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**Coherence in Global Governance:
The Case of Trade and Environment**

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Abstract

Coherence in Global Governance: The Case of Trade and Environment

'Global Governance' has been described as "the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organizations, both inter- and non-governmental, through which collective interests on the global plane are articulated, rights and obligations are established, and differences are mediated" (Weiss and Thakur). The management of global interests is undoubtedly a highly complex process, involving a multiplicity of actors operating at different levels of governance as well as the intricate web of inter-relationships between them. The growing number of actors has also resulted in an increase in the overlap between their work. Thus, global problems are being addressed by various actors at different levels at the same time, leading to a fragmented structure of governance. While this fragmentation is inevitable in today's complex world, it is imperative to ensure coherence in the efforts taking place at different fora to ensure that overlap, undercutting and duplication of effort are minimized while cooperation and coordination are maximized. In light of the complex nature of the efforts aimed at addressing global problems, optimal and effective solutions will require a coherence of effort.

This paper examines the challenges of achieving coherence in the legal and institutional mechanisms designed for specific goals, especially on issues of overlap between different governance structures. In the first part, the paper identifies the problems associated with the increasingly fragmented structures of governance and highlights the reasons why different regimes that handle common issues must address them in a coherent manner and in cooperation with each other. It highlights recent initiatives at achieving coherence such as the *UN System Chief Executives Board*.

The second part of the paper focuses on a particular area where the need for coherence is felt severely – the interface between the international trade and environmental governance structures. While international trade rules are embodied in the World Trade Organization (WTO), environmental issues are governed by a host of individual Multilateral Environmental Agreement (MEA) secretariats dealing with separate issue areas such as hazardous waste, ozone depletion, biodiversity, climate change etc. Of the over 270 MEAs governing different environmental issues, roughly 25 include trade-related provisions, which either prohibit trade in certain products or allow countries to restrict trade. These trade restrictions appear to be contrary to the WTO rules designed to achieve free trade, giving rise to the question of compatibility of measures taken under MEAs and WTO rules. The WTO, recognizing the need for coherence between the two governance structures, introduced in the Doha Round launched in 2001, negotiations for clarifying the relationship between WTO rules and the MEAs that contain 'specific trade obligations' [paragraph 31(i)], thus addressing issues relating to 'legal coherence' between the two regimes. The Doha negotiations also cover the issue of 'institutional coherence' [paragraph 31(ii)], i.e. procedures for MEA secretariats and relevant WTO committees to exchange information regularly and the granting of observer status to MEA Secretariats. The paper examines in detail the ongoing negotiations, as part of the Doha Round, on enhancing coherence and cooperation between the WTO and MEAs, elaborating upon the controversial issues, the country positions and the current state of play of negotiations on these two agenda items. Based on the example of trade and environment, the paper draws lessons more generally relating to coherence in global governance.

Coherence in Global Governance: The Case of Trade and Environment

1. Introduction

Roughly six decades ago, the post-war international community took stock of the prevailing problems of the time and, concluding that ‘international cooperation’ was the key to the problems plaguing the global system, created the currently existing universe of international institutions, including the United Nations and the Bretton Woods Institutions. In these six decades, the narrow mandates identified for these institutions have expanded in the face of global change and, more recently, as a consequence of the forces of globalization. These past decades have also seen a proliferation of many new organizations at the global as well as regional levels, and an explosive growth of non-governmental organizations. Along with the growth in numbers, there has also been an increase in the overlap between the fields of operation of these institutions. The management of global interests is thus becoming an increasingly complex process, determined by the cumulative individual achievements of the growing range of actors operating at different levels within the framework of interactions and inter-relationships that exist among these actors. The currently existing system of responses to global problems is aptly described in terms of the overarching notion of ‘global governance’.

‘Global Governance’ has been defined as “the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organizations, both inter- and non-governmental, through which collective interests on the global plane are articulated, rights and obligations are established, and differences are mediated”.¹ Aside from the complexity of the mechanism described here, a further complication is the fact that the dividing lines between policy regimes have blurred as more and more issues impact each other. An illustrative example of this ‘issue overlap’ is the case of trade and environment; the objectives of ‘free trade’ and ‘environmental protection’, once thought to be located in mutually exclusive spheres, are increasingly viewed as components of the common policy objective of ‘global sustainable development’. Global problems are being simultaneously addressed by various actors at different levels, leading to a fragmented structure of governance. While this fragmentation seems to be a natural outgrowth in today’s complex and globalized world, it is imperative to achieve coherence in the efforts taking place at different fora to ensure that overlap, duplication and undercutting are minimized while cooperation and coordination are maximized. Considering the current complexity of the governance mechanisms aimed at addressing global problems, viable and effective solutions are likely to

¹ Thomas G. Weiss and Ramesh Thakur (2006), *The UN and Global Governance: An Idea and its Prospects*, Indiana University Press, Bloomington: Indiana University Press.

emerge from a coherence of effort and responses from all quarters. 'Coherence', then, is a central challenge facing the current complex global system.²

This paper explores the theme of 'coherence in global governance'. It seeks to identify the challenges of coherence in the legal and institutional mechanisms designed for specific goals. The particular example of coherence that the paper focuses on is the interface between the international trade and environmental governance structures. It examines, in detail, the current mandate of the Doha Round of multilateral trade negotiations on clarifying the relationship and enhancing cooperation between the World Trade Organization (WTO) and the Multilateral Environmental Agreements (MEAs).

The paper contains two substantive parts, apart from the *introductory* and *concluding* sections. **Section 2** deals generally with the issue of coherence in global governance. It identifies the problems associated with the increasingly fragmented structures of governance that are emerging, sometimes preventing a coherent approach to addressing global concerns. It highlights the reasons why different regimes that handle common issues must address them in a coherent manner and in cooperation with each other. The significance of coherence has been recognized by the existing global governance structures themselves. Within the UN structure, the *UN System Chief Executives Board* and the *High-level Panel on United Nations System-wide Coherence* are examples of recent initiative towards addressing the issue of coherence. Also, within the WTO, there has been recognition of the need for coherence as well as efforts to achieve it. A study of the institutional effort of the UN and the WTO towards the objective of coherence in governance is included in the second section.

The specific example of coherence that is sought to be analyzed in **Section 3** is that of the interface between the international trade and environmental governance structures. While international trade rules are embodied in the WTO, environmental issues are governed by a host of individual MEA Secretariats dealing with separate issue areas such as hazardous waste, ozone depletion, biodiversity and climate change etc.³ Both bodies of law are mutually inter-related as the rules of one has implications for the working of the other. Of the over 270 MEAs governing different environmental issues, roughly 25 include trade-related provisions, which either

² The notion of coherence is highlighted in the *Report of the High-level Panel on United Nations System-wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment* titled "Delivering As One" [United Nations General Assembly, A/61/583, 20 November 2006]. The document makes reference to the term 'coherence' 66 times.

³ These are, respectively, the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989*; the *Vienna Convention on the Protection of the Ozone Layer, 1985* and the *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987*; the *Convention on Biological Diversity, 1992*; and the *UN Framework Convention on Climate Change* and the *Kyoto Protocol to the UNFCCC, 1997*.

prohibit trade in certain products or allow countries to restrict trade. These trade restrictions appear to be contrary to the WTO rules designed to achieve free trade, giving rise to the question of compatibility of measures taken under MEAs and WTO rules. While the overlap of policy concerns of the international trade and the environmental institutional structures has grown tremendously, clarification on legal compatibility as well as institutional cooperation have lagged behind, giving rise to a sorely felt need for coherence. The areas of potential conflict and cooperation between these two systems of governance are introduced in this section as a manifestation of the problem of coherence identified in the previous section.

This section also focuses more closely on the ongoing work of the WTO. At Doha (2001), members agreed to negotiate on clarifying the relationship between WTO rules and the MEAs that contain 'specific trade obligations' (paragraph 31(i)), thus addressing, in a limited sense, the issue of 'legal coherence' between the two regimes. The Doha negotiations also cover the issue of 'institutional coherence' (paragraph 31(ii)), i.e. procedures for MEA secretariats and relevant WTO committees to exchange information regularly and the granting of observer status to MEA Secretariats. This section focuses specifically on the efforts within the WTO to promote coherence in the context of clarifying the WTO-MEA relationship. It examines the nature of the interface between the rules contained in MEAs and those of the WTO and also the working relationship between the two institutional structures. An analysis of the issues that are currently being discussed and an evaluation of the current state of play of negotiations on these two agenda items are included. In the concluding section, the study, based on the example of 'trade and environment', seeks to draw lessons relating to coherence in global governance.

2. The Challenge of Coherence in Global Governance

2.1. The Problem of Multiple/Fragmented Global Governance

Rosenau has characterized "global governance" as "systems of rule at all levels of human activity – from the family to the international organization – in which the pursuit of goals through the exercise of control has transnational repercussion."⁴ 'Governance' implies something more expansive than 'government' and according to Weiss, application of the vocabulary of 'governance' to the global level resulted from the growing recognition of the proliferation of non-state actors and their growing importance. "Global governance should perhaps be seen as a heuristic device to capture and describe the confusing and seemingly ever-accelerating transformation of the international system."⁵ He explains how "burgeoning information,

⁴ James S. Rosenau (2005), "Governance in the Twenty-first Century" In Wilkinson, Rorden, *The Global Governance Reader*, Routledge, p.45.

⁵ Thomas G. Weiss (2000), "Governance, Good Governance and Global Governance: Conceptual and Actual Challenges", *Third World Quarterly*, 21(5), p.808.

communication, market, finance, networking and business activities are producing a world in which patterns are extremely difficult to discern.”⁶

An emerging characteristic of the current system of governance of global issues is an increasing fragmentation of all components of governance – policy making, dispute settlement, rule implementation etc. With the proliferation of institutions and actors at different levels that have implications for global issues and the increasing diffusion of the dividing lines between issue areas, proponents of global governance face difficulties in making effective policy prescriptions.

Policy coherence, understood in a narrow sense would imply simply “the absence of incoherences, i.e. of inconsistencies between and the mutual impairment of different policies.”⁷ But a broader and “more ambitious“ definition would see coherence as “the interaction of all policies that are relevant in the given context with a view to the achievement of overriding ... objectives.”⁸ Lack of policy coherence may have the following negative implications: (i) ineffectiveness (ii) inefficiency and (iii) loss of credibility.⁹ However, a realistic understanding of coherence would recognize its limitations as well, i.e. that it operates in the context of “competing“ values, interests, standards and norms. “These norms include coherence, efficiency and effectiveness but also public participation, rights to local decision-making, moral beliefs, diversity, representation and competition etc. These norms are not necessarily integrated with the standard of coherence. And it is not preordained that coherence should be seen as the most important norm at all times. Therefore, the pursuit of coherence should be recognized as only one quest among others, though a very important one.”¹⁰

The notion of ‘coherence’ in global governance would imply a constructive interaction of the multifarious actors that deal with a particular issue. For instance, coherence on a global problem such as climate change would involve coordination between the various inter-governmental, non-governmental and regional organizations as well as states and sub-state actors whose work may have implications for climate change. This “vertical coherence” percolating through different levels will need to be further complemented with “horizontal coherence” among governance structures at the same level dealing with inter-related issue areas. Climate change, for instance, is an issue on the agenda of not just the *United Nations Framework Convention on Climate Change* (UNFCCC) Secretariat but also

⁶ Ibid., p.806.

⁷ Sometimes, this is referred to as ‘policy consistency’. See Guido Ashoff (2005), *Enhancing Policy Coherence for Development: Justification, Recognition and Approaches to Achievement*, Studies 11, Bonn: German Development Institute, p.11.

⁸ Ibid, p.11.

⁹ Although this analysis is made originally in the context of domestic policy making, it would apply equally to policy making in global governance. Ibid., p.11.

¹⁰ Ibid., p.35.

of institutions such as the *United Nations Development Programme* (UNDP), WTO and the *International Labour Organization* (ILO),¹¹ to name just a few, as well as several non-governmental organizations working on this issue at the global level. Thus, within the scope of governance at the global level, there must be cooperation across organizations dealing with different facets of the problem at hand. The ideal situation of coherence in addressing global issues would involve simultaneous attainment of "vertical" and "horizontal" coherence. But in practice, this ideal is to be achieved by building step-by-step the links of cooperation in both directions. In building coherence, the following questions, as articulated by Weiss, become relevant:

"In the face of anarchy, what mechanisms should be primarily responsible for global governance? Is there a way to structure a reasonable measure of co-ordination and co-operation among governments, intergovernmental organisations, non-governmental organisations and the private sector that would constitute meaningful, or at least improved, patterns of global governance? If it is the product of purposeful decisions and goal-oriented behaviour, how can global governance exist in the absence of clear consensus about goals? To what extent does global governance depend on shared values and norms?"¹²

Global governance, then, is "to search for order in disorder, for coherence in contradiction, and for continuity in change".¹³ The current situation of global governance is far from being orderly or coherent; fragmented governance structures with little or no coordination between them act as a hurdle towards achieving desirable outcomes in relation to global problems. The focus in this paper, for instance, is in particular upon the relationship between two inter-governmental processes that are attempting, since over two decades, to establish cooperative arrangements between themselves in order to address common issues in a coordinated fashion. The painfully slow movement on this front, marked by long phases of complete standstill, indicates the difficulties in establishing linkages between actors and provides an indication of the magnitude of the challenge in aiming towards the overarching and somewhat idealistic objective of 'coherence in global governance'.

¹¹ The 2007 Human Development Report of the UNDP is titled "*Fighting Climate Change: Human Solidarity in a Divided World*" and establishes climate change as a 'development' concern. In December 2006, EU Trade Commissioner Peter Mandelson called for a WTO zero tariff agreement on key green goods and a subsequent US-EC proposal at the CTESS advocated a zero tariff on climate change-related goods. In September 2007, the ILO presented a new plan to address climate challenge and to promote environmentally sustainable development ('*Green Jobs Initiative*').

¹² Weiss, n.5, p.809.

¹³ Rosenau, n.4, p.45.

2.2. Efforts at Coherence in Governance

In practice, intergovernmental organizations are beginning to accord increasing importance to ‘coherence in governance’ as a policy objective. In the context of coherence at the domestic level, the annual OECD ministerial meeting in 2002 stated: “Analysis should consider trade-offs and potential synergies across such areas as trade, ... environment ... to encourage greater policy coherence in support of the internationally agreed development goals”.¹⁴ At the intergovernmental level, most organizations have formal provisions to facilitate cooperation with other institutions in order to promote overall coherence in the achievement of desired goals. The respective interactions of two intergovernmental organizations – the UN and the WTO – with the objective of coherence are detailed below.

2.2.1. The United Nations and Coherence

The United Nations took an initiative to promote internal coherence through the establishment of the *Chief Executives Board (CEB)* in 2001.¹⁵ The ‘UN System’ comprises all the organizations established by the Charter of the United Nations.¹⁶ Although the specialized agencies have their own objectives, interests and concerns, they have been brought into a special agreement with the UN through negotiated agreements.¹⁷ The Funds and Programmes are subordinate to the UN but controlled by distinct inter-governmental bodies. The *International Atomic Energy Agency (IAEA)* has a slightly distinct relationship with the UN¹⁸ in that it reports to the Security Council and General Assembly in addition to the ECOSOC, to which all specialized agencies report. The WTO has a special status, as it does not have a formal agreement with the UN.¹⁹

¹⁴ OECD (2003), *Policy Coherence: Vital for Global Development*, Policy Brief. Available at: <http://www.oecd.org/dataoecd/11/35/20202515.pdf>

¹⁵ <http://www.unsystemceb.org>

¹⁶ The ‘UN system’ includes the UN, its specialized agencies established under Article 57 of the Charter and several programmes established by the General Assembly under Article 22 of the Charter.

¹⁷ These are legally independent international organizations but have been brought into relationship with the United Nations through agreements. Relationship Agreements were signed by the *International Labour Organization (ILO)* on 14 December 1946; by the *Food and Agriculture Organization (FAO)* on 14 December 1946, by the *United Nations Educational, Scientific and Cultural Organization (UNESCO)* on 14 December 1946, by the *International Civil Aviation Organization (ICAO)* on 13 May 1947, by the *International Bank for Reconstruction and Development (IBRD)* on 15 November 1947, by the *International Monetary Fund (IMF)* on 15 November 1947, by the *Universal Postal Union (UPU)* on 1 July 1948, by the *World Health Organization* on 10 July 1948, by the *International Telecommunication Union (ITU)* on 1 January 1949, by the *World Meteorological Organization (WMO)* on 20 December 1951, by the *International Finance Corporation (IFC)* on 20 February 1957, by the *International Maritime Organization (IMO)* on 13 January 1959, by the *World Intellectual Property Organization (WIPO)* on 17 December 1974, by the *International Fund for Agricultural Development (IFAD)* on 6 April 1978, by the *United Nations Industrial Development Organization (UNIDO)* on 1 January 1986, and by the *World Tourism Organization (UNWTO)* on 11 March 2004.

¹⁸ Resolution 1145 (XII) of the General Assembly, 14 November 1957.

¹⁹ In 1952, the then Executive Secretary of the WTO, Eric Wyndham White, and the then UN Secretary General, Trygve Lie, exchanged letters, noting the “...close de facto working arrangements which exist between the UN and GATT”. In 1995, when the WTO was established, a further exchange of

The CEB, which is the successor of the *Administrative Committee on Coordination* (ACC), promotes coordination and cooperation on several "substantive" and "management" issues facing the organizations of the UN. At the CEB, the executive heads of the organizations of the UN system (along with those of the IAEA and WTO), under the chairmanship of the UN Secretary General, come together on a regular basis. Since its composition gives it the advantage of a broad overview, the CEB reviews the major concerns facing the UN system and approves policy statements on behalf of the *UN System as a whole*. The objective of the forum is to promote interaction and therefore coordination between the different institutions working in specific areas within (and even outside) the UN system. The CEB has backed and supported all coherence-based recommendations of the UN such as those contained in the 2005 Report by the Secretary-General, *'In Larger Freedom: Towards Development, Security and Human Rights for All'*, which focuses on the need for a comprehensive response to current challenges, and the *'Delivering As One'* Report of 2006, which recognizes the need for coherent action within the UN system.

Consequent to the 2005 World Summit in New York, the UN Secretary General established a High-level Panel to explore how the UN system could work more coherently and effectively in the areas of development, humanitarian assistance and the environment. The panel worked on designing a framework for the fundamental restructuring of the operational work of the UN and the culmination of their effort was the 2006 Report titled *"Delivering As One"*. Overcoming systemic fragmentation and 'delivering as one' was identified as a central theme of the report.

The content of the Report is summed up in the statement, "The United Nations system is clearly united in its desire to improve its coherence and coordination."²⁰ It encompassed a two-pronged framework for a unified and coherent UN delivery structure through the establishment of "One United Nations" at the country level and strengthened coherence of governance, funding and management arrangements at the centre. The Report worked out the constituent elements of a coherent approach and recommended:²¹

- consolidation of existing entities wherever necessary, and elimination of unnecessary duplication and competition
- identification of the comparative advantage of organizations and delineation of functions, roles and responsibilities
- formulation of mechanisms to enable policy consistency
- significant streamlining of UN agencies

letters between Renato Ruggiero and Boutros Boutros Ghali underlined the cooperative nature of the relationship between the two organizations. See <http://www.unsystemceb.org>

²⁰ Report of the High-level Panel on United Nations System-wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment (2005), *Delivering As One* [A/61/583], para 14.

²¹ *Ibid.*, p.5.

It also recommended the setting up of a “Global Leaders Forum” of the ECOSOC, comprising the leaders of half of its members, on a rotation basis, and executive heads of the major international economic and financial institutions. Among its functions would be: to provide leadership and guidance to the international community; to develop policy frameworks to secure consistency in the policy goals of the major international organizations, and to promote consensus-building among Governments on integrated solutions for global issues.²²

The Report further stated that the CEB’s “...potential had been under-exploited and its decision-making role had been underused” and asked the CEB to undertake a review of its functioning with a view to improving its performance and accountability for system-wide coherence.²³ According to the Report, an effective and results-oriented CEB, along with a better functioning ECOSOC, would enhance coherence throughout the system.²⁴

The UN has, thus, clearly recognized the problem of fragmentation within its own functioning and the need for coherence in its planning and delivery systems. Although it is too early to judge the effectiveness of its coherence-related recommendations in practice, the serious recognition of the value of and need for coherence is evident from its recent initiatives in this direction.

2.2.2. *WTO and Coherence*

Within the multilateral trading system, comprising the GATT and now the WTO, the need has long been perceived for a broader and deeper cooperation with other international institutions. During the Uruguay Round of negotiations (1986-1994), this need was formally recognized and the ‘Functioning of the GATT System (FOGS) Group’ was set up to help identify the contradictions and inconsistencies between trade and other policies, and ministers stressed the need for cooperation between different policy areas.²⁵

Several provisions of the WTO Agreement touch upon the issue of coherence. Article III of the *Agreement Establishing the WTO*, which establishes the ‘Functions of the WTO’, identifies as one function of the WTO, cooperation with the World Bank and the International Monetary Fund (IMF) to achieve greater coherence in global economic policy-making.²⁶ Further, a Ministerial Declaration on “The Contribution of the WTO to Achieving Greater Coherence in Global Economic Policy-making” invites the Director-General of the WTO to review with the heads of the Bretton Woods

²² Ibid., p.41.

²³ Ibid., para 18.

²⁴ Ibid., p.44.

²⁵ Gary P. Sampson (2005), *The WTO and Sustainable Development*, Tokyo: United Nations University, p.289.

²⁶ This is not surprising, as the three institutions share a common philosophy and have compatible objectives.

Institutions how the institutions can cooperate to achieve greater coherence.²⁷ In furtherance of the objective of achieving coherence in global *economic* governance, formal Agreements have been concluded between the WTO and the World Bank, and between the WTO and the IMF, both of which acknowledge the importance of cooperation between these three institutions.²⁸

Article V of the Agreement Establishing the WTO, entitled 'Relations with Other Organizations', requires the General Council to "...make appropriate arrangements for effective cooperation with other intergovernmental organizations *that have responsibilities related to those of the WTO*" (italics added). Thus, the scope of this provision is limited to *related* organizations and as Sampson points out, "...falls far short of mandating the WTO to work together with the specialized agencies of the United Nations in order to bring greater coherence to global policy-making".²⁹ He further states that there is considerable scope for improved cooperation between the WTO and UN agencies for greater coherence in policy-making and calls for identification of "...specific areas where complementarity and mutually supportive policies could be pursued".³⁰ Sampson's plea is to expand the coherence agenda of the WTO, which is currently aimed at the Bretton Woods Institutions, to include all global intergovernmental institutions (such as the UN agencies) and to expand the objective to achieving coherence in global policy-making in general.

Pascal Lamy, the current Director General of the WTO, refers to the WTO as "an embryo of global governance". He points out that the WTO does not have a restrictive ambit as it gives full recognition to social values other than market opening and trade efficiency. He points out that the GATT has always recognized the legitimacy of government policy that may be trade restrictive but is genuinely aimed at fundamental social objectives. Apart from the constitutional provisions of the WTO that allow derogation from free trade obligations, WTO jurisprudence has established that the provisions of the WTO must not be read "in clinical isolation" from public international law. This reiterates the identity of the WTO as merely one component of the global system. Lamy underscores the need to cooperate more coherently with other international organizations working in the interests of international governance. He suggests that coherence must apply in the relationship between the opening up of markets and the measures that accompany the effects of such opening; i.e.

²⁷ Sampson, n.25, p.292.

²⁸ The Agreements provide a framework for institutional cooperation between these organizations, including exchange of information, sharing of research efforts, staff consultations and exchange, joint reports etc.

²⁹ Sampson, n.25, p.290.

³⁰ Sampson, n.25, p.290.

consideration of the costs of adjustment must be an integral part of the opening-up agenda.³¹

It has been argued that the UN specialized agencies and the WTO should pursue consistent and mutually supportive policies. The expanding mandate of the WTO has converted it from a specialized trade organization to a general organization of governance, with its system of rules impacting many non-trade sectors as well. Sampson proposes, on the lines of the FOGS proposal for greater global economic coherence, the formation of a 'Functioning of the World Trade Organization System' (FOWTOS) Group, where governments could work on bringing greater coherence to policy-making at the global level.³² The agenda on trade and environment, for instance, would be a prime candidate for coherence in policy-making and recognizing this, the Doha Round contains a mandate to explore the trade-environment interface.

3. The Case of Trade and Environment

3.1. *The Environment Issue at the WTO*

The need for coherence in global governance is exemplified in the interface between the international governance regimes for trade and those for environmental protection, more specifically, between the WTO and the MEAs. The compatibility or otherwise of these two international legal and institutional regimes has been an issue of central concern, although it must be said at the outset that much of the debate in this area is *speculative*. Till date, no problem has *actually* arisen in the WTO over the use of trade measures applied pursuant to MEAs. Although, several environmental and public health disputes have arisen in the WTO (and previously, in the GATT), they have all concerned *unilateral* trade measures.³³ The absence of challenge of multilateral provisions is attributed to the wide membership of most MEAs and to a probably genuine desire of States not to create unnecessary conflict between legal regimes with legitimate goals. In fact, the WTO Committee on Trade and Environment itself has taken the stand that problems are unlikely to arise in the WTO over trade measures agreed and applied among Parties to an MEA. The Report of the CTE recommended that disputes arising over the use of a trade measure applied

³¹ Lamy, Pascal, *Towards Global Governance?*, Master of Public Affairs Inaugural Lecture at the Institut d'Etudes Politiques de Paris, 21 October 2005.

Available at: http://www.wto.org/english/news_e/sppl_e/sppl12_e.htm#fntext1

³² Sampson, n.25, p.301.

³³ *United States – Prohibition of Imports of Tuna and Tuna Products from Canada, 1982; Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, 1988; Thailand – Restrictions on the Importation of and Internal Taxation on Cigarettes, 1990; United States – Restrictions on Imports of Tuna, 1991 & 1994; United States – Standards for Reformulated and Conventional Gasoline, 1996; Measures Concerning Meat and Meat Products (Hormones), 1997; United States – Import Prohibition of Certain Shrimp and Shrimp Products, 1998; Australia – Measures Affecting Importation of Salmon, 1998; Japan – Measures Affecting Agricultural Products, 1998; European Communities – Measures Affecting Asbestos and Asbestos-containing Products, 2000; European Communities – Measures Affecting the Approval and Marketing of Biotech Products, 2004.*

pursuant to an MEA between two WTO Members which were both signatory to an MEA should be resolved through the dispute settlement mechanism of the MEA.³⁴ Nevertheless, the potential for this conflict is so high that it may not be wise to be driven to a “misplaced complacency”.³⁵

The potential for conflict between MEAs and WTO rules stems from the fact that the two regimes have contradictory objectives and methods of operation. While trade policy is geared to removing obstacles to trade (*deregulation*), environmental objectives are often dependent on controlling the international market (*regulation*). The desire of the international community to move towards overall sustainable development requires the achievement of consistency between the two different bodies of international law governing these two distinct areas. A situation where conflicts may arise because measures taken in accordance with the legal obligations of one agreement violate those of another is undesirable. As more and more environmental agreements are designed around trade measures,³⁶ the need for addressing the relationship between the two bodies of law increases.

The international environmental legal regime today comprises over 270 MEAs addressing various environmental problems of global concern such as, *inter alia*, loss of wildlife,³⁷ transboundary movements of hazardous wastes,³⁸ ozone depletion,³⁹ loss of biodiversity⁴⁰ and climate change.^{41,42} MEAs often use trade instruments to achieve environmental objectives; approximately 25 MEAs contain specific trade-related provisions such as quotas, and import and export bans. Most trade provisions used in these and other MEAs may potentially conflict with basic obligations under WTO rules. An added danger is that of creating a “chilling effect” on environmental policy because of the uncertainty of the WTO-compatibility of trade measures in MEAs. In case of a conflict between the two bodies of law, is it possible to determine a hierarchy of norms?

A central question relating to coherence is whether the WTO, in deciding disputes, should make reference to relevant rules of public international law outside of the WTO. “...the WTO dispute settlement system has already played a significant

³⁴ *Report of the WTO Committee on Trade and Environment*, PRESS/TE 014, 18 November 1996, paras 178-79.

³⁵ Duncan Brack and Ors., *International Trade and Climate Change Policies*, (London: Earthscan Publications Ltd., 2000), p.x.

³⁶ The *Rotterdam Convention on Hazardous Chemicals*, 1998, the *Cartagena Protocol on Biosafety*, 2000 and the *Stockholm Convention on Persistent Organic Pollutants*, 2001 are all centered on trade restrictions.

³⁷ *Convention on International Trade in Endangered Species of Wild Flora and Fauna*, 1973.

³⁸ *Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal*, 1989.

³⁹ *Montreal Protocol on Substances that Deplete the Ozone Layer*, 1987.

⁴⁰ *Cartagena Protocol on Biosafety*, 2000.

⁴¹ *Kyoto Protocol to the United Nations Framework Convention to Climate Change*, 1997.

⁴² *UNEP Register of International Treaties and other Agreements in the Field of the Environment*, 2005 lists 272 MEAs.

role in defining the relationship between MEAs and the WTO.⁴³ The *Reformulated Gasoline* Appellate Body recognized that the General Agreement is not to be read in “clinical isolation” from public international law.⁴⁴ In the *Shrimp-Turtle* decision, the AB held that the cited MEAs were *not* relevant as a means of interpretation of GATT. In the more recent *EC Biotech case*,⁴⁵ the EC argued that relevant MEAs such as the *Convention on Biological Diversity, 1992* (CBD) and the *Biosafety Protocol, 2001* must be taken into account as they constitute a *lex specialis* useful for interpreting WTO rules, which are *lex generalis*. The *EC Biotech* panel confirmed, in line with previous jurisprudence, that it had to interpret WTO agreements in accordance with customary rules of interpretation of public international law as reflected in Article 31 of the *Vienna Convention on the Law of Treaties, 1969*. But it rejected the idea that it was required to take into account either CBD or the Biosafety Protocol as several WTO Members, including the disputants were not parties to the agreements in question.⁴⁶ The panel further stressed that a treaty interpreter *could* rely on such a treaty only if found useful but was under no *obligation* to do so. Thus the issue of WTO-MEA relationship has not been conclusively determined yet by the WTO jurisprudence.

The WTO *Committee on Trade and Environment* (CTE) was entrusted with the charge of defining the relationship between trade and environment. The CTE, which was a discussion forum and not a negotiating one, examined the relationship between the provisions of the MTS and trade measures for environmental purposes, including those pursuant to MEAs, and the relationship between the dispute settlement mechanisms in the MTS and those found in MEAs. It noted that trade measures can play an effective role in MEAs and that WTO rules provide enough leeway for WTO Members to apply MEA trade measures.

In anticipation of a potential clash between MEA provisions and global trade rules, trade ministers at the Doha Ministerial Meeting in 2001, agreed to negotiations on the relationship between existing WTO rules and specific trade obligations (STOs) set out in MEAs.

3.2. The Doha Mandate on WTO and MEAs

The Doha Declaration, adopted in 2001 when the Doha Round was launched, states: “We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the

⁴³ Quoted in Yu III, Vicente Paolo B. (2007), “Multilateral Environmental Agreements” In Najam, Adil, Halle, Mark and Melendez-Ortiz, Ricardo (eds.), *Trade and Environment: A Resource Book*, Canada: ICTSD, IISD and the Ring.

⁴⁴ Report of the Appellate Body (1996), *Reformulated Gasoline*, p.11.

⁴⁵ Report of the Panel, *EC Biotech case*.

⁴⁶ The *Convention on Biological Diversity, 1992* (CBD) has been ratified by EC, Argentina and Canada but not by the US and the *Biosafety Protocol, 2001* has been ratified only by the EC and signed by Argentina and Canada.

environment and the promotion of sustainable development can and must be mutually supportive ...⁴⁷

The Doha Declaration envisages institutional cooperation as a way of enhancing mutual supportiveness of trade and environment. It includes in the negotiating mandate on trade and environment, an exploration of the overlap areas between the WTO and the MEAs as well as cooperation between MEA secretariats and the WTO.

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

- (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting of observer status ...⁴⁸

...

This environmental mandate was included in the Doha mandate despite the objections of the developing countries and at the insistence of the European Union. The developing countries, who long argued that WTO provisions were adequate to deal with WTO-MEA issue and therefore needed no alteration, caved in to this inclusion in the hope of making gains in other sectors.⁴⁹ Under the Doha Round, WTO members have been presented with an opportunity to define clearly the relationship between MEAs and WTO rules, focusing on both *legal* and *institutional* coherence. The negotiations take place in the CTE in Special Session (CTESS).

3.2.1. Legal Coherence

'Legal coherence' refers specifically to the outcome of the interaction of the *rules* contained in the WTO agreements and those contained in the MEAs [paragraph 31(i) of Doha Development Agenda]. Discussions under this segment have broadly traversed the following issues: (i) definition of an MEA (ii) definition of STOs (iii) legal relationship/hierarchy between MEAs and WTO (iv) parties and non-parties and (v) possible outcomes.⁵⁰

⁴⁷ Ministerial Declaration adopted on 14 November 2001 [WT/MIN(01)/DEC/1, 20 November 2001]. Available at: www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf

⁴⁸ Ibid.

⁴⁹ Yu III, n.43, p.151.

⁵⁰ Ibid., p.151.

Since the compatibility under exploration is one between WTO and MEAs, the first question that arises is that of what constitutes or qualifies as an MEA. The Argentinian submission is that the MEA should be 'in force', should be 'multilateral' (negotiated by more than two parties under aegis of the UN) and 'open'.⁵¹ The developing countries (such as India)⁵² take a narrow view, demanding inclusion of only those MEAs that are 'in force'. Japan, on the other hand, suggests that even MEAs that have not entered into force should be covered. The Canadian proposal takes the view that certain MEAs, such as the PIC Convention and the Biosafety Protocol, have a significant number of signatories and should be included as MEAs even though they are not yet in force.⁵³ The Chinese submission is that all MEAs open for formal participation of any non-party to the MEAs should be considered as within the scope of negotiations.⁵⁴ The EC and Switzerland favour a broader definition. As per the EC, an MEA would be (i) legally binding between at least three parties, (ii) mainly aimed at protecting the environment and (iii) open to all countries concerned. The Agreement should have been negotiated under the aegis of the UN.⁵⁵ The relevant MEAs that would be primary candidates for qualification seem to be CITES, the Montreal Protocol, the Basel Convention, the Rotterdam Convention, the Stockholm (POP) Convention and the Biosafety Protocol.

Trade measures in MEAs can take many forms⁵⁶ and usually form part of a broader package of measures that MEAs use. Many MEAs incorporate a clarifying provision regarding its relationship to the WTO, stating that nothing in the MEA will adversely affect a country's right or obligation under other existing international agreements, including the WTO ("the savings clause"). Although discussions on the WTO-MEA relationship have been ongoing at the WTO (CTE) for over a decade at a broader level, the Doha mandate focuses specifically on the relationship between the WTO rules and the 'specific trade obligations' (STOs) contained in several MEAs. There are disagreements about which STOs should be included in the discussions. Several submissions such as those by Argentina, Canada, India, Malaysia and the US support the 'specific trade obligation' (STO) approach, which focuses narrowly on only those measures that qualify as STOs, i.e. which are 'mandatory' and 'specific'. For instance, Argentina's submission asserts that the mandate under paragraph 31(i) is very "precise and specific" and the reference to 'specific trade obligations' covers the provisions of MEAs which entail an 'obligation'. All non-mandatory trade measures, non-trade obligations and non-specific trade obligations in an MEA are

⁵¹ Argentinian submission, para 13.

⁵² Indian submission, para 4.

⁵³ Canadian submission, para 3.

⁵⁴ Chinese submission, para 8.

⁵⁵ EC submission, paras 6-7.

⁵⁶ *Forms of trade measures*: reporting requirements, labelling & identification, notification, export/import bans, transformation measures etc. See Yu III, n.43, p.146.

therefore excluded.” India also included in the term STO the elements of specificity, trade and obligation.⁵⁷

A more expansive interpretation, such as the one supported by EC and Switzerland, is that STOs could also include measures that are not explicitly provided for nor mandatory under the MEA but are necessary to achieve an objective of the MEA. These countries argue that a list of qualifying STOs should be neither exclusive nor exhaustive. EU identifies four categories of measures arising from trade obligation: (i) those explicitly provided for and mandatory under the MEA (ii) those not explicitly provided for but consequential to the obligations of the MEA (iii) those not identified in the MEA but that parties could decide to implement in order to comply with their obligations (iv) not required by MEA but which parties can decide to implement if the MEA contains a general provision for adoption of stringent measures by parties. According to EC, STOs are highly unlikely to be challenged as they are negotiated in a multilateral context. If such a case were to arise, Parties should make every effort to solve the issue through the MEA dispute settlement, as recommended by CTE. If such a case should be brought to the WTO, WTO panel should take due account of the MEA when addressing the case.⁵⁸ According to Japan, trade measures must be based on scientific reasons and should be reasonably related to the objectives. The scope of trade measures should be proportional to MEA objectives. India has suggested that STOs should be mandatory, clearly defined or related to the import and export of a tangible item.

On the relationship between existing WTO rules and STOs, there is broad agreement over the two bodies of law being equal and over the need for mutually supportive implementation. The Argentinian proposal points out that the relationship can be identified in the following ways:⁵⁹

- *complementarity*: concurrent obligations in two different international agreements should be complied with at the same time.
- *express derogation*: when compliance with an obligation under one convention is incompatible with the provisions of another international agreement and is covered by an express exception in the latter
- *conflict*: when compliance with one obligation necessarily entails failure to comply with another, and the two cannot be reconciled.

According to the EC, WTO rules enable Members to pursue their public policy goals while taking into account their obligations to avoid or minimize trade distortions. In the EC view, there exists an appropriate balance.⁶⁰ EC underscores that the MEA issue is not a ‘zero sum game’ and that clarification of the relationship between WTO

⁵⁷ Indian submission, para 9.

⁵⁸ EC Submission.

⁵⁹ Argentinian Submission (2002),

⁶⁰ EC submission, paras 9-17.

rules and MEAs would enhance both regimes by providing them legal security. The EU views the MEA/WTO relationship as an international governance issue. Clarifying the WTO-MEA relationship would create clearer policy making, prevent conflicts, render multilateralism more attractive than unilateralism and improve policy coherence.

At the very outset, the Doha mandate explicitly establishes the limited applicability of the negotiations to 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."⁶¹ This is a limited application of the search for coherence as it will leave outside the scope of its ambit all non-members of MEAs. The reason behind deciding on this narrow mandate is probably to make the negotiating agenda less controversial and more acceptable. On the possible outcomes of the negotiations, some countries (Japan, Switzerland) propose an interpretative decision or understanding, while others suggest an 'MEA exception clause'.

Thus, on the issues relating to legal coherence, many divergences remain. It would serve the negotiators well to remember the point made by EC that considering the growing interface between trade and environment, it is important that the relationship between WTO rules and trade measures pursuant to MEAs is the result of a political consensus arising out of a process of negotiations between WTO Members rather than simply being left to potential dispute settlement and the results it imposes.⁶²

3.2.2. Institutional Coherence

'Institutional coherence' refers to the establishment of procedures for promoting cooperation and coordination between different institutions. The issue of institutional coherence between MEAs and the WTO is currently being discussed under the mandate provided in Paragraph 31(ii) of the Doha Declaration. The mandate given to the CTESS in paragraph 31 (ii), "... opens the door to a *coherent* development of MEA regimes and the WTO system."⁶³ Negotiations under this head are projected to be the least controversial and therefore the most likely to succeed. WTO Members have unanimously and consistently expressed their desire for relations between the multilateral trading system and MEAs to be mutually supportive. At Doha, the CTESS was mandated to negotiate on two elements of institutional coherence: (i) procedures for regular information exchange between MEA secretariats and the relevant WTO committees and (ii) criteria for the granting of observer status.

⁶¹ Submission by the Argentine Republic, *Mandate Under Paragraph 31(i) of the Doha Declaration on Trade and Environment*, TN/TE/W/2, 23 May 2002, p.2.

⁶² EC Submission.

⁶³ Swiss Submission (2003), para 1.

Currently, only the main MEA Secretariats have observer status in the CTE regular sessions; participation in the CTESS is permitted in an ad hoc and limited fashion.⁶⁴ The US, expressing support in its submission, states "Efforts to increase communication and coordination between trade and environment officials can only enhance coherence in policy-making at national levels in ways that promote mutual supportiveness of negotiation and implementation of trade and environment policies at the international level."⁶⁵ The US submission also points out that identifying preliminary concrete action under para 31(ii) is useful as any progress under this mandate could have positive spillover effects for the agenda under para 31(i).⁶⁶ The EC, in its 2002 submission, pointed out that the debate on paragraph 31(ii) was where it is thought reasonable to aim for early decisions.

According to the EC, 'Core' MEAs – those that have participated in the previous informal information exchange sessions – should be granted observer status in the CTE meeting in normal session.⁶⁷ These are the MEAs that contain a trade component and can be considered to have a 'competence' and to hold a direct interest in trade policy matters. Apart from the UNEP, CBD, CITES, ICCAT, UNFCCC, which already enjoy observer status in the CTE, the MEAs identified as relevant are those that attended the MEA information sessions, as listed below.⁶⁸

List of MEAs Proposed for Observer Status in the Committee for Trade and Environment
- <i>Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal</i>
- <i>Convention on Biological Diversity (CBD)</i>
- <i>Convention for the Conservation of Atlantic Marine Living Resources (CCAMLR)</i>
- <i>Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)</i>
- <i>International Commission for the Conservation of Atlantic Tunas (ICCAT)</i>
- <i>Intergovernmental Forum on Forests (IFF)</i>
- <i>International Tropical Timber Organization (ITTO)</i>

⁶⁴ For details, see Richard L. Skeen (2004), "Will the WTO Turn Green? The Implications of Extending Observer Status to Multilateral Environmental Agreements", *Beppress Legal Series*, Paper 146.

⁶⁵ US Submission, para 3.

⁶⁶ US Submission, para 6.

⁶⁷ EC Submission (2006), para 6.

⁶⁸ EC Submission (2006), p.1, fn.1.

- <i>Montreal Protocol on Substances that Deplete the Ozone Layer</i>
- <i>Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade</i>
- <i>Stockholm Convention on Persistent Organic Pollutants (POPs)</i>
- <i>United Nations Convention on the Law of the Sea (UNCLOS)</i>
- <i>United Nations Framework Convention on Climate Change (UNFCCC)</i>
- <i>United Nations Fish Stocks Agreement (UN Fish Stocks)</i>
<input type="checkbox"/> <i>United Nations Forum on Forests (UNFF)</i>

On information exchange, there is agreement that information sessions should take place regularly and frequently and all MEA secretariats must have the opportunity to participate. Adequate opportunity must be provided for exchange of information involving national government officials, MEA secretariats and WTO representatives. Apart from information sessions, other mechanisms for collaboration could be devised such as development of mutual data bases and maintenance of joint contact lists etc.⁶⁹

The EC insisted that the WTO-MEA interface should go beyond a mere information exchange, without real structure and follow-up, and should be institutionalized. Information exchange sessions should also be encouraged to convene in other relevant WTO Committees, where issues such as transfer of technology are being discussed.⁷⁰ The EC also suggests that during the COP of MEAs, the WTO should be more visible. Also, regional seminars on trade and environment could represent an attractive complement to the more formal Geneva meetings. Another aspect of information exchange could be to maintain an electronic database within the WTO website with relevant documents.⁷¹

The Swiss submission points out that information exchange and granting of observer status must not be understood as an end in itself, but should lead to enhanced cooperation between UNEP, the MEAs and the WTO and ultimately improve the mutual supportiveness between trade and environment.⁷²

⁶⁹ US Submission, paras 7-9.

⁷⁰ EC Submission (2002), paras 6-8.

⁷¹ EC Submission (2002), paras 11-14.

⁷² Swiss Submission (2003), para 24.

In its recent document, the WTO Secretariat has elaborated upon the existing forms of cooperation between the WTO and the MEAs/UNEP. The note includes (i) existing forms of cooperation between UNEP/MEAs and the WTO (ii) existing forms of information exchange between UNEP/MEAs and the WTO (iii) respective Secretariats' technical cooperation activities (iv) background notes on MEAs and (v) observer status.⁷³

Within the trade and environment agenda of the Doha Round, the issue of legal and institutional coherence between WTO and MEAs has been discussed threadbare but there remain areas of contention, highlighting the challenges of institutionalizing coherence even in a limited manner.

4. Summing Up

The interrelationship between the intergovernmental regimes for trade and environmental protection is just one example of the challenges that face the international community in ensuring coherence in the efforts towards achieving common global interests. Political declarations recognize the need for coordination of effort towards common goals. International organizations have also taken measures to ensure such coordination. However, just a viewing of a limited slice of overlap – the trade and environment interface – demonstrates the challenges of achieving that coherence. The WTO introduced into its negotiations in 2001, the mandate to work towards coordination between the legal and institutional governance structures of trade and those for environmental protection. As is evident from the discussions above, WTO members are striving to establish processes of cooperation between the WTO and the MEAs and to clarify the relationship between the overlapping provisions of the two legal regimes. Although there is broad agreement over the institutional cooperation aspect, with most members agreeing to the need for the presence and interaction of MEAs in the CTE and the CTESS, there are complications in the determination of the legal relationship between provisions with a potential overlap. Although so far, no MEA-related measure has been challenged at the WTO, the potential for a clash is real and it is important to be prepared to address this situation.

What the case study above clearly establishes is the challenges of governance in a complex international system where problems are global and the responses to them are fragmented and where issue areas spill over into each other's domains. Coherence in the multi-layered global governance that exists today would require the coordination of actions among a wide range of actors – both vertically and

⁷³ World Trade Organization, *Existing Forms of Cooperation and Information Exchange Between UNEP/MEAs and the WTO*, Note by the Secretariat to the Committee on Trade and Environment Special Session, TN/TE/S/2/Rev.2, 16 January 2007, para 3.

horizontally. In the particular example chosen for study here, only one particular inter-relationship is studied and yet the challenges in attaining cooperation emerge. This is an indication of the magnitude of the challenge that global governance faces in relation to coherence.

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