental protection since the 1972 Stockholm Conference but it lacks the organizational structure, powers, status and resources to match the WTO and it serves as the Secretariat for only a handful of MEAs. According to Haas, a new GEO could centralize the institutional support for MEAs under the one roof, while also consolidating environmental policy and technology research, retaining UNEP as the monitoring and research hub of the UN system and absorbing other existing environmental agencies such as the Commission for Sustainable Development. He also suggests that the GEO could hold high-profile, regular ministerial meetings, include the widespread involvement of environmental policy networks and “galvanize rapid response to new alerts.” He even suggests the establishment of national environmental embassies to represent states and participate in future negotiations. The GEO could play the role of legal advocate for environmental protection and regulation to counterbalance the WTO “by collecting a roster of international environmental lawyers to participate in WTO panels.”⁹² According to Esty the GEO should form part of a broader structure of checks and balances, with other organizations (such as the ILO), given the opportunity to cross check and challenge WTO proposals.⁹³

However, again, the major Catch-22 facing any proposal of this kind is that it will need the agreement of a critical mass of states. If the 148 members of

88. CTE 2000a, 3.

89. WWF 1999.

90. Biermann 2001; Haas 2002; and Esty 2002.

91. Haas 2002, 87. Not all environmentalists share this view (e.g. von Moltke 2001)

92. Haas 2002, 88.

93. Esty 2002.

the WTO cannot reach any agreement to green the rules of the WTO from within, it is going to be an uphill battle to find sufficient state support for a GEO to force the greening of the WTO from without. In short, there appears to be much more support by states for disciplinary neoliberalism or, in this case, disciplinary liberalization, than disciplinary environmentalism. Moreover, even if the project to build a GEO was successful, it is likely to replicate the deadlock within the GEO or else intensify the deadlock between the WTO and the environmental regimes championed by the GEO. The same fate is likely to befall the alternative recommendation by Friends of the Earth International to relocate the negotiations on the relationship between the WTO and MEAs to the UNEP Governing Council.⁹⁴ Given the current disciplinary power and global reach of the WTO, it might be argued that exploring how environmental norms and environmental NGO involvement might be strengthened within the WTO is a more productive task than merely counterbalancing the WTO with a GEO (or more powerful UNEP). However, given the resistance to such moves within the WTO, setting up counter institutions of environmental governance might help to dramatize the conflict, promote more general awareness of the issue and possibly pave the way for WTO reform from within.

Conclusion

Despite the tensions that have emerged within the CTE, it has served as an important discussion forum and, as one WTO officer put it, "increased the level of comfort of developing countries over environmental issues."⁹⁵ The ad hoc, informal information exchanges with MEAs have also been effective in raising levels of awareness about the WTO/MEA interface, although most of these efforts began at the initiative of UNEP not WTO members.⁹⁶ Thanks to UNEP's efforts and financial assistance, many developing countries have been able to improve coordination between their trade and environmental departments at the domestic level, and include environmental negotiators in their delegations.

Yet hopes that the CTE might emerge as a creative new discursive space within which more environment-friendly trade rules might be developed within the WTO have so far been dashed. The deliberations within the CTE have revealed major conflicts over the conceptualization of, and future prescriptions for, trade-environment linkages in general, and on the MEA question in particular. Cancun offered no breakthrough and it is likely that the CTE special negotiating session will continue to split hairs over the meaning and scope of the Doha mandate in paragraph 31(i) in its post-Cancun deliberations.

In the meantime, the EU is likely to remain the major green *demandeur*

94. FOEI 2003.

95. Interview with WTO Officer #2, May 2002.

96. This initiative began around mid-1999 with a view to building synergies and mutual supportiveness between the WTO and MEAs (Interview with UNEP officer, May 2002).

within the WTO.⁹⁷ However, leaders of major ENGOs, such as FOE International's Vice President Tony Juniper, have a more jaundiced view. Juniper has suggested that the EU's role may well fade in the future as it becomes increasingly preoccupied with expanding trade within its own region by orchestrating the dramatic enlargement of its membership from 15 to 25 members. This enlargement is likely to change the EU's own internal and external dynamics, along with its internal and external commitment to environmental reforms. This is expected to flow from the fact that none of the new accession states have strong environmental NGOs or strong green parties, and this will change the balance of power in the parliamentary and executive organs of the EU.⁹⁸

With Intergovernmental Organizations such as UNEP only able to enjoy observer status, and with ENGOs frozen out of WTO discussions, the future does not look bright for the general greening of the WTO. In the absence of clear legal rules that exempt MEAs from WTO challenges, the Big Chill is set to continue. Increasing international awareness of vulnerability to a WTO challenge will likely give rise to a conservative or "cool" implementation of trade restrictive obligations under existing MEAs to avoid the threat of legal challenge and also produce a "chilling effect" on ongoing multilateral environmental negotiations, which are likely to become increasingly self-censoring in terms of trade restrictions.⁹⁹

It is therefore most likely that the resolution of many of these problems will ultimately be left to the WTO's appellate bodies, which may or may not choose to follow the trajectory laid down in *Shrimp Turtle*. This is not an optimal way of addressing the incompatibility between the trade and environmental regimes from the point of view of democratic or environmental governance, but it is the only place where the legal norms of MEAs currently have a toehold. In the longer term, however, paying careful heed of developing country concerns while also bringing in a wider range of environmental voices into the WTO negotiations (from the environmental ministries of member states, from IGOs and environmental NGOs) is likely to provide the basis for a more lasting resolution of the MEA/WTO tension.

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97. The European Commissioner for Trade Pascal Lamy has also stated in the lead up to Cancun that the EU will continue to ensure MEAs can coexist with the WTO agreements (Lamy 2003).

98. Juniper 2003.

99. Conca 2000, 488.

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