This meeting, as part of the Partnership and Security research project, explored the implications and likelihood of private enforcement becoming possible in relation to different branches of international law, and the implications of such a shift of power to enforce international norms from states to private actors. Participants included lawyers (Theresa Glennon, Visiting Fellow, Clare Hall; Anat Scolnicov of Lucy Cavendish College; and Mark Walters of the Faculty of Law, Queen’s University, Kingston, Ontario); political philosophers (Paul Bou-Habib of Keele; Serena Olsaretti and Melissa Lane of Cambridge; Andrea Sangiovanni of Harvard, and Lawrence Hamilton of Clare Hall and the University of Natal); and a Cambridge postgraduate student in philosophy (John William Devine).

The paper presented by Jeffrey Dunoff contrasted the so far unresolved question of whether foreign nationals sentenced to death in the United States can invoke and seek to enforce the protection of the Vienna Convention, with the current status of WTO norms in American treaties as enforceable only by the state. Noting some pressures and current debates to change the latter status, in order to empower private parties to enforce WTO norms in domestic courts, Dunoff explored whether private actions would generate an optimal level of WTO enforcement; whether they would be complements or substitutes for public actions; and the implications of decentralized jurisdiction for the development of WTO law and of participating-country parity in relation to it. He concluded by arguing in a reference to John Ruggie’s influential model of ‘embedded liberalism’, that current WTO dispute settlement represents a valuable compromise of ‘embedded legalism’ which enables states to engage in the delicate balancing of rules and real power relations and interests in trade. Private enforcement would risk rigidifying the WTO system to the extent that states might no longer be able to consider its rules to be on the whole in their interests to maintain.

Discussion explored the differences between possible private company and NGO actions for enforcement, with some present arguing forcefully that both would present risks to the state of the kind that Dunoff identified. Attention also focused on the question of to what extent enforcement is necessary to bring about compliance; it was noted that the voluntary GATT system had achieved about the same level of compliance (roughly 80%) as the binding sanctions of the WTO system. It was suggested that perhaps the current inability of individuals to use courts to enforce international norms, tended to push them into political channels which might actually enhance rather than diminish their ability to influence international trade policy. Overall, many came to believe with Dunoff that the dichotomy between rule based and power based systems is a false one, but that the
current strength of the WTO lies in the way that states can still pursue their interests while abiding (for the most part) by rules, a balance which a move towards private enforcement might well fatally upset.