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The Relationship between the Dispute-Settlement Mechanisms of MEAs and those of the WTO

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INTRODUCTION

The potential conflicts between the substantive provisions of multilateral environmental agreements (MEAs) and the rules governing the World Trade Organization (WTO) have been the subject of much debate within these institutions, and among stakeholders and the academic world. Little has been said, however, about the overlap or conflicts that could arise due to their parallel dispute-settlement mechanisms and the resulting forum shopping that could disrupt the certainty achieved by the regulation of international relations through dispute-settlement mechanisms.

This article identifies some of the issues that may have to be addressed, as well as some of the arguments and alternatives that may be suggested, to prevent WTO members and non-member States from pursuing multiple dispute-settlement courses uselessly and to ensure that the most appropriately equipped fora are responsible for settling disputes. Even if the dispute-settlement mechanism envisaged by the WTO's Understanding on Rules and Procedures for the Settlement of Disputes (DSU) seems more powerful and effective than many MEA dispute-settlement mechanisms, other means do exist and are explored in this article, with a view that parallel dispute-settlement mechanisms be used for the best interests of WTO members and stakeholders.

OVERLAPS BETWEEN THE SUBSTANTIVE PROVISIONS OF MEAS AND THOSE OF THE WTO

It has been argued that authentic trade measures required or explicitly permitted by a MEA should be considered compatible with the invocation of Article XX of the General Agreement on Tariffs and Trade 1994 (GATT), which, under certain conditions, authorizes WTO members to deviate from GATT rules, including its market access disciplines, to give priority to one of its listed policy considerations. This derives from the application of the general principle of interpretation, which provides for a presumption against conflicts between treaty provisions. WTO panels and the Appellate Body are obliged to take into account this presumption pursuant to Article 3(2) of the DSU when interpreting and applying the WTO provisions, including Article XX of GATT.

WTO members are allowed to take measures that may restrict trade if such measures respect the prescriptions of Article XX. Article XX(g) refers to measures relating to the protection of natural resources and Article XX(b) refers to measures necessary for the protection of health of persons, animals and plants. The fact that an environmental problem is regulated and protected by the international community through a MEA lends weight to the claim that a measure, adopted pursuant to such negotiated MEA provisions, is based on authentic environmental motivations and may therefore be considered as relating to the protection of natural resources or be necessary for the protection of health or the environment. This is especially true with the new 'necessity test' developed by the Appellate Body, where it is established that assessments, if a measure qualifies for the purpose of Article XX(b), involve a process of weighing and balancing a series of factors, which include: (1) the importance of the common interests or values protected by the measure; (2) the efficacy of such measure in pursuing the policies aimed at; and (3) the accompanying impact of the law or regulation on imports or exports (the 'restrictiveness' criteria). The more vital or important the policies to which a measure is aimed, the easier it is to accept it as a 'necessary' measure designed for that purpose. The very existence of a MEA may be

1 Understanding on Rules and Procedures for the Settlement of Disputes (DSU), General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations (Marrakesh, 15 April 1994).


argued as evidence that the concerns covered by the MEA are vital and important and, thus, 'necessary'.

That a measure is applied in accordance with the framework set out in a MEA can also be of some relevance when assessing whether the measure was applied in compliance with the provisions of the chapeau of Article XX, that is, not being a disguised restriction on international trade. Participation and compliance with MEAs could be of relevance to assessing the good faith of WTO members invoking Article XX.3 Importantly, Article XX permits certain unilateral actions to be taken to promote environmental goals, even in the absence of a MEA on the subject matter.6 It would be illogical if a WTO member, acting in furtherance of the goals of a relevant MEA (and party to such a MEA), was to be placed in a worse position than if no such MEA existed.

So far, trade measures taken by WTO members pursuant to MEAs or pursuant to recommendations by MEA institutional bodies have not been challenged at the WTO. For instance, in the context of the non-compliance mechanism under the Montreal Protocol, the Meeting of the Parties, prior to the recommendation of the Protocol's Implementation Committee, decided to impose a combination of measures, consisting, inter alia, of restrictions on Russia's trade in controlled substances to facilitate Russia's compliance with its obligations under the Protocol.4 Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), trade suspensions have been adopted against dozens of parties and non-parties and such measures have never been challenged under the WTO or GATT.7 Finally, there are recommendations from the contracting parties of the International Convention for the Conservation of Atlantic Tunas (ICCAT) to ban imports of certain fish species and their products from other contracting parties in order to prompt countries of origin to comply with sustainable fishing practices.8

In summary, in situations where a WTO member invokes a MEA to justify a defence based on Article XX of GATT, it can be argued that Article XX should be applied in such a manner as to ensure (1) the avoidance of conflict with, and (2) the effectiveness of, the relevant MEA. Yet specific issues relating to the overlap of the dispute-settlement process of MEAs and the WTO may remain problematic.

THE RELATIONSHIP BETWEEN THE DISPUTE-SETTLEMENT MECHANISMS OF THE WTO AND THOSE OF MEAS

MAIN CHARACTERISTICS OF THE WTO DISPUTE-SETTLEMENT MECHANISM

The dispute-settlement mechanism of the WTO is a central element in providing security and predictability to the multilateral trading system.2 The system is an elaboration of the GATT that preceded it. However, the system under GATT had no fixed timetables, many cases dragged on for a long time inconclusively, rulings were easier to block, and implementation of reports as well as retaliatory actions were rarely regulated. The DSU that now governs the settlement of disputes under all WTO agreements listed in its Appendix I (covered agreements) developed Articles XXII and XXIII

2 In the US – Shrimp/Turtle Case, ibid., the Appellate Body stated at para. 121 that 'it appears to us 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 of GATT. See also the Appellate Body statement in the US – Shrimp/Turtle Case (relating to Article 11(5) of the DSU), at para. 124: 'Clearly, and as far as possible, a unilateral approach is strongly preferred. Yet it is one thing to prefer a unilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT; it is another to require the conclusion of a unilateral agreement as a condition of avoiding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement'.
3 Report of the Seventh Meeting of the Parties to the Montreal Protocol (UNEP/CL.4/Prt.7/2, 27 December 1993), the case concerning Russia's non-compliance with the Montreal Protocol is probably the one that most clearly reflects the uncertainties surrounding trade measures taken by MEAs and their potential challenge at the WTO. The recommendation of the Implementation Committee was adopted by the Meeting of the Parties thanks to an 'improved' rule of procedure that allowed it to override Russian opposition. Russia never challenged this, mostly due to other financial interests that were at stake. Russia could not challenge the trade restriction at the WTO because it is not a WTO member. For an in-depth analysis of this case, see J. Werksman, 'Compliance and Transitions: Russia's Non-Compliance Tests the Ozone Regime', 56 Zeitsschrift für ausländisches öffentliches Recht und Völkerrecht (1998), 751.
4 For instance, pursuant to CITES, Resolution 5.2, 'Implementation of the Convention in Bolivia', Proceedings of the Fifth Meeting of the Conference of the Parties (22 April–3 May 1995), it was recommended that 'all parties refuse to accept shipments of CITES specimens' from Bolivia if within 90 days Bolivia had not demonstrated to the Standing Committee that it [had] adopted all necessary measures to adequately implement the Convention'. Other cases involved, inter alia, Bolivia, Paraguay, Greece, Italy and China.
5 For instance, see Recommendation 99-10, ICCAT – Regarding Equatorial Guinea pursuant to the 1995 Recommendation regarding Compliance for Bluefin and North Atlantic Swordfish Fisheries (October 1999).
6 DSU, Article 3(2).
of GATT in introducing a more structured process. The WTO dispute-settlement mechanism functions according to a principle of reversed consensus (also called negative consensus). According to this principle, many steps and procedural stages happen automatically, within pre-determined time limits, unless, by consensus, WTO members agree otherwise. Panels and Appellate Body reports must now be adopted by all members sitting in the Dispute-Settlement Body (DSB), unless there is consensus to the contrary (the reversed or negative consensus): this is what is called the 'quasi-automaticity' of the new dispute-settlement mechanism of the WTO.

Only governments of WTO members are entitled to initiate dispute-settlement proceedings. Proceedings may commence when a WTO member considers that any benefits accruing directly or indirectly under any agreements are being impaired by measures taken by another member. There is no need for any specific economic or legal interest to initiate the DSU process and the challenging member does not need to prove the trade impact of the challenged measure.

The main dispute-settlement procedures of the WTO are those of the panel, appellate review, and the surveillance and implementation processes (including the possibilities of arbitration for specific procedural issues during the implementation stage). Article 25 of the DSU also authorizes WTO members to use arbitration rules as an alternative means of settling their disputes.

The WTO dispute-settlement mechanism is divided into four stages: consultations, panel process, appellate process and implementation. Article 4(2) of the DSU requires that countries in dispute enter into consultations - generally for at least 60 days - prior to bringing a request for the establishment of a panel to adjudicate over the matter. If consultations fail, the complaining party may request the DSU to establish a panel. The DSU is composed of all WTO members and is responsible for administering the DSU and overseeing the operation of the dispute-settlement system. The panel will be established, at the latest, by the second DSB meeting after it is requested.

Panels are composed of three well-qualified individuals, proposed by the WTO Secretariat, whose proposals may only be rejected by the parties of the dispute for compelling reasons. In practice, disputing members exercise strong political control over the selection of panelists. After 21 days, absent any agreement on the selection of panelists, any party can request the Director-General of the WTO to nominate panelists. The main stages of the panel procedure include the submission in writing by each party of their case, a first meeting between the parties and the panel, followed by written rebuttals and a second meeting (as well as the hearing of experts in cases involving scientific or technical matters). After an interim report is released, the panel's final report is generally given to the parties of the dispute within 9 months and circulated to all WTO members within 2 months thereafter. The panel report must be adopted by the DSB within 60 days of its circulation (unless it is appealed). Parties to a dispute can appeal any panel's findings on points of law, but the Appellate Body cannot re-examine existing evidence or examine new evidence.

Three members of a standing seven-member Appellate Body, set up by the DSB and broadly representing the WTO membership, hear each appeal. The Appellate Body can uphold, modify or reverse a panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum duration of 90 days (but some processes have lasted longer).
up to 140 days). The DSB must adopt both the Appellate Body's report and the panel report (as reversed, amended or upheld) within 30 days of the circulation of the Appellate Body's report. Reports of the panel and the Appellate Body must be made public.

The final phase of the WTO dispute process is the surveillance of implementation of the DSB's recommendations (i.e. the conclusions of the panel or Appellate Body) and the regulation of counter-measures in case of non-compliance, as provided for in Articles 21 and 22 of the DSU. The DSU generally prohibits the unilateral determination of any WTO violations during and outside the DSU process. The DSB monitors how adopted recommendations are implemented, and until the winning member is satisfied, the case remains on the DSB agenda until the issue is resolved. Panel and Appellate Body reports usually identify specific WTO violations (pursuant to the claims alleged by the complaining parties), but leave to sovereign WTO members the flexibility (over a reasonable period of time) to correct the challenged measures in a manner that is compatible with WTO rules.

In case the offending member fails to comply with the DSB recommendations within the time frame agreed or arbitrated for implementation (which varies between 8 and 15 months) or if parties cannot agree on mutually acceptable compensation within 20 days, a party may ask the original panel (and the Appellate Body thereafter) to review the implementing measure. In situations where the implementing measures are found to be incompatible with the WTO's rules, the successful member may ask the DSB for permission to impose trade sanctions corresponding to the level of trade nullified and impaired by the incompatible measure. The DSB may authorize requested sanctions, but arbitration performed by the original panel – from which there is no appeal – on the actual level of such nullification and impairment of benefits is possible. Sanctions are supposed to be imposed on the same sector(s) as those covered by the violations, but cross-retaliation in other sectors and other agreements are also possible.

A fundamental provision of the DSU, in the context of its relationship with other dispute-settlement mechanisms (such as those in MEAs), is Article 23. Article 23 of the DSU is entitled 'The Strengthening of the Multilateral System'. It provides that:

23(1) When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

23(2)(a) Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding... [emphasis added]

Article 23 of the DSU is one of the most fundamental provisions of the DSU. Not only does it prohibit unilateral measures or countermeasures, and arguably some State 'behaviour' that would potentially threaten the multilateral trade system, but it also provides that the WTO has exclusive jurisdiction for allowing remedies for violations of the WTO Treaty. It seems, thus, as if WTO members have in advance provided to the WTO adjudicating bodies exclusive jurisdiction to address violations of WTO rules.

In other words, the WTO adjudicating bodies will 'attract' jurisdiction over any trade-related disputes. The WTO dispute-settlement mechanism can be triggered easily and quickly, and panels and the Appellate Body will often be expected to make rapid rulings, arguably to the exclusion of the jurisdictions of other international fora. The exclusive and powerful jurisdiction of the WTO adjudicating bodies to deal with allegations of WTO violations does not resolve the complicated issue of overlaps and conflicts of jurisdiction.

28 WTO 27 January 2000, United States – Sections 301–310 of the Trade Act of 1974, WT/DS152/R (US – Section 301 Trade Act). This seems to have been one of the conclusions reached by the Panel – in the case of threat of unilateral determinations by a powerful State – the USA. The Panel was of the view that with the 'indirect effect' of the admittedly non-mandatory US Section 301, the risk of unilateral determination (both having 'chilling effect' on Members and the marketplace), as well as the overall systemic damage of any spill-over effect of such discretionary legislation, were such – in particular in light of the economic power of the United States – as to lead to a conclusion that the United States, in maintaining such Section 301, appeared prima facie to be in violation of Article 23 of the DSU. An important reason why Article 23 of the DSU must be interpreted with a view to prohibiting any form of unilateral action is because such unilateral actions threaten the stability and predictability of the multilateral trade system... Unilateral actions are, therefore, contrary to the essence of the multilateral trade system of the WTO... See US – Section 301 Trade Act, ibid., paras 7.11–7.34. See also ibid., paras 7.1–7.84.

jurisdictions. It is interesting to note that Article 11(3) of the Agreement on Application of Sanitary and Phytosanitary Measures (the SPS Agreement), entitled 'Consultations and Dispute Settlement' provides that:

Nothing in this Agreement shall impair the rights of members under other international agreements, including the right to resort to the good offices or dispute-settlement mechanisms of other international organizations or established under any international agreement.

This provision refers to the possibility of using other mechanisms under other international agreements, in parallel to those of the WTO.

**THE DISPUTE-SETTLEMENT MECHANISMS OF MEAS**

Most binding environmental treaties contain more or less detailed provisions on the settlement of disputes. They are characterized by their optional nature and by the fact that in most cases their results are not usually binding on the parties.

The basic model of dispute settlement in MEAs involves a progressive process that facilitates dispute resolution by subjecting the dispute to gradually more intrusive and formal mechanisms. The 'standard menu' includes optional adjudication by the International Court of Justice (ICJ), arbitration, or conciliation at the request of a party.

The scope of dispute-settlement mechanisms is normally limited to disagreements arising from the interpretation or application of the MEA. In cases of dispute, the first step is generally to seek a solution through consultation, negotiation or other peaceful means between the parties. If this fails, a second stage may consist of a joint request by the disputing parties for intervention by a third party through good offices, fact-finding, conciliation or mediation. Under each of these methods, the third party attempts to assist the parties to reach an agreement that ends the dispute, although the level of involvement varies. Alternatively, or for those disputes not resolved in accordance with negotiation or mediation, the case may be submitted to binding dispute settlement, frequently at the ICJ or through arbitration, if the countries in dispute agree to it. The majority of MEAs do not oblige parties to solve their disputes through binding adjudication processes (such as that of the ICJ), although in many cases parties can set their preferences upon ratification of the agreement. Some MEAs foresee compulsory conciliation, if parties have not accepted the same or any procedure for dispute settlement.

For that purpose, a conciliation commission may be created at the request of any party. However, unless otherwise agreed, the decision or recommendation of the commission is again not binding. Some MEAs establish that parties must consider the decision in good faith.

In recent years, many environmental treaties have incorporated free-standing non-compliance procedures, used as a dispute-avoidance mechanism. Non-compliance procedures are characterized by their non-controversial and technical assistance-oriented nature. They are normally administered by a special dedicated institutional mechanism, such as a standing or implementation committee. The size and composition of the committee may vary, but in general, they should try to reflect an 'equitable geographical distribution' (for instance the Montreal Protocol) or an adequate representation of those members most likely to be affected by the MEA (for instance proposals for the Committee of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal).

Several possibilities trigger the immobilization of such a committee. Review often can be initiated either through a complaint from one party against another, or by the secretariat of the MEA in any situation where it suspects a party of non-compliance. It has been common under the Montreal Protocol to

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31 See, for instance, Vienna Convention for the Protection of the Ozone Layer, Article 11(3); Vienna Convention on Biological Diversity, Article 27(4).
32 See, for instance, Vienna Convention for the Protection of Ozone Layer, Article 11(5).
33 See, for instance, Montreal Protocol on Substances that Deplete the Ozone Layer, Article 8; Resolution X/1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Annex I; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Article 17; Kyoto Protocol, Article 18.
35 For instance, see for the Montreal Protocol: Report of the Tenth Session of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP/CLP.10/10G, 1998); Decision XI 10; but also see Kyoto Protocol under which the United Nations Framework Convention on Climate Change (UNFCCC) Secretariat may not initiate proceedings: Report of the Conference of the Parties on its Seventh Session, FCCC/CP/2001/13/Add.3 (2002), Decision 214/CP7, at 89.
initiate the review through self-reporting by a party defaulting on its obligations despite its best efforts to the contrary. It might further be possible to authorize a standing or implementation committee to start a review at its own initiative if, upon its own periodic review of the secretariat's analytical summaries of information provided by the parties, the committee concludes that there is evidence of possible non-implementation or non-compliance, and provided neither a party, nor the convention secretariat on its own, has taken the necessary steps to bring the case formally before the standing or implementation committee. 49

Often, if the standing or implementation committee of a MEA finds that a party will not be in compliance, despite best efforts, it may issue recommendations in the form of a report and submit the recommendations to the Conference of the Parties of the MEA to decide on the steps to bring the State back into compliance. These non-compliance procedures usually do not dictate a standard response to all cases of non-compliance, but instead allow parties to tailor their responses to the specific circumstances and needs of the non-compliant party. This response may include assistance with collecting and reporting data, technical or financial assistance, technology transfer, or information transfer and personnel training. 49

If a committee finds that a party has not made a sufficient effort to meet its obligations, or if it is otherwise warranted by the circumstances, the committee may recommend punitive action against the non-compliant party. These can range from suspension of the party's rights and privileges under the MEA (for example denial of access to financial resources) to trade restrictions. 44 Under the Montreal Protocol, parties also adopted an indicative list of measures that might be taken by its Meeting of the Parties in respect of non-compliance. 45 These measures include the suspension of rights to trade substances covered by the Protocol. 45

Questions on the binding or non-binding nature of the response measures resulting from a non-compliance procedure 44 and the relationship of the non-compliance procedure with the dispute-settlement mechanisms foreseen in a MEA have yet to be answered in these regimes. 45 Moreover, the use of dispute-settlement mechanisms in MEAs is limited and should further develop in the future.

THE RELATIONSHIP BETWEEN THE DISPUTE-SETTLEMENT MECHANISMS OF MEAS AND THOSE OF THE WTO

As seen above, most MEAs do not have any compulsory dispute-settlement mechanisms that produce binding decisions. Furthermore, they do not refer to any exclusive jurisdiction, but provide for a 'menu' of dispute-settlement means, usually consisting of the ICJ or arbitration to be agreed by the parties. 46 The non-compliance mechanisms do not provide for any exclusive authority in favour of the MEA bodies, but their triggering mechanisms are generally fairly simple — often the non-compliance provisions may be invoked by the non-complying MEA State, by a competent executive body of the MEA or, eventually, by another MEA State.

The situation is different within the WTO, where Article 23 of the DSU provides that WTO-related disputes can be debated only before the WTO's adjudicating

49 This question arises, for instance, under the Montreal Protocol regime during the non-compliance procedure concerning Russia. In this regard, it is also interesting to analyse Article 18 of the Kyoto Protocol, which stipulates that 'any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment of this Protocol', suggesting that responses that are not part of such an amendment would not be binding. For a detailed discussion of compliance in the Montreal and Kyoto regimes, see J. Werksman, 'Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime', 9 YbIEL (1998), 47.

44 Although considered distinct and separate procedures, the relationship between traditional dispute-settlement mechanisms and non-compliance procedures raise conceptual questions concerning, for instance, the need to exhaust proceedings or the simultaneous activation of proceedings. However, some authors consider that, for instance in the case of the Montreal Protocol, because an implementation committee is a political organ, a case would not be sub judice if discussed nor res judicata if decided. For a detailed discussion, see G. Handl and E. Deutsch, n. 37 above, at 437; and see M. Kostenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol', 3 YbIEL (1999), 133.

45 The exception to this rule is the International Tribunal of the Law of the Sea (ITLOS), which enjoys mandatory jurisdiction over all State parties to UNCLOS in disputes relating to activities based in the seabed area (section 5 of Part XI of UNCLOS). For a detailed description of the ITLOS regime, see P. Sands (ed.), Manual on International Courts and Tribunals (Butterworths, 1998), 39-40.
bodies (a panel, the Appellate Body or through arbitration under Article 25 of the DSU). It also seems clear that it is only before the WTO adjudicating bodies that WTO violations can be the object of claims (which is distinct from stating that only the WTO Agreement can be invoked, argued, or interpreted by panels and the Appellate Body when examining a claim of WTO violation). Moreover, recommendations of panels and the Appellate Body through their quasi-automatic adoption by the DSB are binding, and if not respected, may lead to sanctions.

Yet, a single dispute, or aspects thereof, may involve issues that would appear to be of relevance to the non-compliance and the dispute-settlement provisions of a MEA, while the same governmental actions also affect trade and are thus WTO matters covered under Article 23 of the DSU. Based on Article 23 of the DSU and the automatic nature of the DSU mechanism, it is doubtful that any WTO adjudicating body would stop its process for the only reason that a parallel dispute is being addressed in another forum, unless the parties agree so. It may, therefore, be difficult to speak of pure conflicts between dispute fora, since WTO members have declared WTO fora as exclusively mandated to adjudicate WTO-related disputes. Moreover, the object and purpose of a MEA's mechanism may often differ from those of the WTO and thus not deal with the same subject matters.

This leads to the conclusion that while a MEA party is the subject of a non-compliance (or dispute-settlement) process for its actions or inactions, the same governmental action(s) (and their trade impacts) could be examined before a WTO adjudicating body, pursuant to an allegation of a WTO violation. This is indeed a frequent situation, where States are bound by multiple obligations that apply in a concomitant manner and are subject to parallel jurisdictions. For instance, in the Southern Bluefin Tuna Case, the arbitral tribunal stated that:

... But the Tribunal recognizes as well that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder... the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention.49

Even in situations where both treaties would provide for their exclusive jurisdiction over a specific matter, in the absence of an international authority to assess such conflict, parties may be faced with two parallel procedures.

An example of such parallel jurisdictions between the WTO mechanism and that of another treaty is the EC – Swordfish dispute.49 In that dispute, Chile enacted swordfish conservation measures by regulating equipment and limiting the number of fish that could be caught by denying new permits.50 Chile effectively prohibited the utilization of its ports for the landing and servicing of EC-based long-liners and factory ships that disregard minimum conservation standards. The EC challenged these measures as being contrary to its WTO rights pursuant to Article V of GATT, which provides for the free transit of goods along the territories of its members. Chile contended that the WTO does not limit its sovereignty over its ports and demanded that the EC enact and enforce conservation measures for its fishing operations on the high seas, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS). Chile then initiated the dispute-settlement provisions of UNCLOS and invited the EC to agree to resolve the dispute before the International Tribunal of the Law of the Sea (ITLOS). The EC finally agreed to the formation of an arbitral tribunal under UNCLOS. In this case, the substantive issues before the WTO adjudicating bodies could have included the right of Chile to benefit from the application of Article XX of GATT, which authorizes a WTO member to give priority – under certain conditions – to environmental considerations when acting pursuant to other treaties (such as UNCLOS).

In a situation such as the EC – Swordfish dispute, it is conceivable that both adjudicating bodies (that of ITLOS and WTO) would examine whether UNCLOS effectively requires, authorizes or tolerates Chile's measures, and thus whether such Chilean measures are in compliance with UNCLOS – an element that could influence the panel (or the Appellate Body) in its decision whether Chile may benefit from the application of Article XX. The two institutions could have reached different conclusions on factual aspects or on the interpretation of the MEA's provisions. Fortunately, the parties reached an agreement and suspended their disputes both before ITLOS and before the WTO. However, this example highlights that, at the moment, there does not seem to be any solution to this possibility of having different tribunals handling different aspects of the same dispute. The issue is whether, when and how WTO members that are also parties to MEAs should deal with the many different dispute fora concerned with various aspects of a dispute when

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47 DSU, Articles 3, 4, 7 and 11.
48 Arbitral Tribunal constituted under Annex VII of the UNCLOS, Award on Jurisdiction and Admissibility of 4 August 2000, Australia and New Zealand v Japan (Southern Bluefin Tuna Case), at 91.
49 WTO Chile – Measures Affecting the Transit and Importation of Swordfish, WT/DS193 (EC – Swordfish).
50 See M.O. Cruz 'The Swordfish in Peru', 46 Bridges (July–August 2000), 11.
findings from these various fora can lead to disparate and even inconsistent conclusions.

Timing between the Different Dispute-Settlement Mechanisms: Is there an Obligation to Exhaust the Dispute-Settlement Mechanism of MEAs before using those of the WTO? Even if there is no conflict in a strict sense, the relationship between the dispute-settlement mechanisms of MEAs and those of the WTO may still raise important tensions, namely with regard to their sequence and timing. A 1996 report of the WTO Committee on Trade and Environment (CTE) stipulated in its conclusions and recommendations that:

if a dispute arises between WTO members, parties to a MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute-settlement mechanisms available under the MEA.

Yet this, at best, has solely the legal value of a recommendation of the WTO CTE, which would find relevance in a WTO panel, but does not constitute an amendment to Article 23 of the DSU. More directly, if a MEA obliges its parties to use its dispute-settlement mechanism in case of disagreement, the refusal to use such a MEA mechanism could constitute a violation of the MEA itself. But in the absence of any MEA provisions as to when the MEA dispute mechanism is to be used generally, and/or in relation to the WTO mechanism, is there an obligation to 'exhaust' the MEA mechanism before initiating a WTO dispute? Or would this interpretation be viewed as inhibiting the right of a WTO member under the DSU to initiate a formal dispute whenever it considers that a benefit has been impaired or nullified?

In practice, there appears to be no real obligation to exhaust MEA dispute-settlement mechanisms before initiating a procedure under the WTO; moreover, most of the procedures in MEAs are not compulsory. This indicates that acrimonious parties may potentially use the WTO dispute-settlement procedure for matters already dealt with under a MEA and that the WTO dispute-settlement mechanism could not be stopped.

Short of any agreement between the parties and in the absence of any international rule as to how these different mechanisms interact, many scenarios may emerge. As discussed before, in light of the quasi-automatic nature of the WTO dispute process and Article 23 of the DSU, it is doubtful that a WTO panel would decline jurisdiction because another dispute process – albeit more relevant and better equipped – has been seized of a similar or related dispute. If both processes were triggered at the same time, it is probable that the WTO panel process would go much faster than the MEA process. So, what arguments can be raised before a WTO adjudication body with regard to a related MEA's dispute-settlement mechanism?

Good Faith Arguably, the principle of good faith would require a State to negotiate settlements to disputes that it faces under international instruments to which it is bound. The ICJ has stated that:

the obligation [to negotiate] constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations.

Even in situations where the WTO process has been triggered, governments can continue the MEA dispute process if they consider it necessary or beneficial to the WTO procedure, for instance as evidence of good faith efforts to negotiate a mutually agreed solution. In this sense, the WTO panel may examine and consider a MEA dispute avoidance/settlement mechanism as a legal fact.

In the US – Shrimp/Turtle Case, the Appellate Body stated that the USA had failed to undertake 'serious across-the-board negotiations' with other WTO members. Such refusal was one of the elements used by the Appellate Body to conclude that the USA had applied its measures in a discriminatory manner, contrary to the provisions of the 'chapeau' of Article XX of GATT.

51 Except if one is of the view that pursuing the DSU process would necessarily empty the mechanisms of the MEA of their object and purpose.
52 Report (1996) of the Committee on Trade and Environment (W/1 CTEN) para. 176.
53 See, for instance, Article 11(2) of the Vienna Convention for the Protection of the Ozone Layer or Article 20(3) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.
54 In international law, there is a principle obliging States to exhaust local remedies before having recourse to international dispute-settlement mechanisms, but the dispute mechanism of a MEA is not a local remedy and thus cannot benefit from the application of this principle. On the issue of the exhaustion of local remedies in international law and its application to WTO jurisprudence, see P.J. Kuijper, The Law of GATT as a Special Field of International Law', XXV NYU (1994), 227; and P.J. Kuijper, The New Dispute Settlement System', JLT (1996), 49; R.S.J. Martha, 'World Trade Dispute Settlement and the Exhaustion of Local Remedies Rule', 30:1 JLT (1996), 107.
Abuse of Rights A State may possibly argue that once one of the dispute-settlement bodies (WTO or MEA) has pronounced itself on an issue, there is a presumption that parties 'accept' this decision, because they brought the issue to that forum (although some may argue that this would not be the case under the WTO system, where the parties do not need to agree to bring a case to a panel). Re-initiating a parallel mechanism where the same remedies are claimed could be seen as an abuse of rights. However, the applicable law before a MEA body and the applicable law before WTO bodies are different and the remedies offered by the systems are also generally different. It may be difficult to speak of abuse of rights when a State is pursuing different remedies and clarifications on different aspects of the same dispute in different fora. Moreover, an argument can be made that for trade-related matters, WTO members have given their prior consent to give priority to the DSU process over that of other treaties, which priority can be exercised at all times. This would not imply that the MEA dispute process cannot be exercised, but it would make it difficult to argue that the use of the WTO mechanism is an abuse of rights since the MEA dispute process is ongoing. Finally, it is also doubtful that any MEA or WTO dispute-settlement forum would refuse to proceed on allegations duly made pursuant to their respective treaties on the basis that another for is examining similar facts and related matters.

Res Judicata Res judicata is a general principle of law where a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and constitutes an absolute bar to those parties from subsequent actions involving the same claim, demand or cause of action. The IC-‘Swordfish dispute is an example. If the ITLOS process had been completed before a WTO dispute-settlement tribunal was completed, it would be difficult to argue that there is res judicata based on a binding ITLOS judgment. The parties may be the same and the subject matter may be related, but legally speaking the applicable law would not be the same. Since the applicable law would always differ (albeit they may contain similar provisions), it is difficult to speak of res judicata between two dispute-settlement mechanisms of two different treaties. The judgment rendered in ITLOS would likely not constitute res judicata before the WTO.

The Relevant Rule of International Law (Article 31(3)(c) of the Vienna Convention) Article 31(3)(c) of the Vienna Convention on the Law of Treaties mandates any interpreter of a treaty provision to take into account any other rule of international law applicable to the parties. A MEA dispute avoidance and settlement mechanism constitutes legal rules applicable between parties, which must be taken into account by a WTO adjudicating body (pursuant to Article 31(3)(c) of the Vienna Convention) when interpreting WTO obligations and in respect of the procedural stages of its dispute-settlement mechanism. In this sense, one may argue that when interpreting the requirements of Article XX and other GATT provisions, the existence of such a MEA mechanism and the binding conclusions of a MEA process should be taken into account when relevant in the interpretation and application of Article XX.

Expertise Article 13 of the DSU allows any WTO panel to request from the parties, or from other sources, any relevant information. Arguably, this could include evidence from proceedings in other fora. For instance, a WTO panel may want to require expert information from a MEA secretariat, or, with the agreement of the parties, it may also want to use the analysis or data collected during a MEA process and it could do so in using Article 13 of the DSU.

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SUGGESTIONS TO IMPROVE THE DISPUTE-SETTLEMENT MECHANISMS OF THE WTO IN ENVIRONMENT-RELATED CASES

IN INVOLVEMENT OF MEA SECRETARIATS

WTO members should encourage greater involvement of relevant MEA secretariats in dispute-settlement procedures. Even before the formal panel process, MEA secretariats could, for instance, be invited to send comments and participate in consultations or mediation. A decision by the DSB could also encourage panels to fully exercise their rights under Article 13 of the DSU to request information from MEA secretariats. The advantage of early involvement of relevant MEA secretariats is that these experts may be in a better position to assess compliance with a MEA, which is a factor that may also be relevant in the panel process. For instance, reference to a MEA compliance (or dispute) mechanism could be used as one of the elements in establishing that discrimination in the application of the measure should not be characterized as 'unjustifiable', or that its application was not a disguised restriction on international trade for the purposes of the chapeau to Article XX of GATT. The respect given to a non-compliance process by MEA parties can also be viewed as evidence of State practice. Even if this is the practice of only one party, it may still be a relevant element to be taken into account when interpreting whether that particular WTO member is covered by the provisions of Article XX.

USE OF ENVIRONMENTAL EXPERTS

In all WTO-related disputes, experts may be consulted. States should be encouraged to rely on such outside experts at the early stages of a dispute to collect evidence which could be used later – should the matter not settle. The encouragement to use a group of experts at the early stages of a dispute may improve the expert selection process at the panel stage and oblige parties to identify expert issues. The use of experts, even before the formal DSU process, may be seen as an effort to settle disputes in a mutually agreed manner. Further, use of environment and development experts may also assist panels in certain circumstances. An agreement on environmental trade-related matters could include specific provisions for the selection of experts and panelists for the panel process. Provisions applicable to disputes could also be complemented by an amendment to the DSU, possibly by adding a list of additional special procedures for disputes involving this new agreement to Appendix 2 of the DSU.

REFERENCE TO THE INTERNATIONAL COURT OF JUSTICE

Based on the model of the International Trade Organization (Havana Charter) of 1948 (which never came into force) trade disputes involving a pre-determined list of environmental treaties could be subject to final review by the ICJ. Since the WTO dispute-settlement mechanisms can apply and enforce only WTO provisions, it could be argued that the ICJ would be the best international forum to adjudicate certain matters where non-WTO rights and obligations are applicable. At the least, in these circumstances, the ICJ might usefully provide a non-binding opinion on the relationship between the provisions of the WTO and the provisions of other treaties. Such a proposal would eventually necessitate an amendment to Article 23 of the DSU, which obliges WTO members to bring to the WTO adjudicating bodies any dispute relating to the interpretation and application of WTO provisions.

DISPUTE PREVENTION AND MEDIATION - FURTHERING THE USE OF ARTICLE 5 OF THE DSU

To prevent trade and environment issues from escalating into formal WTO trade disputes, the provisions of Article 5 of the DSU, on mediation, conciliation and good offices, may be used before invoking their right to formal, binding dispute-settlement proceedings. This provision allows disputing parties to voluntarily undertake third party assisted discussions at any stage during the course of a dispute and permit the Director General, in an ex officio capacity, to offer these services. Despite their attractiveness, the Article 5 procedures have never been used because they require the agreement from all the disputing parties. To prevent future conflicts from escalating into full trade disputes, WTO members may wish to consider how to use more effectively WTO third party assisted processes.

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59 A greater list of suggestions can be found in, for example, G. Marceau, "Praise for the Prohibition Against Clinical Isolation in WTO Dispute Settlement", 33:5 JWT (1999), 87, at 139.
60 The Appellate Body in US – Shrimp/Turtle, n. 4 above, at paras 79-81 and 89-110, interpreted this provision as allowing panels to take into account even non-solicited submission from non-members.

In their various forms, fact-finding, conciliation, good offices and mediation involve a third party to clarify the facts surrounding the dispute, to assist the disputing parties in communicating, to encourage them to re-evaluate their positions, to offer compromise suggestions and solutions, and to generally maintain a constructive environment for discussion. In the case of environment-related trade disputes, a third party could, for example, assist the parties to consider options other than a trade ban, such as certification and labelling, or additional financial and technical assistance to address the issue at its source.

Guidelines on Article 5 of the DSU could be created to encourage early notification and exchange of information. They could also provide opportunities for affected stakeholders, relevant international organizations, such as the United Nations Environment Programme, the United Nations Conference on Trade and Development and the United Nations Development Programme, and the relevant MEA secretariats to be consulted to provide expert evidence and interpretation on a matter in dispute. To ensure they are not used to delay access to formal WTO procedures, the Article 5 procedures could run in parallel to the consultation period, or formal dispute-settlement procedures. Increased use of Article 5 procedures would have significant advantages for both developed and developing countries. As an informal process, they could operate outside the formal WTO structure and require no changes to WTO rules. They may also address the concerns of environmentalists about the WTO dispute-settlement system becoming an international environmental court. By involving relevant stakeholders, Article 5 procedures would engage the creativity of experts and civil society to find solutions to underlying environmental problems. Article 5 procedures could also allow parties to come to a negotiated settlement without the need for the use of formal and expensive binding dispute-settlement procedures. On 17 July 2001, the Director-General issued a communication encouraging the use of Article 5 DSU procedures. Although sometimes invoked by one party to a dispute, Article 5 procedures require the consent of both parties for their operation.

**SETTING UP OF AN ENVIRONMENT ADVISORY BOARD**

With a view to ensuring that full expertise is available to resolve environment-related WTO disputes, WTO members may also consider creating a conciliatory, quasi-judicial body along the lines of the Textile Monitoring Body (TMB) under the authority of the WTO General Council, or, alternatively, reporting to parties prior to the formal initiation of a DSU dispute process. A similar process could be established for environment-related trade disputes. Disputing parties could be obliged to first expose their complaint to a body of specialists who would make a recommendation about the dispute. After further discussions, any party not satisfied with the recommendations could pursue formal dispute-settlement proceedings. Such an Environment Advisory Body (EAB) would have the advantage of providing access to experts and enjoying more flexibility in its examination of the evidence and other relevant factors than a panel. This EAB would also offer expertise to be used by the WTO adjudicating bodies—in case of the absence of mutually agreed solutions. This in turn may provide for quicker and better decision-making by the adjudicating bodies. The composition of such an EAB could include the participation of the industry concerned as well as non-government organizations and other experts, together with regional representation. In order to ensure that this process does not unduly delay access to the WTO dispute mechanisms, provisions could include the possibility for the compliant party that has used the EAB mechanism to 'skip' the consultation process under the DSU and to obtain immediate access to the formal dispute-settlement procedure.

**CONCLUSION**

In the context of a dispute between two WTO members concerning a measure claimed to be required or authorised by a MEA provision or decision, a WTO member that considers that any of its WTO benefits have been nullified or impaired has an absolute right to trigger the WTO dispute-settlement mechanism and request consultations and the establishment of a panel and, eventually, to initiate parallel procedures under the MEA. It is very unlikely (and might not even be desirable) that a hierarchy between the two systems, MEAs and WTO, be established. The dispute-settlement mechanism of the WTO is attractive because it is simple, quick and powerful. However, the WTO dispute-settlement mechanism could be

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62 WTO 17 July 2001, Article 5 of the Dispute Settlement Understanding – Communication from the Director General, WT/DSU/ 25.

improved so as to ensure that the expertise developed in MEAs, together with actions taken pursuant to MEA provisions and dispute-settlement and avoidance mechanisms, are duly taken into account in the WTO dispute-settlement process. But this may not suffice. There is a need to strengthen compliance and dispute-settlement mechanisms in MEAs so as to enhance the effective implementation of MEAs, which may lead to fewer challenges before the WTO and provide an important source of mutual support between the dispute-settlement systems of MEAs and the WTO.

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