



**Safeguarding Multilateral
Environmental Agreements
from international trade
rules and settling trade
and environment disputes
outside the WTO.**

Is the WTO the only way?

B R I E F I N G P A P E R

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**Friends of
the Earth
Europe**

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If you detect any, please let us know.

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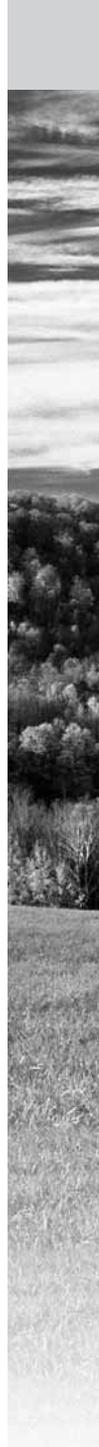
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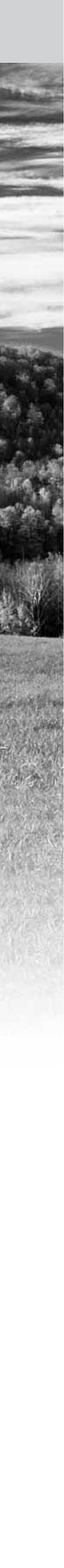
The debate about the relationship between trade and environment, as currently negotiated within the World Trade Organisation (WTO), is threatening to let trade rules further encroach into the regulatory scope of Multilateral Environmental Agreements (MEAs) – instead of consolidating the rights of MEAs to limit trade liberalisation whenever it poses a threat to a sustainable environment for countries and societies. This paper addresses the need to secure a safe political and legal space for the environment and outlines a number of alternative approaches, which would enable governments to move the current negotiations on the relationship between trade rules and MEAs from the WTO to a more suitable forum. Additionally, the emergence of more environmental related trade disputes, such as the recent trade dispute over genetically modified organisms between the US, Canada, Argentina and the EU, has re-emphasised the need for an alternative dispute settlement procedure to that of the WTO for solving trade and environment conflicts. With a view to illustrate that alternatives to the WTO do exist, the objective of the paper is to provide information on the most relevant options. It also elaborates on a few proposals for institutional reforms that would strengthen these alternative institutional options. It pays particular attention to the role of the United Nations Environment Programme (UNEP).

Chapter one briefly illustrates the failure (a) of the current WTO negotiating process to find a political and juridical solution that would safeguard environmental agreements from WTO rules, and (b) of public international law to offer any clear legal guidance as to how a trade and environment dispute should be solved. The chapter also explains the methodological approach followed. In assessing the various alternatives identified, the paper makes use of a set of evaluation criteria, such as the environmental expertise available, the transparency of the procedures, the political significance of the outcome and the openness to NGO input. In doing so, the paper highlights both the advantages and limitations of each option presented. The paper compares each alternative with the WTO.

Chapter two explores possible alternative fora to paragraph 31(i) of the WTO's Doha Development Agenda (DDA) for debating the trade and environment relationship. The paper elaborates upon the following alternatives:

- The International Court of Justice (ICJ);
- The United Nations International Law Commission (ILC);
- The International Court of Environmental Arbitration and Conciliation (ICEAC);
- A possible independent working group of interested Governments.





Chapter three advances a set of options for an alternative mechanism to that of the WTO's Dispute Settlement Body (DSB) for solving trade and environment dispute. The paper describes the following options:

- Good offices, mediation or conciliation;
- The Permanent Court of Arbitration (PCA);
- The International Court of Justice (ICJ);
- The International Court of Environmental Arbitration and Conciliation (ICEAC);
- A Joint compliance & dispute settlement mechanism for multiple MEAs;

Chapter four puts forward recommendations as to what role UNEP would be expected to play in facilitating the implementation of the options proposed, given the relevance of UNEP in all environmental matters. The paper proposes that, given its skills and technical capacity, on the one hand, and the political constraints that hamper UNEP's political freedom on the other, UNEP ought to focus on strengthening its technical role in order to influence the policy debate by becoming a key player on technical grounds. The paper suggests, for example, establishing a "clearinghouse" within UNEP for identifying successful examples of MEA trade-measure implementation.

Chapter five, drawing from the previous chapters' analysis, makes a case for the International Court of Justice and the United Nation's International Law Commission as the most suitable options for clarifying the WTO/MEA relationship thanks to their legal and environmental expertise, the transparency of their process and their independence from trade interests.

With reference to an alternative dispute settlement procedure, the paper suggests, again, the International Court of Justice (ICJ) as the most desirable alternative, followed by the Permanent Court of Arbitration (PCA), given their independence from trading interests, their environmental expertise, their transparency and their openness to stakeholder participation. The paper concludes that, according to the evaluation criteria applied, the WTO would constitute the least suitable of all the options considered, both as a forum to set rules for the relationship between trade and MEAs, and as a forum to settle disputes between trade and environmental regulations.

The paper concludes by offering governments and other decision-makers a set of policy recommendations. **The main policy recommendation being that more suitable alternatives to the WTO do exist and are available for governments to exploit, both for debating the principles dictating the WTO/MEA relationship, as for settling disputes between trade and environment matters.**

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List of Abbreviations

CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species
CTE	Committee on Trade and Environment
CSD	Commission on Sustainable Development
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
EU	European Union
ECOSOC	Economic and Social Committee of the United Nations
FAO	Food and Agricultural Organisation
GATT	General Agreement on Tariffs and Trade
GMO	Genetically modified organism
GA	General Assembly
ICEAC	International Court for Environmental Arbitration and Conciliation
ICJ	International Court of Justice
ILC	International Law Commission
MEA	Multilateral Environmental Agreement
NGO	Non-governmental organisation
PCA	Permanent Court of Arbitration
UNCLOS	UN Convention of the Law of the Seas
UNCITRAL	United Nations Commission
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
US	United States
WHO	World Health Organisation
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation

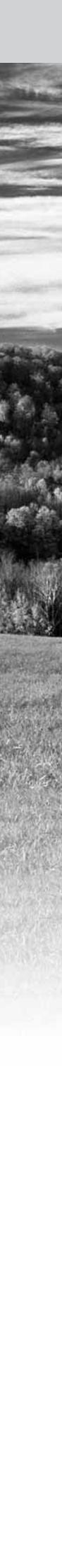
1. Trade and environment: state of play

This paper addresses how to ensure that policies and regulations to implement international agreements to protect the environment and natural resources are not sidelined by multilateral trade rules. In a nutshell, this conflict revolves around the question of whether, and to what extent, MEAs can implement environmental policy measures that restrict or impede trade by prohibiting the sale or use of specific products considered environmentally harmful. It explores the need for an alternative-negotiating forum and for a fundamentally revamped dispute settlement system outside the WTO for trade and environment lawsuits.

1.1 The failure of the Doha Development Agenda (DDA)

Although the issue of trade and environment has been on the table at the WTO since its very inception, there has been little progress towards finding a solution. Meanwhile, recent developments are putting MEAs further into jeopardy. In 2001, the World Trade Organisation's (WTO) so-called Doha Development Agenda (DDA)¹ initiated a set of negotiations on the relationship between the WTO and MEAs. WTO negotiations, between 2001 and 2005, not only have failed to yield any tangible result – much of the discussions within the WTO have in fact been focusing on technicalities rather than progressing on the principles for clarification. The current WTO negotiations are failing to bring any progress in terms of safeguarding existing environmental standards and emerging regimes of international environmental governance from subordination to multilateral trade rules. Due to a strong pro-liberalization lobby, attempts to strengthen MEAs and international environmental governance, against a purely economically driven international agenda, are proving challenging. The negotiations on paragraph 31 (i) of the DDA, have given reason to believe that global environmental standards, represented by MEAs, are unlikely to prevail over trade interests once a dispute over the trade implications of MEA arises. Moreover, DDA negotiations, as well as having failed to provide any further institutional and legal clarification, are threatening to set rules and criteria for the use of trade measures in both current and future MEAs. The outcome of the current DDA negotiations may well be the recognition of a limited number of MEAs as being WTO consistent, regardless of other MEAs' merits. In turn, this could hamper the ability of governments to implement MEAs and regulate trade in favour of the environment (see box 1).

1 See para. 31 (i) of the Ministerial Declaration 2001.



Moreover, the fact that all negotiations within the current Doha round of trade negotiations are part of a “single undertaking”, means that negotiations are conducted as a single package and gains in one area are likely to be balanced by concessions in others. The negotiations on the WTO-MEA relationship are thus being conducted as part of a “tit for tat” economic bargaining process, in which environmental protection may be traded away for specific economic gains. WTO negotiations on the trade-MEA relationship cannot deliver results that will guarantee, nor allow, the protection and strengthening of MEAs.

In short, it is highly unlikely that the negotiations within the Committee on Trade and Environment (CTE) will lead to a ‘safety net’ for MEAs. This view is supported by the fact that only a few MEA Secretariats are allowed to follow the negotiations directly and, even then, only on an ad hoc basis. Furthermore the MEA secretariats may only intervene when addressed, or at the end of the session.

BOX 1: THE GMO TRADE DISPUTE AT THE WTO

The current dispute between the EU and US, Canada and Argentina over EU-marketing and use restrictions for genetically modified organisms (GMOs) exemplifies the risk WTO rules pose to high national environmental and health protection standards. The case essentially revolves around the right of countries to apply the precautionary principle when risk assessments and available scientific methods and data do not provide conclusive scientific information on the safety of a product. Hence, the WTO will decide to what extent countries can unilaterally set consumer and health standards that are higher or more trade restrictive than those of other countries (as reflected by international standards). The WTO’s deliberation will also indicate to what extent countries like the US can use WTO rules to impede or block efforts of other countries to implement national environmental standards that may prove higher than their own.

At the time of writing (September 2005) it is unclear how the WTO Panel will decide, but it is already clear, that the WTO is not the appropriate forum to rule on such matters. The panel referred the case to GMO experts in order to get guidance on whether the risk assessment procedures applied by the EU were appropriate accepting that they do not have sufficient scientific knowledge. These experts presented their opinion on highly complex scientific questions

including 20 different product applications and assessment processes that have been identified by the US as being overly restrictive. The Biosafety Protocol to the Convention on Biological Diversity provides for more detailed rules for risk management foreseeing more flexibility for governments in managing and restricting the use and trade in GMO products on the national level. In the dispute settlement submissions to the WTO the EU refers to the Biosafety Protocol as a model for how to manage unknown risks related to GMOs. However, since the US has not signed the Biosafety Protocol it is unclear to what extent the panel will take into consideration the provisions of the protocol as a legitimate basis for specific unilateral approaches for GMO risk management. This uncertainty is problematic given its negative effects on high unilateral standards for GMO related risk management. There have also been incidences where countries such as Sri Lanka revoked their original ban on GMOs after coming under pressure from GMO producers and being threatened with a costly WTO court case.

An alternative dispute settlement procedure would therefore have to provide a fairer and more objective framework for settling trade and environment conflicts and ensure that the various dimensions of sustainability are fully accounted for.

Many environmental civil society organisations have increasingly voiced their concerns about the potential negative outcomes of WTO negotiations on the WTO-MEA relationship.² Shifting the debate on the WTO-MEA relationship, as well as the settlement of disputes over the trade implications of MEAs, out of the WTO would allow for a more structured and open approach to the clarification of the relationship between these two sets of rules. Such a move can also help reaching an agreement on international governance principles that ensure that environmental and development targets are not undermined by trade liberalisation.

The political argument for an initiative aiming for a negotiating forum and dispute settlement process outside the WTO – apart from the constant threat to the effective implementation of MEAs posed by the WTO – is based on the observation that the need to find solutions for cross-cutting issues, such as conflicts between multilateral trade and environment rules, is likely to increase. The conflict over patent rights and the provision of essential medicines in developing countries is another example where ethical, health, developmental and human right considerations have come into conflict with trade-related rules (Ashcroft 2003).

Economic and other forms of globalisation (i.e. social, cultural) contribute to a growing number of international regimes and treaty systems for the regulation of interacting governments and other actors. As a result conflicts between international regimes can be expected to increase. Although public international law is often regarded as fragmented, due to the lack of coherence between governments' positions at national level, public international law is very much a politically driven system of internationally agreed rules which governments have actively decided to cooperate and abide by (Abbott and Snidal, 2001). It should be emphasized that WTO members are able to opt at any time for an alternative forum to that of the WTO for clarifying the WTO/MEA relationship and for solving trade and environment disputes.

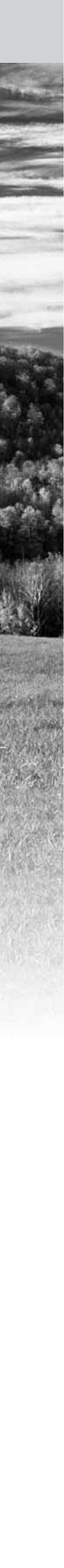
The need for finding an equitable and fair solution to conflicts between environmental and trade rules which pit economic against social, developmental and environmental goals, will not disappear but become increasingly pressing. The objective of this discussion paper is to illustrate that alternatives to the WTO are both desirable and viable, and to show that governments indeed have the possibility to put into place new approaches to solving trade and environment conflicts.

1.2 Methodology

In order to allow for a differentiation between the various options here identified and allow a value judgement to be made regarding their appropriateness, especially when juxtaposed to the WTO, a set of qualitative criteria has been applied as an analytical toolkit to each option. These qualitative criteria can be prescribed as procedural, as well as institutional, characteristics of the particular option examined:

- Does this option already exist?
- Is it part of the UN-System?
- Are its decisions legally binding?
- What is its political significance?

2 See Friends of the Earth International 2003 Don't let the WTO trade away our environment at the WTO, available at <http://www.foei.org/publications/pdfs/mea-en-final.pdf>, The need for strengthened environmental governance, available at <http://www.foei.org/publications/trade/GMEF.rtf>., Forum Umwelt und Entwicklung/FoEE/Greenpeace/ 2004: Discussion Paper: The new EU approach to the MEA negotiations, global governance and the need to address the MEA trade linkage.

- 
- How independent is it from government influence?
 - How independent is it from trading interests?
 - Does it have an established track record on environmental expertise?
 - How transparent is it? Would the public have access to its proceedings? Are documents openly available and are stakeholders able to provide input?
 - Is a broad range of input/expertise available and/or demanded, including input by NGO expertise?

In the following chapters, this set of qualitative criteria will be applied to all alternatives presented in order to identify the option(s) that will be best suited to undertake the clarification of the relationship between WTO and MEA rules and serve as an alternative dispute settlement forum. The WTO itself is compared with all other alternatives.. This contributes to clarifying the desirability of the various options in relation to the WTO.

2. Alternative fora for developing rules clarifying the WTO & MEA relationship

The WTO's DDA round can be considered as the first institutional attempt to provide a political space for clarifying the WTO/MEA relationship. This chapter focuses on the identification of possible alternative fora to the WTO for developing and/or codifying principles of public international law that support a legally predictable approach to the settlement of disputes between MEAs and the WTO. The paper identifies four options:

- the International Court of Justice,
- the International Law Commission,
- the International Court of Environmental Arbitration and Conciliation, and
- Independent Group of Interested Governments.

2.1 The status quo: WTO negotiations

Bearing in mind the set of qualitative criteria chosen for assessing the desirability of an alternative debating forum for the WTO/MEA relationship it is clear that the only strength offered by the WTO negotiations lies in the WTO's institutional ability to factually determine trade relations and develop international trade law as a result of its quasi-mandatory dispute settlement mechanism. However, when assessed against all other criteria, the WTO scores very low. The WTO was set up as a separate organization, outside of the United Nations. It is thus not accountable to the UN General Assembly and it does not always follow UN rules for democratic decision-making in which all countries participate in the negotiations and final decision-making on basis of a one-country one-vote system. On the contrary, it has become WTO practice to organize negotiating sessions that involve only the most powerful countries, through so-called mini-ministerials and green room sessions. The agreements reached at such sessions are subsequently dropped upon other members on a "take it or leave it" approach. The negotiating process within the WTO is highly intransparent, at times even secretive. The general public has no access to the proceedings, nor is it allowed to formally provide input into the negotiations. Public symposia and accreditation at Ministerial Conferences can allow third parties, such as NGOs, to bring relevant information to the attention of the WTO secretariat and WTO members – but these inputs are usually ignored.

Moreover, WTO negotiations are by definition reliant on governments' political influence, with an inherent bias towards those more economically powerful. With reference to its expertise, the WTO, qua mandate, considers non-trade issues exclusively from a trade perspective (e.g.: it may consider the impacts of environmental and social standards on trade, but not the environmental and social impacts of trade itself). As a result of this, the WTO cannot develop objective rules for weighing different societal values against trade interests.

2.2 International Court of Justice

The International Court of Justice is the principle legal institution of the UN-system. The court has a dual role: to settle in accordance with international law the legal disputes submitted to it by governments, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.

ADVANTAGES The advisory opinion is not a verdict regarding a specific case but a legal analysis and assessment of a specific question in the realm of public international law. The court's advisory procedure is modeled on that for contentious proceedings, with the sole difference that the ICJ decides which government and organizations may submit input into the process and provides them with the opportunity to present written or oral statements. In principle its advisory opinions are consultative in character and therefore not binding as such on the requesting bodies. Certain instruments or regulations can, however, provide in advance that the advisory opinion shall be binding. An alternative political and legal discussion on the subject of the WTO/MEA relationship could thus be initiated by requesting the ICJ for an advisory opinion. The ICJ seems to be an appropriate institution since, on the one hand, it holds the necessary legal competence and political insight necessary for defining such principles, and on the other hand it is also sufficiently independent from governments and trade interests to formulate unbiased legal principles on which the settlement of trade and environment conflicts could be based.

LIMITATIONS The advisory procedure of the court is open solely to intergovernmental organisations, with just five organs³ and 16 specialised agencies⁴ of the UN authorised to request advisory opinions. Since UNEP is classified as a subsidiary organ of the General Assembly, it cannot request an advisory opinion itself but can only recommend the UN General Assembly to initiate a procedure. Likewise, the Commission on Sustainable Development, a sub-Commission of ECOSOC, would only be able to go through ECOSOC. However, two specialised agencies that might show an interest in requesting an advisory opinion to the ICJ may include the World Health Organisation (WHO) and Food and Agriculture Organisation (FAO), given the impact of trade rules on standards aimed at protecting and promoting human health and sustainable agriculture.

3 General Assembly, Security Council, Economic and Social Council, Trusteeship Council, Interim Committee of the General Assembly, Committee on Applications for Review of Administrative Tribunal Judgements.

4 International Labour Organisation (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), International Bank for Reconstruction and Development (IBRD), International Finance Corporation (IFC), International Development Association (IDA), International Monetary Fund (IMF), International Civil Aviation Organization (ICAO), International Telecommunication Union (ITU), World Meteorological Organization (WMO), International Maritime Organization (IMO), World Intellectual Property Organization (WIPO), International Fund, for Agricultural Development (IFAD), United Nations Industrial Development Organization (UNIDO), International Atomic Energy Agency (IAEA).

2.3 International Law Commission⁵

The International Law Commission (ILC) was established by the General Assembly in 1947 to promote the progressive development of international law and its codification. The Commission, which meets annually, is composed of 34 members elected by the General Assembly on a five-year term and serving in their own capacity, not as representatives of their governments. Its principle objective is to encourage the progressive development of international law and its codification.

ADVANTAGES Most of the Commission's work involves the preparation of drafts on topics of international law. The Commission chooses some topics and others referred to it by the General Assembly or the Economic and Social Council. When the Commission completes draft articles on a particular topic, the General Assembly usually convenes an international conference of plenipotentiaries to incorporate the draft articles into a convention that is then open to States to become parties to. The mandate of the Commission appears particularly appropriate since it covers the need to find a legal, principle-based and objective solution for dealing with two different but equal bodies of international law. In addition, one of the key elements of its work has been the drafting of arbitration rules and institutional frameworks for arbitration. As far as its mandate goes, the Commission is free to choose its own areas of activity, allowing for a flexible and broad mandate. The ILC also appears to be the only body within the UN-system able to actively develop public international law and bring it directly to the attention of the General Assembly. The ICJ is currently undergoing a major analysis of the fragmentation of international law, which also addresses the problems arising from potentially conflicting regimes like trade and environmental regimes. It would therefore be possible for ILC to establish a "sub-commission" charged with dealing with the clarification of the interrelationship between trade and MEA rules: by drafting specific arbitration rules for trade-MEA conflicts.

LIMITATIONS Although the ILC benefits neither from a specific environmental mandate, nor expertise, it is worth bearing in mind that a number of agreements regarding natural resources management (e.g. straddling fish stocks agreement) and the UN Convention of the Law of the Seas (UNCLOS), have been negotiated under its auspices.⁶ If the ILC were to engage on the subject of clarifying the WTO/MEA relationship, then relevant experts from a number of MEAs would necessarily have to be brought into the process. Another noteworthy limitation lies in the ILC's timeframe. Many of its processes normally require several years to reach completion, due to the lengthy consultation process with governments and other UN organs.

2.4 International Court of Environmental Arbitration and Conciliation (ICEAC)

The International Court of Environmental Arbitration and Conciliation (ICEAC) was established in Mexico in November 1994, by 28 lawyers from 22 different countries, as an attempt to provide an independent international alternative means of settling environmental conflicts. Its office is based in San Sebastian,

⁵ Unless cited otherwise the information contained in this section has been drawn directly from the ILC website: www.un.org/law/ilc.

⁶ See ILC programme at <http://www.un.org/law/ilc/progfra.htm>

Spain. It is an institution⁷ independent of governments and thus not an intergovernmental institution like, for example, the ICJ. It provides an independent forum for conciliation and arbitration as well as consultative opinions. The Court engages in conciliation and arbitration as well as consultative opinions.

ADVANTAGES The ICEAC accepts cases submitted by governments, organisations and NGOs. The ICEAC is committed to the implementation of the right to public participation in decisions related to the environment, and the right to broad and affordable access to justice, in accordance with Principles 10 and 26 of the Rio Declaration and the principles within the Aarhus Convention. The costs of the Court's judicial work are in fact proportional to the complexity of the case, and non-profit organisations and individuals with a proven incapacity to afford the judicial fees are exempted from all court and procedural costs. ICEAC's consultative opinions have value in that they are legal recommendations in spite of the fact that they are not binding on the other party. An advantage of the ICEAC is its independence from governments and large international or intergovernmental organisations. The flexibility of the ICEAC's procedure for issuing consultative opinions and its independence would offer a well suited international forum for contributing to the development of appropriate solutions to the MEAs-trade rules conflict.

LIMITATIONS However, the ICEAC suffers from limited recognition and acceptance as an institution that can serve as a forum for developing such principles. It is neither a government supported organization nor is it part of the UN-system, lacking therefore the political and legal legitimacy necessary for making a substantial contribution to the clarification of WTO/MEA relationship.

2.5 Independent Group of interested governments

In contrast to the two alternatives just discussed, an independent group of interested governments does not yet exist. Its idea originated from a previous discussion paper⁸ and postulates the creation of a working group, or policy network, created amongst interested governments to initiate a discussion process within the UN-System with the aim of drafting general, legally sound rules for solving conflicts between trade and MEA measures. The working group would address the general problem of how to weigh the principles of different rule systems against each other. Such a body would comprise ideally environment, trade and development experts charged with assessing the trade implications of an MEA in the context of the promotion of human health, the protection of biodiversity and natural resources, as well as from a development perspective. This initiative could also build on existing work within MEA secretariats and focus on how MEAs define their relationship to trade rules as well as outlining existing systems of rules and conflict resolution procedures and how they work.

7 ICEAC is not officially sponsored by governments nor do they send judges or other staff to this courts as they do in intergovernmental organisations like the ICJ.

8 FoEE, Greenpace, German Forum on Globalisation, Discussion Paper: The new EU approach to the WTO negotiations related to MEAs (Para 31 (i) DDA), global governance and the need to address the MEA-trade linkage in the UN-System, July 2004, available at <http://www.foeeurope.org/trade/WTO-MEA-04-07-2004.pdf>

ADVANTAGES This working group could be created, for instance, under one of the UN organs, such as the General Assembly, the Economic and Social Council, UNEP or the Commission on Sustainable Development. The drafting and implementation of an understanding regarding the relationship between WTO and MEA rules should be subject to the UN-rules for participation of NGOs and civil society. In addition, a direct link could be created with other institutions part of an evolving global governance structure. A working group could draw on UNEP both as a facilitator and as an expert. Although the negotiations might require several years, a bi-product of this process may well be the clarification of a government's position on the WTO-MEA relationship, which alone would bring a substantial contribution to the debate.

LIMITATIONS Unless the working group was composed of independent experts, such a working group and the debate that would generate from it, are likely to prove highly political and biased and might therefore fall short of reaching consensus on an acceptable solution. Moreover, the political relevance of the working group's outcome would be to a large extent dependent on the political weight of the participating governments.

2.6 Preliminary Conclusions

Table 1 provides some insights to the suitability of the various options here discussed for addressing the need to clarify the relationship between WTO and MEA rules according to the qualitative criteria applied.

TABLE 1: COMPARATIVE ADVANTAGES AND LIMITATIONS OF CHAPTER 2					
	WTO	ICJ	ILC	ICEAC	IGIG
Existence	+	+	+	+	-
Link to UN-system	-	++	++	-	0
Legally binding	++	++	0	-	-
Political significance	+	+	+	-	+
Independence from governments	-	++	+	++	-
Independence from trade policy	-	+	0	++	-
Previous environmental expertise	0	+	+	+	++
Transparency/Access	0	0	0	+	++
Scope of Input	0	-	+	++	0

+= GOOD; -= NOT GOOD; 0= INDIFFERENT/UNCLEAR

*Independent Group of Interested Governments

As far as the WTO is concerned “scope of input” and “previous environmental expertise” were both given a zero, “0”, rather than a minus, “-”, because of the amicus curie, public symposia and information sessions with MEAs which in principle allows third parties, such as NGOs, to bring relevant information to the attention of the WTO secretariat and WTO members. Due to Art XX of the GATT, discussions undertaken within the CTE and some environment related disputes, the WTO has been exposed to some extent to the goal of environmental protection. Hence it would be unfair to assign the WTO a minus (“-”) for these categories. However, as argued in chapter 1 and 2, the WTO addresses such conflicts exclusively with reference to possible trade impacts, failing to take duly into account the environmental impacts of trade.

With reference to the governmental initiative, the “0” in “scope of input” and the “0” in “transparency” reflect the insecurity concerning the degree of input and transparency that non-governmental actors can realistically expect from such a negotiating process.

2.7 Findings

As shows in the table, the WTO scores poorly on almost all fronts, failing to prove a suitable forum for clarifying the relationship between trade and MEA rules due to its lack of environmental expertise and heavy bias towards trade interests, as well as to the lack of transparency that characterises its negotiating process.

In contrast, the table would suggest the ICEAC as the most promising forum from an environmental perspective. However, as discussed above, it remains unclear the extent to which governments would acknowledge the ICEAC’s deliberations for establishing generally valid rules of public international law.

From a political and strategic point of view therefore, the ICJ might be the preferred option. The ICJ is part of the UN family, it comprises the legal competence necessary to adequately consider environmental and trade interests in an unbiased fashion, it follows transparent and predictable rules and procedures and benefits from much international recognition. However, before considering an issue, the ICJ would require a request from the GA, ECOSOC or one of the specialized agencies.

The ILC also provides a valid option and is in fact already analysing the problems caused by the fragmentation of international law. It might be a logical follow-up to this undertaking to develop specific recommendations regarding potential conflicts between international trade and environmental rules. The ILC could decide itself to take this issue up, or, alternatively, the UNGA could request it to do so.

3. Existing dispute settlement and potential alternatives

This chapter focuses on the more concrete question of addressing trade-related conflicts in the context of MEA rules by looking at a set of possible alternatives to the WTO's dispute settlement mechanisms. It should be emphasized that, according to most MEAs, it is up to the parties to a specific dispute if they want to involve a formal dispute settlement mechanism and, if so, which mechanism to opt for.

International law recognizes the following mechanisms to settle a dispute:⁹

- **Diplomatic negotiation:** The oldest and most practical of the methods of peaceful settlement of disputes. It is considered a prerequisite before international adjudication.
- **Good offices:** A peaceful settlement technique whereby a third party acting with the consent of the disputants serves as a friendly intermediary without necessarily offering the disputing parties substantive suggestions for settlement.
- **Mediation:** A peaceful settlement technique whereby a third party acting with the agreement of the disputants actively participates in the negotiations, offering suggestions concerning the terms of settlement and, in general, trying to reconcile the opposite claims and appeasing any feelings of resentment between the parties.
- **Commissions of inquiry:** Independent or party-initiated agreement to allow a neutral commission to investigate and report to the parties in question on the disputed facts.
- **Conciliation:** A procedure whereby a third party is appointed with the agreement of the disputants to conduct fact-finding procedures and recommend a concrete solution for settlement. The recommendation is not binding on the parties.
- **Adjudication:** The process of bringing a dispute before a judicial tribunal for resolution according to established rules of law.
- **Arbitration:** In modern international practice, a more formal method of legally binding settlement of disputes by judges of the parties' choice, agreed-on rules of procedure, and law.

⁹ Source: Van Dervort, Thomas R., International Law and organization: An introduction, Sage publication, Inc. USA, 1998

All MEAs contain provisions for dispute settlement among their parties or in case one party does not comply with the MEA rules. The existing dispute settlement procedures of MEAs are based on conciliation or arbitration procedures and/or dispute settlement by the International Court of Justice. However, hardly any such dispute, e.g. over implementation failures, ever reached the stage of an official dispute settlement procedure beyond diplomatic negotiations. Political or economical interests usually cause the restraint of MEA parties to initiate such disputes. Either MEA parties are convinced that an official dispute settlement will do more harm than good since it might just lead to the retreat of the party, which is in non-compliance. Or they fear that a dispute will lead to a larger conflict ending in some form of economic sanctions that may hurt their population or economy as a whole.¹⁰ Moreover, it is important to make a distinction between disputes where both conflicting parties are signatories to a specific MEA – whose rules have triggered a conflict over its trade impacts – and those disputes where just one of the conflicting parties is a signatory to the MEA in question. A party to a lawsuit who is not a signatory to the MEA whose trade provisions are being disputed, does not have to accept the dispute settlement procedure of an agreement it has not signed to. An important exception concerns the mandatory jurisdiction of the ICJ, which has been accepted by (anno 2005) 65 States. As a result, these countries will have to accept the jurisdiction of the ICJ whenever another party opts for the court as its preferred dispute settlement mechanism. As with the previous chapter, each option will be assessed according to the same set of qualitative criteria with the WTO. This briefing only discusses dispute settlement mechanisms where a third party is involved. The alternative dispute settlement fora here assessed are:

- Good offices, Mediation and Conciliation;
- The Permanent Court of Arbitration (PCA);
- The International Court of Justice (ICJ);
- A Joint MEA compliance and dispute settlement mechanism as a new body, and
- The International Court of Environmental Arbitration and Conciliation (ICEAC).

3.1 WTO dispute settlement mechanism in comparison with alternative dispute settlement fora

In contrast to the MEA dispute settlement procedures, the WTO dispute settlement mechanism has developed into one of the most important and powerful international legal procedures. This strength of the WTO's dispute settlement mechanism is the result of the legally binding nature of the deliberations issued by the dispute settlement panels and the appellate body, which allow for economic sanctions to be applied when governments fail to comply. Many supporters of the WTO argue that the recent opening up of the dispute settlement mechanism to other areas of public international law could be taken as a positive and encouraging development.¹¹ However, this can hardly be taken as a guarantee that the WTO will continue with this interpretation in a systematic fashion in future disputes, nor does it offer a clarification for the legal status of environmental measures taken on the basis of MEAs. Moreover, when the qualitative criteria are applied to the WTO's dispute settlement mechanism, it becomes apparent how the WTO fails to

10 Such processes could be observed when, for example, Russia was in non-compliance with some provisions of the Montreal Protocol.

11 The Appellate Body of the WTO stated in the Reformulated Gas case that the "new Dispute Settlement Understanding 'reflects a measure of recognition that the General Agreements is not to be interpreted in clinical isolation from public international law'". In the Shrimp Turtle case, the AB turned to five MEAs. (See Mann/Porter 2003: viii).

prove competent in settling trade and environment disputes (all recent environment related disputes in the WTO - such as the beef hormone, the shrimp-turtle, the asbestos and the GMO cases - involved comprehensive consultation of experts).

Similarly to limitations identified for its negotiating procedures the WTO's dispute settlement mechanism is highly intransparent. Governments' submissions during a settlement procedure are not necessarily publicly available. The general public also has a limited scope for providing formal input (eg: amicus curie) and there is no obligation on the part of the WTO to take notice of the input provided. Again, the WTO's dispute settlement mechanism lacks any environmental expertise: members of the panels are usually trade diplomats from WTO member states who lack case-specific expertise, especially with reference to non-trade concerns such as environmental standards or MEA provisions. Even the consultation of experts does not necessarily alter this fundamental bias towards liberalization because it is up to the panel to interpret the findings of the experts in the context of the trade liberalization framework.

3.2 Good offices, Mediation and Conciliation

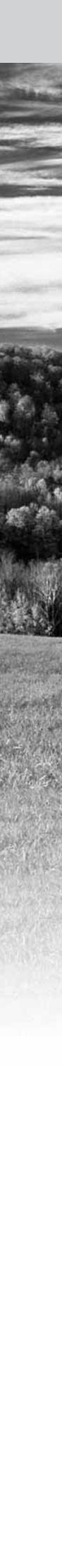
Good offices, mediation and conciliation procedures and flexible dispute settlement mechanisms, which allow for the parties to determine themselves which third party to involve as a mediator and/or recommend a settlement on basis of a fact-finding procedure. It should be noted that the WTO dispute settlement mechanism itself provides for the WTO Director General to offer good offices or mediation in case of a dispute over trade rules. However, if the dispute concerns a MEA, parties would also be free to ask a more neutral party, such as the UN Secretary General, or a party with specific environmental expertise, such as the Director General of the UN Environment Program (UNEP).

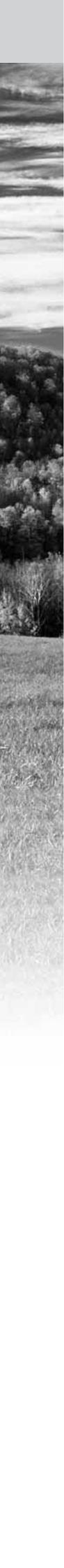
ADVANTAGES The main advantage of good offices, mediation or conciliation is the flexibility of the procedure. It creates the possibility to involve a party with specific environmental expertise like the Director General of UNEP as a mediator or conciliator in the dispute settlement procedure. This could be particularly useful when a dispute concerns a matter, in which the environmental expertise of a conciliator would form a proper basis for the settlement of the dispute.

LIMITATIONS As the procedure is non-binding, agreement amongst the parties would be required on the procedure to follow and the third party to involve, which could be complicated in practice. As these mechanisms are basically variations on diplomatic negotiation, parties would have a major influence upon the outcome of the settlement. Also, the recommendations are not binding upon the parties. There are no specific requirements for transparency and stakeholder involvement, which means that they are likely to be limited in case of controversial disputes.

3.3. Permanent Court of Arbitration

PCA is the oldest institution discussed here. It was established in 1899 in the follow-up of the first Hague peace conference and is based on the 1899 and 1907 Hague Conventions on the Pacific Settlement of International Disputes. Currently 103 countries are parties to one or both of the Conventions. Each Member State may designate up to four arbitrators, known as "Members of the Court." The court is institutionally and legally independent from the United Nations-system. Nevertheless, it observes the princi-





ples of public international law that evolve in this system by, for example, basing its rules on those developed within the UN-System. On June 19, 2001 the PCA Administrative Council adopted by consensus the Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ("Environmental Rules"). These rules result from the efforts of the International Bureau, This is the PCA Secretariat, together with a working group and drafting committee of experts in environmental law and arbitration. They are based on the United Nations UNCITRAL Arbitration rules (see PCA 2002). The Environmental Rules seek to address the principal lacunae in environmental dispute resolution, which are identified by a PCA Working Group. The PCA is presently active drafting environmentally related dispute settlement clauses at negotiations being facilitated by several United Nations convention secretariats. The United Nations Economic Commission for Europe for example, has approved a reference to the PCA Environmental Arbitration Rules in its draft "Legally Binding Instrument on Civil Liability under the 1992 Watercourses Convention".

ADVANTAGES The PCA is the only international legal institution that developed specific rules for the settlement of inter-state disputes over environmental issues. The rules are very flexible and allow countries to determine, to a large extent, how the process is run (e.g. they can determine whether one, three or five members sit on a panel). NGOs and other "private parties" can call on the Court. The environmental expertise involved depends entirely on the submissions of the parties, however the conciliator(s) can ask for additional submissions of information. The settlement of the dispute is binding for the parties as they sign a written settlement agreement.

LIMITATIONS Despite the specific arbitration rules related to natural resources or the environment there seem to have been only two cases submitted to the PCA (both concern a dispute between Ireland and the UK regarding discharges from the Sellafield nuclear plant into the Irish Sea). Thus, there is only limited experience with actual cases. In addition, the arbitration process does not need to be open to the public. Parties can reserve their right to confidentiality. And finally, as with the other courts, a settlement procedure can only be initiated if all parties involved agree to undergo an arbitration procedure.

3.4 International Court of Justice

Many MEAs foresee as one option dispute settlement by the IJC as a possibility to arrive at a decision that is then legally binding for the parties involved in the dispute as long as the dispute parties agree to submit the case to this court.

ADVANTAGES The ICJ is the principal judicial organ of the United Nations. The court has a dual role: to settle in accordance with international law the legal disputes submitted to it by states, and to give advisory opinions on legal questions referred to it by authorized international organs and agencies. The court deliberates in session and then delivers its judgment at a public sitting. The judgment is final and without appeal. Should one of the states involved fail to comply with it, the other party may have recourse to the Security Council of the United Nations. The ICJ has also the advantage of having an environmental chamber (albeit it has never been asked to decide on a case). The procedure to bring a case to the environmental chamber is similar to the general submission procedures: the dispute parties need to indicate that they want the environmental chamber to handle the case.

LIMITATIONS The main disadvantage about this option is that the environmental chamber has never been called upon to rule in a case or give an opinion on a specific conflict and subsequently there are no experiences with regards to the quality and amount of environmental expertise to be taken into account by the ICJ in a potential case. Another limitation is the fact that NGOs cannot submit a case, neither is it clear whether the court would consider information regarding the environmental aspects of the case in form of amicus briefs.

3.5 International Court for Environmental Arbitration and Conciliation (ICEAC)

As mentioned earlier on in the paper, 28 lawyers from 22 different countries established the ICEAC in Mexico on November 1994, as a form of institutionalised arbitration and as an attempt to provide an independent international alternative means of settling environmental conflicts. Cases can be submitted by governments, organisations (like UNEP or MEA secretariats) and NGOs.

ADVANTAGES The ICEAC facilitates, through conciliation and arbitration, the settlement of environmental disputes submitted by States, or natural or legal persons.¹² The court benefits from jurists representing all political and legal cultures and geographical areas, providing the Court with a consistent approach to the solution of environmental conflicts. In the settlement of a dispute or in the issue of consultative opinions, the Court applies international treaties (general rules and principles of International Environmental Law), relevant national or sub-national law (in accordance with generally accepted rules of Private International Law) as well as any other principle (including rules and standards which the Court deems relevant and appropriate, including equity). In arbitration, the decision by the arbitrator is final and binding on the parties. Conciliation constitutes a binding agreement between the parties that has been negotiated by the dispute parties. In this case the ICEAC acts as a facilitator of the negotiations.

LIMITATIONS Although the independence from governments and government-driven international organisations proves important for guaranteeing a fair and equitable dispute settlement such an institution also runs the risk of lacking political support from governments. Indeed many states are reluctant to submit themselves to the court's adjudication, particularly because of its close links to individual environmental activists and NGOs. In addition, despite the fact that its decisions are binding, enforcement of decisions will be a problem if there is insufficient political support by governments and no institutional connection to organisations promoting compliance with public international law. As a practical example, the ICEAC has issued a decision on the inter-relationship between the Convention on Biological Diversity and the TRIPS Agreement, which has generally not been given credit by either community.

¹² ICEAC website, <http://iceac.sarenet.es/Ingles/Fore.html>

3.6 Joint MEA compliance and dispute settlement

As pointed out above, a single MEA is in a weak position when it is confronted by the entire “WTO-regime” of international trade rules encompassing more than 20 specific agreements. Consequently, Friends of the Earth International (FoEI, 2003) suggested establishing a joint compliance and dispute settlement body covering a number of MEAs with the aim of increasing coherence among the MEAs with reference to dispute settlement procedures¹³. Although this option might also be impeded by the “non-party”-problem a dispute settlement mechanism common to a number of MEA would nevertheless extend the legal weight of this mechanism, since it acts not only for one specific agreement but for several similar to that of the WTO. It can therefore benefit from the experiences collected within the entire system and base its decision on a broader information base. It should be emphasized that this system would probably be a combination of existing dispute settlement mechanisms like the above-mentioned proposal to involve the Director-General of UNEP as a mediator or conciliator, and an arbitration procedure that refers to the ICJ if possible.

ADVANTAGES Through the participation of a broad array of environmental experts and policy makers, the process will ensure greater consideration to non-trade concerns and environmental expertise thereby going beyond a purely trade-focused agenda. It can also be designed as an open procedure in which participants and MEA secretariats can develop an appropriate solution based on commonly shared experience and knowledge. And most importantly, the joint mechanism would guard not only the effective implementation of the MEAs but also to a certain extent the system of international environmental governance.

LIMITATIONS The main problem with this option lies in the fact that there would be a need to re-negotiate the existing dispute settlement procedures of every participating MEA. Otherwise the legal status of the dispute settlement procedures and the rulings would remain unclear and may give rise to political conflicts on how to apply rules incorporated in the various MEA. Even in cases where MEA secretariats are under the institutional and administrative umbrella of UNEP, this process will not necessarily prove any easier. Any decision to change dispute settlement procedures can only be taken by the conferences of the parties (see e.g. UNEP 2001a, WTO 2003).

3.7 Preliminary Conclusions

A number of different dispute settlement options have been looked at as alternatives to the WTO. Although this analysis could not possibly list all relevant details about the legal and political frameworks that are relevant, this brief introduction of the various mechanisms showed that there are alternatives for an effective environment-trade dispute settlement can be build. Table 2 illustrates a comparative assessment of the various alternatives according to the qualitative criteria applied.

¹³ Friends of the Earth International (2003): The Need for Strengthened International Environmental Governance Position paper for the 8th Special Session of the Governing Council /Global Ministerial Environment Forum, Jeju, 29 - 31 March 2004.

TABLE 2: COMPARATIVE ADVANTAGES AND DISADVANTAGES, CHAPTER 3

	WTO	non WTO*	PCA	ICJ	ICEAC	joint-MEA
Existence	+	+	+	++	+	-
Link to UN-system	-	+	0	++	-	+
Legally binding	++	-	++	++	0	+
Political significance	+	+	0	+	-	+
Jurisdiction	++	-	+	+	-	0
Independence from governments	-	-	+	-	+	0
Independence from trading interests	-	++	0	++	++	++
Previous environmental expertise	0	++	+	+	+	++
Transparency/Access	-	0	0	+	++	+
Scope of Input	0	+	+	+	++	++

+= GOOD; -= NOT GOOD; 0= INDIFFERENT/UNCLEAR

* Good offices, mediation or conciliation by non-WTO third party like UNEP

On the question of whether decisions are *legally binding*, it should be emphasized that the decisions of the ICEAC, despite the fact that it is a private or non-governmental organisation, are legally binding for the parties who submitted themselves to the procedure of the court.

The WTO scores the highest exclusively with reference to *jurisdiction*, given that it is the only forum, here assessed, benefitting from mandatory jurisdiction over all cases involving WTO members - all WTO members being obliged to accept a case being handled by the WTO dispute settlement body [DSB] when it concerns a WTO agreement. Of course, countries that are not members to the WTO are free to reject the WTO DSB. Most other fora exert voluntary jurisdiction, meaning that the dispute can only be settled if both parties agree for the court to handle the case. The exception is the ICJ, which exerts mandatory jurisdiction over 60 of its member countries that have submitted a declaration stating that they will accept the Court's mandatory jurisdiction.

On the question of *previous environmental expertise*, it is clear that all institutions have some, respectively a good record of environmental expertise that is relevant to settle disputes about trade and MEA rules. However, one can assume that the environmental chamber of the ICJ, if it is called upon, will be able to draw on judges and other sources with an appropriate environmental expertise. The environmental expertise of a mediator or conciliator could be particularly high if parties would agree to involve the UN Environment Program in the settlement of a dispute, which is legally possible.

On transparency/access, the PCA is ranked slightly higher because it accepts submissions from NGOs, although a dispute can be handled on a confidential basis, if one party asks for such a handling. According to the ideas on which the proposed Joint MEA mechanism is based, it must be assumed that it

would be more transparent and accessible than the typical single MEA dispute settlement mechanism.

On scope of input, it is assumed that a Joint MEA settlement system has more resources than a single MEA to call for environmental expertise. In addition, not all MEAs allow for NGO submissions in dispute cases. As far as the other institutions are concerned the amount and source of environmental input depends to a certain extent on the judges or the arbitrators. The ICEAC is ranked higher than the IJC and PCA because it is more open to NGOs.

3.8 Findings

The table clearly illustrates that, out of all the options assessed, the WTO scores the lowest as a result of its failure to satisfy a number of criteria that are indispensable for modern, transparent intergovernmental institutions. Hence, according to the qualitative criteria applied to the assessment, the Joint-MEA dispute mechanism and the ICJ are ranked at the top, followed by ICEAC and the PCA. As stated, a joint mechanism could be the result of a combination of existing mechanisms.

Since the Joint MEA dispute mechanism does not yet exist, and would still be affected from the “non-party” problem, the ICJ would appear the preferable option. The ICJ also benefits from much legal and political significance and reputation as the principal legal UN organization. However, despite its environmental chamber, the ICJ does not have any extensive record of environmental expertise, although its judges do. Therefore, if such a lack of expertise were to be deemed unacceptable, then the choice of an alternative dispute settlement forum would have to fall either on the ICEAC or the PCA, which do hold much environmental expertise.

However, as discussed earlier on in relation to an alternative debating forum on the MEA/WTO relationship, the PCA would benefit from a greater recognition, both politically and strategically, than the ICEAC due to its intergovernmental status with governments as members. Moreover, the PCA is actively involved in environmental arbitration and follows closely the developments of MEAs.

Hence, based on this preliminary assessment, and from an environmental policy perspective that aims at securing environmental provisions in MEAs against trade policy interests, the PCA and the ICJ appear to be the most appropriate alternatives to the WTO dispute settlement mechanism. Additionally, the PCA is open to NGOs and it is regarded as an established intergovernmental institution based on multilateral agreements.

4. The role of UNEP

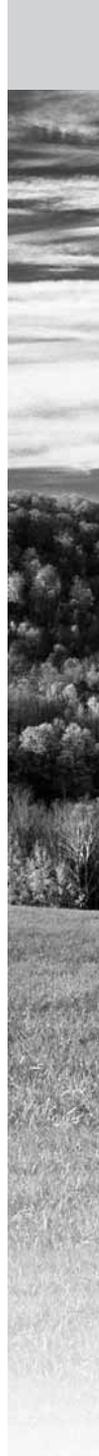
The fact that UNEP has not yet been highlighted as one of the key institutional players regarding the clarification of the trade and environment conflict is not meant to indicate that UNEP does not play a crucial role in this context. Indeed UNEP ought to play a central, albeit a somehow different role: rather than acting as an arbitrator UNEP should enhance its role as providing expertise and empirical knowledge. Thus, in addition to the preceding chapters this section will briefly examine – as complimentary element – the role of UNEP in supporting the process of establishing alternative dispute settlement fora and rules for resolving conflicts between the WTO and MEAs, or more generally, trade and environment conflicts. It first addresses the complex policy environment that tends to impede substantial programmatic efforts of UNEP towards trade and environment issues. Subsequently, the chapter also describes how UNEP interacts with the WTO and how it could ensure a more central role in the trade and environment policy debate.

4.1 A complex political reality

The role of UNEP is dependent on a complex political environment. Although some governments support the strengthening of UNEP's political, scientific and financial basis, much still needs to be done to achieve a wider consensus on these issues. The USA in particular has regularly blocked efforts aimed at upgrading UNEP to the status of a UN organisation and to enhance UNEP's work programme to be more analytical and policy oriented. Developing countries have also shown much scepticism with reference to the idea of a more audacious UNEP, given the risks of having special and differential treatment overlooked when formalising commitments, or having environmental standards applied in a protectionist manner and potentially working as market-entry barriers. Some also simply do not want to contribute financially to this UN body as they do not consider the environment a priority. However, despite this difficult political reality, there is scope for UNEP to provide a critical contribution in the discussions on the Trade and Environment relationship.

4.2 Enhancing cooperation between UNEP and the CTE

With regards to MEA rules and trade disputes UNEP should concentrate on reviving its cooperation with the WTO's Committee on Trade and the Environment (CTE) which, despite its initial encouraging efforts, is currently bogged down in almost complete dead-lock and which only has a very limited impact on WTO negotiations. One possibility could be to revive this cooperation scheme bringing together trade and environment policy makers, within countries or regions, with a view to establishing concrete links between trade and environment policy implementation in country/region-specific contexts and highlight-



ing the impacts of trade rules on the environment. The result of this process could help reduce the scepticism of trade officials about the necessity and justification of trade-related MEA measures.

4.3 UNEP as a key technical actor

In order to make UNEP a central actor in the facilitation of the discussion on Trade and Environment issues, UNEP should follow the approach of becoming an indispensable resource institution on a technical level. UNEP is not just a body that administers a number of important MEAs. It is also gathers knowledge about the implementation and effects of MEA provisions, which could serve as a useful basis for discussion. In this respect, two options are suggested:

UNEP as an information clearinghouse – With a view to clarifying the WTO/MEA relationship, UNEP could devise an information clearinghouse for MEA measures and experiences on MEA-implementation at the national level. UNEP could collect and analyse information on problems encountered during trade rules implementation in the context of specific MEAs. There are indications that, for example, governments are not able to put in place national regulations to ensure access to and equitable sharing of benefits of genetic resources as demanded by the Convention on Biological Diversity (CBD) due to the obligations they have under the Trade Related Intellectual Property Rights agreement of the WTO.

Expanding the Montevideo Programme – The question of clarifying the relationship between WTO and MEA rules could become an exercise for the environmental law programme of UNEP. UNEP's Environmental Law activities are carried out within the framework of strategic Programmes for the Development and Periodic Review of Environmental Law (The Montevideo Programmes) approved by the Governing Council every ten years. The current programme addresses, among many other issues, the relationship of environmental law with other fields such as trade, security and military activities and the environment. The environmental law programme could provide input to the debate by analysing the issue from a legal perspective.

4.4 UNEP as a facilitator

UNEP's role as a key technical player or knowledge broker in the discussion on the relationship between trade and the environment would also fit into two further options:

Working Group of Interested Governments – UNEP could act as a facilitator for the establishment of a working group, or a commission by interested governments, under UN auspices to examine the relationship between WTO and MEA rules from a trade and environment perspective with a view to establish clear rules for conflict arbitration.

Joint UNEP/MEAs working group – The current work of UNEP could be enhanced by establishing a more formal process between UNEP, as facilitator, and the MEA Secretariats in order to promote discussions on their relationship to trade rules and negotiations. Although there have been some informal discussions on these issues in the past, this has not been developed systematically, nor formalised. Such a renewed process of gathering empirical knowledge would not only enhance the understanding among MEAs of the relevance of the subject, but it could also harness a UN-based process of establishing clear rules for solving conflicts.

4.5 UNEP as a mediator or conciliator

As stated above, UNEP could play an important role in the settlement of disputes over the implementation of MEA rules, if parties decided to call upon the Director General, or the institution itself, to play a role as mediator or conciliator. Especially the role of conciliator in cases where part of the dispute concerns technical environmental questions would be appropriate, as UNEP could bring substantial independent environmental expertise.

5. Conclusions and recommendations

The starting point for the consideration of alternative avenues for dispute settlement in the field of WTO and MEA interactions was the observation that the current state of affairs of the DDA negotiations is not simply unsatisfactory but likely to threaten the future development and effective implementation of MEA provisions. The preceding analysis of alternative fora for clarifying the relationship between WTO and MEA rules, and alternative dispute settlement systems, made it clear that these alternatives provide real options for trade and environment negotiations outside of the WTO and that Governments have no need to resort to the WTO for solving disputes over WTO and environmental rules. The chapter on UNEP also provided some suggestions as to how UNEP could provide valuable input into alternative dispute settlement procedures and the development of principles clarifying the relationship between the WTO and MEAs.

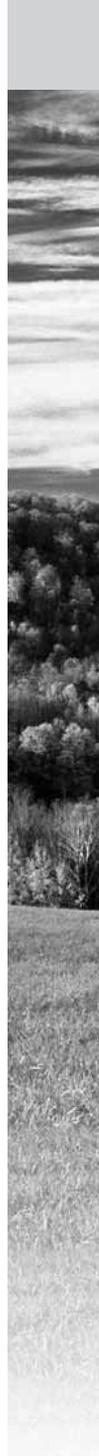
The ranking of the various options on the basis of qualitative criteria that evolve around environmental expertise, openness/transparency, legal and political significance identified alternative solutions to the WTO.

Whereas for the first question, the development of principles governing the interactions of WTO and MEA rules the ICJ and the ILC turned out to be the most promising fora that could serve as a framework for developing objective and transparent rules. They can ensure that MEA provisions are not automatically subordinated under the goal of trade liberalization or considered legitimate only as long as they are implemented as the least trade restrictive measure possible.

The evaluation of the second question, regarding the best forum for actual dispute settlement outside the WTO, identified the ICJ and the PCA as the institutions that can provide legally sound but more objective dispute settlement.

Although the ranking still leaves scope for more analysis, it illustrates to governments that, not only alternatives to the WTO exist, but that the WTO itself represents the least desirable option of all.

We call on governments to consider these alternatives and move forward to establish new processes that will safeguard global environmental rules.



References

Abbott, Kenneth W. and Duncan Snidal. 2001: Hard Law and Soft Law in International Governance. In *Legalization and World Politics*, edited by Judith L. Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, 37-73. Cambridge, MA: IO Foundation and MIT Press.

Ashcroft, Richard 2003: *Bioethical Issues of IPRs. Practical Implications for Healthcare, Access to Essential Medicines and Patents Holders*, 2003. Imperial College, London.

Forum Umwelt und Entwicklung/FoEE/Greenpeace/ 2004: Discussion Paper: The new EU approach to the MEA negotiations, global governance and the need to address the MEA trade linkage.

Friends of the Earth International (2003): The Need for Strengthened International Environmental Governance Position paper for the 8th Special Session of the Governing Council /Global Ministerial Environment Forum ,Jeju, 29 - 31 March 2004.

Friends of the Earth International 2003: Don't let the WTO trade away our environment at the WTO, available at <http://www.foei.org/publications/pdfs/mea-en-final.pdf>,

Friends of the Earth International 2004: The need for strengthened environmental governance, available at <http://www.foei.org/publications/trade/GMEF.rtf>,

Mann, Howard and Porter, Stephen 2003: *The state of trade and environment law 2003. Implications for Doha and Beyond*. International Institute for Sustainable Development, Winnipeg.

Permanent Court of Arbitration (PCA), 2001, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*

Thomas, Urs P. 2004. Trade and the Environment : Stuck in a Political Impasse at the WTO after the Doha and Cancun Ministerial Conferences. *Global Environmental Politics* 4 (3): 9-21.

UNEP 2001a: MEAs: Proposal for a systematic approach UNEP/IGM/2/5, 4 July 2001. UEP Nairobi.

Van Dervort, Thomas R., 1998: *International law and organization: an introduction*, Saga Publications, Inc., USA

WTO 2001: Ministerial Declaration. WT/MIN(01)/DEC/W/1, 14 November 2001. WTO, Geneva.

WTO 2003: Matrix on Trade Measures pursuant to selected Multilateral Environmental Agreements. Note by the Secretariat. WT/CTE/W/160/Rev.2, TN/TE/S/5, 25 April 2003. WTO, Geneva.









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