

The Doha Round Negotiations on the MEA – WTO Interface: Shared Perceptions or Ulterior Motives?

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Introduction

Although there has yet to be a dispute taken up in the World Trade Organization that relates to the operation of specific trade obligations contained in a Multilateral Environmental Agreement – or MEA – the ongoing negotiations in the WTO's Doha Round are ostensibly motivated by a desire to pre-empt the jurisdictional and jurisprudential conflicts that could potentially arise out of a dispute settlement action. Taken at face value, the concern seems justified given that there are now about 200 MEAs on the books, about twenty of which contain some form of trade provisions. Do WTO Members in 2004 have a shared perception of a problem and how it should be addressed or is there really not much of a problem to be negotiated – in which case the current negotiation might be seen either as a cynical exercise or one where some participants' motives are less clear than they pretend.

Gaining WTO Members' consensus agreement to the current negotiation at the time of the 2001 Ministerial Conference in Qatar was not an easy task. Initiating these talks was an important objective of the European Communities and allied WTO Members and the proponents faced strong opposition from certain other WTO Members, in particular developing countries. When agreement to the negotiating mandate was finally reached, it was on a mandate that was watered down from what the EC sought and it was to some extent possible only then because it was seen as a consolation prize for Brussels which had failed in Doha to gain agreement to other negotiations that it had made priority objectives in the lead up to the Ministerial meeting.

Anyone that has been following the fortunes of the Doha Round over the past several years could be excused for not even realising that a negotiation on the WTO-MEA relationship is underway. It has not been a headline grabber and it is certainly not moving at a lightning pace. That said, the framework agreements reached in July at the WTO's General Council meeting

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have probably moved the Doha Round into its second half of play and this could be a good time to take stock of where we stand on this trade and environment negotiation.

Background to the WTO-MEA Negotiations

There are several trade and environment negotiations currently underway as components of the Doha Round. One negotiation seeks to eliminate subsidies to fishing fleets that are contributing to the exhaustion of fish stocks. Another negotiation aims to reduce or eliminate market access barriers for environmental goods and services. Neither of those two negotiations involves a potential for conflicting priorities between trade and environment. But the negotiation that is mandated by paragraph 31(i) of the Doha Ministerial Declaration is different. It has, as its underlying premise, the potential for jurisprudential conflict so this will be the focus of my remarks at this conference.

But first, a bit of background is in order.

The potential for conflict between the rules of the international trading system and rules designed to protect the environment has been on the radar screen for quite some time – certainly well before the Doha meeting in 2001. Discussion of environmental issues in the GATT-WTO goes back at least to 1971 when delegations discussed preparations for the 1972 Stockholm Conference on the Human Environment and the GATT Secretariat authored a paper on the subject of “Industrial Pollution Control and International Trade”. Ten years later, GATT member countries undertook an exercise aimed at preventing the unannounced export to unsuspecting countries of goods that were prohibited for sale on the domestic markets of the exporting countries. But arguably the first real hint of trouble in terms of a conflict between the trade rules and environmental protection measures came in 1991 with the so-called “Tuna-Dolphin” dispute between Mexico and the United States. The way in which that dispute was resolved led many in Civil Society to conclude that in the GATT-WTO system, a desire to keep trade flows liberal would trump environmental protection.

Although I would not agree with that particular reading of the Tuna-Dolphin case, I do think that there is evidence to show that at around the same time, we began to see a significant increase in the number of MEAs under negotiation. The 1992 Earth Summit gave additional energy to this movement. By the time the Uruguay Round of GATT negotiations was finished in late 1993 and the WTO was ready to take off, sensitivity to environmental issues and their relationship to the trading system practically guaranteed that one of the Ministerial Decisions taken in Marrakesh would create a Committee on Trade and Environment in the new WTO. The April 1994 Ministerial Decision ensured that the new Committee would start life with a broad mandate.

Already in 1994, trade ministers directed the new committee to address:

- The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements, and
- The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system.

This is a good point in our discussion to review the types of trade measures that might be provided in Multilateral Environmental Agreements. Broadly speaking, there are four

categories of trade measures that are found in MEAs: trade bans, export and/or import licensing procedures, notification requirements and packaging and labelling requirements. One way in which the trade measures of an MEA could conceivably come into conflict with the WTO rules would be if the trade measure were applied in a way that violates WTO's non-discrimination principle. Suppose, for example, that an MEA banned trade in a particular product between its parties and non-parties to the MEA but permitted trade in the same product between its own members. This would amount to a violation of the WTO's most-favoured nation (MFN) principle – actionable under the WTO's dispute settlement provisions.

Last April, the WTO Secretariat distributed an updated matrix of trade measures provided in MEAs, covering 14 different MEAs.² More than forty pages of the document are devoted to the description of the potentially invoked trade measures. Some examples of the trade measures contained in the matrix include:

- Recommendations by the International Commission for the Conservation of Atlantic Tunas to prohibit imports of Atlantic Bluefin Tuna from a variety of countries;
- The Convention on International Trade in Endangered Species (CITES) requirements that CITES members penalize trade in or possession of regulated specimens;
- The requirements of the Montreal Protocol on Substances that Deplete the Ozone Layer that its parties ban the import of controlled substances from non-parties; and
- The UN Fish Stocks Agreement's provisions allowing port State's to prohibit landings and transshipments of fish where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

It is not too difficult to see how MEA non-parties in particular might possibly take offence at the introduction of these trade measures and consider challenges in the WTO. This is the nub of the issue: the possibility that a dispute would be brought in the WTO challenging a trade measure permitted or mandated by an MEA.

In 1996, the Committee on Trade and Environment reported to the WTO's First Ministerial Conference on the state of play in its consideration of these and other issues it had been mandated to take up. While the Committee's report³ reflected the fact that many WTO Members did not see a problem in the WTO-MEA relationship, others had doubts about the likely WTO consistency of certain trade measures applied pursuant to MEAs. Concerned about the potential for conflict, a number of delegations advocated clarification of the relationship between WTO provisions and the trade provisions found in the MEAs. Apart from discussing a range of procedural ways in which coherence between WTO and MEA policy could be enhanced, participants in the CTE already in the 1995-96 deliberations produced a number of very specific proposals for negotiated solutions to the uncertain interface of WTO and MEA provisions.

The European Community circulated a non-paper in which it proposed first to include MEA trade provisions within the GATT's general exceptions provision (Article XX) and secondly to introduce in GATT a reference to these measures and also to "measures necessary to protect the environment". The EC proposal called for negotiating an Understanding that would have given special protection against these trade measures being attacked in WTO dispute settlement. The EC's proposed Understanding would have limited a WTO panel's mandate in

² WT/CTE/W/160/Rev.2 (25 April 2003)

³ WT/CTE/1 (12 November 1996)

any dispute to examining only whether the MEA measure or “measure necessary to protect the environment” had been applied in conformity with the headnote language of Article XX. There would be no examination of whether or not the trade measure was necessary.

A very interesting proposal for an Understanding was tabled by New Zealand.⁴ New Zealand proposed an Understanding that would differentiate its treatment for the purposes of WTO dispute settlement of environmentally motivated trade measures depending on whether these measures were specifically mandated by an MEA and whether they applied between Parties to the MEA or were applied to non-Parties. In the New Zealand proposal, WTO dispute settlement would not be available to WTO Members in the case of a trade measure specifically mandated by an MEA to which both WTO Members were Parties. In effect, the MEA trade measure would prevail over WTO obligations to the extent of its mandated inconsistency. Trade measures applied between Parties to an MEA but not specifically mandated by the MEA and trade measures applied to non-Parties of an MEA could be tested by WTO dispute settlement against certain criteria to be established in the proposed Understanding. New Zealand’s proposed procedural criteria were aimed at ensuring that the MEA in question reflected a genuine multilateral consensus. The Understanding’s proposed substantive criteria were directed at ensuring that the trade measure at issue was necessary to achieve the environmental objective of the MEA. The incorporation in the New Zealand proposal of a necessity test differentiated it importantly from the EC proposal.

The Swiss circulated a non-paper in May of 1996 in which they proposed negotiation of a “coherence clause” that would have restricted a WTO dispute settlement panel considering a trade measure mandated by an MEA to examining whether the manner of the measure’s application constituted arbitrary discrimination or was applied with a view to achieving trade advantage. Like the EC proposal, the Swiss proposal would not permit a panel to examine either the legitimacy of the underlying environmental objective or the necessity of the measure. In the Swiss proposal MEAs benefiting from the coherence clause would be agreed and listed.

American participants in the 1996 discussion took a different tack to the issue of WTO-MEA compatibility. Rather than proposing a negotiated “legal” framework, the American proposal called for a political approach to the problem and suggested that Ministers agree already at the Singapore meeting on a number of what amounted to guiding principles. Among these principles were affirmations that:

- WTO rules should not hamper the ability of MEAs to achieve their environmental objectives;
- That trade measures have been and will continue to be important tools for achieving environmental objectives;
- That MEA negotiators are in the best position to determine when trade measures would be appropriate to use in an environmental protection context;
- That the WTO should recognize and respect the technical and environmental expertise of MEA negotiators; and,
- That WTO panels can and should seek input from relevant MEA bodies in any dispute involving questions relating to an MEA.

I was an officer in the US Government at the time these principles were put forward by American trade negotiators and re-reading them now reminds me of just how much influence

⁴ WT/CTE/W/20 (15 February 1996)

the Environmental Protection Agency had in the interagency policy development process during the Clinton Administration.

Past is prelude and this is nowhere more the case than it is in the trade and environment discussions that have been ongoing now for a considerable number of years in the GATT and in the WTO. Clearly the negotiating mandate agreed in Doha was influenced heavily by the work of the CTE over the years.

I have already made the point at the beginning of my remarks that there has yet to be a dispute in the WTO involving an MEA. Notwithstanding this fact, the debate in the WTO has been shaped to some extent by a number of disputes that, while not related to MEAs, have had heavy trade and environment implications. Altogether, there have been six trade and environment cases under the GATT and three under the WTO.⁵

While none of the cases actually adjudicated to date in the WTO have raised the prospect of a WTO-MEA problem, a 2000 dispute between the EC and Chile did illustrate – for the first time – the risk of conflicting judgments. In that case, Chile had banned EC-origin fishing vessels from off-loading swordfish catches in Chilean ports on the grounds that EC fishing vessels were not observing practices necessary to aid in the conservation of highly migratory swordfish fisheries in the South Pacific. In April of 2000, the EC initiated WTO consultations with Chile alleging violations of GATT Articles V and XI. At about the same time, Chile initiated dispute resolution proceedings under the auspices of the International Tribunal for the Law of the Sea. Proceedings in both the WTO and the ITLOS were suspended by the EC and Chile in March 2001 following bilateral agreement on a provisional arrangement to governing fishing for swordfish in the region.

The Doha Mandate and Key Issues Under Consideration in the Negotiations

The mandate for the current WTO negotiations on the WTO-MEA relationship is found in paragraphs 31 and 32 of the Doha Ministerial Declaration⁶ and provides in relevant parts:

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

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.”

And the mandate in paragraph 31(i) is further circumscribed by the provisions of paragraph 32 which provides that “The outcome ...of the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations...”

⁵ Under the GATT: (1) US-Canada Tuna; (2) Canada-US Salmon and Herring; (3) US-Thailand Cigarettes; (4) Mexico-US Tuna; (5) EC-US Tuna; (6) EC-US Auto taxes. Under the WTO: (1) Reformulated gasoline (USA); (2) Shrimp-Turtle (USA); (3) Asbestos (EC)

⁶ WT/MIN(01)/DEC/1

All of this means that while WTO Members agreed in Doha to clarify the legal relationship between WTO rules and specific trade obligations in certain MEAs rather than leaving that clarification to the dispute settlement system – they have also limited the scope of the negotiation to doing this only for WTO Members that are party to an MEA. Now this won't surprise anyone familiar with the way things work in a WTO negotiation, but since the initiation of the negotiations in 2001 delegations have focussed most of their effort on developing a common understanding of the mandate for the negotiations! (One would have thought that this mandate should have been clearly understood when it was agreed by Ministers).

A good deal of the discussion to date in the negotiation has centred on the mandate's components and the meaning to be given to terms like "specific trade obligations" (or STOs), "set out in MEAs" and "among parties to the MEA in question". There has also been a more conceptual discussion of the WTO-MEA relationship.

The discussion of the WTO-MEA relationship has been ongoing for quite a long time now in the WTO system and quite frankly I would be very surprised if a definitive outcome were reached on this issue by the end of the current round of multilateral trade negotiations. In this past summer's report⁷ on the state of play by the Chairperson of the Special Session of the CTE, the Chair observed that, in general, views continue to diverge on the meaning of the mandate in paragraph 31(i) and more discussion is clearly required. Just what the Chairperson had in mind when he referred to divergence can be illustrated by a summary look at two recent proposals put forward in the CTE by the USA and the EC.

The American submission⁸ is aimed at demonstrating that whatever the theoretical possibilities for conflict, there are unlikely to be practical problems between MEA STOs and the rules of the WTO as long as the WTO Members that are participating in the negotiation and implementation of the MEA do an effective job of domestic coordination and design the MEA's STOs carefully. Relying on the United States experience in the case of three popular MEAs - CITES, POPs and PIC and focussing on export restrictions in the MEAs, the American paper concludes that the MEA/WTO relationship is working very well. The American contention is that careful domestic and international cooperation leads naturally to the design and implementation of STOs that have, in practice, contributed to a mutually supportive relationship. Important features of STOs cited by the Americans in this regard include:

- "The careful design of export restrictions (and their complementary import provisions) so as to target a specific environmental problem;
- Science-based procedures by which the export restrictions can be adjusted in light of advances in knowledge or other changes in relevant conditions;
- Procedures for changes to the scope of the export restriction over time that are both inclusive and appropriately flexible, and
- The clarity and transparency of export restrictions.

The American paper concludes that in the light of these factors, it is not surprising that no formal disputes have arisen in the WTO context relative to the STOs found in the three MEAs discussed. Another way of saying this is "there is no problem and there won't be if we do our homework well so there's nothing to negotiate here in terms of changes to the rules". There is no underlying conflict crying out for resolution in Washington's view.

⁷ TN/TE/9 (28 June 2004)

⁸ TN/TE/W/40 (21 June 2004)

A different philosophical bent comes through in the EC paper.⁹ The Community's view really hasn't changed all that much since it tabled its paper in the CTE pre-Singapore. The starting point seems to be that there is a real probability of legal conflict between the WTO and MEA STOs and that WTO members need to act in this negotiation to head off the problem with some sort of new rules. The EC's 2004 submission takes the position that the relationship between MEAs and the WTO rules has to be seen in the context of a global governance system based on five principles. Two of these principles are particularly relevant to the issue of conflict avoidance. These are:

- "MEAs and WTO are equal bodies of international law. They should recognize each other with a view to being mutually supportive, in order to meet the common goal of sustainable development; and,
- WTO rules should not be interpreted in "clinical isolation" from other bodies of international law and without considering other complementary bodies of international law, including MEAs."

The EC makes the argument that there are fundamental legal principles relating to the harmonious interpretation and application of treaty rules and that the obligations of WTO Members both under the WTO and under the MEAs in which they participate can be met in a consistent way so long as there exists an interpretation of the relevant legal rules that avoids potential conflict. Relying on what it cites as the "deference principle", the EC argues that both WTO and MEAs should remain responsible and competent for the issues falling within their areas of competence and expertise. Policy formulation and legal interpretation in MEAs and the WTO cannot be taken in isolation from each other. The EC wraps up its arguments with the conclusion that while it is encouraging that there has so far not been a conflict between MEAs and the WTO, the interface between the two sets of law is growing and action should be taken to ensure the legal preservation of such a harmonious co-existence.

Concluding Observations

The current negotiations on the WTO-MEA relationship are not progressing very rapidly and this is not at all surprising because there is no shared perception of a problem. A review of the minutes of the Special Sessions clearly shows that there are two evident camps on these issues. One camp seems to share the view expounded in the US paper. That view is that there really isn't an important legal issue here and that conflict between WTO and MEAs will be avoided so long as WTO Members coordinate their actions in the two different contexts. This view seems broadly shared by India, Australia, Hong Kong, China, Chinese Taipei, Korea, Argentina, India and Brazil.

The other view is that espoused by the EC and shared to a large extent by Norway and Switzerland. This view – which is at the heart of why there is a negotiation underway here in the first place – seems to hold that there is a real potential for legal conflict and that the only way to be certain of avoiding such conflict is to clearly draw a line delineating the respective responsibilities of the WTO and MEAs in any potential dispute settlement. This group is apparently seeking a negotiated legal solution that would in essence preclude WTO from judging whether or not a trade measure taken under an MEA is necessary or not. To extrapolate somewhat, this camp seems to want a result providing that as long as an STO is applied in conformity with the MEA that should be sufficient to make it "legitimate" for WTO

⁹ TN/TN/W/39

purposes. If there hasn't been a dispute so far, what is motivating this camp? It's almost as if they are expecting that trade measures they are likely to take and justify on MEA grounds are probably going to be legally challenged in the WTO. No wonder that some observers suspect that the negotiation is motivated less by a desire to clarify the system's legal operation than it is by a desire to shield certain trade actions from challenge under the WTO.

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