



**MULTILATERAL ENVIRONMENTAL
AGREEMENTS IN THE WTO:
NEGOTIATIONS UNDER PARA 31(1)
OF THE DOHA MINISTERIAL
DECLARATION**

An Analytical Paper

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NOTE FROM WWF

This paper is based upon work commissioned by WWF and undertaken by Jake Werksman and Beatrice Chaytor of the Foundation of International Environmental Law and development (FIELD). This was developed as a background analytical paper for WWF and other campaigners in the environmental community. WWF and other environmental campaigners recognise that the narrowness of the Doha negotiating mandate may well leave the environmental community in a position considerably less favourable than the one in which we find ourselves now, given the evolution of the international trade and environmental law (although the status quo is far from ideal). Nevertheless, there are processes occurring outside the WTO, which if harnessed properly, could help to ameliorate the impacts of such an outcome.

Two issues were identified as being critical - the threat to the legitimacy of current TREMs, and the 'chill factor'. There is a danger of increasing the 'chill' factor with the narrow Doha mandate. Here it is important to distinguish between the 'chill' factor in the course of negotiating MEAs, and the chill factor in the course of implementing existing MEAs. The second is of more immediate importance.

In the intermediate, WWF urges the environmental community to push for coherence between global economic and environmental governance, with the development of these two forms of governance running in parallel. This should be addressed through simultaneously working within the WTO and outside the WTO, particularly in the MEA Conference of Parties. In the long term, there should be recognition that both WTO and MEA bodies of law are equal, and that they operate in a broader milieu, within which both bodies should be subjected to tests that they are delivering on an agenda supportive of sustainable development.

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INTRODUCTION

WTO Members agreed, in Doha, to begin negotiations “on the relationship between existing WTO rules and specific trade obligations set out in [MEAs].” The WTO has never been faced with a formal conflict between a trade-related measure taken pursuant to a Multilateral Environmental Agreement (MEA-TREM) and WTO rules. Nevertheless concerns about the potential for such a conflict persist:

The more recently adopted MEAs require or authorise the use of TREMs. These MEAs include the Rotterdam PIC Convention, the Stockholm POPs Convention, and the Cartagena Protocol on Biosafety (CPB);

The POPs and the PIC Conventions authorise or require the use of TREMs with regard to non-Parties as well as Parties, a type of TREM many view as most likely to attract a WTO challenge;

The Convention on the International Trade in Endangered Species of Fauna and Flora (CITES) and a number of regional fisheries agreements including ICCAT, are increasingly authorising the use of TREMs to regulate trade in listed species and in Illegal, Unregulated and Unreported fish;

The Kyoto Protocol (KP), while it does not specifically require or authorise the use of TREMs, will likely have a significant impact on trade and investment in the energy sector and may be used by Parties to justify unilateral TREMs;ⁱ

During the negotiations of these new MEAs, WTO rules have been invoked to discourage the inclusion of TREMs or to prevent the application of principles, such as the precautionary principle, as a basis for trade-related decision-making. Some delegations have sought instead to include “savings clauses” within MEAs that would subordinate environmental rules and institutions to trade disciplines;

The United States and other WTO Members with significant trading interests in products and services that may be affected by MEAs have signalled their reluctance to join a number of new MEAs, including the KP and the CPB;

Although progress has been made in developing and strengthening non-compliance procedures under the KP and under the CPB, these procedures have not been designed to provide the bilateral, dispute settlement functions necessary for resolving trade conflicts. In any case, such MEA-based procedures would not have jurisdiction over any conflicts that might arise between MEA Parties and non-Parties; and

Efforts to avoid or resolve potential MEA-WTO conflicts by strengthening and expanding the capacity of international environmental governance at the World Summit on Sustainable Development (WSSD) have largely failed.

Given the narrow framing of the Doha mandate on the issue there is uncertainty about the scope and outcome of negotiations. The paper starts with an assessment of the Doha

mandate. Section II recalls the attempts in the WTO Committee on Trade and Environment to reach negotiated settlement of the WTO-MEAs issue, Section III analyses strategies for managing conflicts raised by use of MEA-TREMs, and Section IV highlights the typology of possible conflicts. In Section V a typology is developed of conflict management proposals tabled by WTO members and discussed in the CTE, while Section VI develops a typology of MEA-TREMs. Conclusions are contained in Section VII.

I. The Scope of Negotiations under the Doha Ministerial Declaration

The Doha Ministerial Declaration (DMD) states:

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

the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs).ⁱⁱ 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...

The outcome of . . . the negotiations carried out under paragraph 31(i) . . . 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.

An analysis of these paragraphs has to be undertaken with restraint. Although it is a declaration of Ministers and high level representatives, agreed by consensus, it is also an awkwardly balanced text that contains a number of apparent contradictions and ambiguities. Nonetheless, as a ministerial declaration, it will provide a touchstone for the negotiations, and will be relied upon by delegations to support their positions.

The chapeau of para 31 recalls the principle of “mutual supportiveness” employed by the CTE, whereby the WTO will approach the WTO-MEA relationship with the presumption that these regimes will not conflict, but rather can be interpreted to reinforce their respective goals. This same language is used in Agenda 21, has been cited by the Appellate Body and is now also contained in the preamble of the CPB and of the Stockholm Convention. Most importantly, the chapeau contains the commitment to negotiate.

This must be contrasted with the previous mandate of the CTE, which was limited to identifying the relationship between trade measures and environmental measures and to making “appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required” (Marrakech Decision on Trade and the Environment). The mandate to negotiate creates a legitimate expectation that the results

will have a substantive content, and that delegations can be expected to link issues that arise under this agenda item, with gains and concessions made across other issue areas.

The chapeau restricts the effect of the mandates that follow by indicating that the mandate is not intended to prejudge the outcome of the negotiations. However, the subparagraphs that follow seek to do just that by restricting the scope of the negotiations. Subparagraph (i) refers specifically to negotiations on the WTO-MEA relationship. The negotiations are limited to *existing* WTO rules and *specific* trade obligations set out in multilateral environmental agreements (MEAs), and to the application of these TREMs between Members that are also *Parties* to the MEAs.

The reference to existing WTO rules may be used to prevent the negotiations from focusing on process-based solutions that could deal with WTO MEA-TREMs that arise in the future. For example, a general rule of deference, that might require WTO procedures to defer to MEA procedures might fall outside the Doha mandate, because it would appear to apply to future as well as existing WTO rules. The reference to specific obligations in MEAs appears to limit the scope of negotiations to an accommodation related to the category of TREM (those required by and specifically set out in an MEA).

The final clauses of subparagraph (i) chapeau restricts the negotiations to the applicability of such WTO rules as among parties to the MEA, and precludes the negotiations from prejudicing the WTO rights of any Member that is not a party to the MEA in question. This would seem to remove any discussion of a blanket protection of MEA-TREMs as they apply to Members that are non-Parties. On the positive side, it also seems to prevent an outcome that would prohibit the application of MEA-TREMs to non-Parties.

The concluding clauses of paragraph 31, which refer back to subparagraph (i) reinforce the constraints on the Doha MEA mandate, in an effort to ensure that the outcome does not “add to or diminish the rights and obligations” nor “alter the balance of these rights and obligations”. The SPS Agreement is particularly sacrosanct, most likely in anticipation of an attempt by the EU to promote an interpretation of the Agreement that might extend the application of the precautionary principle (see EC-Beef Hormones).

The cumulative effect of paragraph 31 is to discourage any potential substantive result from arising from the procedural decision to include MEAs within the trade negotiations. It reflects the constitutional arrangements of the WTO Charter, which provide that generally applicable changes in the rights and obligations of Members can only result from a formal amendment to the agreements. The prohibition on adding to or diminishing the rights and obligations of Members is borrowed from the Dispute Settlement Understanding, which limits WTO Panels and the Appellate Body to clarifying existing rights and obligations.

If paragraph 31 is followed in full, the result of the Doha MEA negotiations would, therefore, appear to be limited to an “authoritative interpretation” of existing WTO rules, that may be adopted (by $\frac{3}{4}$ majority) by the Ministerial Conference or the General Council under Article IX.2 of the WTO Charter.

Of the proposals reviewed below, only the Swiss proposal (WT/CTE/W/139 & WT/CTE/W/168), that would be based on an authoritative interpretation of the word “necessary” within GATT Article XX, would fall within this narrow mandate. If an authoritative interpretation were advanced along the same lines as the Appellate Body’s approach to MEAs and other expressions of the “contemporary concerns” of the international community, recognition that such TREMs are “necessary” may be acceptable as applicable with regard to Parties and to non-Parties.

It may, however, given the Doha mandate’s reference to “specific trade obligations” within MEAs be necessary for a Swiss-type proposal to be modified either to include these principles, or to enumerate the specific MEA-TREMs that would be recognised as “necessary.” It must be recalled, however, that the “necessary” test is the easier element of the Article XX test to clear, and that any such TREM would also need to be shown to have been applied in a manner that met the standards of Article XX’s chapeau.

Proposals to recognise MEAs as international standards, or their institutions or procedures as standard setting bodies may fall outside the Doha MEA mandate, but could be achieved under the existing mandates of the relevant Councils and Committees. Proposals to shift the burden of proof with regard to the application of the GATT exceptions, as proposed by the EU, would change Members' existing rights and obligations, and would appear to be precluded by the Doha mandate.

The mandate in paragraph 31 thus anticipates a very modest result from the Doha negotiation, that in its content would shield only those TREMs likely to prove least controversial from a trade perspective, and in its legal character would be no more than an authoritative interpretation, rather than a change of rules. The effort to lower expectations from the Doha environmental mandate generally was reinforced by the decision to allocate these aspects of the round to the CTE, the forum in which these issues have languished for more than half a decade.

II. Previous efforts towards a Negotiated Solution

WTO’s previous efforts to manage the potential conflict between MEA-TREMs the WTO were carried out under the auspices of its Committee on Trade and Environment. While a number of Members proposed modifications to the WTO rules to better accommodate MEA-TREMs no agreement on any such modification was reached. Instead, the CTE adopted a report, which was forwarded to the WTO Singapore Ministerial Conference where it was endorsed by the WTO Membership.

The CTE Report recognised that TREMs could play an important role in the effective implementation of MEAs, but found that the WTO should be able to accommodate such TREMs without the need for any formal amendment to its rules. Any potential conflicts should be resolved in a manner that leads to “mutually supportive” outcomes whereby the objectives of both the WTO and the MEA can be respected and achieved. The CTE noted that no MEA-TREM had yet been challenged under the GATT or under the WTO. The CTE did, however, acknowledge that if a conflict between an MEA-TREM and WTO rules arose, a WTO Member would have the right to bring the dispute before a WTO Panel.

The CTE Report encouraged the designers of MEAs to include effective dispute settlement systems within those regimes to lessen the need for any potential role for the WTO in resolving such disputes and indicated that Members that were parties to the MEA should resolve MEA-related disputes through such systems. Finally, the CTE flagged that the more serious potential for conflict between MEAs and the WTO could arise from any TREM taken pursuant to a MEA that was applied to WTO Member that was not a party to that MEA. In such a circumstance the WTO Member would not have participated in the approval of the TREM, nor would it have access to the MEA's dispute settlement system and could thus only protect its interests through the WTO.

Since Singapore a number of WTO Members, primarily the European Community (EC), have continued their call for a formal decision of the WTO Membership that would define the relationship between the WTO and MEA-TREMs in a manner that would shield such measures from WTO challenges..

Since Singapore, pressure from the EC led to the inclusion in the Doha Ministerial Declaration of a negotiation mandate specific to the relationship between the WTO and MEAs. The resulting text appears to leave behind the Singapore consensus and the understanding that a formal outcome describing or defining this relationship was not necessary. The mandate was, however, fiercely negotiated, and the resulting compromise language as discussed above is both vague and narrow.

III. Managing Conflicts in Rule-making and Jurisdiction

Any strategy for managing potential conflicts between MEA-TREMs and the WTO will need to recognise that both trade and environment regimes form part of a single (if occasionally incoherent) system of general international law. States that are parties to both the WTO and a MEA are simultaneously bound by both. Even those States that are party to only one, or to neither, can nonetheless be constrained by the existence of these regimes if the rules and principles they contain enjoy the support of sufficiently large numbers of countries.

This interaction between regimes, and between Parties and non-Parties is unavoidable. The challenge posed by the Doha mandate to those concerned about potential conflicts between trade and environment regimes is to promote a consensus around principles, procedures and institutions that can effectively and legitimately avoid these conflicts and to manage them should they arise.

There are essentially two kinds of potential MEA-WTO conflicts to manage: conflicts between rules and conflicts between jurisdictions. Rules conflict when their application by Parties would lead to inconsistent outcomes. Jurisdictions conflict when the procedures or institutions of more than one regime seek to manage the same or overlapping issue areas. A strategy for conflict management needs to recognise this interrelationship. A political agreement that an MEA-TREM should prevail over a WTO rule could be undermined if the WTO retain the procedures and the jurisdiction to assess whether the MEA-TREM is being applied in a manner consistent with the WTO rule.

A strategy for managing such conflicts should also recognise that the main flash points in the trade and environment interface are not likely to arise as a result of abstract “conflicts” between MEAs and the WTO, but rather as a result of concrete and fundamental disagreements between major trading partners on environmental priorities and on the proper means to respond to these priorities.

The most controversial issues covered by some MEAs, i.e., those that are more likely to be the subject of a trade dispute such as on the urgency of global warming the risks associated with genetically modified organisms and the role of science and precaution in decision making, reflect the divisions between governments and within society, either through the vagueness of their rules and procedures, or through the absence of major trading partners from their membership. These characteristics, in turn, make it less likely that the WTO Members would agree to extend a blanket protection to TREMs taken pursuant to these MEAs.

Promoting a consensus around a strategy for managing conflicts between MEAs and the WTO also needs to recognise that the Doha MEA mandate resulted from difficult and bitter negotiations and that the majority of the WTO Membership, particularly developing country Members, would have preferred to have excluded the issue. This suggests that efforts to stretch the meaning of the mandate beyond its quite clearly stated and narrow limits risks antagonising delegations. Such efforts could backfire, leading to proposals to protect trade rules against MEA disciplines.

For these reasons, the analysis that follows suggests that Doha negotiations are unlikely to result in a decision that deems all MEA-TREMs, whether they are taken against Parties or non-Parties to that MEA, as being compatible with WTO rules. Nor is Doha likely to result in a decision that exempts all MEA-TREMs from WTO jurisdiction. WTO Members, whether or not they are parties to a MEA are unlikely to defer to an unidentified or ill-defined body of TREMs.

Advocating such a blanket approach of deference would be asking WTO Members to waive their existing rights to be free of unnecessary, arbitrary, unjustifiable or disguised discrimination in their trading relations. Similarly WTO Members are unlikely to agree, in advance of any potential dispute, to remove from the WTO the jurisdiction to assess whether the application of a particular TREM by a specific Member is consistent with WTO rules. Such an approach would be based on the naïve assumption that MEAs, by their very nature always produce effective and legitimate policy, or that all parties to MEAs will always apply TREMs in a consistent and justifiable manner.

The Doha mandate appears to preclude any ambitious resolution to the MEA-WTO relationship that would result in changes to Members' existing rights and obligations. A progressive, but pragmatic strategy might aim for something in between the blanket protection of all MEA-TREMs, and yet another call for mutual supportiveness.

The Doha mandate does open the possibility for the adoption of an authoritative interpretation that would create a privileged category of specific TREMs that would be shielded from the application of WTO rules and WTO procedures when those TREMs were applied between Parties to that MEA. In essence, such a decision would simply be endorsing an application of the law of treaties that recognises that the Parties to these MEAs have, by ratifying these agreements, waived certain rights under the WTO.

By the same logic, such a decision could not extend this protection to TREMs challenged by a non-Party to the MEA. Furthermore, even this limited "solution" seems unlikely unless the WTO Membership can be convinced that these selected TREMs:

- are designed in accordance with principles and criteria that reflect the principles and criteria of *both* the WTO and the MEA;
- are precisely defined within the MEA and leave very limited discretion to the MEA Party as to how the TREM could be applied.

This blanket protection to a narrow privileged category of MEAs carries the risk of suggesting that those TREMs that were not included should be disfavoured if challenged. For this reason, any approach that led to creating a privileged category of MEA TREMs would also need to promote authoritative interpretative guidance to dispute settlement panels to view all MEA TREMs with deference under various WTO agreements.

Under the General Agreement on Tariffs and Trade (GATT) this could be achieved through an authoritative interpretation of Article XX indicating that TREM under one or more MEAs should be considered "necessary" under Article XX (b) (the Swiss Proposal).

Under the SPS and TBT Agreements, the Doha negotiations could also result in the recognition of certain MEA-TREMs as international standards, creating rebuttable presumptions of the conformity of such TREMs with these agreements.

Outcome	Protection		Legitimacy		Likelihood	Risks
	Rule	Juris	Envt	Trade		
Full protection for all MEA-TREMs	+++	+++	+++	---	---	Goes beyond Doha mandate, may backfire
Full protection for privileged MEA-TREMs	+++	+++	++	++	+	Creates a stigma for unprotected MEA-TREMs
Deference towards all MEA-TREMs	+	+	++	-	--	Goes beyond Doha mandate
Deference towards privileged MEA-TREMs	++	++	+	+++	++	Creates a stigma for unprotected MEA-TREMs

This approach would, however, engage the WTO's political institutions in a "principles and criteria" based assessment of MEAs and, most likely, the individual TREMs within MEAs. It raises the very real risk that any principles and criteria agreed as a result of the Doha mandate, would reflect a more restrictive approach to the MEA-TREM relationship than can be inferred from existing WTO jurisprudence.

It must be recalled that the WTO Appellate Body, in parallel with the preparations for Doha has, for the first time, endorsed the use of a TREM (a trade ban on shrimp caught by vessels in a manner that endangers rare species of sea turtles) which makes distinctions between otherwise physically identical products on the basis of the environmentally harmful methods in which those products were produced (a PPM). The TREM in question, while it could in part be justified as advancing the objectives of CITES, was not specifically authorised by that regime.

The reasoning applied by the Appellate Body when it allowed this measure to stand could be interpreted to justify the use of unilateral TREMs to achieve global environmental objectives even as against non-Parties to MEAs. Arguably, this kind of TREM, a unilaterally imposed ban, without the specific endorsement of an MEA, and based on a PPM, would be amongst those least likely to be shielded by any principles and criteria resulting from a political negotiation at the WTO. Some Members have already criticised this result, claiming the AB overstepped its mandate by allowing this kind of TREM to stand. These Members may view the Doha negotiations as a means of correcting the AB's interpretation.

On the other hand, relying on the status quo, as reflected in the Shrimp/Turtle result, carries risks as well. Although the AB is unlikely to reverse itself in an obvious manner, it has shown itself to be vulnerable to political pressure. Its recent treatment of *amicus curiae* briefs in the *Asbestos* case revealed this possibility. Furthermore, the AB's membership also changes over time, raising the risk that its ideological stance could shift, and that incoming members could feel less loyalty to previous rulings.

Faced with the narrow opportunity and significant risk posed by the Doha MEA mandate, it may be useful to structure a step by step response to the Doha mandate. It would be useful to construct a system of principles for demonstrating the environmental and the trade legitimacy of MEA-TREMs, and to call for a process that allows these principles to be successfully discussed and agreed, outside the WTO.

This would require a deeper level of analysis than that required by an advocacy of a blanket exception for all MEA-TREMs which, even if it were desirable, is unlikely to be accepted by WTO Members. It would, however, require an acknowledgement that not all TREMs applied “pursuant to” an MEA would *per se* be acceptable, from either a trade or an environmental perspective. It would also require an acknowledgement that until MEAs offer a more effective dispute settlement process, case by case assessments of the manner in which a MEA-TREM is applied, may, by default, fall to the WTO.

IV. Typology of Conflicts

A conflict of rules will arise when a measure taken by a Party pursuant to one regime conflicts with its obligations under another regime. The most frequently cited examples of MEA-TREMs that *conflict* with WTO rules are import and export restrictions on regulated substances required or authorised under, for example, CITES and the Ozone regime, which are *prima facie* violations of the GATT’s prohibitions on quantitative restrictions. These TREMs could, however survive a WTO challenge if they were found to be eligible for one of the GATT’s environmental exceptions.

Conflicts of jurisdiction arise when the procedures or institutions of more than one regime seek to manage the same issue area. These conflicts can occur in the course of the negotiations of new rules. For example, during the negotiations of the CPB, a number of governments concerned about the potential trade impacts of the Protocol sought to establish a Committee on Biotechnology under WTO auspices.

Conflicts of jurisdiction could also arise in the context of a specific dispute, if more than one dispute settlement forum could resolve a legal dispute or a question of compliance arising from the set of facts or legal issues. The nascent (now settled) dispute between Chile and the EU over Chilean prohibitions on the landing of swordfish by European fishing vessels, which raised issues under both the WTO and the LOSC, is a frequently cited example of the potential for such conflicts. Before the issue was settled, it had raised the risk that both a WTO Panel and the Law of the Sea Tribunal could have simultaneously seized the same dispute.

Most of the progress so far in international negotiations on trade and environment, has been made on efforts to manage conflicts between rules, rather than conflicts of jurisdiction. Increasingly, MEAs, even as they include TREMs, make reference to the need to take into account free trade principles, such as non-discrimination and the need to design TREMs in a least trade restrictive manner. MEAs stress the need for MEAs and international trade agreements to be implemented in a “mutually supportive manner”.

However, efforts to manage conflicts between rules are of limited value if they do not also manage conflicts of jurisdiction. If a TREM has been precisely defined within an

MEA and required or authorised by that MEA as between Parties, it should be possible to exclude the WTO from jurisdiction over the measure. For example, a Party to the POPs Convention, which has committed itself to restricting its imports and exports of a substance agreed, by consensus for inclusion in Annex III of that Convention. From both a trade and an environment perspective, it would be legitimate to bar that Party from using the WTO to challenge an import ban on that substance.

However, if the MEA allows a Party discretion as to whether or how to apply a TREM, the issue is far more complicated. A TREM as set out in a MEA may appear to be designed in a WTO-compatible manner, and nested in “mutually supportive” principles. But real conflicts can arise as a result of the application of a TREM by a specific Party of import with regard to a specific product produced by a specific Party of export.

Many MEA-TREMs will not be defined with sufficient precision to be able to determine, merely by reference to the MEA, that the TREM has been applied in a WTO-compatible manner. If the MEA allows any latitude to the Party of import, in the design and application of the TREM, issues may legitimately arise as to whether, in this instance, the measure was the least trade restrictive measure reasonably available, and whether it was being applied in a fair, non-discriminatory and justifiable manner. As Shrimp/Turtle demonstrates, the WTO’s answer to each of these questions may be “yes” and the measure may prove to be WTO consistent, but the questions, once raised, would need to be answered.

Although no formal conflicts between and MEA-TREM and WTO rules have arisen, free trade rules have had a “chilling effect” on the development and implementation of MEA-TREMs when negotiators invoke the possibility of rule conflict, backed by the implied threat of a jurisdictional conflict ending with a WTO dispute. Indeed this chilling effect, felt most strongly in the context of various MEA negotiations is the most common form of WTO-MEA “conflict.” This type of conflict is likely to continue without satisfactory resolution of the WTO-MEA interaction.

V. Typology of Conflict Management Proposals

As of December 2001, WTO members have recommended two main approaches to provide clarity and greater legal certainty to the relationship between MEA-TREMs and WTO rules: the ‘environmental window’ and the waiver approach. The environmental window would involve either amendment to GATT Article XX or lists of criteria or guidelines that trade measures would have to meet to be considered acceptable. In the waiver approach, Members may seek WTO waivers for MEAs on a case by case basis.

Even where proposals are made for amendment of WTO rules and procedures, there is acknowledgement of a clear delineation of jurisdiction between WTO and MEA procedures and institutions. Both the Swiss and Canadian proposals emphasise that MEAs must decide on appropriate environmental policy, but WTO should be left to determine if a particular MEA-TREM is applied in an arbitrary, discriminatory or protectionist manner.

Although the EU leaves open the possibility that TREMs applied to non-Parties, may be scrutinised by the WTO, it continues to be the strongest proponent of an amendment to Article XX. Switzerland has also suggested some adjustment of WTO rules or procedures to accommodate MEA concerns: interpretative decision on the term ‘necessary’ in Article XX (b).

A common guiding principle in a good number of proposals is that the MEA should be open to all countries and reflect broad based international support. Canada has called for a ‘principles and criteria’ approach to assessing the WTO validity of TREMs. One of its recommended principles is that the MEA-TREM should be specifically authorised and precisely drafted. Switzerland proposes the use of a mutual supportiveness and deference guiding principle with objective criteria. These proposals envisage shared jurisdiction between the WTO and MEAs through a commonly agreed set of principles or procedures.

Other WTO members, including the ASEAN countries, are unconvinced that it would be possible to draw up general criteria on all MEAs, which have different negotiating objectives. ASEAN instead calls for an *ad hoc* waiver mechanism that would operate with a set of non-binding guidelines, including the necessity of the TREM. New Zealand also proposes a waiver approach and latterly has recommended an alternative ‘first best’ theory, which does not seem markedly different from Canada’s ‘principles and criteria’ approach. TREMs developed in the MEA on a ‘first best’ basis could still be applied in an arbitrary or discriminatory manner, and be subject to WTO challenge.

Proposals	Clear delineation of jurisdiction between WTO and MEA procedures and institutions	Shared jurisdiction through a commonly agreed set of principles or procedures	Adjustment of WTO principles or procedures to accommodate MEA concerns
EU	MEAs make environmental policy disputes between parties to MEAs to be resolved in MEA not WTO		New para (k) in Art. XX – exemption of TREMs from necessity test Widen para (b) coverage to TREMs and all trade measures for environmental purposes reversal of burden of proof in TREMs disputes
SWITZERLAND	MEAs must establish rules and mechanisms for protection of environment WTO must assess if TREM is arbitrary, discriminatory or protectionist	Interpretative ‘Coherence’ clause – mutual supportiveness and deference guiding principles and objective criteria for privileged MEAs ‘Co-operation mechanism’ – formal co-operative arrangements between MEA and WTO institutions	interpretative decision on Article XX (b) term ‘necessary’ to encourage privileged set of TREMs
NEW ZEALAND	Sliding scale of WTO scrutiny for TREMs dependent on target (party/non-party) and whether specifically authorised by MEA Ex ante WTO waiver Ex-post WTO dispute settlement	‘First best theory’ – consultative mechanism among MEA parties to design first best TREM suitable for environmental goal (least trade distortive)	
ASEAN	multi-year waiver on case by case basis for MEAs complying with certain guiding principles		
CANADA	MEA negotiators to decide when TREM is necessary WTO panels to decide when TREM is arbitrary, discriminatory and protectionist	‘principles and criteria’ approach including effectiveness and least trade restrictive tests guidelines from WTO Secretariat to WTO panels and MEA negotiators	

VI. A Typology of MEA-TREMs

Developing a typology of MEA-TREMs is useful in making a general assessment of the likely compatibility between the WTO and MEA-TREMs, but it has to be kept in mind that the WTO rules are always applied on a case-by-case basis in the context of a dispute raised by one Member with regard to the way another Member has designed and is applying a particular measure. This means that even a TREM that might, *prima facie*, fall into the category of measure that most would agree would be viewed as WTO compatible, could still be applied by a Party in such a way that would attract a WTO challenge.

A decade of discussions on the relationship between the WTO and MEA-TREMs has generated a typology of TREMs constructed from the perspective of free trade disciplines. This typology has been used to suggest which MEA-TREMs are more and less likely to be considered legitimate from a WTO perspective. Because free trade rules discourage any TREMs that are taken unilaterally, and without the consent of affected Members, they are more likely to defer to TREMs that are specifically required or authorised by an MEA. TREMs put in place unilaterally are more suspect under trade disciplines. The bias against unilateral TREMs has its basis in general notions of fairness and in treaty law, which recognise that States, through their consent, can waive their rights under one regime by agreement under another regime.

Some TREMs can be described as obligations that are clearly identified and could be said to be *required* by the MEA. Examples of such TREMs are the Montreal Protocol's prohibition on the trade in regulated ozone depleting substances, and the prohibition on the export of Annex III chemicals under the Stockholm Convention. Other trade related measures can be said to be *authorised under* (but not required by) the MEA. Such measures would include restrictions on the import of living modified organisms identified by a Party as carrying risks to biological diversity under the CPB.

It is also possible that a MEA Party could seek to use the MEA to justify a trade related measure related that is not specifically required or authorised by the MEA. For example, a Party to the Kyoto Protocol may wish to put in place safeguard measures or other trade restrictions on greenhouse gas intensive products originating in non-Parties to the Party to prevent those countries from free riding. The trade restrictions put in place by the United States on the import of shrimp, though not authorised or required by CITES, were justified in part as a means of advancing CITES objectives.

MEA-TREMs may be further differentiated on the basis of whether they take the form of specific measures, or, instead, they take the form of procedures or principles used to justify a measure. Although some MEAs authorise the use of specific TREMs, a growing number of new MEAs set out procedures or principles that govern the design and application of TREMs. For example the PIC Convention and the CPB contain procedures that a Party of import must use to determine whether or not to ban or otherwise regulate the import of a regulated product. Such procedures can include specific decision-making frameworks such as risk assessment and risk management procedures. MEAs may also authorise or require the application of decision-making

principles. For example, the CPB authorises the use of the precautionary approach and the socio-economic consideration in the context of risk assessment and management.

RELEVANT TREMs	TRADE LEGITIMACY	ENVIRONMENTAL LEGITIMACY	CONFLICT VULNERABILITY	IDENTIFYING TARGET COUNTRY/PRODUCT	
				CRITERIA	UNI/MULTILATERAL
CITES – import and export bans, restrictions, quotas	+++ Required TREMs of global MEA Justified TREMs* (stricter domestic measures)	+++ Targeted at protection of endangered species	Low/Medium*	Graduated species lists Detrimental trade in listed species	Multilateral/ Unilateral*
POPs – import and export bans, restrictions	+++ Required TREMs of global MEA	+++ Measures based on scientific evidence Targeted at protection of human/animal health and environment	Low	Agreed scientific consensus Graduated product lists	Multilateral
ICCAT – import bans, quotas	++ Authorised non-discriminatory TREMs of regional MEA	+++ Measures based on scientific evidence Targeted at conservation of threatened species	Medium	Illegal, unreported, unregulated fishing Regulated fish species	Multilateral
PIC – import and export restrictions, procedures and decisions	++ Discretionary application of authorised TREMs in global MEA	++ Measures focused on trade in harmful chemicals Targeted at protection of human health and the environment	Medium* (Stricter domestic measures)	Graduated product lists Assessment of risk to humans and environment	Unilateral
CPB – trade restrictive assessment and decision-making procedures	+ Discretionary application of authorised TREMs in global MEA	+++ Measures based on conflicting scientific evidence Targeted at protection of environment	High	Assessment of risk to biodiversity Precautionary approach	Unilateral

VII. Conclusions

States have been broadly able to manage conflicts between MEA-TREMs and WTO rules, however they manifest, without fatally undermining either regime. Yet, the development of specific trade measures within existing and future MEAs and at the same time, the protection of WTO members' existing rights and obligations depends on an outcome whereby the objectives of both the WTO and the MEA are respected and achieved. However, a bland political statement that MEAs and WTO are equal and should be developed and applied in a mutually supportive manner would be axiomatic. Nevertheless, ultimately clarification of the operational elements of 'mutually supportive' must be a political rather than a quasi-judicial process.

Among WTO members, a number of proposals have emerged, which either advocate: guiding principles for deference towards MEA-TREMs, or accommodation of MEA objectives within WTO rules and institutions, or mechanisms for co-operation between MEAs and WTO institutions on the development and application of TREMs.

The typology of TREMs demonstrates that even those defined with sufficient precision may raise questions about whether they are the least trade distorting and applied in a fair, non-discriminatory and justifiable manner. Thus the outcome of the Doha negotiations is unlikely to be that all MEA-TREMs taken either against Parties or non-Parties to the MEA are deemed automatically compatible with WTO rules. Indeed the reference in the Doha mandate to specific trade obligations in MEAs limits the scope of negotiations to those specifically set out and required by the MEA. Moreover, the chapeau of paragraph 31 (i) further removes the possibility of the application of any blanket deference to TREMs targeted at non- Parties. It is also doubtful whether the negotiated outcome will cater for the development of TREMs under future MEAs.

The eventual outcome of the Doha negotiations may be viewed as a first step in a graduated approach to reconciliation of the MEA-WTO relationship. Thus a progressive and pragmatic strategy would be to develop a staged response to the Doha mandate.

A first step could be to promote a consensus around the construction of principles to demonstrate the environment and trade legitimacy of MEA TREMs. This could be done within the MEA Conference of the Parties or in a separate process under the auspices of UNEP.

ENDNOTES

ⁱJ Werksman, K Baumert and N Dubash “Will international investment rules obstruct Climate protection policies?” World Resources Institute Climate Note, 20 pp. (WRI: 2001) J Werksman, “Greenhouse Gas Emissions Trading and the WTO” Review of European Community and International Environmental Law Volume 8 Issue 3 (1999).

ⁱⁱ Paragraph 19 of the DMD separately provides for the TRIPs Council to examine, *inter alia*, the relationship between the TRIPs Agreement and the Convention on biological Diversity.

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