

To: conference participants
From: David Vogel
Re: how nesting matters

The dimension of the nesting of international governance structures that engages my research involves the relationship between *trade regimes and international environmental treaties and agreements*. Both govern trade – the former directly and the latter often indirectly.

The most obvious area of potential conflict between the two regimes would be a dispute between two countries that were signatories to the World Trade Organization, only one of whom had ratified a multilateral environmental agreement (MEA). If a signatory to a MEA imposed a trade restriction to advance an environmental objective that was either required by or permitted by a MEA on a WTO signatory that had not ratified the MEA, which international agreement or treaty would prevail? How would the WTO's Dispute Settlement Mechanism (DSM) rule on such a complaint?

While the possibility of such a conflict between these two international regimes have received considerable attention from both the trade and environmental communities, no such dispute has yet to arise and it is entirely possible that none ever will.

One reason is those MEAs that are either enforced through or directly govern trade that originated prior to the formation of the WTO have been endorsed by virtually all WTO members. Moreover, the MEAs drafted since 1994 have attempted to recognize possible points of tensions between the two kinds of agreements and have sought to minimize conflicts with their signatories' obligations under the WTO. For example, the preamble to the Cartagena Protocol on Biosafety states that "this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under an existing international agreement."

The international community clearly recognizes the importance of minimizing potential conflicts between MEAs and the WTO. Often criticized as giving free trade priority over environmental protection as a result of its decisions in environmental-related trade disputes such as *Tuna-Dolphin* and *Shrimp-Turtle*, the WTO is anxious to avoid giving the international environmental community another 'target' of criticism by ruling against a country whose trade restrictions were in compliance or consistent with an MEA. While MEAs have no legal status in the WTO agreement itself, the WTO Secretariat as well as the decision of the appellate body in the *Shrimp-Turtle case*, have repeatedly indicated the WTO's willingness – even eagerness – to avoid explicitly challenging trade restrictions related to a MEA.

In the *Shrimp-Turtle trade dispute*, the appellate dispute settlement panel explicitly noted that the turtles being protected by the American shrimp ban were a protected species under CITES, even though the US had not invoked the terms of this treaty as a justification for its policy. The panel evidently chose to consider CITES as part of the "customary rules of public international law," which suggests a willingness to grant the terms and objectives of an MEA a kind of quasi-legal status. This partially explains why the US ultimately prevailed in this case and why it lost the *Tuna-Dolphin* case: the dolphins the US was attempting to protect were not listed under CITES and the US was then the only country that had adopted regulations governing their welfare. In

other words, there was evidence of a global consensus regarding the importance of protecting turtles but not dolphins.

The WTO has also recommended that any trade disputes arising from a nation's obligations under an MEA be resolved within the framework of the MEA. While due to the weakness of the dispute settlement mechanism under MEAs, a country might instead chose to take its dispute to the WTO, the WTO would like to strongly discourage it from doing so.

One of the important changes in international governance that has taken place over the last decade has been an increase in interaction between WTO officials and the governing bodies of those MEAs that contain trade provisions, in order to reduce potential areas of conflict. Through *Tuna-Dolphin*, WTO officials and dispute settlement panels had very limited familiarity with the environmental dimensions of trade, let alone with the provisions of MEAs and the policy considerations that underlay their adoption. More recently, dispute panels extensively solicit input from environmental experts and those on whose advice they rely are now highly familiar with international environmental treaties.

Even without formerly acknowledging the legal status of MEAs, the terms of the WTO agreement provide its DSMs with sufficient flexibility to accommodate a nation's obligations under them. Both GATT Article XX and the SPS Agreement permit nations to impose trade restrictions that are "necessary to protect . . . human health . . . or the environment." There is no reason why dispute panels cannot chose to interpret these exceptions broadly enough to accommodate trade restrictions that are deemed necessary for the protection of the environment, and thus implicitly respect the terms of MEAs. Clearly there are areas for potential conflict, such as GATT Article II, which prohibits discrimination against foreign and domestic "like products." But here again, products can, in principle, be considered "unlike" if they have different environmental impacts, a point which underlay the WTO's decision to uphold France' restrictions on imports of asbestos from Canada.

In this context, it is significant that in the current trade dispute between the EU and the US and Canada over the restrictions on agricultural biotechnology by the EU and several Member States, the WTO is *not* being asked to adjudicate between the regulatory standards for GM foods and crops required or permitted by the Cartagena Protocol – which has been ratified by the EU and not the US - and those permitted under the terms of the WTO. The dispute panel has recently ruled against the EU, but it does not appear to have done so in terms that challenge the EU's regulatory obligations under the Cartagena Protocol. Indeed, the panel has not even addressed the question of the safety of GMOs. Rather this decision appears to have been based on the narrowest possible grounds, namely the dispute panel's interpretations of the consistency between the EU's policies, and its obligations under the SPS provisions and those governing Technical Barriers to Trade.

Alternatively, had the dispute panel chose to rule in favor of the EU, it could have done so without basing its decision on the terms of the EU's obligations to or rights to comply with, the provisions of the Cartagena Protocol. In short, the Article XX environmental exceptions give the WTO sufficient flexibility to affirm or challenge regulatory policies as non-tariff barriers without having to explicitly reference the terms of MEAs.

A more interesting question raised by the nesting of these two regimes concerns the future international legal and policy status of the precautionary principle. This principle is not mentioned in the text of the GATT and its use is permitted in the SPS Agreement only on a limited basis, namely as a temporary measure pending the collection of additional data. For its part, the EU has officially endorsed it: it is explicitly mentioned in the two most recent treaties that govern the EU as well as in numerous policy pronouncements from both the EC and the EP. While various statutes and court decisions make some reference to it, it is not a formal part of American environmental law. The EU would like to see the PP become internationally recognized – in effect internationalizing its own approach to environmental policy - while the US strongly opposes such a recognition for precisely the same reason: its weakening the role of risk-assessment in the making of environmental policy runs counter to the direction of American environmental policy-making.

As this juncture, it is unclear if and when the current trade round will be concluded and whether or not the EU will succeed in its effort to have some version of the PP incorporated in the language of the next trade agreement. Accordingly, it has adopted a kind of end-run around the WTO, making increasing reference to the PP in international environmental agreements. The EU is clearly in a much stronger position to shape the terms of MEAs than the provisions of the WTO, in part because the former can be done without the agreement of the US.

Not surprisingly, the strongest and most unequivocal reference to the PP is contained in the Cartagena Protocol, which was largely initiated by the EU. The US is not a signatory, though did participate in the negotiations that led to it. In Article 10.6 and 10.8 the CP states:

Lack of scientific certainty due to insufficient information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risk to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism . . . in order to avoid or minimize such potential effects.

According to Annex II: “lack of scientific knowledge or scientist consensus should not necessarily be interpreted as indicated a particular level of risk and absence or risks, or an acceptable level of risk.” The CP goes on to reference one of the earliest formulations of the PP in international environmental policy, namely Principle 15 of the Rio Declaration (1992).

The goal of the EU is to have the PP increasingly internationally accepted, in the short-run in international environmental agreements and in the long run, either implicitly or explicitly, by the WTO. It remains to be seen how successful this effort will prove. But the marked differences between EU and US approaches to environmental policy, which is also reflected in the increasing number of international environmental agreements ratified by the EU and not the US suggests a growing disjuncture between the global governance of trade and that of environmental protection. The WTO’s dispute settlements procedures may at some point become a battleground for determining whether the American or European approaches to risk assessment will prevail, but to date, both approaches have been able to co-exist.

