

**Information Exchange and Observer Status: The World Trade
Organisation and Multilateral Environmental Agreements.
Paragraph 31 (ii) of the Doha Ministerial Declaration**

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Executive Summary

The Doha Ministerial Declaration (DMD) devotes a good deal of attention to environmental issues. Environment and sustainable development are addressed in DMD paragraphs 6, 19, 28, 31, 32, 33, and 51. The institutional dimension is covered in DMD paragraphs 6, 31 (ii), and 51—but only paragraph 31 involves the need for negotiations.

There are a range of reasons why the relationship between the World Trade Organization (WTO) and multilateral environmental agreements (MEAs) cannot be handled in the same manner that information exchange and observer status are handled by the WTO in general. These relate to structural differences in trade and environmental regimes and differences in organizational status between the WTO and MEA secretariats.

DMD paragraph 31 (ii) calls for negotiations on procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status. This establishes a two-part negotiating agenda: on information exchange—which is presumed to occur—and observer status—which is recognized as desirable, provided it can be based on criteria.

Since the establishment of the Committee on Trade and Environment (CTE) at the time of the Marrakesh Conference that concluded the Uruguay Round, these matters have been discussed quite extensively in the CTE. Over time, a variety of forms of information exchange have been developed and observer status has been granted to a limited number of MEA secretariats—and the United Nations Environment Programme (UNEP)—on an ad hoc basis. Negotiations in the CTE Special Session have proceeded on this basis.

DMD paragraph 31 (ii) has attracted only three submissions from Member states—the United States, the European Union, and Switzerland. This is an indication that the topic is not as controversial as, for example, DMD paragraph 31 (i) and (iii). It has even been suggested that these are matters that are suitable for early action, that is a decision prior to completion of the entire DMD agenda.

It would appear that no string disagreements exist with respect to information exchange. The principal goal is to ensure that it is sufficiently comprehensive to be useful yet not so cumbersome as to impose significant additional burdens on the secretariats involved or the Member states of both the WTO and MEAs.

The issue of observer status is more complex, largely because no clear criteria have thus far emerged. There are essentially two approaches: the desire to limit observer status to certain “major” or “core MEAs and the desire to ensure that all MEAs with a trade interest are involved. In the former case, some 6-8 secretariats are liable to be involved, in the latter 13. Different criteria are listed in Table 1 below.

The issue of information exchange and observer status between the WTO and MEAs is a vexing one with a number of complex aspects but one that should be resolvable in a reasonable amount of time. Thus far only the United States and two demandeurs (the

European Union and Switzerland) have been heard from. It is important to ensure that all relevant voices are heard in the coming sessions so that this matter can be brought to a rapid conclusion, making the way free for the more complex issues that exist under DMD paragraph 31 (i) and 31 (iii).

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1. Introduction: Why Coordinate Trade and Environment Agreements?

Since the tuna/dolphin panel report was issued in August 1991, the relationship between trade and environment has evolved significantly. The initial response was mutual distrust. Environmental interests were convinced that trade rules would become obstacles to achieving their goals. Trade negotiators initially feared that environmental interests would become new havens for protectionism and assumed that environmental regimes wanted to use dispute settlement in the trade regime to enforce rules they were incapable of implementing themselves. Since then it has become widely accepted that trade policy and environmental management overlap in numerous ways that require careful coordination.

1. Both trade and environment are international in character. Environmental management has an international dimension that is inescapable and transcends the interests of individual states. This interest is represented by more than 300 multilateral environmental agreements (MEAs). Indeed, the need to address international environmental issues is itself a force that promotes globalization.
2. Some of these MEAs, including most of the global ones, can impact on trade rules.
3. Some of this subgroup of MEAs actually include trade rules, and the number of such rules is liable to grow as economic globalization proceeds.
4. The result of both trade liberalization and environmental management is structural economic change, as certain economic actors benefit while others find themselves at a disadvantage. As a result, trade rules and environmental needs sometimes reinforce each other in a highly desirable manner. When they conflict, however, they touch upon some of the central concerns of the two policy areas, creating conflicts with significant potential to inflict serious damage. Some environmental issues can be misused for protectionist ends; and some trade rules can get in the way of necessary environmental disciplines.

For all of these reasons, the relationship between trade policy and environmental management is inescapable and requires careful attention on the part of policy makers.

In its submission to the Special Session of the Committee on Trade and Environment (CTE-SS), created for the purpose of conducting negotiations mandated by the Doha Ministerial Declaration (DMD), Switzerland identifies three principal benefits from enhancing cooperation between the secretariats of the MEAs and the relevant committees of the WTO¹:

- International and national coordination. The challenges of coordination between the WTO and MEAs are increased by structural differences between the regimes².
5. Efficiency in capacity building and technology transfer. Both trade and environment agreements include significant commitments to capacity building and technology transfer. These can be enhanced by appropriate forms of cooperation.

¹ TN/TE/W/30 (29 April 2003). Switzerland refers to “information exchange between MEAs secretariats and the CTE” but the actual negotiating mandate is wider, covering “relevant committees of the WTO.”

² See below for an explanation of these differences

6. Prevention of conflicts between MEAs and WTO rules. These conflicts can be threatening to both trade liberalization and environmental management, as outlined above. In addition, failure to properly manage this relationship can result in the loss of public support for the trade regime, always a matter for concern when attempting to achieve agreement on decisions that may attract the resistance in some countries of important economic interests fearing that they will be disadvantaged. The resulting coalitions can be threatening to the achievement of the goals of trade liberalization³.

The need to coordinate trade and environment agreements is addressed in paragraph 31 (I) and 31 (ii) of the Doha Ministerial Declaration.

2. Paragraph 31 (ii) of the Doha Ministerial Declaration

The Doha Ministerial Declaration (DMD) includes numerous items that are significant from an environmental perspective. Many of these are to be found in paragraphs that are not immediately identified as dealing with the environment—agriculture, investment rules, TRIPS, and market access, to name but the most important⁴. The institutional issues surrounding trade and environment are covered in paragraph 6, 31 (ii), and 51 of the DMD. The fact that these matters occur in three different locations of the Declaration suggests that they are more complex than meets the eye.

DMD para 6: “We welcome the WTO’s continued cooperation with UNEP and other intergovernmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations,…”

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

…

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

…

DMD para 51: “The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.”

Paragraph 6 deals with international organizations (WTO, UNEP, etc.); Paragraph 51 deals with internal organs (CTD and CTE); Paragraph 31 (ii) with specific institutions of the trade and environment regimes (WTO committees and MEA Secretariats). These three paragraphs suggest that striking the right balance between trade, environment,

³ These coalitions have been called “baptist-bootlegger coalitions” because they bring together those with a fundamental motivation (environmentalists) and those who pursue narrow economic interests (protectionists). David Vogel,

⁴ Konrad von Moltke, “Umwelt in der Doha-Runde,” *Politische ökologie*, forthcoming (September 2003)

development, and sustainable development is likely to remain a formidable challenge for the Doha Round negotiators.

DMD paragraph 6 gives intergovernmental environmental organizations added status within the trade regime. Article V of the WTO Agreement assigns responsibility for relations between the WTO and other organizations to the General Council⁵. A variety of arrangements have emerged, ranging from formal agreements with the Bretton Woods institutions to the identification of certain organizations in some of the WTO agreements, to joint activities with UNCTAD to a “Cooperation Arrangement” between the WTO and UNEP⁶. It appears that the existence of international organizations with substantive competence in areas that are covered by WTO rules represents a significant factor in promoting effective implementation of these rules. The World Intellectual Property Rights Organization (WIPO) contributes to the effectiveness of the Agreement on Trade Related Intellectual Property Rights (TRIPS). The International Organization for Standardization (ISO) is referenced in the Agreement on technical Barriers to Trade (TBT). The Codex Alimentarius Commission provides indirect support to the Agreement on Sanitary and Phytosanitary Standards (SPS).

The development of comparable relationships in the environmental area has proven much more difficult. Nevertheless two instances can be noted where international environmental negotiations led to agreements on matters that had been extremely controversial within the GATT/WTO. In the early stages of consideration of environmental issues by the GATT—prior to the tuna/dolphin panel report—a significant amount of negotiation effort was devoted to the issue of domestically prohibited goods. A draft GATT decision was elaborated but could not achieve consensus, largely because environmental interests were not convinced that this document would resolve the underlying environmental policy issues in a satisfactory manner⁷. Several subsequent environmental negotiations have created a fairly complex international structure that promises to manage these matters successfully⁸. Similarly the international trade with genetically modified organisms remains a particularly contentious issue within the WTO. The Cartagena Protocol deals with a part of this problem in a manner that may prove definitive in the trade context, even for non-parties⁹. At the very least the existence of the Cartagena Protocol should simplify discussion of these issues within the trade regime. These examples suggest that there is scope for a much greater variety of relationships between the trade and international environmental regimes than is currently assumed.

⁵ “The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.”

⁶ World Trade Organization, Committee on Trade and Environment. Special Session, “Existing Forms of Cooperation and Information Exchange between UNEP/MEAs and the WTO. Note by the Secretariat” (TN/TE/S/2)

⁷ The author was involved at the time of consideration of this matter in the United States.

⁸ The Basel Convention; the Rotterdam Convention, and the Stockholm Convention together represent this structure.

⁹ This assumption rests on a particular interpretation of the shrimp/turtle case in the context of trade with living GMOs.

“The environment” actually involves a large number of discrete issues leading to the creation of numerous international environmental institutions, some of which do not have the status of international organizations and some of which are very small¹⁰. This applies with particular force to the MEAs. Since MEAs are not “international organizations” they are not covered by Article V of the WTO Agreement. UNEP is—and the DMD recognizes this fact by the use of the word “welcomes.” UNEP, however, cannot speak for the MEAs, not even for those that it hosts, let alone those that are located in other international organizations (such as UNFCCC, UNCLOS, or the United Nations Food and Agriculture Organization for forestry) or that have different institutional settings (such as the Framework Convention on Climate Change or the Law of the Sea Convention, which have substantial secretariats, or the Ramsar Convention on Wetlands of International Importance, which has a small secretariat hosted by a non-governmental organization).

DMD paragraph 51 articulates a certain unease about the ability to ensure that the objective of sustainable development (an explicit goal of the WTO, according to the Marrakesh Agreement¹¹) in the kind of process that characterizes trade rounds. Whether the envisaged institutional response will be meaningful, let alone effective, remains open to doubt, in particular in light of the fairly sharp boundary that has been drawn between the CTD and the CTE, as if the drafters feared the two might get together (although their membership is of course identical: all member states of the WTO).

By far the most complex of the three paragraphs is 31 (ii), dealing with the WTO and MEA secretariats. The elements of Paragraph 31 (ii) are clear:

1. it is a subject for *negotiation*, to cover
2. *Procedures* for information exchange, and
3. *Criteria* for observer status.

The fact that these are matters for negotiation indicates that there are differences of opinion among member states concerning these issues (contrary to Paragraph 6 and 51, which are declaratory or determinative in nature). These differences have not manifested themselves to date in the form of specific submissions to the Special Sessions of the CTE (CTE-SS). This in turn suggests that feelings are not running high on these issues. DMD paragraph 31 (ii) is part of the single undertaking. In principle the Doha Round cannot end without some resolution of the issues raised—although that resolution can take any form that is capable of a consensus, including extremely limited change to current practice.

The difficulties inherent in each of the two substantive items for negotiation are quite different. With regard to information exchange, problems arise because of differences in institutional structure of the trade and the environment regimes. With regard to observer status, problems arise because this is an issue with broad ramifications.

¹⁰ Konrad von Moltke, *International Environmental Management, Trade Regimes and Sustainability*. Winnipeg: International Institute for Sustainable Development, 1995. Also at <http://www.iisd.org/trad/pubs>.

¹¹

3. Institutional Character of the Trade and International Environmental Regimes

The subjects of para 31 (ii) are “ the relevant WTO Committees” and “MEA Secretariats.” Their respective functions in the trade regime and in environmental regimes are notably different, reflecting the different focus and institutional responses that the two classes of regime represent¹².

3.1. The Trade Regime

3.1.1. Purpose. The purpose of the trade regime is “trade relations¹³.” The international trade regime involves a large number of agreements, including bilateral trade agreements, regional trade agreements and the “multilateral” trade regime represented by the WTO. All of these agreements are bound together into a single regime by the principle of non-discrimination. “Most favored nation” treatment provides that concessions made to one trading partner must also be extended to all other trading partners. “National treatment” ensures that the goods from all trading partners are treated equally within each country. Exceptions are possible within a framework defined by GATT Article XXIV¹⁴.

The trade regime originated as an agreement on the liberalization of trade in goods with a focus on border measures, in particular on the reduction of tariffs. Over the years, this focus has shifted to embrace a wide range of domestic (“behind-the-border”) measures that can act as nontariff barriers to trade and consequently as disguised forms of discrimination. In the Uruguay Round the reach of the trade regime was further extended to include trade in services, intellectual property rights and a vestigial agreement on investment. The current “trade regime” still has trade in goods at its core but its borders continue to be subject to negotiation. The WTO Agreement, however, strongly reinforced the unitary nature of the regime by binding together all the “WTO agreements” into a single undertaking with joint institutions, including common dispute settlement in particular.

3.1.2. Institutional response. The WTO Agreement specifies “The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annex to this Agreement.”¹⁵ This broad definition is largely self-referential: the main business of the WTO is whatever the WTO decides its business to be, provided that it is “trade-related.” This has proven to be a fairly elastic concept, embracing issues as remote from trade as many elements of the Agreement on Trade Related Intellectual

¹² Konrad von Moltke, *International Environmental Management, Trade Regimes and Sustainability*. Winnipeg: International Institute for Sustainable Development, 1995. Also at <http://www.iisd.org/trad/pubs>. See Annex II for a more systematic discussion of these issues.

¹³ WTO Agreement Article II.1

¹⁴ In practice implementation of GATT Art XXIV has not been simple since the rule of consensus decision-making effectively renders the rejection of any agreement politically impossible. This has led to a greater variety of agreements than was probably envisioned by the drafters of the GATT.

¹⁵ WTO Agreement Art. II.1

Property Rights (TRIPS)¹⁶ or as detailed as the Agreement on Sanitary and Phytosanitary Standards (SPS). The committees of the WTO (referenced in DMD paragraph 31 (ii)) largely mirror the agreements that constitute the organization. Each agreement has its own committee. Apart from organs dealing with management issues only two committees do not relate to a specific agreement: the Committee on Trade and Development (CTD) and until the Doha Ministerial Declaration the Committee on Trade and Environment (CTE). WTO committees are “committees of the whole,¹⁷” open to all members. They are constructed as organs for the joint consideration of issues arising in relation to the individual agreements. In the context of the Doha Round they are also constituted as committees of the Trade Negotiation Committee (TNC).

Implementation of the WTO agreements is largely multi-unilateral, that is each country implements its obligations as it sees fit, subject to non-binding review through the Trade Policy Review Mechanism or binding dispute settlement through the Dispute Settlement Understanding (DSU). The latter only applies when one Member believes that the implementation of another has deprived it of benefits that it could reasonably expect under the agreements and is willing to pursue a formal dispute process to rectify the problem. In other words there is no binding implementation unless one country feels sufficiently strongly about an issue to be willing to couch it in a dispute. While the number of disputes remains impressive, it is actually quite modest relative to the number and complexity of the agreements and the number of Member states.

3.2. *International environmental regimes*

3.2.1. Purpose. International environmental regimes are designed to protect global public goods¹⁸. A certain tension exists between the interests of its members (states) and the demands placed upon them by the need to manage public goods that transcend their borders and which they are incapable of representing and managing other than collectively.

Environmental regimes confront a number of daunting problems. The issue that they are designed to address is sometimes incompletely defined and almost always dynamic in nature. We know a limited amount about the natural environment, often enough to recognize that a problem exists but not enough to understand all its ramifications. Environmental regimes are consequently flooded with information, some of it from monitoring undertaken by the regime, or at least in accordance with its mandates, some by researchers working independently of the regime, and some of it by chance, from sources that were not known to possess relevant information. This information can concern the natural environment or it can cover a range of human activities that may impact on the environment. The regime needs to monitor and process this information and to adjust its own rules and procedures to reflect the changing awareness of the needs of the

¹⁶ One of the ironies of the trading system is that the use of the term “trade-related~” almost invariably signals the inclusion of matters that are not strictly trade related.

¹⁷ The exception is the Committee on Budget.

¹⁸ Inge Kaul, Isabelle Grunberg, and Marc Stern, eds., *Global Public Goods : International Cooperation in the 21st Century*. Oxford University Press, 2001

environment and the impacts of human activities on it. The possibility of surprises is always present—such as the discovery of the ozone “hole” over Antarctica, the collapse of the North Atlantic fishery, or recognition of unexpected risks associated with persistent organic chemicals in the environment¹⁹.

3.2.2. Institutional response. Environmental regimes have responded to this situation by creating institutional structures that are surprisingly flexible, at least when judged from the perspective of most other international regimes. Research is integrated into most international environmental regimes. A high degree of transparency and participation provides some protection against surprises. And the rules that have been adopted require continuous monitoring, assessment, and adjustment at all levels of the regime. The agreements (MEAs) that are at the heart of international environmental regimes reflect these difficult realities.

The role of the respective secretariats of MEAs is different than the role of the WTO secretariat. MEAs secretariats are independent process managers, working under the authority—and oversight—of the members of the regimes, for the most part states, yet enjoying a degree of initiative and autonomy that is quite inconceivable for the WTO secretariat. Moreover many MEA secretariats by now work informally with numerous nongovernmental constituencies, including scientists, representatives of industry and commerce and nongovernmental organizations. At their most effective, the MEA secretariats articulate and represent the environmental interest that is at the heart of the regime they are concerned with.

3.3. The Dilemma

The relationship between trade and environment has created a significant number of challenges for the trade regime. Unlike the trade regime, and most other international regimes, environmental regimes are not primarily concerned with the interests of member states—although these interests obviously play a central role in these regimes. The environmental regimes have an inescapable international dimension that transcends the borders of members states—and sometimes involves the global commons, that is a domain outside the sovereign control of states. Yet the measures adopted by international environmental regimes have economic consequences that at certain times or for certain actors can be highly significant. These measures can have direct trade impacts, that is they are themselves trade measures. Or they can have indirect trade impacts, and consequently constitute hidden barriers to trade. For these reasons environmental agreements impact on the trade regime, and vice versa. Certainly there is no reason why the rules of the trade regime and those of environmental regimes should not be congruent and mutually supportive. This is not, however, an automatic outcome and requires significant forms of cooperation, as indicated in the mandate of DMD para 31 (ii).

A dilemma arises from the different objectives and consequently different institutional characteristics of the trade regime and environmental regimes. The most superficial manifestation of these differences is the existence of an integrated trade regime and the absence of any equivalent arrangement for the environment. More important are

¹⁹ See Annex I for the legal basis of some environmental secretariats.

institutional differences that render the evident need for coordination between these regimes more difficult than anticipated.

The WTO committees referenced in DMD paragraph 31 (ii) are standing bodies of the Member states, integrated into the structure of WTO organs. The permanent missions to the WTO give these committees a substantial degree of continuity and inter-sessional capabilities. They have no direct equivalent in the MEAs, other than the Conferences of the Parties (COPs) and their subsidiary bodies. Most MEAs also have some form of executive body that meets between COPs to oversee the work of the secretariat and to provide a greater degree of continuity. Neither the COPs nor their subsidiary bodies nor the executive bodies have a continuing institutional existence²⁰. Only the MEA secretariat provides that.

The question is whether the MEA secretariats can speak for their respective regime in an authoritative fashion. That remains unresolved for the present. Some MEA COPs have adopted decisions that indicate some reticence towards the participation of their secretariats in WTO deliberations without continuing involvement of the COP itself²¹. Unlike the WTO Secretariat, which does not claim to provide authoritative interpretation of the WTO agreements unless this can occur under the authority of a WTO organ²² several MEA secretariats can provide significant amount of information concerning their regime and its development since this has become part of their functions.

In addition to the need to create structures of communication between the trade regime and MEA secretariats there exists a need to ensure that the trade interest is taken into account in environmental negotiations. Several recent environmental negotiations have involved discussions concerning the coherence of the agreements being negotiated with provisions of the WTO agreements. No authoritative interpretation of the WTO agreements has been available to the negotiators²³, leaving the field open to partisan interpretation by countries citing WTO rules in a manner that bolstered their position in

²⁰ The problem was illustrated at the Seattle Ministerial Conference where the United States and the EC agreed to establish a WTO Working Group on biotechnology, which would have had the effect of aborting the negotiations that were concurrently under way for the Cartagena Protocol on Biosafety. The chair of the Cartageena negotiations was present in Seattle but was never consulted on a question of vital importance to him. The Executive Director of UNEP, which hosts the CBD secretariat was also present but not consulted. The proposal did not outlast the collapse of negotiations in Seattle and the Cartagena Protocol was adopted a few months later.

²¹

²² This tension is illustrated by the role of the WTO secretariat in providing services to dispute panels established under the DSU and the numerous instances where the Appellate Body has needed to correct what it viewed as incorrect interpretations of the WTO agreements. One of the surprises of the new dispute settlement system has been not the number of disputes that have gone to the Appellate Body—for a variety of reasons most disputes are likely to do so—but the extensive role of the AB in rectifying legal interpretations adopted by panels. Among the most striking examples of this phenomenon is the case that is arguably most significant from the perspective of MEAs, the shrimp/turtle dispute.

²³ There has even been disagreement whether any advice was offered. Richard Benedick, US negotiator for the Montreal Protocol on Substances that Deplete the Stratospheric Ozone Layer reports in *Ozone Diplomacy* (Cambridge, MA: Harvard University Press, 1989) that an official from GATT attended the negotiations and provided advice on the trade measures. No verification from the GATT secretariat has been possible.

the environmental negotiation. No solution to this problem is in sight. It is not addressed
The unspoken question behind para 31 (ii) is how to handle the reciprocal relationship,
that is how to provide WTO committees with appropriate status in MEA processes.

4. Current Status of Negotiations

DMD paragraph 31 (ii) has attracted only three submissions from Member states, one each from the United States²⁴, the European Union²⁵ and Switzerland²⁶. The Secretariat has prepared two notes for the Special Sessions²⁷. There have been four meetings of the CTE-SS²⁸, duly reported to the TNC²⁹. In addition there have been several informal meetings and information sessions with UNEP and selected MEA secretariats. The current situation was summarized as follows: “According to a WTO official, most Members agreed at the (1-2 May 2003) meeting that WTO information exchange with MEAs should be formalised, but some—primarily developing country—Members resisted proposals that would increase the workload and/or require additional financial resources.”³⁰ The issue of according observer status remains largely in abeyance as the broader implications are considered. UNEP and a group of five MEA Secretariats³¹ have been invited to attend on an ad hoc basis and there is an expectation that this arrangement will continue, although some secretariats were beginning to question the utility of their presence: “Frustration at the process in general was evident, as one MEA sources aid it was not clear that MEAs had anything to gain from devoting resources to the WTO-MEA endeavour, particularly as they did not see any sign that the WTO negotiations were helping them to implement their own MEA mandates.”³²

The CTE-SS will meet again 8 July 2003, primarily for the purpose of finalizing its report to the Cancun Ministerial Conference the following September.

²⁴ TN/TE/W/4 (6 June 2002).

²⁵ TN/TE/W/15 (17 Oct 2002). In keeping with widespread practice, this paper will refer to the “European Union,” although within the WTO normal usage is “European Communities,” a term superceded by “European Community.”

²⁶ TN/TE/W/30 (29 April 2003)

²⁷ TN/TE/S/2 and TN/TE/S/4.

²⁸ TN/TE/R/1-3. The Report of the session of 1-2 May is not yet available on the WTO website (see BRIDGES Weekly Trade News Digest Vol. 7 Number 16 (7 May 2003).

²⁹ TN/TE/1-3

³⁰ See BRIDGES Weekly Trade News Digest Vol. 7 Number 16 (7 May 2003).

³¹ Basel Convention; the Convention on Biological Diversity (CBD); Convention on International Trade in Endangered Species (CITES); International Tropical Timber Organization (ITTO); the Montreal Protocol, United Nations Framework Convention on Climate Change (UNFCCC)

³² BRIDGES Weekly Trade News Digest Vol. 7 Number 16 (7 May 2003)

5. Which MEAs?

A number of alternative lists of MEAs that are relevant to the trade regime have been generated. UNEP and six MEA secretariats have been invited to attend CTE-SS sessions

Table 1: MEAs: Different Criteria for Information Exchange and Observer Status

Agreement	1	2	3	4	5	6	7	8	9	10	11	12
Basel Convention on the International Transport of Hazardous Wastes	X	X	X	X	X			X	X	X		P
Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)		X	X									
Convention on Biological Diversity (CBD)	X	X	X	X	X		X	X	X	X	G	P
- Biosafety Protocol		X	X						X	X		
Convention on International Trade in Endangered Species (CITES)	X	X	X	X		X		X	X		G	P
Convention on long Range Transport of Atmospheric Pollution (LRTAP)										X		
Economic Commission for Europe, Protocol on Persistent Organic Pesticides					X							
FAO Code of Conduct for Responsible Fisheries										X		
Global Environment Facility (GEF)				X						X		
International Convention for the Conservation of Atlantic Tuna (ICCAT)		X	X		X		X			X	G	
Intergovernmental Forum on Forests (IFF)					X	X		X		X		
International Plant Protection Convention (IPPC)		X	X									
International Tropical Timber Agreement	X	X	X		X	X				X	P	P
Montreal Protocol on Substances that Deplete the Stratospheric Ozone Layer	X	X	X	X		X	X		X	X	P	
- Multilateral Fund for the Implementation of the Montreal Protocol				X								
Rotterdam Convention on Prior Informed Consent (UNEP Chemicals)		X	X	X	X			X	X	X		
Stockholm Convention on Persistent Organic Pesticides (UNEP Chemicals)		X	X	X	X			X	X	X		
United Nations Convention on the Law of the Sea (UNCLOS)			X							X		
United Nations Fish Stocks Agreement		X	X						X			
United Nations Framework Convention on Climate Change (UNFCCC)	X	X	X		X	X	X	X	X	X	G	
- Kyoto Protocol		X	X									

Notes on Table 1

1: Invited to CTE-SS, 1-2 May 2003

2. Listed in Matrix on Trade Measures Pursuant to Selected MEAs (WT/CTE/W/160/Rev.1

3. Listed in Switzerland submission

4. Attended Information Session 22-24.09.1997

5. Attended Information Session 23-24.07.1998

6 Attended Information Session 29-30.06.1999

7. Attended Information Session 5-6.07.2000

8. Attended Information Session 24-25.10.2000

9. Attended Information Session 27-28.06.2001

10. Background information provided to CTE by WTO secretariat

11. Observer Status Pending CTE-SS

12. Observer Status in CTE (p=pending, g=granted)

as observers on an ad hoc basis. In discussions on DMD paragraph 31 (I) the concept of Specific Trade Obligations (STO) has emerged as a focal point. The submission of Switzerland contains a list of 16 “trade related MEAs.” The CTE has held six MEA Information Sessions and provided information on 15 MEAs. The following table summarizes this information.

This table indicates that there is still no clear consensus on which MEAs to include. The difficulty is compounded by the dual nature of DMD paragraph 31 (ii), which seeks “information exchange,” a relatively limited obligation, and “observer status,” a more substantial institutional commitment. It is likely that arrangements for information exchange can be quite comprehensive, involving almost any MEA that has trade relevance. On the other hand observer status will need to be determined on the basis of “criteria,” as indicated by the DMD. These criteria have not yet emerged. There appear to be two possible approaches, one outlined in the Swiss submission that generates a list of 16 MEAs and one based on the discussion under DMD paragraph 31 (I) on STOs. That discussion has not yet been concluded but is liable to generate a much more limited list of 6-8 MEAs.

7. Information Exchange

The DMD text on information exchange calls for “procedures for information exchange.” It assumes that information exchange needs to occur and is a desirable thing. The discussions in the CTE-SS—to call them negotiations would be an exaggeration—have moved slowly but without any sense that there will not be a decision when it is necessary³³. There has been some suggestion that this is an issue that is suitable for (early action,” that is for a final determination and implementation prior to completion of other elements of the Doha Agenda³⁴.

A note from the secretariat outlines “Existing Forms of Cooperation and Information Exchange between UNEP/MEAs and the WTO.”³⁵ In November 1999, a “cooperation arrangement³⁶” was concluded between the secretariats of the WTO and UNEP. The arrangement was formalized through a press release setting out the results of several years of consultations between the Director-General of the WTO and the

³³ Most attention has been devoted to DMD paragraph 31 (i) and 31 (iii), and to the criteria for observer status under 31 (ii).

³⁴ “Report by the Chairperson of the Special Session of the Committee on Trade and Environment to the Trade Negotiations Committee,” I.B.7. TN/TE/3 (02 Dec 2002)

³⁵ TN/TE/S/2 (10 June 2002)

³⁶ The terminology builds on a “global arrangement” concluded between “the Secretariat of the World Trade Organization and the United Nations as a whole.” The term “arrangement” consciously avoids the use of more formal terminology such as “agreement,” “accord,” or “understanding.” The WTO has concluded “agreements” with WIPO, UNCTAD, the IMF and the World Bank on specific issues relating to the WTO agreements or for broad cooperation. The use of the less formal term indicates a hesitation to be drawn into a relationship with the UN that might be compared to a Specialized Agency.

Executive-Director of UNEP. The arrangement outlines a variety of relatively informal steps that are planned. In addition, UNEP has organized regular meetings back-to-back with CTE meetings, each devoted to a specific topic of relevance to trade and environment. Since 1998, the WTO Secretariat has organized regional seminars on trade and environment for developing countries and economies in transition; the note lists seven such workshops in which UNEP has participated. Two secretariat of the Basel Convention participated in three of the workshops and the secretariat of the Montreal Protocol in one. UNEP and UNCTAD have created a Capacity-Building Task Force on Trade, Environment and Development (CBTF) that has held four workshops. A decision has been taken to institutionalise CBTF back-to-back workshops with the WTO Regional Seminars. UNEP has also developed a manual on integrated environmental assessment of trade agreements³⁷, and has sponsored numerous studies on the environmental impacts of trade liberalization³⁸.

Information exchange between the WTO secretariat and UNEP/MEAs has become a continuous activity. The CTE has invited 13 MEA Secretariats³⁹ to participate in a total of six information sessions, at which background notes were presented by the MERA Secretariats. In addition a large number of documents on MEAs have been circulated in the CTE by both the WTO and MEA secretariats⁴⁰.

In its contribution to DMD paragraph 31 (ii), the United States emphasizes the need for coordination at the national level. “The United States believes that efforts to enhance information exchange at the multilateral level—both through continuation of existing mechanisms and through exploration of additional means pursuant to paragraph 31 (ii)—will provide incentives for trade and environment officials to increase coordination of policy development at the national level, and for some countries to initiate this kind of cooperation.”⁴¹ The United States tends to view international action in the context of DMD paragraph 31 (ii) primarily in terms of its ability to promote such coordination. This position reflects the fact that the United States is not party to several of the most important MEAs that have a trade dimension: the Basel Convention, the Convention on Biodiversity and its Protocol on Biosafety, the Kyoto Protocol of the UNFCCC, and the Law of the Sea Convention (UNCLOS). Consequently many of the issues of coordination that arise at the international level between parties to these MEAs and Members of the WTO do not take the same form in the United States.⁴²

The United States underlines that “trade and environment officials represent the same government in any one country and have a mutual responsibility to ensure that positions

³⁷ United Nations Environment Programme (UNEP), Reference Manual for the Integrated Assessment of Trade-Related Policies. Geneva: UNEP, 2001. Also at <http://www.unep.ch/etu/publications/index.htm>.

³⁸ Available at <http://www.unep.ch/etu/publications/index.htm>.

³⁹ See Table X

⁴⁰ A list is to be found in an Annex to TN/TE/S/2 (10 June 2002).

⁴¹ “Contribution of the United States on Paragraph 31 (ii) of the Doha Ministerial declaration,” 1.2. TN/TE/W/5 (06 June 2002).

⁴² See above p. for a discussion of the reasons why global public goods are not adequately represented by national coordination.

presented in a variety of international for a are internally consistent and reinforcing.”⁴³ This approach has the advantage of circumventing the dilemmas posed by the institutional incongruence of international trade and environmental regimes⁴⁴ but it ignores the clear mandate of the DMD to address this issue.

The United States Contribution addresses both information sessions and document exchange. It advocates the inclusion of government officials in this process. Sessions should be organized around specific themes, and more attention could be given to two-way information flow, that is to permit some initiative to MEA secretariats or to UNEP. Beyond these activities, the United States suggests exploring other mechanisms for cooperation, such as coordinating technical assistance, the development of mutual data bases and the maintenance of joint contact lists.

The United States has relatively elaborate proposals for document exchange, emphasizing again the national level: “In the first instance, document exchange between trade and environment officials should occur at the national level.”⁴⁵ The proposals then list a variety of types of documents for exchange, highlighting the problem of documents that are restricted within the WTO but may be of concern for MEAs. The proposals conclude with the statement that “while these procedures would offer some improvements in existing access to documentation between organizations, document exchange at the international level is not a substitute for the kind of exchange of information that should take place at national levels between trade and environment officials.”⁴⁶

The European Union goes much further in its submission⁴⁷. It seeks official institutionalization (presumably involving some explicit link to organs of the WTO) of the information sessions, as well as to ensure that “the WTO and MEA interface should go beyond a mere information exchange, without real structure and follow-up.” It seeks “a two-way information and awareness-raising tool,” which should extend beyond DMD paragraph 31 to DMD paragraphs 33 (technical assistance) and DMD paragraph 37 (transfer of technology) as well as successive WTO work programmes and the implementation of WTO agreements. The European Union submission also addresses the full scope of DMD paragraph 31 (ii), envisaging the involvement not only of the CTE but—in accordance with the language of the DMD—other WTO committees (although agriculture and investment, two DMD issues with highly environmental saliency, are not explicitly mentioned).

The European Union submission seeks to fully integrate UNEP (which is not referenced in DMD paragraph 31 but in paragraph 5) as well as MEAs that have not yet entered into force. This latter issue is implicit rather than explicit in the DMD text but needs to be resolved as part of the negotiations. .

⁴³ Contribution of the United States 1.3.

⁴⁴ See above.

⁴⁵ Contribution of the United States III.11

⁴⁶ Contribution of the United States III.12

⁴⁷ “MEAs: Information Exchange and Observer Status. Submission by the European Communities.” TN/TE/W/15 (17 Oct 2002).

Finally the European Union submission addresses the issue of representation of the WTO agenda in MEA COPs⁴⁸. It states that “the WTO should be more visible and side events should be systematically organized in the margins of the COP to allow for an exchange of views on current work programmes and issues of mutual interest.”⁴⁹

Switzerland has made the latest submission on these issues⁵⁰. In contrast to the United States, Switzerland states that “information exchange at the international level is an essential element to achieve complementarities between trade and environmental institutions.”⁵¹ The Swiss submission is the first to include a list of MEAs that should be involved⁵². Including “the whole range of MEAs dealing with trade-related aspects, whether they have or have not entered into force.”⁵³ The submission is largely congruent with that of the European Union, even though it does not go beyond the CTE within the WTO. On the other hand it lists a number of topics for information exchange not covered in previous submissions (compliance and dispute settlement mechanisms in MEAs and the WTO; subsidies; integrated assessments of trade liberalization; and labelling for environmental purposes). It suggests a broader agenda for information sessions to be jointly sponsored by the CTE and some MEAs, covering “specific topics that are defined in the Doha Mandate.”⁵⁴ Like the EU submission it integrates UNEP fully into the proposal.

The differences between the US communication and the EU and Swiss submissions are notable. They appear to be negotiable. In this situation, submissions by other WTO Members take on particular weight.

8. Observer Status

The issue of observer status is complicated by its relationship to the broader issue of observer status in all organs of the WTO. Indeed, the DMD mandate does not require the CTE-SS to resolve the question itself but only to identify “criteria for granting observer status” but implicitly in “all relevant WTO committees,” that is not only the CTE or CTE-SS. At the present time there are requests for observer status pending before six other WTO organs⁵⁵. The DMD paragraph 31 (ii) mandate consequently involves several interrelated elements, each of which presents its own problems:

⁴⁸ See above.

⁴⁹ Submission by the European Communities II.2

⁵⁰ “Information Exchange and Observer Status. Submission by Switzerland.” TN/TE/W/30 (29 April 2003).

⁵¹ Submission by Switzerland II.5

⁵² See Table 1

⁵³ Submission by Switzerland II.7

⁵⁴ Submission by Switzerland II.9.

⁵⁵ General Council (1), TRIPS Council (2), Committee on Agriculture (1), SPS Committee (1), Committee on Trade and Development (1). TN/TE/S/4, p. 3

4. The mandate calls on CTE-SS to define criteria for observer status, that is not simply to identify specific organizations that may be eligible or to pick among organizations that have applied;
5. It implies that these criteria will also apply to requests for observer status in other negotiating bodies by MEAs.

The need to take this particular approach arises from the fact that MEAs are not themselves international organizations, yet have the character of intergovernmental institutions and thus enjoy a status apart from nongovernmental organization—which would be granted observer status only under exceptional circumstances for example when they fulfill functions normally reserved for intergovernmental bodies (such as IUCN for the Ramsar Convention) or when they are explicitly mentioned in WTO agreements (such as the International Organization for Standardization in the TBT Agreement).

The WTO secretariat prepared a note on observer status⁵⁶ covering both WTO negotiating bodies and the CTE. It covers the fact that while the Trade Negotiating Committee has not addressed the issue of observers a number of intergovernmental organizations have been granted observer status in the Special (negotiating) Sessions of the Committee on Agriculture and the Council on Services. This has generally been done on an ad hoc basis admitting organizations that already had observer status in the relevant standing body of the WTO. Pending resolution of the more fundamental issues in the CTE-SS, a similar practice was initiated by the CTE-SS⁵⁷. Despite the suggestion that this would become standard practice⁵⁸, there appear to be new questions that have arisen following the CTE-SS of 1-2 May 2003.

The matter of observer status for international intergovernmental organizations in the WTO is handled in Annex 3 of the Rules of Procedure promulgated by the General Council⁵⁹. The criteria for considering observer status are that applicant organizations “have competence and a direct interest in trade policy matters.” Decisions are then taken on a case by case basis by the relevant WTO body. There is no provision for universal observer status, unless this might be provided by a formal arrangement for cooperation and consultation.

⁵⁶ “Observer Status. Note by the Secretariat.” TN/TE/S/4 (31 Jan 2003).

⁵⁷ Email from Marie Isabelle Pellan, 17 Feb 2003 to selected recipients (See Table 1).

⁵⁸ “Please note that this decision was taken on an ad hoc basis, with the proviso that it would be without prejudice to the outcome of the negotiations currently under way in the CTE Special Session, in particular with regard to the criteria for granting observer status to MEAs in the relevant WTO committees (Paragraph 31 (ii) of the Doha Declaration).

Also, since the issue of observer status is before the General Council and the Trade Negotiating Committee (TNC), it was understood that this decision by the CTE Special Session was without prejudice to a solution of the issue of observer status in the General Council or the TNC.

Despite the ad hoc nature of this decision, one can hope that the CCTE special Session will be able to reach an agreement, at the end of each meeting, on inviting UNEP and MEAs to the following meeting, which would also extend to other MEAs.” Email from Marie-Isabelle Pellan to selected recipients (17 Feb 2003).

⁵⁹ “Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council.” WT/L/161.

“Competence and a direct interest in trade policy matters” is therefore the starting point for discussion about criteria for MEAs. The matter of “competence” is difficult to resolve—presumably any MEA with “a direct interest in trade policy matters” must be assumed to be competent in them. Consequently the CTE-SS discussions center on the determination of what “direct interest” may mean for MEAs. But the issue is of course observer status when issues under discussion do not concern the MEAs themselves but matters that they may be involved in, directly or indirectly.

The United States contribution points out that DMD paragraph 31 (i) and 31 (ii) certainly involve matters of direct interest to MEAs⁶⁰. The issue is how to determine observer status when the topic is not the MEAs themselves but matters that are addressed in the context of MEAs. The core of the US contribution is the proposal to consider “whether it may be appropriate to develop specific guidelines that set forth pertinent characteristics to be taken into account when a request for observer status is under examination.”⁶¹

The submission of the European Union takes a much more comprehensive approach, pointing out that sustainable development is a strategic objective of the WTO. It builds on the participation of four MEAs and UNEP as observers of the CTE. It suggests that beyond this group all “core” MEAs (those that have participated in information sessions) should be granted observer status. It also goes beyond the CTE to state “as regards requests by other MEAs for observer status in the CTE or by core MEAs for observer status in other WTO committees, we also propose that there be a strong presumption in favour of prompt positive decisions to grant observer status.”⁶² The European Union also strongly advocates including UNEP. Although UNEP is not mentioned in DMD paragraph 31 (ii), it is explicitly referenced in DMD paragraph 6. “The [EU] fully supports the observer status of UNEP in a set of those WTO committees UNEP deems ‘relevant’ to its work, and in particular the Committee on Trade and Development.”⁶³

The submission by Switzerland deals only with granting observer status to MEA secretariats in the CTE and CTE-SS. It contains a list of sixteen MEAs⁶⁴ that Switzerland considers eligible on account of their having an “important trade component.”⁶⁵ Switzerland also points out that most MEAs permit international organizations as observers at meetings by simply expressing an interest in doing so—the European Union having pointed out that the WTO has not had any problems in participating in relevant MEA meetings.

⁶⁰ Paradoxically, MEAs are not permitted as observers when their status as observers is under consideration. They were asked to leave the session after discussion of para 31 (I) ended and para 31 (ii) was taken up. BRIDGES Weekly Trade News Digest Vol. 7 No. 16 (7 May 2003) at <http://www.ictsd.org/weekly>.

⁶¹ Contribution of the United States IV.16

⁶² Submission of the European Union, III.20.

⁶³ Submission of the European Union, III.25.

⁶⁴ See Table 1

⁶⁵ Based on the Matrix elaborated by the WTO secretariat (see Table 1).

9. Conclusion

The issue of information exchange and observer status between the WTO and MEAs is a vexing one with a number of complex aspects but one that should be resolvable in a reasonable amount of time. Thus far only the United States and two demandeurs (the European Union and Switzerland) have been heard from. It is important to ensure that all relevant voices are heard in the coming sessions so that this matter can be brought to a rapid conclusion, making the way free for the more complex issues that exist under DMD paragraph 31 (i) and 31 (iii).

Annex 1: Legal Basis of Some Secretariats

Convention on Biodiversity

Article 24. Secretariat

1. A secretariat is hereby established. Its functions shall be:
 - (a) To arrange for and service meetings of the Conference of the Parties provided for in Article 23;
 - (b) To perform the functions assigned to it by any protocol;
 - (c) To prepare reports on the execution of its functions under this Convention and present them to the Conference of the Parties;
 - (d) To coordinate with other relevant international bodies and, in particular to enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions; and
 - (e) To perform such other functions as may be determined by the Conference of the Parties.

2. At its first ordinary meeting, the Conference of the Parties shall designate the secretariat from amongst those existing competent international organizations which have signified their willingness to carry out the secretariat functions under this Convention.

Montreal Protocol

Article 12: Secretariat

For the purposes of this Protocol, the secretariat shall:

- (a) Arrange for and service meetings of the Parties as provided for in [Article 11](#);
- (b) Receive and make available, upon request by a Party, data provided pursuant to [Article 7](#);
- (c) Prepare and distribute regularly to the Parties reports based on information received pursuant to Articles [7](#) and [9](#);
- (d) Notify the Parties of any request for technical assistance received pursuant to [Article 10](#) so as to facilitate the provision of this Protocol;
- (e) Encourage non-Parties to attend the meetings of the Parties as observers and to act in accordance with the provisions of this Protocol;
- (f) Provide, as appropriate, the information and requests referred to in subparagraphs (c) and (d) to such non-party observers; and
- (g) Perform such other functions for the achievement of the purposes of this Protocol as may be assigned to it by the Parties.

Convention on International Trade in Endangered Species

Article XII

The Secretariat

1. Upon entry into force of the present Convention, a Secretariat shall be provided by the Executive Director of the United Nations Environment Programme. To the extent and in the manner he considers appropriate, he may be assisted by suitable inter-governmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild fauna and flora.

2. The functions of the Secretariat shall be:

- (a) to arrange for and service meetings of the Parties;
- (b) to perform the functions entrusted to it under the provisions of Articles XV and XVI of the present Convention;
- (c) to undertake scientific and technical studies in accordance with programmes authorized by the Conference of the Parties as will contribute to the implementation of the present Convention, including studies concerning standards for appropriate preparation and shipment of living specimens and the means of identifying specimens;
- (d) to study the reports of Parties and to request from Parties such further information with respect thereto as it deems necessary to ensure implementation of the present Convention;
- (e) to invite the attention of the Parties to any matter pertaining to the aims of the present Convention;
- (f) to publish periodically and distribute to the Parties current editions of Appendices I, II and III together with any information which will facilitate identification of specimens of species included in those Appendices;
- (g) to prepare annual reports to the Parties on its work and on the implementation of the present Convention and such other reports as meetings of the Parties may request;
- (h) to make recommendations for the implementation of the aims and provisions of the present Convention, including the exchange of information of a scientific or technical nature;
- (i) to perform any other function as may be entrusted to it by the Parties.

Basel Convention on the International Transport of Hazardous Wastes

Article 16 Secretariat

1. The functions of the Secretariat shall be:

- (a) To arrange for and service meetings provided for in Articles [15](#) and [17](#);
- (b) To prepare and transmit reports based upon information received in accordance with Articles [3](#), [4](#), [6](#), [11](#) and [13](#) as well as upon information derived from meetings of subsidiary bodies established under [Article 15](#) as well as upon, as

- appropriate, information provided by relevant intergovernmental and non-governmental entities;
- (c) To prepare reports on its activities carried out in implementation of its functions under this Convention and present them to the Conference of the Parties;
 - (d) To ensure the necessary coordination with relevant international bodies, and in particular to enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions;
 - (e) To communicate with focal points and competent authorities established by the Parties in accordance with [Article 5](#) of this Convention;
 - (f) To compile information concerning authorized national sites and facilities of Parties available for the disposal of their hazardous wastes and other wastes and to circulate this information among Parties;
 - (g) To receive and convey information from and to Parties on;
 - 7. sources of technical assistance and training;
 - 8. available technical and scientific know-how;
 - 9. sources of advice and expertise; and
 - 10. availability of resources
 - with a view to assisting them, upon request, in such areas as:
 - 11. the handling of the notification system of this Convention;
 - 12. the management of hazardous wastes and other wastes;
 - 13. environmentally sound technologies relating to hazardous wastes and other wastes, such as low- and non-waste technology;
 - 14. the assessment of disposal capabilities and sites;
 - 15. the monitoring of hazardous wastes and other wastes; and
 - 16. emergency responses;
 - (h) To provide Parties, upon request, with information on consultants or consulting firms having the necessary technical competence in the field, which can assist them to examine a notification for a transboundary movement, the concurrence of a shipment of hazardous wastes or other wastes with the relevant notification, and/or the fact that the proposed disposal facilities for hazardous wastes or other wastes are environmentally sound, when they have reason to believe that the wastes in question will not be managed in an environmentally sound manner. Any such examination would not be at the expense of the Secretariat;
 - (i) To assist Parties upon request in their identification of cases of illegal traffic and to circulate immediately to the Parties concerned any information it has received regarding illegal traffic;
 - 1. To co-operate with Parties and with relevant and competent international organizations and agencies in the provision of experts and equipment for the purpose of rapid assistance to States in the event of an emergency situation; and
 - 2. To perform such other functions relevant to the purposes of this Convention as may be determined by the Conference of the Parties.
2. The secretariat functions will be carried out on an interim basis by UNEP until the completion of the first meeting of the Conference of the Parties held pursuant to [Article 15](#).

3. At its first meeting, the Conference of the Parties shall designate the Secretariat from among those existing competent intergovernmental organizations which have signified their willingness to carry out the secretariat functions under this Convention. At this meeting, the Conference of the Parties shall also evaluate the implementation by the interim Secretariat of the functions assigned to it, in particular under paragraph 1 above, and decide upon the structures appropriate for those functions.

United Nations Framework Convention on Climate Change

Article 8 Secretariat

1. A secretariat is hereby established.
2. The functions of the secretariat shall be:
 - (a) To make arrangements for sessions of the Conference of the Parties and its subsidiary bodies established under the Convention and to provide them with services as required;
 - (b) To compile and transmit reports submitted to it;
 - (c) To facilitate assistance to the Parties, particularly developing country Parties, on request, in the compilation and communication of information required in accordance with the provisions of the Convention;
 - (d) To prepare reports on its activities and present them to the Conference of the Parties;
 - (e) To ensure the necessary coordination with the secretariats of other relevant international bodies;
 - (f) To enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions; and
 - (g) To perform the other secretariat functions specified in the Convention and in any of its protocols and such other functions as may be determined by the Conference of the Parties.
3. The Conference of the Parties, at its first session, shall designate a permanent secretariat and make arrangements for its functioning.

Rotterdam Convention on Prior Informed Consent

Secretariat

1. A Secretariat is hereby established.
2. The functions of the Secretariat shall be:
 - (a) To make arrangements for meetings of the Conference of the Parties and its subsidiary bodies and to provide them with services as required;

- (b) To facilitate assistance to the Parties, particularly developing Parties and Parties with economies in transition, on request, in the implementation of this Convention;
- (c) To ensure the necessary coordination with the secretariats of other relevant international bodies;
- (d) To enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions; and
- (e) To perform the other secretariat functions specified in this Convention and such other functions as may be determined by the Conference of the Parties.

3. The secretariat functions for this Convention shall be performed jointly by the Executive Director of UNEP and the Director-General of FAO, subject to such arrangements as shall be agreed between them and approved by the Conference of the Parties.

4. The Conference of the Parties may decide, by a three-fourths majority of the Parties present and voting, to entrust the secretariat functions to one or more other competent international organizations, should it find that the Secretariat is not functioning as intended

World Trade Organization

Article VI

The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as “the Secretariat”) headed by a Director-General.
2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.
3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.
4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of

the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Annex 2: Konrad von Moltke, Abram Chayes, Antonia Chayes, Oran Young,
“International Secretariats.”
Paper for the Pocantico Workshop on International Secretariats, June 1995.

1. Introduction: An Historical Note

Since the formation of the earliest international organizations--for example the Central Commission for the Navigation of the Rhine in 1868 or the--they have needed administrators. In an international society dominated by state actors and increasingly powerful nongovernmental organizations which pursue particular interests, the secretariat has sole responsibility for achieving the goals of the regime which they serve⁶⁶. It is difficult to adequately understanding the functioning of international regimes without a full understanding of the secretariat and its role. An effective regime with an ineffective secretariat is hard to imagine, so the effectiveness of the secretariat is a necessary but not sufficient condition for the effectiveness of the regime. Nevertheless, international secretariats have received little systematic attention.

It is generally accepted that until creation of the League of Nations and the International Labour Office, the secretariat of international organizations was composed of national officials on secondment⁶⁷. While not invariably subject to instructions from their government, these officials continued to depend entirely on their home administration for income and advancement and were therefore assumed to reflect their country's interests. International secretariats were thus seen as the extension of diplomacy by other means. The International Joint Commission, formed in 1908 to manage water issues on the border between Canada and the United States and given licensing authority over measures which affect the levels and flows of border waters, reflected this attitude by establishing two secretariats, one in each country.

The League Nations and the International Labour Office presented two alternative models for an emerging international civil service. Sir Eric Drummond, first Secretary-General of the League of Nations became a proponent of a secretariat with international civil servants. However, he took as template the British model of efficient, unobtrusive administration at the service of their political masters: capable of exercising remarkable influence but never in public. Albert Thomas, first Director-General of the International Labour Office is described as "an irrepressible veteran of French politics and labor

⁶⁶ International regimes are defined as "social institutions consisting of agreed upon principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue-areas." Marc A. Levy, et al., *The Study of International Regimes* (Working Paper WP-94-13). Laxenburg: International Institute for Applied Systems Analysis, November 1994.

⁶⁷ Johan Kaufmann, *Conference Diplomacy. An Introductory Analysis*. Dordrecht: Martinus Nijhoff Publishers, 1982, p.106

activity [who] created the pattern of articulate and dynamic leadership in matters of policy."⁶⁸

Creation of the United Nations brought formal recognition of the independence of the UN Secretariat. Art. 100 of the Charter of the United Nations reads "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization. Each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not seek to influence them in the discharge of their responsibilities." Art. 101.3 specifies: "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible." It was soon recognized that the United Nations, and the specialized agencies entering into relationships with it, should follow congruent personnel policies. The result, known as the "common system," was built on the series of association agreements between the United Nations and the specialized agencies. It now includes the United Nations, the specialized agencies (with the exception of the Bretton Woods Institutions) and other major United Nations programmes and bodies such as UNICEF and UNDP, ranging in size from a staff of more than 15 000 to just 39 (ICJ).

The reality was significantly more complex, with wide variations reflecting the details of the statutory position of the secretariat, the personality of the executive head, the accumulated goodwill and trust of a secretariat and the resources available in relation to the tasks at hand. The concurrent formation of the United Nations system brought the establishment of an International Civil Service Commission as part of the "Common System."⁶⁹ From the outset, the Bretton Woods Institutions represented a special case within the overall structure of international organization created in the years following World War II, reflecting the special interest in creating stable international economic relations as well as the assessment that errors of economic policy were a contributory factor to the instability of the international system between the wars. In later years, the difference in governance came to define differences in approach with the UN system expanding to admit many more members than the founders had ever envisaged while the Bretton Woods institutions remained firmly in the hands of a few leading industrialized countries.

The past decades have seen an unprecedented, in many respects an unanticipated and in some regards even an unnoticed explosion in the number of international institutions. In general, countries are unenthusiastic about the expansion of international institutions. The fact that such an expansion has nevertheless occurred justifies the hypothesis that most of

⁶⁸ Inis L. Claude, *Swords into Ploughshares*. New York: Random House, 1964, p. 176

⁶⁹ John P. Renninger, *Can the Common System be Maintained? The Role of the International Civil Service Commission*. New York: United Nations Institute for Training and Research, 1986.

this expansion corresponds to a need which is perceived by a substantial coalition of relevant countries to be pressing.

Most international institutions have some organized form of administration, a secretariat. At the same time, the functions of existing secretariats--traditional international organizations for the most part--have changed as they have taken on new responsibilities or have adjusted to the emergence of other institutions with related functions. The development of these secretariats is largely punctuated by the evolution of complex substantive international agreements that are characteristic of the international scene in areas as diverse as arms control, environmental management and international trade. In many instances, these agreements lie at the heart of major evolving international regimes. The associated secretariats play a crucial and often underestimated role in ensuring the effective operation and development of these regimes.

Not all of the new secretariats were created by governments. In some instances they were created by international organizations. When it created the International Finance Corporation and the International Development Association, the Executive Directors of the World Bank formulated charters for the new institutions and presented them to member governments for signature. UNESCO reorganized several units to create the World Heritage Center. In other cases, the secretariat is a joint creation of governments and nongovernmental organizations (the World Conservation Union and the International Council of Museums and OS, for example). Yet other institutions are privately organized but have received some form of government sanction (the International Standards Organization). The largest number of new international institutions are private creations, ranging from the International Chamber of Commerce to the Worldwide Fund for Nature (WWF). Generally these private international institutions, "nongovernmental organizations" in UN parlance, were created to represent some special interest or to create additional international pressure to promote some general interest. They are not secretariats responsible to the general good. However, some of these nongovernmental international institutions have also taken on secretariat functions or play a vital role in ensuring the effectiveness of certain regimes such as human rights regimes (International Red Cross, Amnesty International), the Antarctic regime (Greenpeace) or the regime governing international trade in endangered species (WWF)⁷⁰.

Confronted with this variety of secretariats, it is no longer possible to apply traditional criteria of international relations to understanding their role and functioning. The literature tends to focus on the larger "secretariats."⁷¹ In fact there is virtually no

⁷⁰ Pei-heng Chiang, *Non-governmental Organizations at the United Nations. Identity, Role, and Function*. New York: Praeger Publishers, 1981.

⁷¹ Jean Siotis, *Essai sur le secrétariat international*. Genève, Librairie Droz, 1963. Douglas Williams, *The Specialized Agencies and the United Nations*. New York: St. Martin's Press, 1987. Evan Luard, *International Agencies: The Emerging Framework of Interdependence*. Dobbs Ferry: Oceana Publications, 1977. Thomas George Weiss, *International Bureaucracy. An Analysis of the Operation of Functional and Global International Secretariats*. Lexington: Lexington Books, 1975. See also: Erskine Childers and Brian Urquhart, *Renewing the United Nations System*. Uppsala: Dag Hammarskjöld Foundation, 1994.

discussion of the functions of secretariats responsible for the implementation of specific agreements⁷².

The responsibilities of secretariats in contemporary regimes are by no means limited to carrying out routine administrative chores required for the smooth functioning of policy organs. Increasingly, secretariats perform tasks in substantive areas of regime activity. These tasks are also distinct from the activities typically undertaken by large international organizations. Indeed, when such organizations take on secretariat functions for an international agreement, they will often establish a separate office or center within their own structure for this function. Yet the issues faced by these secretariats are widely comparable, covering such practical questions as the legal status, emoluments and rights of their employees, budgets and access to other financial resources and such matters of policy as their role in data-gathering, reporting and analysis, verification, assessment of scientific information, review of country performance, dispute settlement, capacity building, ensuring transparency, liaison with other international organizations, access to information and regime development. Often senior officials have a significant informal role in addition to their formal responsibilities.

The functions of these secretariats and major issues concerning their operation have not been the subject of continuing attention. Although there are obvious differences among international secretariats in institutional status, size and responsibilities, their functions and problems are similar in many respects--and differ from the better known functions and problems of international organizations.

To date, secretariats have generally worked in isolation from one another, relating mainly to colleagues in international organizations, interested nongovernmental organizations and relevant officials in national governments.

2. Classifying Secretariats

At the most elementary level, secretariats serve the continuing administrative needs of the regime: prepare meetings, receive and circulate information, conduct activities which they have been expressly assigned by the relevant constitutional instrument or by a formal decision of the parties. Most secretariats exercise these functions effectively, although some have more adequate resources for this purpose than others.

These elementary functions, however, do not provide a basis for a better understanding of the changing role of international secretariats. A number of options exist for classifying secretariats. Most frequently used is a distinction by subject matter. However, this does

⁷² Konrad von Moltke, "International Commissions and Implementation of International Environmental Law," in: John Carroll, ed., *International Environmental Diplomacy*. Cambridge: Cambridge University Press, 1988, pp. 87-94. The only attempt at a systematic discussion is Rosemary Sandford, "Secretariats and International Environmental Negotiations: Two New Models," in: Lawrence Susskind, et al., eds., *International Environmental Treaty Making*. Cambridge, MA: The Program on Negotiation at Harvard Law School, 1992, pp. 27-59

little to elucidate structural characteristics of secretariats. The critical question which needs to be addressed is the identification of criteria for the effectiveness of secretariats. Effectiveness is not a term with identical meaning in all settings. It is determined in large measure by the goals which have been set in a given regime, and these are frequently dynamic and subject to varying interpretation. Effectiveness can be understood in a narrow sense to mean the completion of tasks assigned to a secretariat by its constitutional instrument: are meetings held as planned, deadlines met, documents prepared and reports published. Effectiveness can also be understood in a more substantive manner: does the secretariat contribute to the achievement of the articulated goals of the regime? Would alternative arrangements help to achieve these goals more quickly or easily? Effectiveness can finally be articulated in relation to the regime's long term development: does the secretariat help to move a regime towards the better articulation of its goals and does it support the attainment of these future developments? These are complex questions which will require extensive research and debate. They are important in their own right and as a guide to the further elaboration of the secretariat function which exists in most regimes.

Alternative approaches to the development of a secretariat typology could focus on institutional status, size or functions. Each of these criteria can represent critical components of secretariat effectiveness.

2.1. Institutional Status.

Secretariats have been created in a wide range of institutional settings, sometimes as part of larger institutions, sometimes free-standing, sometimes with only virtual institutional existence.

International Organization as Secretariat (Secretariat Organization). In some instances, major international organizations have been created to administer one or more agreements. The administration of these agreements has come to define the character of the entire organization even after it may have taken on additional, related responsibilities. Examples are the International Postal Union, the International Labour Office, the International Atomic Energy Agency or the World Intellectual Property Organization. The General Agreement on Tariffs and Trade represented a special case since it was never formally constituted as an international organization; the evolution of the new World Trade Organization remains to be seen but it is to be expected that it will come to resemble other Secretariat Organizations. The result of this form of secretariat is that implementation of the agreement (or agreements) in question becomes a high profile activity of the organization. The secretariats in question command sizable budgets and strong provisions exist for regime expansion or transformation in response to changing requirements. Generally the secretariat will enjoy a measure of independence in its relations with member states.

Secretariats as part of an International Organization (Dependent Secretariats). Most international organizations have by now fostered additional agreements among all or some of their members and provide secretariat functions for the administration of these

agreements as an integral part of their general program of activities. Frequently administration of the agreements is viewed as part of the regular function of the organization and the secretariat enjoys only limited administrative autonomy within the organization, being subject to management supervision by the head of the agency in question. The International Maritime Organization, the Food and Agriculture Organization and the World Health Organization, UNESCO all have such activities. While the weight of the parent organization is generally behind the agreement, the secretariat does not enjoy much independence nor does the agreement appear in isolation from the organization. Consequently secretariat effectiveness depends to a critical extent on the internal support it receives.

Independent Secretariats. Located within International Organizations (Embedded Secretariats). Independently negotiated agreements require secretariat functions and the conference of parties (or the negotiators) may seek administrative support for this purpose from an existing international organization. While the secretariat retains a measure of independent institutional identity, the host organization provides administrative services and procedural oversight. The United Nations Environment Programme has numerous such arrangements, for example within its Regional Seas Program and for the recent Conventions on stratospheric ozone depletion, and biodiversity. Embedded secretariats can benefit less from actions by the host organization. They are generally not sufficiently developed to stand alone so that effectiveness depends to a significant degree on the interactions between the secretariat, its host organization and the members of the respective regimes.

Small Independent Intergovernmental Secretariats. A large number of (generally small) independent intergovernmental secretariats exist. Examples are the Paris and Oslo Commission, the Helsinki Commission, numerous River Basin Commissions or the North American Commission on Environmental Cooperation. In these instances, the parties did not wish to assign administrative responsibility to an international organization, for example because no appropriate organization existed or because they wished to retain more direct control over the secretariat. In most instances, the regime in question has a limited number of members. Many of these secretariats deal with environmental matters which do not readily fit into national boundaries or international organizations. Because of their limited size, such secretariats typically depend quite heavily on actions by members, either individually or collectively, to achieve effectiveness.

Independent Intergovernmental Secretariats with Host Government Support. Smaller independent secretariats may not be able to provide a full range of administrative services or employment conditions. In these instances, a host country may provide financial control and contract execution even while staff remains responsible to all parties. The International Commission for Protection of the Rhine Against Pollution is such a body. While the secretariat retains minimal institutional identity it will generally tend to serve as an instrument of bureaucratic coordination rather than for the articulation and administration of independent policies. Its effectiveness depends almost entirely on its members.

Other Independent Secretariats. Quasi-nongovernmental and nongovernmental organizations have assumed a range of secretariat functions. The World Conservation Union (IUCN), the International Red Cross and the International Standards Organization are nongovernmental organizations with strong government participation. They are capable of providing secretariat services. In other instances, nongovernmental organization such as Worldwide Fund for Nature (through TRAFFIC, a wildlife trade monitoring group), Greenpeace or IUCN have established institutional structures which serve to supplement secretariat functions in areas of particular concern to their membership. This can create unusual institutional dynamics between the secretariat and the institution which is providing monitoring services and contributing actively to the development of the rules governing the regime.

Seconded Secretariats. Secretariats composed of seconded government officials, who may sometimes remain physically located within their home government agency. These frequently exist in bilateral agreements and serve almost exclusively for purposes of bureaucratic coordination.

Revolving Secretariats. Secretariat functions may be provided by parties to an agreement on a rotating basis, for example for preparation of G7 Summit meetings or for the Antarctic Treaty system. In these instances, one country provides secretariat services for a specified period of time, frequently with transitional arrangements to ensure continuity. In some instances documentation is physically transported from one country to another. Such revolving secretariats tend to be used where members are unwilling to relinquish even limited control over the regime to an independent secretariat or to a host organization or to any member who may derive leverage from hosting the secretariat. They typically arise where issues of substantial importance are being managed.

2.2. Size.

Secretariats may vary widely in size, ranging from a single professional to a staff of several hundred. Size is an expression of the significance members attach to the agreement in question, reflecting a willingness to assign resources and to permit the secretariat to develop an internal dynamic which is a prerequisite for sustained external activity.

Smaller secretariats typically will have a more focused area of activity and will depend heavily on host institutions or on one or more of the members to the agreement. The number of such small secretariats is unknown but it can be assumed to be in the hundreds, possibly thousands. They have received virtually no attention either by analysts or by governments in terms of their operation and effectiveness.

Size also relates to budget and capacity to interact with members, other international institutions and nongovernmental organizations. As a general rule, smaller secretariats have only the limited resources needed to ensure their operations and to maintain statutory relations with their members. No independent resources are available to

undertake specialized functions, to fund research or consultants or to undertake their own consultations. In many instances, resources are even insufficient to provide regular publicly available reports on the secretariat's activity. Small secretariats are largely dependent on the resources of their members to undertake any of these activities if they are desired, and members will typically only make these available if this appears to be in their own interest.

Countries are sometimes faced with a dilemma when determining whether to provide secretariats with additional resources, to allow them to grow in size and to undertake new functions. The general disinclination to support an increase in international institutions appears to be counterbalanced by other factors since the numbers of such institutions, and in some instances their size, continue to grow. Countries may in fact use the development of international secretariats both constructively and defensively. They may seek to advance an agenda through international action or they may wish to delay consideration of certain issues, internationally or domestically. In both instances, they will be inclined to support some development of relevant international secretariats.

Large numbers of small secretariats exist along international frontiers, frequently created by local or regional authorities without sanction from the national government and frequently located within the offices of one of the authorities in question. Their status in international law is unclear. Where they have been established to co-manage some resource or facility--for example a body of water or a waste disposal facility--they are essentially private law bodies created by public authorities. Where they undertake policy functions--e.g. the formulation of joint position statements of matters of common concern--they are informal associations in some respects more comparable to nongovernmental bodies than to intergovernmental ones.

2.3. Functions.

International secretariats by now exist in virtually every domain of public policy. Their functions vary widely, reflecting the issues which they are confronted with.

The range of other, more significant functions exercised by secretariats is large and growing. Among these are data gathering; reporting and analysis; verification; assessment of scientific information; review of member performance; dispute settlement; liaison with non-members and other international institutions and with nongovernmental organizations. Some secretariats have acquired an active role in agenda setting and regime development.

Increasingly, some international secretariats have also undertaken tasks based on informal understandings with the members of the regime, in response to outside pressures, including the intervention of interested parties or the occurrence of events in the natural environment. These informal activities can be an important source of dynamic development of the regime and give rise to changes in the formal attributions of the secretariat.

As in most institutions, budgets and budgetary rules can play a critical role in determining a secretariat's functions. Most secretariats have access to designated funds to ensure their functioning. In some instances, however, secretariats may have access to special funds, provided by individual members or even outside parties, to promote certain activities, subject to a willingness of all members to permit these activities to go forward. This broad range of functions represents the most important area for more systematic analysis and discussion.

3. Issues for Consideration

The extraordinary development of international secretariats has occurred largely inadvertently: each individual secretariat corresponds to identifiable needs within a given regime but no attention has thus far been paid to the overall pattern of development. A discussion of secretariats can be structured around five themes: data gathering and reporting; implementation review; regime development; resource flows; liaison and networking.

3.1. Data Gathering and Reporting.

Numerous international secretariats have obligations regarding the gathering and dissemination of data relevant to the operation of their regime. In most instances, members of the regime have voluntarily undertaken to provide such data so that a presumption exists that the necessary information will be available and provided. In some instances, the secretariat is limited to information provided by members; in others it has the authority to develop its own data.

In practice, data gathering represents a significant regime function and the data may often reveal information which certain members prefer not to subject to public scrutiny. Most international negotiators tend to have a high opinion of their country's own practices and frequently agree to international reporting obligations on the erroneous assumption that these will not prove burdensome. When it turns out that this assumption was incorrect and that provision of certain data, or provision of data in a certain form, is a real and sometimes unpleasant task and that the resultant image of some members' compliance is less flattering than anticipated, members may prove reluctant indeed to make the information available. They will positively resist secretariat efforts to develop independent sources of information, for example from scientists, interested parties, nongovernmental organizations or the media.

Wide variations exist between regimes concerning the willingness to pursue independent data gathering activities, particularly when these lie within the jurisdiction of a state. In some instances--for example the international wildlife trade--symbiotic relations have evolved between a formal regime and interested nongovernmental organizations which can be more knowledgeable about actual conditions within individual countries than the secretariat, and in some instances even more knowledgeable than the government of the country concerned. Some secretariats have grown accustomed to utilizing such information. Others have developed independent information gathering capabilities. The

EMEP program subsumed under the Convention on Long Range Transboundary Air Pollution in Europe illustrates the delicate balance among data gathering, data provision, control and interpretation which needs to be struck in dealing with these issues. The stratospheric ozone regime required a complex form of cooperation between the secretariat that has monitoring authority, governments and individual corporations. At several stages, public certified accountants were used to shield individual company data from public scrutiny⁷³.

In many areas of international cooperation--in particular environmental management and human rights--, the provision and publication of relevant information are one of the most important enforcement tools at the disposal of the secretariat. In effect an international structure of accountability has evolved, based on voluntary self-obligation of states to provide certain information to other states and, in some instances, even to private bodies within other states. The secretariat is confronted with the sometimes delicate task of ensuring member compliance with these obligations even when such compliance may lead to disagreeable conclusions. This requires a degree of both tact and determination which depends in large measure not on the legal mandate of the secretariat but upon the character and abilities of the individual heading it.

Members may have certain obligations to provide data and the secretariat may have the right to gather data at its own initiative. This defines a relatively clear set of circumstances. Conditions are less well defined when they relate to relevant information which may otherwise be available or under the control of members. In many instances, no clear guidelines exist concerning the rights of the secretariat to obtain such information, let alone use it in private or public.

Increasingly international secretariats may come to be treated in a manner not unlike citizens. In other words information available to the citizens of a country will also be available to international secretariats. In practice, rules governing citizen access to information differ widely between countries. Consequently international secretariats will find themselves with significantly different levels of access to information, depending on the country concerned. In some instances, countries may also provide information about other countries--for example remote sensing data--to international secretariats, raising complex issues concerning the control of this material and the manner in which it may be used.

The receipt and gathering of data and access to information presumably have the purpose of producing useful reports and making them available as widely as necessary for the good functioning of the regime. Secretariats generally have the right to draft reports based on information received and to submit these to appropriate authority for release. In some instances, the release of data and submitted information alone may prove an effective tool of implementation as other members of the regime--or interested third parties, frequently nongovernmental in origin--utilize it as the basis of their own work

⁷³ Marc A. Levy, "European Acid Rain: The Power of Tote-Board Diplomacy," in: Peter M. Haas, et al., eds., *Institutions for the Earth. Sources of Effective International Environmental Protection*. Cambridge: MIT Press, 1993, pp. 88-89

and publication. In other instances, however, interpretation of information by the secretariat may indeed occur, creating a situation where in effect a judgment is rendered on the state of compliance of individual members with provisions of the regime. Numerous instances exist where secretariats have found it impossible--or undesirable--to actually publish even the raw data provided by members, let alone any accompanying interpretation, even in the face of unambiguous mandates to do so.

Secretariats need adequate resources to undertake the tasks of reporting and assessment; in some instances, however, problems arise less from the absence of requisite resources than from the impossibility of obtaining consensual agreement on the conclusions to be drawn from the information provided.

Numerous regimes, particularly in the areas of environmental management and consumer protection, rely heavily on scientific information as a basis for determining policy. In many of these areas, the phenomena which are to be managed by the regime can only be ascertained with the help of scientific analysis, in other words science is an integral part of the regime and its ability to identify relevant threats and assess the degree of success or failure of its actions.

Unfortunately scientific information is rarely available in a form which lends itself directly to policy application. The questions posed by policy makers and the questions answered by scientists are rarely identical. Consequently the interpretation of often incomplete, contradictory or indeterminate scientific information is a critical function of the regime. This assessment of science is, however, an activity colored by the culture of both science and policy, neither true science nor pure policy, even when its implications are clear to most actors.

The secretariat can play a critical function in organizing the science assessment, by framing questions, by selecting participants and by providing secretariat services to a process which is fundamentally indeterminate. While all of these activities are subject to review and approval by the members of the regime, the secretariat still can enjoy an important degree of discretion and consequently influence.

No internationally agreed rules exist for the organization of science assessment. Indeed, procedures vary widely from one country to the next so that even a process based on the resources and practices of an individual country is subject to criticism from the perspective of other countries, as illustrated by European Union rejection of U.S. science assessments concerning stratospheric ozone depletion and US rejection of European Union assessments concerning bovine growth hormone. In the former instance, dramatic new scientific data--the Antarctic ozone hole--resolved the uncertainties. In the latter instance, all efforts to develop internationally agree science assessments have thus far failed to produce a consensual result.

International science assessment is still in its infancy, as witnessed by the hesitation evidenced in relation to utilizing the International Council of Scientific Unions and its related bodies for this purpose, the creation of the Intergovernmental Panel on Climate

Change, and the Scientific and Technical Advisory Panel (STAP) for the Global Environment Facility. The problems surrounding this activity are not unlike those faced by international adjudicatory bodies: on the one hand, international scientific assessment must be able to demonstrate independence suggesting reliance on prominent scientists with broad knowledge; on the other hand the individuals involved must have highly specialized knowledge, suggesting the use of a quite select group of persons for specific tasks. The need for international science assessment is not yet sufficient to justify the creation of an organizational structure to manage the process so that individual secretariats play an important role.

3.2. Implementation Review

One of the thorniest questions facing many secretariats is the degree to which they are willing and able to undertake independent verification of information provided by members. The conflict arises between an obligation to all members and the wider goals of the regime and the need to continue to maintain constructive relations with each individual member in a structure based on consensus.

In some regimes, verification can focus on individuals and individual regime members who are viewed as outside the broader consensus so deterioration of relations between the secretariat and such members may not be as serious as elsewhere. In other regimes, however, verification needs to be routine and comprehensive and may be viewed as intrusive even by otherwise complying members.

Secretariats are generally helped if verification is viewed as a regime function rather than as a secretariat function and when some regime members are willing to participate with the secretariat in the verification effort. Failing active participation by individual regime, secretariats must determine the extent to which they wish to undertake verification activities directly or utilize the services of third parties--consultants--to do the initial work. While the former option provides greater control over the outcome, the latter approach leaves a secretariat with the option to distance itself at least temporarily from emerging information concerning compliance.

The verification function represents one of the most potent tools in secretariat-member relations, and consequently one of the most hazardous to employ. The secretariat must balance its obligation to the regime and its overall credibility against the dangers inherent in disputes with individual regime members arising from verification activities. In particular disputes with key members may in themselves also create risks for the integrity of the regime leading to sometimes invidious choices.

Data gathering, reporting and verification implicate a degree of evaluation of compliance with a regime's requirements. This remains, however, largely implicit and subject to extensive evaluation and interpretation. Some regimes have gone further in providing for more substantive review of compliance, and in occasionally also assessment of effectiveness. This can address the outcomes of the regime itself or performance of individual members.

The International Tropical Timber Organization has long struggled with the definition of "sustainable harvest." CITES reviews the status of species listed as threatened or endangered. In each of these instances, the members of the regime--coordinated by the secretariat--are seeking a better understanding of its operation. While these assessments are based on data and a review of scientific evidence, they ultimately represent an assessment of the effectiveness of the regime itself.

Frequently the regime operates through actions of its members. Consequently review of regime effectiveness is tantamount to review of members' performance. Some regimes have made provision for review procedures which address member performance. Such review involves extensive preparatory work that is generally in the hands of the secretariat. In contrast to data gathering, information access and science assessment, review activities are based on broadly agreed regime criteria and generally incorporate a self-analysis of the country being reviewed.

Review activities can be critical in ensuring that regime goals are firmly embedded in the domestic policies of regime members. Indeed, this rather than any critical assessment and subsequent use of the instruments of shame are the primary goals of the review process. Simultaneously the review process provides secretariats with unusual opportunities to develop strong and sometimes lasting ties with colleagues in the country under review. In the process of developing terms of reference, selecting reviewers, helping a country with its self-study, preparing the actual review and guiding the report from the review through its designated stages, the secretariat exercises significant, sometimes critical leverage on the procedure.

Taken together, these activities create a system of interstate accountability managed by international secretariats. Ensuring accountability is a precondition to the effectiveness of most regimes. However, each regime approaches this dilemma in a different fashion, utilizing a mix of tools designed to provide the essential level of accountability with a minimum of impact on the sovereignty of states.

Secretariats frequently cannot ensure accountability on their own. They require support from individual members and also from third parties--nongovernmental actors for the most part--which take the underlying regime mandate seriously and can provide independent evaluation of the performance of both secretariat and members. Ultimately the success or failure of regimes may hinge on the degree to which interested parties are willing to make a commitment to its functioning.

The relationship of international secretariats to nongovernmental organizations is an area of some ambiguity. By definition, since no international nongovernmental statute exists yet, nongovernmental organizations are subject to the law of some individual state. Secretariats may have other interests in relation to such organizations than their host country--and the organizations in question may not hesitate to pursue goals which differ distinctly from those of their country of establishment. There is as yet little precedent to determine the extent and the propriety of independent relations between a secretariat and nongovernmental organizations. Given the importance of the latter to the success of the

former in many regimes, secretariats can hardly afford to ignore nongovernmental organizations and their interests and must maintain appropriate relations with them.

3.3. Regime Development

Responsibility for regime development ultimately rests with its members. In practice, however, members have multiple priorities and can focus on a given regime only sporadically. The secretariat is unique in that it has exclusive responsibilities for the regime and is not required to look beyond it to establish priorities. Consequently the secretariat frequently is the focus for discussions concerning regime development. This can take the form of setting an agenda for regime action, dispute resolution and capacity building.

It is well known that the power to set an agenda provides virtual control over the conduct of a meeting. For that reason, the authority to set agendas is not formally delegated to the administrative staff of most meetings. In practice, however, secretariat staff have significant influence over the agenda, particularly where issues which have not attracted intense interest are concerned and where large numbers of members in a regime lead to the delegation of agenda-setting authority to a presidium or similar institution. Generally the secretariat will exercise more influence in such a body than in a plenary context. Agenda-setting has several important facets: it can involve the ability to ensure that an item is included on the agenda or excluded from it or it can concern the manner in which issues are packaged for discussion or it can simply involve the timing of discussion and decisions within the calendar of activity. Drafting of documents, and their timely or less than timely submission are activities closely associated with agenda-setting. Particularly in international secretariats, the complexity of drafting and the need for preliminary informal discussions prior to submission cause long lead times and late submission dates. As managers of this process, secretariats can exert significant influence.

Some regimes have provisions for the settlement of disputes between parties. Normally this involves a procedure striving for nonpartisan adjudication of disputes as a basis for finding solutions which the parties themselves can accept even when they are to their disadvantage. In many ways, the ability to successfully settle disputes between members is a strong indication of regime effectiveness. At the same time, the dispute settlement process will create a body of interpretation which strengthens and frequently extends the regime.

The secretariat functions in dispute settlement are generally not open. The secretariat plays a critical role where ad hoc panels are the rule. It acts as guardian of the institutional memory and provides support services. It frequently can suggest interpretation of important issues.

Dispute settlement can only function where previously agreed rules are interpreted and applied. The function of precedent is important at the international level since the legally defined rules will generally be incomplete without recourse to a legislator for elaboration. Under these circumstances the process of dispute settlement functions simultaneously as a procedure to promote evolutionary development of the regime through interpretation.

Problems tend to arise from regime development based on dispute settlement since the issues liable to come up for adjudication almost by definition represent controversial matters under circumstances which often do not lend themselves to tidy interpretation. Bad disputes make bad precedents but in many instances, bad disputes can be preferable to no disputes.

Regimes are frequently formed under circumstances where individual members have widely differing capabilities to meet their respective obligations. Building the necessary technical and material capacities represents an important regime function which is largely entrusted to the secretariat. Depending on the circumstances, capacity building can involve substantial resources devoted to important functions of domestic governance. The handling of these resources and the provision of substantive support for the capacity building activities are important secretariat functions which are generally exercised in cooperation with members which provide the necessary resources. The role of the secretariat in capacity building for individual members also creates important informal linkages between the secretariat and the member in question.

3.4. Resource Flows

No international secretariats have access to significant independent sources of financing. The European Union is the principal exception to this rule; its funding through a portion of the value added tax (and its right to collection of customs dues) reflect its exceptional status as a supranational organization rather than a generalizable principle of international organization. In principle the Agency created by the Law of the Sea Convention is to receive significant licensing fees from deep sea bed mining; however, the ability of the Agency to develop a licensing regime which generates significant revenue remains open to doubt.

Some secretariats have access to fee income (for example for the operation of wastewater treatment facilities) but this income is generally closely tied to precisely limited expenditures, primarily for the financing and operation of a facility.

Royalty income represents a potential source of income for some secretariats if they produce goods with a marketable value. In practice, the options for royalty income remain limited and only in rare instances can this be expected to show a net surplus after expenses for provision of the goods or services in question are calculated.

A few secretariats--most notably private and semi-private ones and UNICEF--have succeeded in tapping the market for private donations, either directly or through the creation of related nongovernmental organizations. The ability to do so is limited by a number of factors, including the willingness of private donors to support international activities which appear governmental in nature and the problem of relations between governmentally funded secretariats and nongovernmental organizations which support the secretariats in a variety of ways but do not want them to compete for limited funds. Finally, fundraising from private sources requires different skills in different countries, complicating the possibilities for the funding of secretariats.

In the main, international secretariats are dependent on national governments for their funding. In some instances they can draw on assessed funds, based on the United Nations system of assessments or some other formula, which permits discussion to focus on the expenditure budget rather than on the revenue-raising aspects. In most instances, however, budgets are based on “voluntary” contributions from national governments which generally also carry the implication of heightened influence on the part of the governments making the most substantial contributions.

Large secretariats have significant budgets and are liable to encounter cash flow problems as member commitments are not met with any regularity. This creates a need to be able to borrow money periodically--and to budget for interest expense. In some instances there has also been discussion of the possibility of having working capital.

Secretariat budgets have not normally been a matter of controversy. They tend to be modest in scope, funding the central staff and few other activities. Any further activities require the willingness of individual governments to provide special funds, with the risk of creating undesirable dependencies. Presumably wider discussion of secretariat budgets would be a desirable development.

3.5. Liaison and Networking

Secretariats of all kinds are given a limited mandate which also involves interaction with other international secretariats and organizations. Few systematic structures exist to facilitate such interaction. The United Nations system has a complex not very functional system of coordination and cooperation with the ACC at its head. The dynamics of most international regimes are such that they are oriented towards a limited number of constituents, normally members of the regime, and not towards other international institutions.

The issue of liaison between secretariats has only recently arisen with steps taken by UNEP to ensure coordination of activities between the secretariats it administers. The Commission on Sustainable Development discussed the need for greater coordination between environmental secretariats at its second meeting in April 1984.

The options for securing greater coordination between secretariats are quite numerous, ranging from the organization of regular meetings of select secretariats, to co-location, to sharing of staff, to the holding of an open conference of all secretariats active in a particular area. Generally, such coordination pursues two distinct: to reduce redundant activities and competition between secretariats and to achieve early understanding of potential conflicts between the activities of secretariats.

The tendency of the UN system to competitive behavior between agencies derives from its lack of central authority. Since many agencies operate with a relatively independent mandate--and frequently with distinct constituencies--there is a tendency to seek to capture new issues as they arise. As a consequence, many bodies initiate similar activities more or less simultaneously, resulting in a heightened risk of unnecessary work. Arguments advanced to limit this process are generally based on the need for efficiency

but fail to recognize the internal dynamics of each regime as it responds to new challenges. From the perspective of individual secretariats, lack of initiative jeopardizes its effectiveness which is defined in limited terms and takes priority over concepts of general system effectiveness.

In addition to maintaining relations with members and other international bodies, each secretariat will have a broader constituency of interested parties with which it needs to maintain appropriate relations. These can include scientists, media, business or other interests. Few rules exist which set limits on this secretariat activity, which can be critical for regime effectiveness, although in practice the availability of resources will prove a critical limiting factor. In some regimes, resources have been explicitly provided for this purpose.

4. The Role of Executive Head

Discussions of the development of the UN secretariat almost inevitably return to the personality of its head. Over the years, the heads of international organizations have come to symbolize their organization and, to a surprising extent, have imprinted their character on them. There is no reason to assume that the same is not likely to be true of the heads of smaller secretariats. Indeed, the personality of the executive head may in the event have more impact on the effectiveness of a regime than the specific legal mandate or institutional structure. In the uncertain environment of most international secretariats, effective leadership is the best guarantee of success.

The resources available to undertake international assignments are, almost by definition, generally inadequate for the task. The issues to be addressed are frequently complex, and the number of parties, the lack of homogeneity, ambiguity in the mandate which is needed to reach consensus, and sheer geographical distance all contribute to making international activities particularly difficult to manage. At the same time, national authorities may use international secretariats to advance their interests but see little advantage in allowing them to grow to the point where they might compete effectively for attention and resources. The result is a litany of complaints about "excessive international bureaucracy" unmatched by resources to justify them.

In this situation, the executive head plays a critical role, both in protecting the secretariat's mandate from cannibalization by national interests and in identifying those members whose interests may cause them to support the broader mandate of the secretariat both politically and with resources. This is a delicate task, requiring the development of strong, informal relations of trust with some members without jeopardizing the overall impartiality of the secretariat.

To be effective, the executive head must build a constituency among members who ultimately hold the right of appointment (or reappointment). This requires a delicate handling of relations between all members and attention to issues which are likely to become defining in the relationship between executive head and members. In many

instances, the national constituency of a particular regime will be focused on one or a few national agencies. These may expect assistance from the executive head in drawing attention to their agenda in competition with other policy priorities. Frequently the international dimension can broaden attention and attract higher levels of government to an issue, strengthening its relative position within a country. While this represents a legitimate part of the functions of executive head, it also requires diplomatic handling to ensure that it is not viewed as an attempt by international civil servants to manipulate the domestic political process of individual members.

Media relations represent another area requiring the personal attention of the executive head. While the executive head needs to avoid the impression of appealing over the heads of the representatives of individual members to their own constituents, access to the media is often the only way in which to ensure adequate attention to the issues covered by the regime. The emergence of global media channels, located in a limited number of countries, has further complicated this task.

As a rule, the executive head does not formally speak for the regime. But as a matter of reality, the executive head provides continuity and frequently becomes identified with the regime. The secretariat can provide the executive head with the resources needed to articulate a position which reflects the essential international component of an issue. In general, the formal rights of the executive head are quite limited. Consequently a range of informal understandings are needed to develop a position which can meet the expectations of the secretariat's constituencies. These informal understandings frequently are linked to a specific incumbent, confronting a new executive head with the priority task of developing a new set of informal understandings and networks to underpin the limited formal authority provided within the regime.

5. Systemic Considerations

Lack of coordination. Lack of coordination has been a problem of international organizations for many years. The United Nations system is not a system. The Bretton Woods institutions have remained aloof from the rest of the UN system. Specialized agencies respond to the demands of their own constituencies first. Competition for funding between agencies is fierce, with the critical additional resources controlled not by the UN but by individual states. Each organization has its own governance structure which is not part of any UN coordination efforts. Executive heads of agencies need to acquire personal visibility to be able to support their organization so competition for media attention can be strong. Whenever a new issue emerges on the international agenda an unseemly scramble occurs as any agency that may have an interest in the matter seeks to stake out its position.

Many international regimes are not within the UN system at all. Indeed, with bilateral regimes representing the largest number of international arrangements, the UN actually represents only a very small proportion of all international regimes by number. Regional coordination of international activities is virtually nonexistent.

Countries are no more able to coordinate their activities in international organizations. Even where a single office has been established to ensure coordination of a country's participation in international organizations, the realities of substantive interests and personal relations create privileged relations between domestic agencies and their international counterparts.

Apart from their inability to coordinate their own positions in different international fora, countries have little incentive to foster coordination between international organizations. Despite protestations against the creation of new international institutions and despite the arguments advanced concerning efficient use of limited resources, countries prefer to deal with large numbers of relatively weak international regimes, each of which has a strictly limited mandate, rather than creating an effective international level of coordinated policy action which could compete with national authorities in some way--or which could act to expose those instances where international constraints are used as scapegoats for inadequacies of national policies.

This host of reasons which stand in the way of coordination of international activities is counterbalanced by a continuing need to achieve integrated approaches at the international level and to ensure more efficient use of available resources. In some complex areas of policy--environmental management in particular--solutions require complex activities involving numerous otherwise unrelated agencies. In other words, success depends on coordination but coordination is largely defeated by the current structure of international society.

5.1. Adjudication.

Evidence of decades underlines the reluctance of virtually all countries to submit to a system of international adjudication, that is a court of justice with general authority over all aspects of relations between states. All international regimes favor internal mediation and dispute settlement over the use of an external adjudicatory body.

Conceivably the interest in adjudication at the international level resides on a false analogy between international society and national societies. In the absence of broadly applicable international "constitutional" documents establishing institutions and attributing powers the international adjudicatory process will presumably remain marginal, a symptom of the structure of international relations rather than its cause or a possible remedy. Nevertheless, the issue of adjudication as a means to establish a common basis between disparate regimes is unlikely to disappear.

5.2. Privatization.

Many countries have initiated an extensive process of privatization of functions previously reserved for public bodies. This represents both an expression of skepticism concerning the ability of governments to deliver services to individuals and a sign of the growing vitality of private organizations and their ability to reflect broader social concerns. This process of privatization at the national level has direct relevance for international regimes. There is also an independent parallel development at the international level.

As public functions become privatized, the international regimes which relate to them are also transformed. They need to extend beyond the traditional governmental groups to include a wider constituency. This has occurred to a significant extent in the provision of emergency relief services and many development assistance functions, domains where "private voluntary organizations" (PVOs) have largely supplanted governmental agencies. These PVOs originally focussed on the delivery of services but have inevitably been drawn into an active role with regard to regime development. Their relations with public bodies can best be described as a process of mutual control and verification: PVOs require public authorities to ensure that they do not become captive to particular interests; public authorities require nongovernmental actors to help ensure effectiveness and to contribute to the process of ensuring compliance with policy mandates.

In one specific instance, international requirements have limited the processes of privatization. In the United Kingdom, the government sought to privatize the previously public regional water authorities which provided water management and were the licensing authority for activities with an impact on water quality. Initial plans to transfer all their functions to the private sector were changed by the attitude of the Commission of the European Communities which would not recognize private bodies as fulfilling certain obligations imposed upon the U.K. government by EC Directives concerning water management⁷⁴.

Apart from reflecting the privatizing process at national levels, which is primarily concerned with the transfer of publicly owned corporations to the private sector, there is an independent process at the international level with major implications for secretariats. This can best be described as the emergence of an international civil society, a complex web of individual and institutional relationships rooted not in relations between governments but reflecting an independent dynamic. International secretariats, as the primary exponents of the international public interest, must find ways to engage in a constructive manner the persons and institutions which characterize international civil society.

5.3. Balancing functions.

Hardly any issue of international secretariats is more fraught with difficulties than the need to balance competing, equally legitimate goals of public policy. The need to balance competing claims can be defined by the limited availability of resources which can force priority setting or by the fact that goal conflicts are simply a fact of life. For example, any form of economic development will exact some form of environmental price. What environmental price is reasonable requires a balancing of priorities. There is no international structure currently available which permits such a balancing. The dilemma is illustrated most vividly by the complex relationships that are emerging between trade and environmental policies.

⁷⁴ Institute for European Environmental Policy London, *The State of Reporting by the EC Commission in Fulfilment of Obligations Contained in EC Environmental Legislation*. London: IEEP, 1993.

A national balancing of international priorities is unacceptable. Even when the domestic process is open and accessible to foreign interests, decisions are ultimately taken in light of domestic constituencies, resulting in trade-offs that are liable to be unacceptable to other countries. The various attempts by the United States to define international criteria through its domestic institutions, for example for labor standards or dolphin protection, illustrate how unsatisfactory the outcomes are liable to be.

At the international level, the need to balance priorities has thus far tended to end up as a turf battle, with the substantive outcome of decisions largely decided by the choice of forum within which to take them. Since few integrative international fora exist, the criteria for balancing will ultimately tend to be skewed towards one policy priority to the possible (or perceived) detriment of another. For example, when the trade regime sought to develop guidelines for international trade in hazardous products in an attempt to make a constructive contribution to an intractable problem, the outcome was a structure which those concerned with environmental management consider unworkable.