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Institutional challenges to enhance policy co-ordination — how WTO rules could be utilised to meet climate objectives?

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I. Introduction

The debate on the relationship between the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol on the one hand and the World Trade Organization (WTO) on the other hand raises both old and new issues. The old issues are those which have been discussed in the General Agreement on Tariffs and Trade (GATT)/WTO trade and environment debate for the past fifteen years, in particular the relationship between multilateral environmental agreements (MEAs) and the world trading system and the treatment of process and production methods, among others. The main new elements are the sense of urgency which characterises the climate change debate, as well as the range of different policy measures which may be needed to reach carbon emissions targets; these measures may concern several WTO agreements, including the GATT, the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS), the Agreement on Subsidies and Countervailing Measures (SCM), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Moreover, the solutions chosen to curb emissions of greenhouse gases (GHGs) may vary from country to country, or groups of countries may get together to implement common regional solutions, thus adding to the diversity of possible scenarios.

Certain measures and policies implemented under climate change treaties will involve interaction with WTO disciplines. They will affect

\footnote{We would like to thank Kerry Allbeury and Arancha Gonzalez for their useful inputs. Views and opinions expressed in this article are strictly personal and do not bind the WTO Members or the WTO Secretariat.}
competitiveness of the suppliers of goods and services, and it may be tempting for affected parties (economic operators and governments) to resort to trade measures in order to try to 'level the playing field'. As a starting-point, we should assume nevertheless that it is possible for governments to implement their trade and climate change obligations simultaneously and harmoniously. It is a well-accepted principle of international law that states are presumed to undertake their international obligations in good faith so that they can be implemented without conflict. This principle is reflected in Article 3.5 of the UNFCCC:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

One should also remember that the WTO has a very specific mandate in the international legal order, which is to promote the liberalisation of international trade (in goods and services) and fight protectionism. At the same time, the WTO framework provides space for governments to pursue and implement non-trade policy objectives and obligations. Importantly, like the Climate Change Convention, the WTO aims at promoting sustainable development.²

The primary responsibility for ensuring the coherent development of public international law remains with states. Dialogue among intergovernmental organisations (IGOs) has also an important role to play in building coherence, but it is not sufficient. One of the main challenges in the climate change debate is that it requires extensive collaboration among all actors concerned: states and IGOs, but also non-governmental organisations (NGOs), scientific experts and multinational enterprises,

² In the first paragraph of the preamble to the WTO Agreement, Members recognise 'that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.
among others, in order to be environmentally effective. As will be briefly discussed below, WTO rules authorise Members, in certain circumstances, to maintain ‘unilateral’ trade restrictions when such actions comply with the prescriptions of Article XX of the GATT (or Article XIV of the GATS). Yet, such unilateral actions alone will not necessarily be able to address effectively challenges arising from climate change. It will be important to take into account actions by all WTO Members, including actions which may be adopted and implemented by groups of countries (on a regional basis or otherwise). Both the WTO and the UNFCCC will need to ensure the active involvement of developing countries in the discussions, in order to devise appropriate ways to reduce GHG emissions without impairing economic development. It will be essential to gain a full understanding of the environmental alternatives that are most appropriate and efficient among the various measures that are consistent with WTO rules. This task will require very extensive collaboration between scientific experts on climate change, economists and lawyers. In this context, and as stated by Pascal Lamy, ‘[t]he WTO, far from being hegemonic as it is sometimes portrayed to be, recognizes its limited competence and the specialization of other international organizations’. Indeed the WTO is not the forum where ‘standards’ are discussed and negotiated, but it does offer a forum where the trade effects of such measures can be discussed, monitored and litigated. Thus the real challenge of the WTO will be to ensure that this non-hegemonic attitude is maintained. This contribution briefly examines various aspects of the WTO institutional framework which are relevant to the climate change debate. It will look at the instruments available in the WTO for conducting policy dialogue with other IGOs and NGOs. It will then discuss the role that standards developed in other IGOs can play in the WTO.

We should also note that most of the questions that arise when examining the institutional aspects of the WTO/UNFCCC relationship are horizontal, in the sense that they extend to other interfaces, such as trade and the environment in general, and trade and human rights, among others. The ‘trade and climate change’ debate is an extension of the more general ‘trade and …’ debate.

II. Existing basis for co-operation with IGOs and NGOs

A. Co-operation between WTO and other IGOs

1. The various forms of institutional co-operation

The 2006 Report of the Director-General of the WTO on Coherence in Global Policy-making highlights that, through its councils and committees, the WTO maintains extensive institutional relations with numerous other international organisations; there are some 140 international organisations that have observer status in WTO bodies. The WTO also participates as observer in the work of many international organisations. In all, the WTO Secretariat maintains working relations with almost 200 international organisations in activities ranging from statistics, research, standard-setting, and technical assistance to training.

Pursuant to Article V of the Marrakesh Agreement, the General Council must 'make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO'. The General Council regulation allows IGOs to request observer status in WTO committees which is granted subject to a consensus decision by Members. Several IGOs received such status, but in 1999 tensions arose due to the refusal of some Members to grant observer status to the League of Arab Nations. Since then, Members have not been able to reach consensus on any formal request for observership. However, WTO Members and the WTO Secretariat have developed pragmatic alternative solutions for granting ad hoc observership and for collaboration with the secretariats of other IGOs.

The co-operation between UNEP/MEAs and the WTO deserves specific mention. In the 2001 Doha Ministerial Declaration, Ministers welcomed the continued co-operation of the WTO with the United Nations Environment Programme (UNEP) and other intergovernmental environmental organisations and encouraged efforts to promote co-operation between the WTO and relevant international environmental and developmental organisations. The WTO Secretariat has a co-operation

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5 D. Abdel-Motaal, 'The observership of intergovernmental organisations in WTO post-Doha: is there political will to bridge the divide?', Journal of World Intellectual Property 5 (2002), 477–89.
6 Doha Ministerial Declaration (WT/MIN(01)/DEC/1), adopted on 14 November 2001, paragraph 6.
arrangement with the UNEP extending into such areas as reciprocal representation at meetings, information-sharing, joint research and technical assistance. The WTO Secretariat is an observer of the Governing Council of UNEP and attends annual Council meetings; the UNEP is an observer of various WTO bodies, such as the Committee on Trade and Environment (CTE) and is also invited to attend meetings of the Committee on Trade and Environment in Special Session (CTESS) on an ad hoc meeting-by-meeting basis.

Several MEAs, including the UNFCCC, have observer status in the CTE; together with other MEAs, the UNFCCC is also invited to the CTESS on an ad hoc basis. Ten years ago, the CTE started so-called ‘MEA information sessions’, which allowed WTO Members to receive first-hand information from MEA secretariats. The UNFCCC Secretariat has participated in seven such exchanges and has submitted several information notes briefing CTE members on developments under the UNFCCC. The WTO Secretariat collaborates with other international organisations on the topic of trade and the environment, including secretariats of MEAs, which allows the conveyance of information on relevant discussions in the CTE and CTESS. Joint activities between the WTO and MEA secretariats, including the UNFCCC, have also developed, such as co-authorship of CTE documents and participation of MEA secretariats in WTO technical co-operation activities on trade and the environment. In some instances, the collaboration goes further. The WTO, the World Health Organization (WHO) and the Codex Alimentarius secretariats work together in the sectors relating to health and SPS measures, and collaborate in bringing attention to the need for policy coherence between trade and health matters at the global and national levels. Indeed, there are WTO provisions which explicitly state that measures complying with standards and norms developed in specified international organisations — such as the Codex — are presumed to be compatible with WTO obligations. Should the WTO envisage a similar approach with the UNFCCC?

When examining the relationships between international organisations, one should distinguish the organisations themselves from their secretariats. The formal relationships between organisations have

remained rigid; they are essentially limited to granting each other observer status. MEAs with observer status in the WTO do not have an operational role in the negotiations or in dispute settlement, and the same applies to WTO participation in MEAs. This is a direct consequence of the fact that, at the WTO and elsewhere, international negotiations are carried out, and outcomes defined, by governments. The 'dialogue' between international organisations is not of the same nature as the dialogue between states. This means that policy coherence (whether between trade and climate change, or trade and something else) must be ensured first and foremost at the national level: it is up to each government to ensure that its actions are consistent across the various international institutions of which it is a member. WTO Director-General, Pascal Lamy, has already stressed the responsibility of governments in ensuring synchronisation in global policy-making: '[w]e need to turn the page on the era in which governments would bring conflicting positions to different fora. The right hand of government should not compete with its left hand.' 8 As noted above, there has been increasing collaboration at the level of the secretariats (including technical co-operation, joint notes or studies) and various options have already been explored. However, whether at the WTO or elsewhere, the competences of the secretariats are limited (they do not normally include decision-making) and underlain by their obligation to remain neutral vis-á-vis the membership. Secretariats of international organisations, while they may have somewhat different responsibilities, are not supranational bodies with independent powers (like the EC Commission, for instance), and this situation is unlikely to change soon. The role they can play in ensuring global policy coherence and mutual support is consequently limited.

2. Participation of IGOs in the WTO dispute settlement process

There is no provision dealing specifically with the participation of IGOs in the WTO dispute settlement process. Some WTO provisions impose consultations with another IGO (such as Article XV of the GATT requiring consultation with the International Monetary Fund (IMF)). Other provisions, such as those contained in the SPS, require panels to examine, for instance, whether a challenged national measure is consistent with

8 Director-General, Pascal Lamy’s address to the UNEP Global Ministerial Environment Forum in Nairobi, 5 February 2007, at www.wto.org/English/news_e/sppl_e/sppl54_e.htm
standards contained in the Codex; in such situations, formal and informal exchanges between the panel and the secretariat concerned take place in order for the WTO panel to be informed of the nature of such standards. More generally, a panel could invoke the right to seek information under Article 13 of the WTO Dispute Settlement Understanding (DSU) to consult an IGO on a technical or other scientific issue; but so far, this provision has been used to consult individual experts, even when IGOs could have been, a priori, adequate interlocutors. Various reasons may deter panels from seeking expertise directly from an IGO, such as the fear of engaging in a cumbersome and time-consuming procedure (especially in cases where the membership of that organisation would have to be consulted) and awareness of the constraints (obligation of neutrality) faced by its secretariat.

Finally, we should recall that the Appellate Body has stated on several occasions that individuals or organisations can submit amicus curiae briefs to the Appellate Body or to panels, which have, however, no obligation to consider them. No IGO has taken such an initiative so far. Note that, if accepted, the EC proposal on MEAs tabled in the CTESS (discussed below), would make it compulsory for panels to seek the expertise of relevant MEAs in trade and environment disputes.

B. Collaboration with NGOs and other non-state actors

1. The WTO Secretariat and its Director-General

NGOs and other non-state actors can offer very useful expertise and it is thus important to be able to include them in debates. How the WTO should deal with NGOs and more generally how it should improve the transparency of its activities has been an important issue since the entry into force of the WTO. The so-called ‘external transparency’ of the organisation has been much discussed among its Members, who have traditionally held — and still hold — extreme positions. Even if, arguably, more can still be done, it has to be recognised that considerable efforts have been made over the past ten years to make WTO activities more transparent and to increase interaction with NGOs and other non-governmental actors.

9 For example, in the EC — Asbestos case, the panel relied on individual experts and not the WHO. The WHO was consulted informally with respect to providing the names of possible individual experts.

The basis for establishing relations with non-governmental NGOs is Article V:2 of the WTO Agreement, which stipulates that '[t]he General Council may make appropriate arrangements for consultation and co-operation with non-governmental organizations concerned with matters related to those of the WTO'. The framework for relations with NGOs is further defined in the Guidelines for Arrangements on Relations with NGOs, adopted by the General Council in 1996, where Members 'recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs'.

According to the Guidelines, the primary vehicles for interaction with NGOs are the WTO Secretariat and its Director-General, who are encouraged to 'play a more active role in its direct contacts with NGOs' through various means, such as 'the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO'. On this basis, the Secretariat has developed a number of activities with NGOs, including symposia, the annual 'Public Forum', NGOs briefings, circulation of NGO briefing papers on the WTO website, and so-called 'issue specific dialogues with civil society'. Although environmental NGOs have been traditionally very much involved in all these activities, climate change and trade has attracted specific interest only recently: until 2007, no NGO had requested inclusion of this topic on the agenda of the Public Forum and no NGO position paper had been submitted to the WTO Secretariat. However, this is changing: for instance, no less than four sessions were devoted to this theme during the 2007 WTO Public Forum, which was organised by various actors of civil society together with the WTO Secretariat.

The WTO is restrictive when it comes to the participation of NGOs and other non-governmental actors in its bodies. Two main arguments, reflected in the Guidelines, are invoked to keep the doors to its meetings closed. First, the 'special character of the WTO, which is both a legally binding inter-governmental treaty of rights and obligations among its Members and a forum for negotiations', and, second, the view that consultation and co-operation with NGOs must take place primarily at

11 Guidelines for Arrangements on Relations with Non-Governmental Organizations, Decision adopted by the General Council on 18 July 1996, WT/L/162.
the national level, 'where lies primary responsibility for taking into account the different elements of public interests which are brought to bear on trade policy-making'. Hence the 'broadly held view' that it is not possible for NGOs to be directly involved in the work of the WTO or its meetings. This position was reaffirmed by many Members on the occasion of a passionate debate in the General Council in relation to the Appellate Body's initiative to issue rules for procedures for amicus briefs in the EC — Asbestos dispute. NGOs are, however, allowed to attend (without the right to speak) the plenary sessions of ministerial conferences if they demonstrate that their activities are concerned with matters related to those of the WTO. And nothing prevents individual members from including NGO representatives in their national delegation, which some do on a regular basis.

Other organisations, including the UNFCCC, go further than the WTO in this regard by providing a quasi-automatic right for interested non-state actors to be granted observer status. For instance, Article 7.6 of the UNFCCC provides, inter alia, that 'any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object'. It would be desirable for the WTO to adopt — or at least come closer to — the more generous practice followed by other international organisations as far as participation by NGOs and other non-state actors is concerned. A number of NGOs would be able to contribute to enhancing the understanding of WTO rules and principles by the public at large and to increasing the legitimacy of the role of the WTO in the international community. However, this issue still meets with strong resistance from many Members, in particular developing countries.

2. Participation of NGOs in the WTO dispute settlement process

The dispute settlement mechanism of the WTO has brought about clarifications on the meaning and the scope of the provisions of the WTO that are related to the environment and, in this context, many

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13 The number of NGOs attending WTO ministerial conferences has increased from 108 (235 individuals) in 1996 in Singapore to 801 (2,100 individuals) in 2005 in Hong Kong.
actors — and in particular NGOs — have requested a right to participate in these disputes in order to submit their views.

Under the DSU, only Member governments can initiate a dispute and participate in the proceedings. Nevertheless, NGOs have somehow invited themselves into the process by sending unsolicited amicus curiae briefs to panels. The first dispute in which such an initiative was taken was the US — Shrimp dispute: some NGOs sent amicus curiae briefs to the panel, which decided it could not accept them. On appeal, the Appellate Body reversed the panel decision and found that the 'right to seek information' provided for in Article 13 of the DSU allowed panels to accept unsolicited briefs. Since the US — Shrimp dispute, various panels have received such briefs. In EC — Asbestos, the Appellate Body adopted special rules of procedure for interested parties to file amicus curiae briefs, an initiative which triggered strong reactions among members. The treatment by panels and the Appellate Body of amicus curiae briefs is still controversial among WTO Members, as evidenced by proposals made in the DSU review. While some Members, like the European Communities and the United States, are in favour of developing procedural rules for submission of amicus curiae briefs, various developing countries have proposed to make it clear that the 'right to seek information' cannot be read as entailing the right for panels to accept unsolicited information.

A related and more recent question in this context concerns the right of NGOs and other interested parties to observe meetings of the panel and Appellate Body. The issue of public hearings was raised in the DSU review where some Members proposed the adoption of measures for making panel and Appellate Body meetings public. Recently, several panels agreed to allow the public to observe meetings, at the request of

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16 Communications by the European Communities (TN/DS/W/1) and by the United States (TN/DS/W/86).

17 Communications by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe (TN/DS/W/18); by Kenya (TN/DS/W/42); by India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia (TN/DS/W/47).

18 Communications by the European Communities (TN/DS/W/1), Canada (TN/DS/W/41) and the United States (TN/DS/W/86).

19 The Appellate Body has never held a public hearing so far.
the parties. The event was publicised on the WTO website and those interested were allowed to watch the meeting being broadcast ‘live’ in a separate room at the WTO. Participation by NGOs in these events was disappointingly low. Incorporating some transparency into the dispute settlement proceedings is desirable as it would contribute to demystifying the processes followed by the panel and Appellate Body and do away with the image of ‘faceless bureaucrats’. Publicity of justice is a well-established principle in democracies (‘Publicity is the very soul of justice’20) and, with the appropriate safeguards in place (for instance to protect confidential business information), allowing the public to watch meetings of the panel and Appellate Body could contribute to reinforcing the legitimacy of the WTO dispute settlement system.

III. How does the WTO deal with climate change rules?

A. The WTO and the UNFCCC: two different dispute settlement systems, but ...

The UNFCCC and the Kyoto Protocol impose certain obligations on their signatories and provide for a dispute settlement mechanism to ensure enforcement of such obligations. The WTO imposes different types of obligations, which are enforced through its own dispute settlement system. So, why is the WTO being brought into the climate change debate? Problems may arise in situations involving states that are not parties to the UNFCCC and/or the Kyoto Protocol, or when measures are used which are not clearly mandated in these treaties, such as the use of trade restrictions to realise GHG reduction targets.

Dispute settlement mechanisms in MEAs are different to that of the WTO. A joint note by the UNEP and WTO Secretariats remarks that ‘[t]he focus of the MEAs is on procedures and mechanisms to assist Parties to remain in compliance and to avoid disputes, not on the use of provisions for the settlement of the disputes’. In contrast to the WTO, MEAs normally do not have a compulsory dispute settlement mechanism and do not issue binding decisions. Moreover, signatories to MEAs rarely resort to these mechanisms.21

20 Wrote Jeremy Bentham (1748–1832).
The compliance mechanisms in the UNFCCC and the Kyoto Protocol have been considered to remain weak.\textsuperscript{22} Article 14 of the UNFCCC calls the parties to 'seek a settlement of the dispute through negotiation or any peaceful means of their own choice'. Parties may recognise 'as compulsory ipso facto' submission of the dispute to the International Court of Justice (ICJ) or to arbitration in accordance with procedures to be adopted by the Conference of the Parties. If the parties cannot settle their dispute through these means, it can then be submitted, at the request of a party concerned, to a conciliation commission which 'shall render a recommendatory award, which the parties shall consider in good faith' (Article 14.6). Article 14 of the UNFCCC applies \textit{mutatis mutandis} to disputes arising under the Kyoto Protocol (Article 19).\textsuperscript{23}

However, the different natures of these dispute settlement mechanisms, and their possible imbalance, should not be a cause for concern in practice as the UNFCCC and the Kyoto Protocol contain different types of obligations from those of the WTO agreements. This means that the competences of WTO and UNFCCC dispute settlement mechanisms should not overlap and have no reason to 'compete'. It also means that there is little scope for governments to do 'forum shopping'. The main question is rather whether, for instance, the mechanisms provided for in the Kyoto Protocol, in particular the flexibilities built therein to reach GHG reduction targets, could be invoked to justify trade restrictions otherwise inconsistent with WTO obligations. Another important question is the weight that would be attached to being a signatory to the UNFCCC or the Kyoto Protocol in assessing compatibility of trade measures with WTO rules, should a non-signatory challenge such measures in the WTO. In other words, the issue at stake is how the WTO

\textsuperscript{22} According to Birnie and Boyle, the UNFCCC and the Kyoto Protocol 'are strong on reporting, expert inspection and review, and multilateral consultation, but they remain weak on dispute settlement and non-compliance, where further development is awaited'. P. Birnie and A. Boyle, \textit{International Law and the Environment}, second edition (Oxford University Press, 2002), p. 532.

\textsuperscript{23} In addition, signatories to the Kyoto Protocol adopted 'Procedures and mechanisms relating to compliance under the Kyoto Protocol' (Decision 24/CP.7, 10 November 2001). This compliance mechanism is detailed and appears to be more stringent than those of other environmental agreements. Under this system, an 'enforcement branch' has the responsibility of determining whether an Annex I party is in compliance with its emission targets. Should it find non-compliance (for instance, when a party has exceeded its emission targets), it can require that party to bring itself into compliance. For that purpose, the enforcement branch can require the party to submit an action plan and suspend the eligibility of that party to make transfers in emissions trading.
dispute settlement system would 'use' non-WTO law in the adjudication of disputes. This is discussed in the following section.  

B. Non-WTO law in the WTO dispute settlement system

Under the DSU, the jurisdiction of panels and the Appellate Body is limited to claims of violation of WTO agreements. Hence, a WTO Member could not resort to the DSU to seek redress for an alleged breach of an MEA. This does not mean, however, that non-WTO law has no role to play in WTO disputes. The issue is rather how and for what purpose non-WTO law can be used in claims of breach of WTO agreements brought pursuant to the DSU. We believe that generally non-WTO law can be used in two different ways, with two different purposes.

First, non-WTO law can be referred to in the interpretation of concepts and terms contained in WTO agreements, with a view to ascertaining their meaning. For instance, more recent environmental treaties have been referred to for the purpose of interpreting in an evolutionary manner GATT provisions which were drafted sixty years ago. The typical example is the US — Shrimp dispute in which the Appellate Body decided to resort to 'modern international conventions and declarations' to interpret the concept of 'exhaustible natural resources' found in Article XX(g) of the GATT; it looked at instruments such as the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD) and Agenda 21 to conclude that 'exhaustible natural resources' included biological resources, such as sea turtles, and not only finite resources, such as oil and ores (which seemed to have been the intention of the drafters in 1947). Under this scenario, non-WTO law is taken into account if it can be considered to represent a sufficient degree of consensus among WTO Members, but identical membership between the WTO and the environmental treaty concerned is not required. In the context of a climate change-related dispute, this

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24 Another issue which would merit further development is the treatment, under the WTO dispute settlement system, of countermeasures implemented by a WTO Member as a response to another Member for failing to meet international obligations contracted under another treaty (such as the Kyoto Protocol). However, such a discussion is beyond the scope of the present document.


26 This was presumably the case, in the view of the Appellate Body, for UNCLOS, Agenda 21 and the CBD. In another dispute (Chile — Price Band), the Appellate Body refused to agree to a practice developed between some Latin American countries being used for the interpretation of the Agreement on Agriculture.
would mean that, when interpreting Article XX(g) of the GATT, for instance, a panel or the Appellate Body could refer to other treaties, like the UNFCCC or the Montreal Protocol, to determine whether the ozone layer or the atmosphere could be considered ‘exhaustible natural resources’.

The second instance in which non-WTO law can be referred to is when assessing whether a specific national measure complies, in casu, with a WTO provision (obligation or exception), or, in other words, when determining the appropriate application of that WTO provision. For instance, in US — Shrimp (Article 21.5 Malaysia), the Appellate Body, when assessing the US measure in light of the chapeau of Article XX of the GATT, considered that the existence of regional fishing arrangements negotiated by the United States demonstrated the good faith of the US in its efforts to protect sea turtles. In this scenario, all relevant treaties can be taken into account, even if they are concluded among a small number of countries, as they are only used as one of the facts that would support an allegation. In this sense, reliance on international or even regional standards may provide a de facto presumption of good faith, as required by Article XX. This brings about another institutional challenge, though: the legitimacy of the WTO to be the one institution assessing whether a trade restriction is effectively ‘based on’ mechanisms and standards set up in other treaties and IGOs.

However, Pauwelyn and others argue that, in situations where a WTO obligation would conflict with a right granted in another treaty, the WTO panel should first assess which of the two treaties’ provisions prevails. Should the panel find that the provision contained in the non-WTO treaty prevails, then the WTO dispute system would need to apply and enforce that treaty. We believe that WTO panels can only

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27 In this context, we would like to stress that interpretation of WTO terms is not limited to disputes. What we have just said should be used in ‘day-to-day’ national policy-making involving trade and environment issues.


29 For further developments, see G. Marceau, ‘Fragmentation in international law: the relationship between WTO law and general international law’, in Finnish Yearbook of International Law (Martinus Nijhoff, 2006), vol. 17, p. 31.


31 See, for instance, J. Pauwelyn, Conflict of Norms in Public International Law — How WTO Law Relates to Other Rules of International Law (Cambridge University Press, 2003) and ‘How to win a World Trade Organization dispute based on non-World Trade
apply WTO provisions, but in doing so, they will need to look at non-WTO law, often as factual matters, to interpret the relevant applicable WTO provisions; indeed, WTO provisions themselves often induce defending parties to invoke participation in other treaties as evidence of their legitimate policy objective and good faith. Setting aside the debate on 'WTO applicable law', i.e. to what extent and how a treaty not signed between the parties to a WTO dispute could be used in such a dispute, it remains clear that, in the case of a dispute involving national measures allegedly based on the Kyoto Protocol, a WTO panel will examine the Protocol, if only to reject its relevance. We believe that Members cannot disregard their WTO obligations beyond the situations envisaged in WTO exception provisions; in other words, Members can derogate their WTO obligations only in situations defined by the WTO agreements themselves. It is for WTO Members to make the necessary adjustments through new law-making (e.g. amendments or understandings) if they consider that the current WTO legal framework does not allow them to comply simultaneously with other international obligations they have contracted. But it is not up to adjudicating bodies to engage in law-making to fill a legal vacuum.

In our view, Members can find ways to implement the UNFCCC and the Kyoto Protocol harmoniously with the WTO. The Appellate Body has insisted on the need to maintain a balance between trade liberalisation and the right to pursue other policy objectives, as contemplated in exception provisions. This has allowed the preservation of policy and


32 ‘Applicable law’ means here the law for which a breach can lead to actual remedies in the WTO. This definition is narrower than the definition given by the International Law Commission (ILC) in its report on the fragmentation of international law (A/CN.4/L.682/Add.1, 13 April 2006), for which ‘applicable law’ seems to include all legal rules that are necessary to provide an effective answer to legal issues raised in a WTO dispute (including procedural-type obligations, rules of interpretation, etc.).

33 In addition to the publications referred to in n. 31, see also the Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006, paragraphs 44–5 and 165–71 and bibliographical references therein.

legal space for Members to comply with their rights and obligations under other treaties without undermining WTO objectives. WTO adjudicating bodies have shown that WTO and non-WTO rules can be interpreted and applied in a harmonious manner, thus directly contributing to international legal coherence. The UNFCCC and the Kyoto Protocol, therefore, can find an appropriate place in the adjudication of trade disputes. Measures adopted under the auspices of these two instruments should be found compatible with WTO rules, for instance, if they comply with the provisions of Article XX of the GATT or other relevant WTO agreements (such as the TBT), and assuming that they are taken in good faith and do not pursue protectionist purposes.

C. The use in the WTO of international standards developed by other organisations

The issue of trade and climate change also presents interesting institutional questions since it may involve situations where a WTO Member decides to adopt a national regulation based on existing international standards developed in another IGO. This begs the question of how the WTO deals with, and considers, norms and international standards negotiated in other fora, and whether the UNFCCC and the Kyoto Protocol can be considered as setting ‘international standards’.

Turning to the first question, the WTO does not treat all international standards in the same way: they have a particularly ‘high profile’ in the TBT and SPS, which deal explicitly with such standards and favour their harmonisation. The definition of ‘international standards’ contained in Annex A to the SPS appoints the Codex Alimentarius Commission (Codex), International Office of Epizootics (now the World Organisation for Animal Health) (OIE) and International Plant Protection Convention (IPPC) as forums whose standards are given legal weight in WTO disputes. The standards developed by the Codex, OIE and IPPC for human, animal and plant health, respectively, are, under the terms of their own constitutive documents, non-binding. However, Article 3.1 of the SPS provides that ‘Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement’. Moreover, Article 3.2 states that SPS measures of WTO Members that are in conformity with international standards, guidelines, or recommendations shall be ‘presumed to be consistent with the relevant provisions of this Agreement’. So, while the Codex and other bodies by no means
legislate in the normal or full sense, the norms they produce have a certain authority in creating a presumption of WTO compatibility when such international standards are respected. The SPS thus provides important incentives for states to base their national standards upon, or to fit them to, these international standards. Therefore, the WTO encourages Members to negotiate norms in other international fora which they will then implement coherently in the context of the WTO. Members can nevertheless adopt norms higher than the international standards as long as they comply with the SPS, including Article 5 on risk assessments.

The same is true of the TBT. Article 2.4 of the TBT requires Members to use 'relevant international standards' as a basis for their technical regulations, unless the international standards are an inappropriate or ineffective means to achieve legitimate objectives. Article 2.5 of the TBT further stipulates that a technical regulation which is in accordance with relevant international standards 'shall be rebuttably presumed not to create an unnecessary obstacle to international trade'. So, deviations from international standards are discouraged. When interpreting Article 2.4 of the TBT in EC — Sardines, the Appellate Body determined that a Codex Alimentarius standard was a 'relevant international standard', despite the fact that it had not been adopted by consensus. The Appellate Body found that in order for a standard to be used 'as a basis for' a technical regulation, it must be 'used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation'. Nevertheless, since Members' measures are presumed to be WTO consistent, it is for the complainant to bear the burden of proving violation of Article 2.4 as a whole.35

So, what does this mean for the climate change debate? If a WTO Member adopts a domestic regulation allegedly based on the Kyoto Protocol or the UNFCCC, can this regulation be considered to 'be based on' an international standard within the meaning of Article 2.5 of the TBT, and thus presumed to be TBT/WTO consistent? The answer is not clear, as it depends on how one defines international standards. Many argue that standards should be defined narrowly, which would exclude regulation adopted pursuant to an MEA such as the UNFCCC. Should we argue, nevertheless, that some provisions contained in the Kyoto Protocol or the UNFCCC constitute international standards, then a WTO panel could indeed examine whether a national measure is a

35 Appellate Body report on EC — Sardines, paragraphs 243 and 248.
technical regulation within the TBT, and whether that regulation used a Kyoto standard as the 'principal constituent or fundamental principle for the purpose of enacting the technical regulation'. If, on the contrary, provisions of the Kyoto Protocol or the UNFCCC were not considered to qualify as international standards, or if the national measure could not be viewed as a technical regulation within the meaning of the TBT, the only option would be to invoke these provisions to demonstrate justification under an exception provision, such as Article XX of the GATT.

This brings us back to the logic of the argumentation developed by the United States (and approved by the panel and the Appellate Body) in US — Shrimp (Article 21.5 Malaysia). In this dispute, the United States pointed to agreements reached with some WTO Members as examples of logical ways to deal with conservation of turtles. Malaysia opposed any reference to these regional arrangements because it was not a party to any of them. The Appellate Body said that concluding an agreement with the country opposing the restriction is not necessarily a pre-condition of a WTO consistent import restriction if one has tried in good faith but failed. If a WTO Member can, under the good faith prescriptions of Article XX, maintain an import restriction based on criteria determined unilaterally, there is no reason why the same importing country would be in a worse position if such criteria came from an agreement to which only some of the WTO Members were signatories and the challenging Member was not.

Clearly, and 'as far as possible', a multilateral approach is strongly preferred. Yet it is one thing to prefer a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the conclusion of a multilateral agreement as a condition of avoiding 'arbitrary or unjustifiable discrimination' under the chapeau of Article XX. We see, in this case, no such requirement\(^{36}\) (emphasis added).

In US — Shrimp, the Appellate Body had already stated that 'conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX'\(^{37}\).

\(^{36}\) Appellate Body report on US — Shrimp (Article 21.5 — Malaysia), paragraph 124.

\(^{37}\) Appellate Body report on US — Shrimp, paragraph 121.
Consequently, unilateral actions can find justification under Article XX of the GATT and the existence of a multilateral agreement between the parties involved in a dispute is not a pre-condition to benefiting from WTO exception provisions. This jurisprudence is potentially relevant for disputes arising in relation to trade measures taken pursuant to the UNFCCC or the Kyoto Protocol. It means that, whenever relevant, participation in these treaties would be considered as one of the pertinent factual elements to demonstrate that a trade measure otherwise contrary to WTO obligations would nevertheless find justification under an exception provision.

IV. WTO and MEAs: the stakes in the negotiations on the Doha Development Agenda

The relationship between the GATT/WTO system and MEAs has been one of the main issues under discussion since 1992, when the topic of trade and environment emerged on the trade agenda. In December 2001, ministers decided to include this topic in the Doha Development Agenda (DDA). As noted by WTO Director-General, Pascal Lamy, '[a]s imperfect as the WTO may be, it continues to offer the only forum worldwide that is exclusively dedicated to discussing the relationship between trade and the environment'.

The mandate agreed at Doha requires Members to negotiate on:

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

This mandate, contained in paragraph 31(i) of the Doha Declaration, excludes the most difficult aspect of the relationship between MEAs and WTO rules, i.e. the application of trade measures by MEA signatories to non-MEA signatories. This situation is the only one which had been identified as a potential problem by WTO Members. While the

38 Director-General, Pascal Lamy's address to the UNEP Global Ministerial Environment Forum in Nairobi, 5 February 2007, at www.wto.org/English/news_e/sppl_e/sppl54_e.htm
40 Report (1996) of the Committee on Trade and Environment, WT/CTE/1, paragraph 8.
UNFCCC and the Kyoto Protocol do not mandate the use of trade measures, whether between signatories or against non-signatories, the Montreal Protocol on Substances that Deplete the Ozone Layer, which is also pertinent in the context of climate change policies, does rely on trade measures.

It is not the purpose of this contribution to undertake a detailed review of the arguments and positions developed by members of the CTESS, nor to discuss the various aspects of the relationships between trade and environment rules.\(^{41}\) We shall only recall that Members have always held different views on how to tackle this issue and that the negotiations seem to have had difficulties in narrowing the gap. The last report by the chairman of the CTESS indicates that the group has before it two main proposals, which present 'two rather different perspectives with regard to the scope of the mandate in Paragraph 31(i)'\(^{42}\)

The proposal by the European Communities (EC) suggests a ministerial decision containing various principles (mutual supportiveness, no subordination, deference and transparency) which would 'govern the relationship between MEAs and WTO rules'. The EC also proposes a right for MEA bodies to be granted observer status in relevant WTO bodies and an obligation for WTO committees and panels to 'call for and defer to' MEA expertise whenever examining issues with environmental content relating to a particular MEA.\(^{43}\) If accepted, this proposal would raise the profile of international environmental organisations in the WTO. However, it raises various interesting questions, some of which are being discussed in the CTESS. In practice, who will speak on behalf of the 'MEAs'? Assuming this role goes to the secretariats, will they have sufficient independence to give the expertise sought? Would WTO bodies be bound by the opinion given by an MEA? What would be the relationship with Article 13 of the DSU? Why should involvement of

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\(^{41}\) This subject has been extensively researched. For reading suggestions, see the selective bibliography contained in WT/CTWE/W/49/Add.1. See also G. Marceau, 'Conflict of Norms and Conflicts of Jurisdiction' (2001), 1081; D. Abdel Motaal, 'Multilateral Environmental Agreements (MEAs) and WTO rules: why the "burden of accommodation" should shift to MEAs', Journal of World Trade 35 (2001), 1215; P. Mavroidis, 'Trade and environment after the Shrimps — Turtle litigation', Journal of World Trade 34 (2000), 73.

\(^{42}\) Committee on Trade and Environment in Special Session, Report by the Chairman, Ambassador Mario Matus, to the Trade Negotiations Committee, TN/TE/17, 25 July 2007.

\(^{43}\) Proposal for a Decision of the Ministerial Conference on Trade and Environment, Submission by the European Communities, TN/TB/W/68, 30 June 2006.
IGOs be limited to environment-related issues? What about reciprocity, i.e. WTO being ‘called for and deferred to’ in trade related issues arising under MEAs?

The second proposal, tabled by Australia and Argentina, is far less ambitious. It suggests that ‘a short but substantive report be prepared, highlighting key observations from CTESS discussions and setting out areas of agreement and recommendations’. Examples of possible recommendations are limited to procedural proposals, such as Members ‘continuing to share their national experiences relating to negotiating and implementing specific trade obligations set out in MEAs’ or reporting ‘on their national coordination process’.44

Whatever the outcome of this negotiation, one should note that this discussion has been somehow ‘overtaken by events’ with the developments in WTO case law. Although no dispute involving trade measures taken pursuant to an MEA has taken place so far, several principles found in the Appellate Body jurisprudence, in particular with respect to Article XX of the GATT, would be directly relevant should such a dispute arise (see above).45 This issue, which raises the more general question of balance in the WTO between the law-making process (i.e. the negotiations, where political considerations can fully enter into play) and the judicial activities (i.e. dispute settlement, where political interference is limited), would be worth a separate discussion.

The second negotiating item contained in paragraph 31 of the Doha Declaration is also directly relevant to the relationships between the WTO and multilateral environmental agreements. It requires Members to negotiate on ‘procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting observer status’. Over the past ten years or so, collaboration between the WTO and MEA secretariats has developed on an ad hoc basis and has taken several forms. This collaboration is essentially of a technical nature and aims at increasing mutual understanding of the functioning and impact of relevant agreements (see above).

The mandate in paragraph 31(ii) of the Doha Declaration aims at formalising the various forms of collaboration, and appears to be less

controversial than negotiations under paragraph 31(i). Discussions focus on how to improve information exchange in the CTE, document exchange, future collaboration in the context of technical assistance and capacity-building activities, and criteria for observer status. According to the last chairman’s report, these discussions have progressed significantly and ‘convergence [has] started to emerge on basic elements for an outcome’\textsuperscript{46} This negotiation may be beneficial if it allows the clarification and even expansion of the activities between the secretariats of the MEAs and the WTO. However, it may also entail the risk of creating a straitjacket which proves unable to adapt quickly to new circumstances.

V. Conclusion

Is the WTO equipped to ensure smooth policy co-ordination with climate change instruments and institutions? In our view, the WTO provides an appropriate framework for Members to discuss trade and climate change issues, as part of the more general debate on trade and the environment. In addition, the WTO dispute settlement system has shown that it is able to integrate non-trade values and to make space for non-trade law. Since US — Shrimp, we know that WTO Members can implement unilateral measures to deal with environmental concerns. There are, however, several important challenges ahead. The international community may face a proliferation of unilateral or regional standards that may not be the most environmentally effective, even if they can be considered WTO consistent (which is likely to be the case for most of them). In this context, issues of mutual recognition will become difficult and may lead to increased tensions with those Members that are excluded from recognition schemes. Further thought will also have to be given to the interaction of WTO agreements with climate change instruments currently under consideration in some countries, such as carbon tax, cap-and-trade systems, and green certificates. Moreover, the scientific and technical difficulties linked to assessing the real impact of GHG reduction measures on climate change mitigation will complicate assessment of their WTO consistency. Finally, the use of private standards is likely to increase, hence the need to improve the understanding of their interaction with the WTO and to ensure their co-ordination with

\textsuperscript{46} Committee on Trade and Environment in Special Session, Report by the Chairman, Ambassador Mario Matus, to the Trade Negotiations Committee, TN/TE/17, 25 July 2007.
governmental standards. Another important challenge is the need to involve developing countries, both in the WTO and in the UNFCCC, with due respect for their development needs and priorities. Can the WTO be used to create incentives for developing countries? According to case law (India — GSP), market access preferences can be conditioned on development related criteria. The main question here is whether climate change related preferences could be considered (directly) linked to (sustainable) development. Finally, the relationship between trade and climate change cannot be separated from the trade and energy debate, which involves competition and investment issues, and WTO rules are still very much incomplete in these fields.

Ultimately, the main concern of the international community is that environmentally effective measures be adopted. And whether or not such measures are fully WTO consistent is not a prerequisite for efficiency.

The main problem is not institutional because the international institutions will do what their masters tell them to do. The most important question is whether or not there is political commitment by the entire international community to take all necessary measures to fight climate change. The ultimate arbitrators between conflicting values (assuming that trade and environment are conflicting, an assumption that we do not share) are not panels, the Appellate Body or even the WTO, but governments themselves. States are the ultimate arbitrators between opposing or contradictory rights, obligations and values. International institutions, including the WTO, can only play a supportive role in offering fora in which states can devise and implement solutions, as well as strengthen their co-operation and co-ordination.

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