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TRADE AND ENVIRONMENT IN THE NEW ROUND

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CONTENTS

ABSTRACT

The Doha Declaration has included environment for the first time in its agenda. Environment is considered one of the critical areas for the new Round and a significant step in clarifying the much-debated relationship between the World Trade Organisation (WTO) and Multilateral Environmental Agreements (MEAs). Yet the treatment of environment is one of the least satisfactory aspects of the Doha declaration. The mandate is narrow in scope and lacks clarity, which is likely to lead to a stand off in regard to Article XX. It also excludes the most important and most difficult issue, namely the handling in the WTO of a situation in which a non-party of a MEA challenges a trade-related measure taken pursuant to that MEA by one of its members.

This paper examines this mandate by first exploring the relationship between the WTO and MEAs arguing that there is a real potential for conflict due to the increasing amount of MEAs that use trade measures. It points out that WTO jurisprudence, and international law currently does not provide any clarity for the WTO/MEA relationship. There are real concerns that a conflict resolved under the WTO regime, would provide a result in favour of trade rather than the environment.

The paper then argues that the mandate is not sufficient to provide the certainty required for all the aspects of the MEA/WTO relationship and suggests that the answers may be found outside the WTO forum. It proposes that a global environment organisation would be the ideal way to resolve the situation, but acknowledges that this is not a practical as it in itself presents issues of its own. In conclusion this paper proposes a Declaration or Understanding that will provide the clarity and certainty at this time.

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I INTRODUCTION

The growing tension between trade liberalisation and environmental protection has accelerated within the last decade. One of the critical issues contributing to this tension is the relationship between international trade rules in the World Trade Organisation (WTO) and the international environmental rules in the Multilateral Environmental Agreements (MEAs).

MEAs are increasingly being used to address transboundary environmental and health problems, which are linked to international trade and other economic activities. There are concerns that a number of MEAs contain trade measures that are inconsistent with the rules of the WTO. This could cause a conflict, which may be challenged in the WTO. There are concerns that MEAs could be treated similarly to unilateral environmental measures, which have all been ruled against in favour of the trade outcomes.

The relationship between these two bodies of law is full of uncertainty and it is not known what will happen if measures taken in accordance with an MEA do violate a governments obligations under the WTO or which body of law the disputes would be resolved under. This relationship has become a source of confusion and conflict for governments that have accepted the multilaterally agreed rules of the WTO but which at the same time have subscribed to MEAs whose compatibility with the WTO may be doubtful.

The Committee of Trade and Environment (CTE) since its formation have actively taken up the task of discussing this relationship but until recently they have not taken any action. The new Doha Round of negotiations has presented a new opportunity for exploring this relationship by including environment for the first time on its agenda. However, the treatment of environment under the mandate is one of the least satisfactory aspects of the Doha declaration. The mandate has proved to be very narrow in scope and lacks clarity in critical areas. It excludes the most difficult issue, namely the handling in the WTO of a situation in which a non-party of a MEA challenges a trade-related measure taken pursuant to that MEA by one of

its members. It also envisages negotiations purely within the WTO, which restricts any solutions, if needed to the WTO rules themselves. This leaves out the potential to consider the MEA provisions or any other possible sources of difficulty between these two bodies of law.

In order to examine this relationship the first part of this paper will set out the structural difference between international trade (GATT/WTO) and environmental (MEAs) frameworks. It will then discuss whether there are provisions contained within MEAs that are incompatible with existing WTO rules and whether there is potential for conflict in the future between MEAs and the WTO. The second part of this paper will then examine the paragraphs within the Doha mandate that are critical to the WTO/MEA relationship and explore the definitions and scope for change. Finally, this paper presents a series of options that have been purported by different countries and organisations and proposes that a more global and/or principled approach would be more effective in resolving the WTO/MEA relationship if there is to be further progress.

II GATT/ WTO AND THE ENVIRONMENT

A General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade (GATT) was established in 1947 to increase the standards of living and expand production by promoting free trade among its members, reduce tariffs and other barriers to trade.[1] This trading regime is based on the economic theory of comparative advantage, which purports that the world economy can achieve greater economic efficiency through trade liberalisation.[2] Nations that are able to rely on an open market will specialise in the production of goods they are best adapted to produce. This specialisation increases efficiency by decreasing costs.[3]

GATT Article I, III an XI are the three core conditions that limit the ways in which nations may impose restrictions on products subject to the exceptions of GATT Article XX.[4] These three core conditions are based on the principle of non-discrimination, which means that members are not allowed to treat goods from one country differently than those from another within the regime, and they are not allowed to impose restrictions on imports of goods that are not restricted domestically.[5] In addition, to the extent that members do impose restrictions on free trade, these should be in the form of tariffs rather than non-tariff barriers such as quotas or prohibitions, and they should be applied in a non-discriminatory manner.[6]

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[1] T Alana Deere "Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble" (1998) 10 Int'l Legal Persp 1,4.
[2] D M McRae "Trade and the Environment: The Development of WTO Law" (1998) 9 Otago L Rev 221, 223.
[3] David Ricardo developed the theory of Comparative Advantage in the eighteenth century.
[4] GATT art XX.
[5] J H Jackson "World Trade Rules and Environmental Policies: Congruence or Conflict?" (1992) 49 Washington and Lee L Rev 1227, 1228.

Article I- Most Favoured-Nation Treatment

The *most-favoured nation* (MFN) clause is the key rule to ensuring continued global tariff reduction. It requires equal treatment among WTO signatories with two exceptions: regional trade agreements and special treatment for developing countries.[7] For example, Article I would preclude a WTO member from imposing a 20% tariff on party A's widgets and only a 10% tariff on party B's widgets. The MFN principle would require that the preferential 10% tariff be extended to party A.

Article III- National Treatment

National treatment requires imported products to be treated no less favourably than "like" domestic products. (The term "like" products is generally considered to refer to two goods that compete against each other in the market as substitutes).[8] For example a Party could not require imported widgets to have a safety function and not require the same from its domestic widget manufactures.

Article XI- Quantitative Restrictions

This article *prohibits quotas, import or export licences.* The WTO bans these tactics because they distort trade more than tariffs, and are prohibited other than for specific exemptions defined by the WTO.

B The World Trade Organisation

The World Trade Organisation (WTO) was established on January 1, 1995, as a result of the Uruguay Round trade negotiations (1987-1994).[9] It incorporated the GATT's free trade policies including the binding dispute-settlement

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[6] Ministry for the Environment *Trade and the Environment: The Risks and Opportunities for New Zealand Associated with the Relationship between the WTO and Multilateral Environmental Agreements: Discussion Document* (Wellington, 2001).
[7] Thomas J Schoenbaum " International Trade and Protection of the Environment: The continuing search for reconciliation" (1997) 91 A.J.I.L 268, 271.
[8] Panel on Multilateral Environmental Agreements: The WTO and MEAs-Time for a Good Neighbour Policy <http://wwics.si.edu/tef/paper> (last accessed 20 May 2002).

mechanism.[10] This dispute settlement regime is very sophisticated and leads to (a) adoption of a WTO panel report or a WTO Appellate Body Report within 12 months and (b) implementation of the panel's recommendations 18 months from the time the dispute was formally registered.[11]

Until the WTO, GATT members could be a party to whichever trade agreements they chose. The WTO requires all members to participate in all agreements, except for plurilateral agreements on government procurement and civil aircraft.[12] The WTO agreements cover a wide range of international commerce including agriculture, textiles, clothing, banking, telecommunications, government purchases and intellectual property.[13]

During the closing stages of the Uruguay Round, environmental groups pressed for negotiations to address a number of environmental concerns. The ministers of the Uruguay round negotiations adopted the Marrakesh Ministerial decision on Trade and Environment. The decisions called for the establishment of a WTO Committee on Trade and Environment (CTE). This occurred at the first meeting of the WTO General Council, held January 31, 1995.

The work of the CTE builds on the work of the previous GATT Group on Environmental Measures and International Trade (EMIT). The EMIT group had not been established as a negotiating forum like the CTE its role was analytical rather than prescriptive.

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[9] GATT formally adopted at the 1994 Marrakesh Conference establishing the WTO as "GATT 1994".
[10] T Alana Deere "Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble" (1998) 10 Int'l Legal Persp 1,1.
[11] Gary P Sampson *Trade, Environment, and the WTO: The Post-Seattle Agenda* (Johns Hopkins University Press, 2000) 45.
[12] Panel on Multilateral Environmental Agreements: The WTO and MEAs-Time for a Good Neighbour Policy <http://wwics.si.edu/tef/paper> (last accessed 20 May 2002).
[13] World Trade Organisation: Trading into the future <http://www.wto.org/englich/thewto_e/whatis_e/tif_e.htm> (last accessed 18 September 2001).

III MULTILATERAL ENVIRONMENTAL AGREEMENTS

A What Are Multilateral Environmental Agreements?

Multilateral environmental agreements (MEAs) are international treaties or agreements that provide an important means of protecting the global environment.[14] MEAs have been used to protect the ozone layer, preserve migratory animal species, and trade in hazardous substances. They are a preferred way to solve international environmental problems because they create a single coherent system of rules. This reduces the risk that countries will take measures that have effects on other countries without their consent. There are more than 200 MEAs currently in effect.[15] It can only be expected that the number of MEAs will increase as globalisation continues, and the international community becomes more concerned with the environment.[16] MEAs that are in force now are continuously evolving as environmental knowledge and problem-solving abilities steadily grow.[17]

B The General Legal Structure of Most MEAs

International treaties can be cumbersome due to their treaty adoption and amendment procedures, so MEAs usually use a three-tiered approach.[18] The first tier is a framework agreement, setting out the general obligations, which need to be implemented through national legislation. Domestic legislation must be in place prior to the ratification of a Convention. For example New Zealand intends to ratify the Rotterdam Convention on the Prior Informed Consent Procedure (Rotterdam Convention) in the very near future. This ratification cannot occur, without first amending legislation to put the export controls in place that are required under the

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[14] Meeting International Environmental Obligations –Report of the Controller and Auditor-General <http://www.oag.govt.nz/HomePageFolders/AuditOfficeReport/MIEO/MIEO.htm> (last accessed 22 April 2002).

[15] Meeting International Environmental Obligations –Report of the Controller and Auditor-General <http://www.oag.govt.nz/HomePageFolders/AuditOfficeReport/MIEO/MIEO.htm> (last accessed 22 April 2002).

[16] Panel on Multilateral Environmental Agreements: The WTO and MEAs-Time for a Good Neighbour Policy <http://wwics.si.edu/tef/paper> (last accessed 20 May 2002).

[17] For example, the Montreal Protocl has (a) expanded the list of covered items through the amendment process and (b) included stricter timetables for phase-outs by adjustments. Both amendments and adjustments result in new legally binding obligations.

[18] J Gehring "International Environmental Regimes: Dynamic Sectorial Legal Systems" (1990) I YIEL 47, 50.

Convention. These export controls prevent the prohibited substances from being exported out of the country.

The second tier requires parties to agree upon a separate protocol implementing the framework agreement which contains more detailed obligations, for example the Vienna Convention for the Protection of the Ozone Layer has the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).

The third tier usually consists of annexes or appendices containing technical details, for instance a list of substances or species that are controlled by the protocol and the framework agreement.

MEAs do not come under a single organisation such as the WTO. The United Nations Environment Programme (UNEP) supports some of these agreements, some come under the Food and Agricultural Organisation of the United Nations and others are stand-alone agreements.[19] However, in resolution 53/242, the United Nations General Assembly did approve an annual, ministerial-level global environment forum under UNEP auspices. This forum is to review "important and emerging policy issues in the field of the environment, with due consideration for the needs to ensure the effective and efficient functioning of the governance mechanisms" of UNEP.[20]

In order to make important decisions the MEAs provide for a Conference of the Parties (COP) as the plenary body in which all contracting states are represented. The COP is the supreme body of the framework agreement, with the power to adopt all necessary internal and external decisions.[21] The COPs of the MEAs usually meet once a year. Meeting of the Parties (MOP) has the same function but in regard to the protocols that have been concluded for the implementation of the framework

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[19] Panel on Multilateral Environmental Agreements: The WTO and MEAs-Time for a Good Neighbour Policy <http://wwics.si.edu/tef/paper> (last accessed 20 May 2002).
[20] Panel on Multilateral Environmental Agreements: The WTO and MEAs-Time for a Good Neighbour Policy <http://wwics.si.edu/tef/paper> (last accessed 20 May 2002).
[21] J Werksman "The Conference of Parties to International Treaties (The Law & Sustainable Development Series" in J Werksman(ed) *Greening International Institutions* (Earthscan Publications Ltd,1996) 58-60.

agreement. In the MOP all states that have ratified the protocol are represented. The MOP adopts all internal and external decisions, in particular adjusting the annexes/appendices of the protocols.[22]

Dispute settlement provisions in the MEAs are still largely in early stages of development.[23] There are some that do not even contain any dispute-settlement provisions. MEAs typically focus on dispute avoidance rather than dispute settlement. They use 'sunshine' methods such as reporting, monitoring, on-site visits and transparency to induce compliance. MEAs also use positive incentives, such as financial or technical assistance, training programs and access to technology.

An example of a MEA dispute settlement mechanism can be seen in the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal (Basel Convention). If a dispute occurred then it would be referred to negotiation or another peaceful means of the disputant's choice. If this is not successful, and if the parties agree, then the dispute is to be submitted to the International Court of Justice (ICJ) or to arbitration.[24] Unlike the WTO, the Basel Convention provides no time lines and no set means of resolution if the parties do not agree as to how to proceed.

C Trade Measures

The GATT/WTO fosters free trade and facilitates economic growth, which in turn intensifies the pressure on the global environment.[25] Consequently, the major MEAs include trade-related measures to prevent environmental damage that can be linked to economic activities. Although trade measures might not always represent the best available option to address a global environmental problem, they can provide one means to reach the objectives of MEAs.[26]

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[22] Werksman, above, 58-60.
[23] See for example conclusions reached in UNEP (2001), report item 6.
[24] See Basel Convention (1992), Article 20.
[25] Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y 223, 233.

The WTO has identified 33 MEAs that contain trade implications.[27] Four of these are not yet in force, fifteen are regional agreements, and one is no longer in force.[28] The most common type of trade measure used is the trade ban, either on exports or imports.[29] Trade measures can also include product standards, notification procedures and labelling requirements.[30] The Kyoto Protocol (2000) to the United Nations Framework Convention on Climate Change (UNFCCC)[31] is one of the most recent MEAs, which is suggested to have trade implications, but does not directly restrict trade as part of the agreement.[32]

There is debate over whether trade measures should be used at all, considering that they are not the root cause of environmental degradation. However, it is argued that there have not been any non-trade restricting alternatives that appear to be as effective.[33] Trade restrictions also cause minimal disruption to the world economy.[34] Overall it generally agreed that trade measures should only be used when necessary and where supported by an international agreement. The measures should be the least trade restrictive which are effective in achieving the environmental objective of the agreement. Any attempt to depend on trade measures as the only possible solution would lead to unjustifiable discrimination and protectionism.

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[26] Submission by the European Communities *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda* TN/TE/W/1 (Geneva, CTE, 21 March 2002).
[27] WTO Secretariat *Matrix on Trade Measures Pursuant to Selected MEAs* WT/CTE/W/160/Rev.1 (Geneva, CTE, 14 June 2001).
[28] WTO Secretariat *Matrix on Trade Measures Pursuant to Selected MEAs* WT/CTE/W/160/Rev.1 (Geneva, CTE, 14 June 2001).
[29] Steve Charnovitz "A Critical Guide to the WTO's Report on Trade and Environment" (1997) 14 Ariz.J.Int'l & Comp. Law 341, 343.
[30] Trade Measures in Multilateral Environmental Agreements: Synthesis Report of Three Case Studies COM/ENV/TD (98) 127/FINAL. <http://www.olis.oecd.org/olis/1998doc.nsf/LinkTo/com-env-td(98)127-final> (last accessed 21 April 2002).
[31] Kyoto Protocol to the United Nations Framework Convention on Climate Change (10 December 1997) reprinted in 37 I.L.M 22 (1998) (not yet in force). This Protocol is aimed at stabilising greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous human-caused interference with the world's climate system.
[32] Gary P Sampson *Trade, Environment, and the WTO: The Post-Seattle Agenda* (Johns Hopkins University Press, 2000) 85.
[33] D Brack "The Use of Trade Measures in Multilateral Environmental Agreements" (RIIA Conference, London, 10 March 2000).
[34] D Brack "The Use of Trade Measures in Multilateral Environmental Agreements" (RIIA Conference, London, 10 March 2000).

1 Environmental goals

Trade restrictions have been used when it is the actual international trade of the substance or good that is causing the environmental problem. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[35] agreement employs restrictions on the import and export of various threatened or endangered species listed in its appendices.[36] These trade restrictions are explicitly provided for and mandatory under the MEA. They are used because it is the trade in these species and their products that is endangering them.[37]

Another example is the Basel Convention,[38] which restricts the import and export of hazardous materials. The environmental issue addressed by this Convention is protecting nations from harmful substances, in this case preventing damage to human health and the environment caused by the generation and disposal of hazardous wastes.[39]

2 Trade restrictions to encourage compliance and membership

In order to encourage compliance, a number of treaties use trade measures to ensure that the members meet their international obligations under the MEA. This is achieved by applying more restrictive trade provisions against non-parties than to members within MEAs.[40] The Montreal Protocol is an example of this type of trade measure.

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[35] New Zealand ratified this Convention in 1989.

[36] See Convention on International Trade on Endangered Species of Wild Fauna and Flora, Mar.3, 1973, 12 I.L.M. 1085, 1096 Appendices I-II (1973). It includes import restrictions under its certification scheme corresponding with its export restrictions.

[37] Michael B. Saunders "Comment, Valuation and International Regulation of Forest Ecosystems: Prospects for a Global Forest Agreement" (1991) 66 Wash. L. Rev 871, 880-81.

[38] This Convention came into force on 5 May 1992, was signed by New Zealand at Basel on 22 March 1989 and ratified by New Zealand on 20 December 1994.

[39] Trade Measures in Multilateral Environmental Agreements: Synthesis Report of Three Case Studies COM/ENV/TD (98) 127/FINAL. <http://www.olis.oecd.org/olis/1998doc.nsf/LinkTo/com-env-td(98)127-final> (last accessed 21 April 2002).

[40] T Alana Deere "Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble" (1998) 10 Int'l Legal Persp 1,3.

The Montreal Protocol is concerned with phasing out the production and consumption of fluorocarbons because these substances can be attributed to causing and increasing the hole in the ozone layer, which increases levels of UV radiation at ground level. This Protocol restricts trade in substances that deplete the ozone layer, as well as products that are produced in ozone–depleting manner. To protect the regime, which the Montreal Parties agreed to among themselves, the Protocol also applied trade restrictions on countries that did not ratify the Montreal Protocol.[41] This had the effect of encouraging countries to join this MEA, especially developing countries that are one of the largest manufacturers of Chlorofluorocarbons (CFCs), which is one of the restricted chemicals.[42] There are also other MEAs, which have used trade sanctions as a means for compliance, for example the International Convention for the Regulation of Whaling[43] and the International Convention for the Conservation of Atlantic Tunas (ICCAT).[44]

IV ENVIRONMENTAL TRADE MEASURES AND THE WORLD TRADE ORGANISATION (WTO)

A Nature of the Conflict

The concern about the relationship between the WTO and MEAs is that a number of MEAs contain trade measures, which are inconsistent with the core provisions of the WTO. For example the Basel Convention prohibits trade between parties and non-parties, which conflicts with GATT Article XI that prohibits restrictions other than duties on products of any other contracting party. This conflict makes the MEAs very open to challenge from nations, especially those members of the WTO who are non-members of the MEA.

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[41] The Montreal Protocol

[42] The importation of CFCs into New Zealand has been prohibited since 1 January 1996 and enforced under the Ozone Layer Protection Act 1996.

[43] International Convention for the Regulation of Whaling 1946 <http://sedac.ciesin.org/pidb/texts/intl.regulation.of.whaling.1946.html> (last accessed 23 May 2002).

[44] International Convention for Conservation of Atlantic Tunas <http://environment.harvard.edu/guides/interpol/indexes/treaties/ICCAT.html> (last accessed 23 May 2002).

The WTO and MEAs represent two different bodies of international law and therefore the relationship between them should be fully understood. As it stands currently it is not known what would happen when measures taken in accordance with an MEA violate a government's obligations under the WTO or vice versa. It is also not clear as to which body of law would resolve the disputes.[45]

Many countries, including New Zealand avoid certain policy choices that are beneficial to the environment because they are unsure as to whether these measures would be inconsistent with GATT rules. This uncertainty has also prevented further drafting or amendments being made to MEAs. There are no rules, which state how to avoid potential problems. An example is the Kyoto Protocol[46] that contains a number of protracted and inconclusive negotiations. Clarification of this relationship would reduce or possibly eliminate the uncertainty between the WTO and MEAs and pave the way to avoiding any potential conflict while reinforcing the integrity of both systems.

B Potential for Conflict

There are many divergent views as to whether there is potential for conflict to occur between these two bodies of law. Countries including Mexico[47] argue that no real problem exists. They advocate that because there are very few MEAs that contain trade measures and there have been no conflicts to date that have been brought to the WTO regarding an MEA, therefore it is unlikely that such a conflict would occur in the future.[48] They also recognise that the WTO is becoming more sensitive to environmental issues in its handling of cases which could prevent problems in the future.[49] For example the UNEP have opened discussions with the

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[45] Gary P Sampson *Trade, Environment, and the WTO: The Post-Seattle Agenda* (Johns Hopkins University Press, 2000) 82.
[46] Kyoto Protocol to the United Nations Framework Convention on Climate Change (10 December 1997) reprinted in 37 I.L.M 22 (1998) (not yet in force).
[47] See CTE/M/25 October 2000.
[48] Sampson, above, 83.
[49] United States- Import Prohibition of Certain Shrimp and Shrimp Products (10 December 1998) Appellate Body WT/DS58/AB/R.

WTO about the relationship between the WTO and MEAs. This view may also explain why the CTE has taken no action so far.[50]

However, there is no room for compliancy; the fact that there has not been any conflict in the past does not necessarily mean that there will not be any in the future. There are increasingly more MEAs, currently under negotiation, which have commercial and political importance, [51] for example the Kyoto Protocol on climate change and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol).[52] It is important that there are suitable measures in place to avoid any conflict of the trade and environmental regimes, which provides greater certainty for further development of MEAs.[53]

1 The Reasons for Conflict

The trade measures contained in some of the MEAs that are imposed for seemingly legitimate international environmental purposes might be used to protect the domestic industry at the expense of the foreign producers. This in itself may cause a challenge to be taken up within the WTO. It is usually individual Members with governments or powerful interest groups that use trade rules as a means of protecting themselves against environmental measures that are perceived as jeopardising their economic interests.[54]

This protectionism can also happen unintentionally because environmental problems are often caused by the way a product is produced. MEAs sometimes include "production process method" (PPM) requirements.[55] These specify how something is to be made. Such standards may be necessary and legitimate in an MEA to achieve the agreement's objectives, since the environmental damage may come from the production process. These PPM requirements may conflict with the

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[50] Sampson, above, 83.
[51] Sampson, above, 83.
[52] Final Draft Cartagena Protocol on Biosafety submitted to legal drafting group. UNEP/CBD/ExCOP/1/L.5 (28 January 2000).
[53] Sampson, above, 83
[54] Sampson, above, 83.
[55] J J Jackson *The Jurisprudence of GATT & WTO* (Cambridge University Press, New York, 2000) 430.

"like" requirement in national treatment. For example, the Montreal Protocol could apply to a semiconductor made with ozone depleting substances, which would be prohibited. However, the WTO would consider the finished products as "like" and would prohibit trade discrimination based on how the product was made.

The risk that an MEA might have protectionist features is clearly far greater where there are fewer participants in the agreement.[56] If the MEA included the major trading nations, for example the United States, Europe and Asia and a number of other countries, then it would be less likely that the agreement would have protectionist features that were not critical to achieving the environmental objective. Additionally, to ensure that an MEA does not threaten growth prospects of the developing countries, any MEA should have a substantial number of developing countries.[57]

Existing MEAs can become a potential for conflict in the future. The Montreal Protocol is an example of an MEA that has not provoked any complaints so far to the WTO but the prospect remains that if the ban on production and use of CFC's begins to bite economically, an appeal could be made which would, given all the precedents, succeed to the WTO panel and bring the Montreal Protocol in its entirety into question. There have been complaints in the past about the importation of second-hand refrigerators containing CFCs, which illustrate the kind of problems that could arise.

An MEA could be amended to include a trade measure where previously there were no trade implications. MEAs with trade measures are increasing and existing MEAs are continually evolving (as is the WTO), so that the actions mandated by a specific agreement may change. A conflict is more likely to occur in

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[56] Ministry for the Environment *Trade and the Environment: The Risks and Opportunities for New Zealand Associated with the Relationship between the WTO and Multilateral Environmental Agreements: Discussion Document* (Wellington, 2001).
[57] Sampson, above, 96.

the case where two countries are party to the WTO and the Convention, but only one of them is a party to the amendment.[58]

MEAs can be amended to create further possible divisions between countries, which in turn could create a situation for conflict. An example is the amendment to the Basel Convention which was a decision made at COP2 to ban movement of hazardous waste headed for final disposal and for recovery from Annex VII countries to others. Annex VII countries are members of the OECD, EC, Liechtenstein. For the Ban Amendment to enter into force it needs to be ratified by three quarters of the Parties to the Convention that adopted Decision III/I at COP3, i.e., 62 Parties. There will be a split between countries that will be Party to the Basel Convention including the amendment and some, at least transitionally, will be Party to the Convention excluding the amendment.

There is a great chance that disputes may arise from national measures undertaken to fulfil these obligations under the MEAs. The CITES for example, explicitly allows its Parties to take stricter national measures then the trade measures multilaterally agreed to. There is also the possibility that a party to an MEA in the name of the MEA, but without the formal sanction from the MEA could apply sanctions unilaterally.[59] It is questionable whether WTO tribunals will permit unilateral measures that are not obligatory under MEAs, but are authorised or promoted by MEAs.

The fact that MEAs have not been challenged so far can probably be attributed to the broad membership of countries across both the MEAs and the WTO.[60] As mentioned earlier an inconsistency is more likely to arise where countries are both members of the WTO but only one is a member of the MEA. It

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[58] Ministry for the Environment *Trade and the Environment: The Risks and Opportunities for New Zealand Associated with the Relationship between the WTO and Multilateral Environmental Agreements: Discussion Document* (Wellington, 2001).
[59] Panel on Multilateral Environmental Agreements: The WTO and MEAs-Time for a Good Neighbour Policy <http://wwics.si.edu/tef/paper> (last accessed 20 May 2002).
[60] New Zealand's view (WTO, 2000 October 10, pg1).

may also be due to countries not wishing to be seen as undermining an environmental agreement.[61]

It has also been argued in the CTE that the WTO rules and the objectives of some MEAs are not mutually supportive. For example, that the Trade-Related Intellectual Property Rights Agreement (TRIPs) of the WTO is inconsistent with the objectives of the Convention on Biological Diversity, which include the protection of the rights of indigenous people and transfer of environmentally sound technology.

The fact that the Uruguay Round gave the WTO dispute settlement process more 'teeth'[62] has meant that this dispute settlement process has been called on to settle more international environmental disputes than any other dispute settlement system.[63] This could mean that in the future more such disputes will be undertaken, which makes it more likely that an MEA will be challenged in the future. There are a number of concerns about the dispute procedure itself, which may always relegate environmental issues behind those of trade. Proceedings within the WTO dispute settlement panels are closed preventing the public access to the proceedings.[64] Amicus briefs submitted by non-governmental organisations to the panel have generally not been accepted.[65] Although this may change after the decision in the Shrimp-Turtle[66] case, which suggested that amicus briefs may be acceptable in the future.

C Unilateral Measures vs Multilateral Measures

1 Article XX

Article XX provides exceptions to the GATT's core obligations for trade measures that address the need to consider the environment, in other words they are

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[61] Gary P Sampson *Trade, Environment, and the WTO: The Post-Seattle Agenda* (Johns Hopkins University Press, 2000) 83

[62] This was because previously all parties to the dispute had to agree to make the decision binding. Now however all parties must disagree to the decision not to be enforced.

[63] Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y, 223 234.

[64] Sampson, above, 83.

[65] Sampson, above,83.

[66] Report of the Appellate Body in United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct 12, 1998, 33 I.L.M. 121 7.50-7.55.

set of rules about when and how governments can use trade restrictions that would otherwise violate the rules of free trade.

Article XX states:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

To fall within Article XX provisions the trade measure must meet both parts of the test. The tests are very high and in some cases very problematic.[67] First, the trade measure must comply with the Article's "chapeau", that a restriction must not "constitute a means of arbitrary to unjustifiable discrimination between countries where the same conditions prevail," and that it not be a "disguised restriction on international trade."[68] Recent panel rulings have given the "chapeau's" requirements strict and broad applicability. The Shrimp-Turtles case may indicate a reversal of this trend.[69]

Once this test has been met then the measure must also fall within one of the two exceptions, either XX(b) or XX(g). Article XX(b) specifies that the environmental measures must be shown to be "necessary". GATT panels have

[67] Trade and the Environment: The Development of WTO Law Donald M McRae Otago Law Review (1998) Vol 9 No 221,230-231.
[68] GATT art XX

interpreted "necessary" to mean that "there are no alternative measures that are consistent with the GATT or no alternative measures that are less GATT inconsistent than those adopted that a government might reasonably be expected to employ and are not otherwise inconsistent with other GATT provisions."[70] Thus, in the Thai Cigarette case,[71] a panel found that restrictions on the importation of cigarettes was not justified under Article XX (b), concluding that Thailand could have achieved its health objectives in respect of smoking by adopting measures that applied equally to foreign and domestic cigarettes rather than those that applied to foreign cigarettes alone.

Article XX (g) permits states to take measures that would otherwise be inconsistent with their WTO obligations "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption." Defining what is an exhaustible resource has not been an easy task, however in the Reformulated Gasoline case,[72] it accepted the view of the panel that "clean air"[73] is an exhaustible natural resource.[74] The interpretation of other aspects of the wording, for example "relating to" of Article XX (g) and of the chapeau to Article XX have proved to be more difficult and therefore provided a lot more debate.[75]

The WTO dispute settlement mechanism has only previously challenged unilateral or extraterritorial regulations rather than multilateral environmental trade measures.[76] It was the Tuna-Dolphin I case[77] that first raised doubts about whether

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[69] Report of the Appellate Body in United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct 12, 1998, 33 I.L.M. 121 7.50-7.55.
[70] United States-Section 337 of the Tariff Act of 1930, Report of the Panel adopted 7 Novemenber 1989. 36th Supp.BISD 345 (1990) para 5.26.
[71] Thailand-Restrictions on the Importation of and Internal Taxes on Cigarettes, report of the Panel adopted 7 November 1990, DS10/R, BISD 29th Supp.200 (1991).
[72] United States- Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body of 29 April 1996, WT/DS2/AB/R.
[73] Note that clean air and living resources, including marine species, have been found to be "exhaustible natural resources" in WTO jurisprudence. It is likely that clean water would be considered to be such a resource.
[74] United States- Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body of 29 April 1996, WT/DS2/AB/R 14.
[75] See Trade and the Environment: The Development of WTO Law Donald M McRae Otago Law Review (1998) Vol 9 No 221,230-235.
[76] See for example Tuna/Dolphin I & II.

Article XX would cover multilateral agreements when it laid down a very restrictive interpretation of Article XX.

This is a case where Mexico challenged an embargo on yellow-fin tuna imports imposed by the United States under its Marine Mammal Protection Act 1972 because of Mexico's failure to reach United States standards for dolphin protection. The panel found in favour of Mexico principally on the grounds that the United States had unilaterally imposed trade restrictions on imports of tuna based on how the tuna was produced outside United States jurisdiction.[78]

The panel focused its attention on whether the dispute measure came within the scope of Article(b) or (g). It held that those paragraphs allow measures only to protect the environment within the jurisdiction of the government adopting the trade measure and do not cover a measure to prevent environmental harm or protect a resource occurring, entirely outside its jurisdiction.[79]

In 1994 there was another case referred to as the Tuna-Dolphin II,[80] in which the panel found no basis in the GATT for such a jurisdictional limitation on Article XX. Even so the panel concluded that the United States tuna embargo did not qualify under Article XX(g) because it did not protect the dolphin resource directly but operated by putting trade pressure on other governments to change their policies with respect to dolphin protection.[81]

It is important to note that there is no reference to the word "environment" in this Article. This is probably due to the fact when the GATT was established environmental issues were not a serious concern. It has only been since the United

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[77] United States-Restrictions on Imports of Tuna [1991] BISD 39 S/155 para 5.25,5.26,5.31-5.32. The Tuna/Dolphin case was never officially adopted by GATT Council; Mexico negotiated with the United States on the North American Free Trade Agreement, decided not to pursue GATT remedies further.

[78] Eric L Richards and Martin A McCrory "The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law" (2000) 71 U.Colo.L.Rev 295,163.

[79] United States-Restrictions on Imports of Tuna [1991] BISD 39 S/155 para 5.25,5.26,5.31-5.32.

[80] United States-Restrictions on Imports of Tuna 33 I.L.M. 839 (1994)

[81] United States-Restrictions on Imports of Tuna 33 I.L.M. 839 (1994) paras 5.23-5.27.

Nations Conference on Human Development in Stockholm in 1972[82] that the international community has recognised that trade, environment and development policy were related. However, it was only after the appearance of the Brundtland Report in 1987[83] and in the midst of preparations for the United Nations Conference on Environment and Development (UNCED or the Rio Earth Summit)[84] that the subject catapulted up the international agenda and the relationship between environmental concerns, development policies and global trade flows became a subject of wide international debate.[85]

2 The differences between unilateral and multilateral measures

There are a number of substantive differences between unilateral and multilateral measures that could support the argument that MEAs should be treated differently than unilateral trade measures.[86] Unilateral measures are usually developed by one country without outside collaboration. [87] This approach differs from MEAs, which are usually created through a collaborative and democratic process that involves multilateral debate, reducing the chance that the obligations would contain protectionist or offensive type restrictions.[88]

Unilateral measures usually only benefit that particular country, whereas MEAs are developed usually with a common goal that cross a wide range of countries, thereby the benefits or restrictions apply to all those who are members to the MEA. There is also a power difference between unilateral and multilateral measures taken by countries. The mere creation of unilateral measures by an individual country especially if stronger can be seen to influence weaker developing

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[82]The Text of the Stockholm Declaration <http://www.tufts.edu/departments/fletcher/multi/texts/STOCKHOLM-DECL.txt> (last accessed 23 May 2002).
[83] The 1987 Bruntland Report <http://www.srds.ndirect.co.uk/sustaina.htm#The Bruntland Report > (last accessed 23 May 2002).
[84] The 1987 Bruntland Report <http://www.srds.ndirect.co.uk/sustaina.htm#The Bruntland Report > (last accessed 23 May 2002).
[85]CTE on Trade Rules, Environmental Agreements and Disputes <http://www.wto.org/english/tratop_e/envir_e/cte01_e.htm> (last accessed 23 May 2002).
[86] Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y, 223, 234.
[87] Winter, above, 234.
[88] Michael I Jeffery "The Environmental Implications of NAFTA: A Canadian Perspective" (1994) 26 Urb.L. 31,48.

nations. This contrasts with multilateral negotiation, which usually includes both developed and developing countries, which seemingly reduces the power difference, often associated with unilateral measures.[89]

However, MEAs usually leave the development of domestic policy to the individual members, which can cause the members of MEA to enact legislation, which protects the domestic industry, which is very similar to enacting unilateral measures.[90] This is very probable under the Kyoto Protocol, where Annex I governments who have different political and legal systems might pursue these policies in such a way as to unfairly favour domestic producers over foreign ones.[91] Therefore it may be the actual import ban and not the MEA inspiring it that would be the subject of any dispute in the WTO. If this is the case then the differences between unilateral measures and MEAs is redundant. The focus on the relationship should be looking towards the domestic legislation enacting these MEAs and preparing guidelines for those, rather than leaving these policy choices to individual countries. The danger here is the encroachment on countries sovereignty.

(a) Shrimp-Turtle case

The distinction between unilateral and multilateral measures has been recognised in the United States-Import Prohibition of Certain Shrimp and Shrimp Products case (Shrimp-Turtle case).[92] This is a case where the United States instituted measures prohibiting imports of shrimps from other countries if they were caught in vessels not using Turtle Excluder Devices. The Panel and the Appellate Body ruled that the import ban violated GATT Article XI and could not be justified under GATT Article XX. In other words the United States was acting inconsistently with its WTO obligations in its attempt to protect endangered sea turtles. The decision held that the United States, the nation imposing a trade measure should have attempted bilateral or multilateral negotiations before enforcing its unilateral

[89] Winter, above, 234.
[90] Ministry for the Environment *Trade and the Environment: The Risks and Opportunities for New Zealand associated with the relationship between the WTO and multilateral environmental agreements: Discussion Document* (Wellington, 2001).
[91] Zhong Xiang Zhang and Lucas Assuncao "Domestic Climate Policies and the WTO" (United Nations Conference on Trade and Development, Geneva, December 2001).

trade measure.[93] This decision, however provided more then just the plight of the sea turtles it also indicates a shift in trade and environment jurisprudence under the GATT/WTO. Unfortunately, there is still uncertainty as to whether this dictum will be applied if the occasion arises.

D How Does International Law Deal With Conflicts Between Treaties?

International law is problematic when considering the relationship between MEAs and the WTO. Article 30 of the Vienna Convention on the Law of Treaties mandates that when two parties are bound to conflicting treaties, then the later treaty overrides the earlier treaty to the extent that they are inconsistent.[94] This is the most used principle and known as *lex posterior*.[95]

Firstly, in regards to the GATT and WTO, which treaty would we use? If we used GATT, which was established in 1947 when there was an inconsistency between the GATT and the MEA then the MEAs would override the GATT, as they came into force after 1947. If the WTO is used, which is more likely then the 1994 WTO would override most MEAs (those that became binding before 1994), and future MEAs would overrule both the GATT and the WTO.[96] Determining the treaty's date also presents a problem as they can be amended and there is uncertainty about whether the original date should be used or the amended date. What also has to be considered with this rule, *lex posterior* is that it only applies to parties who are members of both agreements and therefore excludes the situation where a WTO member is not a member of the MEA takes up the challenge or vice versa.

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[92] Report of the Appellate Body in United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct 12, 1998, 33 I.L.M. 121 7.50-7.55.
[93] Report of the Appellate Body in United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct 12, 1998, 33 I.L.M. 121 7.50-7.55.
[94] See Vienna Convention on the Law of Treaties, May 23, 1969, art 30(3), P 3, 1155 U.N.T.S.331, 339.
[95] Robert E Hudec "GATT Legal Restraints on the Use of Measures against Foreign Environmental Practices" in Jagdish Bhagwatu and Robert E Hudec (eds) *Fair Trade and Harmonization: Prerequisites for Free Trade?* Volume 2: Legal Analysis (MIT Press: Cambridge, Mass and London), 1996 121.
[96] See Vienna Convention on the Law of Treaties, May 23, 1969, art 30(3), P 3, 1155 U.N.T.S.331, 339.

The wording of the Vienna Convention also requires that the successive treaties must relate to the same subject matter.[97] To satisfy this requirement, one would have to conclude that the MEA and the GATT dealt with the same subject matter. While it may be argued that both agreements invoke trade sanctions, it would be very difficult to suggest that they relate to the same subject matter. The GATT and now the WTO subject matter relate to the liberalisation of trade. MEAs on the other hand, have, as their subject matter environmental objectives and the use of trade measures could be argued as incidental.[98] It would be difficult to argue that the Basel Convention has as its subject matter the liberalisation of trade.[99]

If it was concluded that both these treaties were of the same subject matter then, consideration needs to be given to the rule of "*lex specialis*" or the idea of specificity. This rule maintains that specific treaties should override general treaties when they relate to the same subject matter, no matter when the two were negotiated.[100] Even though the WTO is later in time relative to a MEA, the MEA should override the WTO because it is more specific.[101]

According to a widely held view in the CTE, trade measures that parties to a MEA treaty have agreed, could be regarded as *lex specialis*, prevailing over WTO provisions. This would mean that provisions would not give rise to legal problems in the WTO even if the agreed measures were inconsistent with WTO rules. However, this is not a definitive interpretation, and numerous uncertainties remain. Another point that could be raised is that where Parties to one international agreement subsequently adopt a second international agreement that is inconsistent with the first, the Parties waived rights afforded to them under the first. [102]

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[97] See Vienna Convention on the Law of Treaties, May 23, 1969, art 30(3), P 3, 1155 U.N.T.S.331, 339.

[98] Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y, 223 234.

[99] Winter, above,234.

[100] Annick Emmenegger Brunner "Conflicts between International Trade and Multilateral Environmental Agreements" (1997) Ann. Surv. Int'l & Comp. L. 74, 77-88.

[101] Brunner, above, 77-88.

[102] See United States-Restrictions on Imports of Tuna, Sept 3, 1991(unadopted), GATT B.I.S.D. (39th Supp) at 155 (1991).

Overall international law is unclear as to which agreement or treaty would overrule if there were a dispute in the MEA/WTO, which further justifies the need to establish clarification within this relationship. The Vienna Convention is also difficult to reconcile with the expectations of those who are party to both treaties. If enforced to resolve trade and environmental conflicts the Convention rule will invalidate outstanding international environmental law that required over thirty years of intensive negotiations to develop. This is not likely to have been the intention when nations reaffirmed the GATT at the Uruguay Round.

V RESOLVING THE WTO/MEA DEBATE

A The Mandate Under the Doha Declaration

This issue of how to handle disputes involving MEAs and the WTO has long been on the agenda of the CTE. However, it was at the fourth WTO Ministerial Conference in Doha, Qatar, in November 2001, that WTO members finally agreed to start negotiations on " the relationship between existing WTO rules and specific trade obligations set out in MEAs."[103] These negotiations form constitute an important element on the Doha Development Agenda (DDA).[104]

1 Mandate Under Paragraph 31(i)

For the purposes of the new Doha Round, trade and the environment is contained in the paragraphs 31,32 and 51. Paragraph 31(i) provides a specific mandate for negotiations on some aspects of the relationship between MEAs and WTO rules. 31(ii) provides for "negotiations" on information sharing between MEAs and WTO committees, and 31(iii) provides for negotiations on barriers to environmental goods and services.

Paragraph 32 calls for the CTE, in pursuing work on "all items on the agenda within its current terms of reference", to give particular attention to linkages with market access, with labelling and with relevant TRIPS provisions; and calls for the

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[103] See paragraph 31(i) of the Doha Mandate.
[104] WTO Website <http://www.wto.org/english/tratop_e/envir_e/envir_e.htm> (last accessed 24 May 2002).

Committee to identify any need to clarify relevant WTO rules and include in its report to the 5th Ministerial Conference recommendations on future action, "including the desirability of negotiations".

Paragraph 51 provides for the CTE and the CTD to act as forums to identify and debate developmental and environmental aspects of the negotiations in order to help achieve the objective of having sustainable development appropriately reflected.

This mandate, particularly Paragraph 31(i) has provided considerable debate as to what can be addressed in these particular negotiations and in particular to what extent it addresses the MEA/WTO relationship. For example, what is a specific trade obligation? What is a MEA for these purposes?

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

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

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

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

(a) What are "existing WTO rules" and 'specific trade obligations? "

Part of the discussion within the CTE is in relation to what is the meant by the terms "existing WTO rules" and "specific trade obligation". Argentina has

provided a recent submission,[105] which provides guidelines as to how these terms should be interpreted in the negotiations. They have defined "existing WTO rules" to be encompassing all the provisions of agreements, which are currently in force[106] and "specific trade obligations" to cover the provisions of MEAs, which entail an "obligation". The term "trade obligations" does not appear to extend to measures not required by an MEA. Therefore all non-mandatory trade measures, non-trade obligations and non-specific trade obligations in an MEA are excluded. It is important to note that Argentina's definitions are considered to be very narrow and have not been unanimously agreed amongst the WTO members.

The European Community has also submitted guidelines as to what this mandate includes or excludes for the negotiations.[107] They have taken a very different approach and sorted the various types of trade measures, ranging from mandatory to non-mandatory into categories that need to be analysed in detail in order to determine where any cut-off point or points between "specific" and "non-specific" trade obligations exist.[108] They have not specifically chosen which should or should not be included as in the Argentinean submission.[109]

What is interesting is that all previous discussions on the relationship between WTO rules and MEA provisions has focused on the term "trade measures" for environmental purposes. However, as highlighted in Argentina's submission,[110] the term "trade measures" is different from the phrase "specific trade obligations" in the Doha Declaration. This has been one of the main reasons why so much debate has occurred because no one is sure whether they are meant to mean the same thing or not. If Argentina's guidelines were accepted then it would appear that from a list

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[105] Submission by the Argentine Republic *Mandate Under Paragraph 31(i) of the Doha Declaration On Trade and Environment* TN/TE/W/2 (Geneva, CTE, 23 May 2002).
[106] These are known as "covered agreements".
[107] Submission by the European Communities *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda* TN/TE/W/1 (Geneva, CTE, 21 March 2002).
[108] Submission by the European Communities *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda* TN/TE/W/1 (Geneva, CTE, 21 March 2002).
[109] Submission by the Argentine Republic *Mandate Under Paragraph 31(i) of the Doha Declaration On Trade and Environment* TN/TE/W/2 (Geneva, CTE, 23 May 2002).
[110] Submission by the Argentine Republic *Mandate Under Paragraph 31(i) of the Doha Declaration On Trade and Environment* TN/TE/W/2 (Geneva, CTE, 23 May 2002).

of the most relevant MEAs[111] that only CITES, Montreal Protocol, and the Basel, Rotterdam, Stockholm on Persistent Organic Pollutants[112] Conventions are captured, as others appear to lack "specific trade obligations" even if they contain less specific measures of some sort.

(b) What is a multilateral environmental agreement for these purposes?

What is considered, as a "multilateral environmental agreement" has also been a subject for debate, as the term MEA is very wide and could include regional agreements or even an OECD Council Act. Argentina's submission[113] purports that MEAs to be negotiated should cover only agreements which are currently in force, have been negotiated and signed under the guidance of the United Nations, its specialised agencies or the UNEP, have attained a certain degree of universality and are open.[114] Therefore their interpretation does not provide a very extensive list of MEAs that can be included in these negotiations. If only in force then this would exclude, the Kyoto, Biosafety, Rotterdam and Stockholm Conventions to name a few, and these potentially are questionable in the WTO/MEA relationship, mainly because they are not as yet tested.

2 The Australian proposal

The Australians proposed a three-phase process for MEA negotiations in June 2002[115] that has attracted broad support as a way forward. In the first phase they suggested that the CTE should identify (a) the specific trade obligations in MEAs that are to be discussed and (b) the WTO rules that are relevant to these obligations.[116] The paper proposed using the secretariat's matrix[117] as a base document for the first part of this exercise. A second phase would use information

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[111] See WTO/CTE/W/160/Rev.1 of 14 June 2001, an updated matrix produced for the 27 June CTE.
[112] Stockholm Convention on Persistent Organic Pollutants http://www.chem.unep.ch/sc/htm (last accessed 25 August 2002).
[113] Submission by the Argentine Republic *Mandate Under Paragraph 31(i) of the Doha Declaration On Trade and Environment* TN/TE/W/2 (Geneva, CTE, 23 May 2002).
[114] Submission by the Argentine Republic *Mandate Under Paragraph 31(i) of the Doha Declaration On Trade and Environment* TN/TE/W/2 (Geneva, CTE, 23 May 2002).
[115] Submission by Australia *Suggested Procedure For the Negotiations Under Paragraph 31(i) of the Doha Declaration* TN/TE/W/7 (Geneva, CTE, 7 June 2002).
[116] Submission by Australia *Suggested Procedure For the Negotiations Under Paragraph 31(i) of the Doha Declaration* TN/TE/W/7 (Geneva, CTE, 7 June 2002).

sessions with relevant MEA secretariats plus members' own experiences to determine whether there have been particular implementation issues with the "specific trade obligations" identified in the first phase. The third phase would involve discussion of "matters arising" from the work undertaken in phases one and two, and would focus on the outcome of the negotiations.

The Australian proposal has the advantages of (a) also calling for the relevant WTO rules to be identified in the course of the first phase of work (b) identifying a specific role in the process for MEA secretariats. The Australian presumption, and others is that an examination in this sort of format will demonstrate the lack of problems requiring solutions. The mandates exclusion of non-party issues makes this all the more likely. This process has a sound common sense attitude towards it especially as a way to get over the pedantic intricacies within the definitions, however it is important to look not only at the WTO rules, but also the relevant WTO jurisprudence. This will reveal how certain conflicts may be dealt with in the future.

B The Scope of the Mandate

What is plain enough is that the negotiation will in any case be narrow in its scope and as stated in paragraph 31(i) the mandate is further constrained by the sentence "The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question." Thus, while the mandate gives scope for clarification of some aspects of the complex relationship, namely the relationship with any "specific trade obligations" in an MEA between WTO and MEA rules, it excludes the most important and most difficult issue, namely the handling in the WTO of a situation in which a non-party of a MEA challenges a trade-related measure taken pursuant to that MEA by one of its members. The limitation in the mandate is unfortunate as this is the more likely scenario for a conflict and it is desirable that all aspects of the WTO/MEA relationship are discussed. Although these wider MEA/WTO issues may be able to

[117] See WTO/CTE/W/160/Rev.1 of 14 June 2001, an updated matrix produced for the 27 June CTE.

be discussed in the CTE under the less restrictive paragraph 32 of the mandate, however, this is uncertain at this stage.

This restrictive mandate could push some countries to use the CTE's existing terms of reference and existing work programme, which gives it a quasi-negotiating mandate. The 1994 terms of reference provide the CTE to make recommendations on "whether any modifications of the provisions of the multilateral trading system are required". [118] Therefore some members of the WTO may be able to persuade other members to contemplate such recommendations. This is not agreeable to many countries who do not consider that any changes need to be made to the multilateral rules themselves. Therefore this may create more upset and prolong the discussions even further before actually making any firm decisions in regard to the WTO/MEA relationship.

The end result is a mandate that is narrowly drafted and lacks clarity in critical areas, which is probably due to members of the WTO remaining sharply divided on the area of trade and environment and perhaps the facilitating of the process and circumstances in which the declaration was drafted. It is likely to lead to a stand off on the question of concluding an agreed understanding on Article XX of GATT.

C Negotiations Purely within the WTO

Paragraphs 31(i) and (ii) appear to envisage negotiations purely within the WTO, as with other negotiations under the single undertaking. This means that if it is decided that there are problems attributable to a gap or flaw in the WTO rules, (which many countries including New Zealand do not think so) then a solution is restricted to changing or amending the GATT/WTO rules. This view excludes considering the MEA trade provisions or otherwise as possible sources of difficulty at the intersection of the two. It may also allow dispute settlement panels to establish policy, which some WTO members and observers have, real concerns about. The

[118] The Trade and Environment Committee, and Doha preparations <http//www.wto.org/wto/english/thewto_e/minist_e/min01_e/briefl1_e.htm> (last accessed 18 August 2002).

EC have proposed two different approaches to resolve the conflict. These are a textual change to Article XX and reversing the burden of proof.

1 Textual change to Article XX

The European Union purports that there are gaps in the WTO rules and therefore one of their proposals is to seek a textual change to GATT Article XX. The amendment process seeks to create a provision that clearly demonstrates the Parties intent to except MEA trade measures from GATT obligations. It has been suggested by others[119] that Article XX(b) should be amended to read "reasonably necessary to protect the natural environment and human health." This would modernise this Article to reflect concern for the environment, which was not evident when GATT was first established.[120] This amendment would also remove the overly strict "least trade restrictive" criterion for such measures. In addition, Article XX could be amended to provide a "safe harbour" for MEAs that employ trade measures that are reasonably necessary and reasonably related to the subject matter of the agreement.[121]

However, if such a provision or other provisions are drafted then there must be some care as to what language is used, so that is can account for existing treaties and prevent prejudicing future MEAs. In this case there is still the difficulty of interpretation and the precedent that is set once it is amended- does this mean every time a new MEA comes along that doesn't quite fit into the amendment that more amendments are made? It could get very complicated. It should also be remembered that MEAs are appealing because of their flexibility and therefore codification of the relationship through an interpretation of Art XX does risk stifling dynamism and innovation in international environmental law.[122]

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[119] Thomas J Schoenbaum " International Trade and Protection of the Environment: The Continuing Search for Reconciliation" (1997) 91 A.J.I.L 268, 277.
[120] Schoenbaum , above, 277.
[121] Schoenbaum, above, 277.
[122] Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y 223, 233.

2 Reversal of burden of proof

The European Union has also purported the proposal of reversing the burden of proof.[123] Under current WTO rules if a WTO member challenged another in regard to the MEA mandate they had adopted then the MEA member would be required to prove that the MEA measure meets the requirements of Article XX. The proposition purported by the European Union would reverse this burden of proof in a case involving an MEA to require that the complainant prove the measure is inconsistent with Article XX. This proposition has been also been met with strong opposition, especially from developing countries and would not necessarily resolve the problem where MEAs are being superseded by the WTO. It also would not resolve the situation whereby the trade measures were being used for protectionist purposes which is one of the main issues with trade measures being used in MEAs.[124]

It is argued by the European Community[125] that the fact that any trade measures in an MEA are negotiated and agreed by consensus in a multilateral context and that this should be, in principle, a guarantee against discriminatory and protectionist action. Therefore challenges between Parties over specific trade measures are highly unlikely from both a political and legal point of view. Accordingly, if Parties have agreed specific trade obligations, they should have no reason or ground to challenge them afterwards. The European Community is also of the view that were such a case to arise then the Parties involved should make every effort to solve the issue through the MEA dispute settlement, as recommended by the CTE in its report to Singapore.[126]

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[123] Winter, above, 233.
[124] Winter, above, 233.
[125] Submission by the European Communities *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda* TN/TE/W/1 (Geneva, CTE, 21 March 2002).
[126] Submission by the European Communities *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda* TN/TE/W/1 (Geneva, CTE, 21 March 2002).

D Information Sharing

Working towards a solution may greatly benefit from information sharing among specialists in different capitals. With 31(ii) likewise it is difficult to see the logic of a unilateral approach to the development of "procedures for information exchange" as they would agree to negotiate or discuss this with MEAs secretariats sooner or later. The UNFCCC secretariat has sought the help from the WTO for proposed compliance and dispute settlement system under the Kyoto Protocol.[127] However, as discussed earlier it is more likely that a conflict would occur due to the national legislation rather than because of the trade measures, which is not usually developed in conjunction with WTO officials.

There is also scope for WTO tribunals to include environmental experts in WTO tribunals as the DSU mandate states that the panellists are "well-qualified" individuals, and that members should be selected with the objective of creating "a sufficiently diverse background and a wide spectrum of experience."[128] Similarly, the WTO Director-General could specially appoint a judge who is aware of both trade and environmental protection concerns.[129] As mentioned earlier the Shrimp-Turtles Appellate Body Report, has mentioned that individuals and organisations could submit amicus briefs to WTO tribunals. [130] Tribunals also have the authority to create an advisory panel for scientific and technical matters.[131] This could prove very useful in disputes involving environmental trade measures, which often require complicated factual findings.[132]

E Other Approaches to Resolving the Dispute

In amongst the vast array of opinions, and ideas as how to structure or resolve the relationship between MEAs and the WTO there have been some strong

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[127] This was confirmed at a CTE special session hearing.
[128] See WTO Agreement Annex 2 "Understanding on Rules and Procedures Governing the Settlement of Disputes", reprinted in 33 I.L.M. 1125, at 1226-47 (1994) art 8.
[129] Steve Charnovitz "Environment and Health Under WTO Dispute Settlement" (1998) 32 Int'l Law 901, 918.
[130] See DSU art 13.2
[131] See DSU art 13.
[132] Charnovitz, above, 918.

proposals that have stood out and dominated the others. In recalling these, it is important to understand that the approach a country will purport does tend to depend on whether they are a developed or developing country. Developing countries are naturally suspicious of developed countries, and the changes they may wish to make especially as previously the developing countries have used the WTO forum to bring to task some of the developed countries unilateral environmental measures, for example the Tuna-Dolphin case.

Some of the proposals that suggest amending or changing the WTO rules have been blocked by developing countries (most actively by India, Egypt and Brazil) as they see any change in the WTO rules on the topic as abandoning or weakening their rights to challenge such measures as WTO inconsistent.[133] There have been a number of other approaches that have been supported by more developing countries, as they do not require change as such as more prescriptive criteria approaches.

1 Savings clause

Some countries advocate the inclusion of a "savings clause" to clarify that the Protocol is not intended to affect the rights and obligations of parties under other international agreements. Under such a provision, the Protocol must be compatible with existing international agreements, including but not limited to WTO Agreements. In the presence of a savings clause provision, disputes under the Protocol could probably be challenged at the WTO. For example, under a savings clause, a country could challenge the application of an AIA to exports under the SPS or TBT Agreements of the WTO. A number of countries oppose savings clause provision and would have the Protocol trump existing agreements such as the WTO Agreements.

[133] Richard H Steinberg "Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development" (1997) 91 A.J.I.L 231,243.

2 Principals and criteria approach

Canada and Switzerland have both created a set of criteria to assist WTO panels in assessing MEA trade measures and international negotiators contemplating the use of trade measures in an MEA. The aim is to recognise and support multilateral solutions to global environmental problems and to accommodate them within the trade regime.

The criteria they have both used is very similar and they suggest the considerations should be that (i) trade measures be chosen when effective and when other alternative measures were considered to be ineffective in achieving the environmental objective or when other measures proved to be ineffective without accompanying trade measures (ii) that trade measures should not be more trade-restrictive than necessary to achieve the environmental objective concerned; and (iii) that the trade measures chosen should not constitute arbitrary and unjustifiable discrimination.

There is a concern that the criterion does not guarantee a consideration by all WTO panels that then may not give this meaningful effect.[134] This approach also does not take into account the fact that the Dispute Settlement Understanding is based solely on WTO agreements and it is not feasible for the panel to consider principles that go beyond these.[135] There is also the fear that this criteria approach could easily become a hierarchy.

3 Voluntary consultative mechanism

New Zealand prefers to take a more voluntary approach and has suggested that co-operation and co-ordination should also take place between member countries within the MEA context.[136] This position has received agreement from other countries, including Canada. This co-operation and co-ordination at the domestic level is equally if not more important for policy coherence. This proposal

[134]Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y 223, 250.
[135] This was a view presented by Hong Kong at a CTE session in June 1999 CTE/M/21.

would encourage a country implementing obligations under an MEA to consult with a Member country before implementing a trade measure.

There is however a question as to whether a country which is a Party to an MEA would have the flexibility to implement its obligations under the MEA in this manner, particularly in situations where trade measures in an MEA are precisely drafted. In such cases, a party may not be in the position to negotiate with a non-Party on the implementation of an MEA measure and still be able to meet its obligations under the MEA. Therefore the proposed voluntary consultative mechanism could unduly complicate the implementation of MEAs.

4 Change of forum

If there is a real problem in the WTO/MEA relationship then perhaps consideration should be given to a more multilateral process that is not confined to the WTO. It has only been recently that environmental interests have been recognised in the WTO as in the Shrimp-Turtle case, but there have been no rulings that have embraced environmental issues. If disputes were adjudicated in a different forum, adjudication might become more objective as the GATT/WTO would be forced to compete on a more level playing field.[137]

In the event a dispute arises between WTO members who are also signatories to an MEA, then it could be referred to the dispute settlement mechanisms available under that MEA or directly to the ICJ.[138] The CTE Report suggested that MEA settlement bodies become more involved in trade and environment disputes.[139] There is a problem with this suggestion because MEAs are regarded as weak bodies of law. In many instances, they do not have a dispute settlement body, or include a provision referring the dispute to arbitration or the ICJ.[140] Although there is the possibility of strengthening the MEA dispute settlement procedure so that it would

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[136] This was a view presented by New Zealand at a CTE session in June 2001 CTE/M/27.
[137] Winter, above,233.
[138] Steve Charnovitz "Environment and Health Under WTO Dispute Settlement" (1998) 32 Int'l Law 901, 918.
[139] See Report of the WTO Committee on Trade and the Environment, Nov 14, 1996, PRESS/TE 014 (1996) 178.

be less likely that there would be a need to resort to dispute settlement mechanisms in the WTO.

Currently, if a dispute were to arise with a non-party to an MEA, and another WTO member, then the WTO would provide the only possible forum for resolving the dispute.[141] In order for the dispute to be referred to the WTO then members would need to waive their rights. This is because if a WTO member brought the dispute then in the current form it must be brought before the WTO. This could be resolved under Article IX:3 of the Agreement Establishing the WTO, which allows the waiver of any obligations in "exceptional circumstances" by vote of a three-fourths majority of the member states.[142] This means that WTO members could waive their rights to hear the dispute in the WTO. This view has been supported by a number of environmental groups including the World Wildlife Fund.[143]

However, as some MEAs are vague and only have a few members it is doubtful that any WTO member would be comfortable deferring their trade rights to these MEAs. The test itself is also very vague, "exceptional circumstances" and if the rights were waived then it would only apply to some MEAs and not others. The waiver would also require periodic renewal, and thus only offers temporary reprieve.[144] This approach appears to rank the GATT/WTO and trade liberalisation above MEAs and environmental protection.[145] Finally, it should be remembered that the WTO dispute process is only open to trade related disputes. If the dispute were related to the lack of progress in the implementation of environmental measures it would have to go through to the MEA.

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[140] For example, The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar 22, 1989, 28 I.L.M 657 (1989) Art 20.
[141] The Trade and Environment Committee, and Doha Preparations <http//www.wto.org/wto/english/thewto_e/minist_e/min01_e/brief11_e.htm> (last accessed 18 August 2002).
[142] See Article X(1). Vienna Convention on the Law of Treaties, May 23, 1969, arts 11-16, 34,39.
[143] (WWF, 2001, October page 2)
[144] Annick Emmenegger Brunner "Conflicts Between International Trade and Multilateral Environmental Agreements" (1997) 4 Ann. Surv.Int'l & Comp.L 74, 94.
[145] Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y 223, 248.

5 A global environmental organisation

A Global Environmental Organisation (GEO) would provide a system that could be as powerful as the GATT/WTO dispute settlement system.[146] It departs from the view that environmental issues should be integrated into the WTO as this puts too much stress on the WTO. The WTO specialises in trade issues, which makes it very difficult for it to take on environmental aspects in a satisfactory way. There will always be suspicion when an environmental decision is made, especially if it favours trade as opposed to the environment.

A GEO would provide a balance between trade and environment, which would give environment first-equal place with trade issues.[147] Such an organisation has advantages over the current regime of MEAs, which consists of a number of treaties that deal with environmental problems on a case-by case-basis.[148] The difficulty is creating such a system is one that is acceptable to countries as like the WTO it would impinge on their sovereignty. There are also issues related to cost, the formation of the structure, which makes its formation in the near future very unlikely. However the GEO does not need to be a new bureaucracy. It could be a consolidation of a number of existing UN agencies with environmental responsibilities into a streamlined new body with a decentralised structure that draws significantly on outside expertise non-governmental organisations, academics and business community.[149] At the moment there are many treaties/ agreements all with their own rules, COPs and MOPs. It may be more useful if these were all brought together under unified leadership, which would also permit the rationalising of priorities and budgets.[150]

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[146] Ryan L Winter "Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?" (2000) 11 Colo.J.Int'l Envtl.L.Pol'Y 223, 251.
[147] Annick Emmenegger Brunner "Conflicts Between International Trade and Multilateral Environmental Agreements" 4 Ann. Surv. Int'l & Comp. L. 74, 100.
[148] Daniel Esty *Greening the GATT: Trade, Environment, and the Future* (Institute for International Economics, Washington, 1994) 219-220.
[149] Professor Daniel C Esty " Global Environment Agency Will Take Pressure off WTO" (13 July 2000) *Financial Times* Washington <http//:globalpolicy.org/socecon/environmt/esty.htm> (last accessed 25 August 2002).
[150] Professor Daniel C Esty " Global Environment Agency Will Take Pressure off WTO" (13 July 2000) *Financial Times* Washington <http//:globalpolicy.org/socecon/environmt/esty.htm> (last accessed 25 August 2002).

6 An authoritative text

Although the preferred approach would be to take the debate out of the WTO and use a more global forum, the fact remains that it would most likely be a WTO member bringing the dispute to the WTO and there it still necessary to have clarification when actually developing the MEAs that include trade measures. It is also unlikely that such a scheme for a global forum will be in place in the very near future and there is a real need for clarification and certainty now.

One idea would be to opt for an authoritative text in the form of an Understanding or a Declaration or a Decision on the Relationship between existing WTO rules and Specific Trade Obligations in Multilateral Environmental Agreements that records appropriate interpretations. The text should be given legal status through adoption by the Ministerial Conference and form part of the results of the DDA negotiations, using the understandings or declarations of the Uruguay Round as a model.

The text could tentatively include a chapeau which would contain a reaffirmation of the commitment to sustainable development, the need to enhance the mutual supportiveness of trade and environment policies in general and of the need to clarify the relationship between existing WTO rules and specific trade obligations set out in MEAs specifically.

This approach should include an operative part which would record in the agreement that international environmental problems are best dealt with in a multilaterally manner, that multilateral environmentally policy should to the extent possible be drawn up within MEAs. It should also include a statement that if there is a conflict between parties to a MEA in relation to the implementation of that agreement then it should be solved within the framework of the MEA and not be the subject of dispute settlement in the WTO.

This approach should also include an endorsement of findings made by relevant panels under the WTO dispute settlement system. The findings that should be included here are those that have the most general applicability. The most prominent example would be the Shrimp-Turtle case,[151] which legitimises the use of restrictive trade measures for the purpose of protecting the environment and the sustainable use of natural resources, provided that the measures are not discriminatory or arbitrary in nature. The panel also underlines the need to solve environmental problems in a multilateral context. These, and other relevant findings should serve as guidance for the efforts that are needed to achieve an outcome in which trade and environment policies are truly mutually supportive, and thereby consistent with the need of sustainable development.

This approach could provide a useful reference for WTO panels in understanding trade measures for environmental purposes, and if adopted by UNEP and MEAs, it would also give MEA negotiators a sense of how to develop clear and predictable trade measures. The application of the Principles and Criteria approach in the negotiations of the Stockholm Convention has re-affirmed their usefulness in helping to guide negotiators in drafting trade measures, which will not conflict with WTO obligations.

This approach is only one idea to at least act as a guide in clarifying the relationship between the WTO and MEAs. It takes on various aspects of some of the other approaches, for example deferring any conflict to the MEA itself. It would then need to be sure that all MEAs have some kind of dispute settlement mechanism. However, the most ideal approach would be to have an outside global forum, which would give environment the status it needs and the assurance that it will not be relegated to second place behind trade matters in the future.

VI CONCLUSION

A global response to increased economic activity, which has impacted on our environment, has been the introduction and use of MEAs. These agreements are the

[151] Report of the Appellate Body in United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct 12, 1998, 33 I.L.M. 121 7.50-7.55.

best way to co-ordinate policy action that tackles global and transboundary environmental problems co-operatively. There is real potential for conflict due to some of the MEAs containing trade measures, which are inconsistent with the core provisions of the WTO. If such a conflict occurred it would damage the WTO and the efforts of the international community to protect the environment.

The relationship between the WTO and MEAs needs to be clarified in order to protect the future drafting of MEAs and to allow countries to put in place legislation to enforce the treaties they have put in place. Clarification would reinforce the integrity of both systems.

It was significant when the Doha mandate included environment on its agenda for negotiations but short lived as the mandate is not satisfactory in resolving all aspects of the WTO/MEA relationship. It is narrow in scope and excludes the relationship of a WTO member but non-member to the MEA- the more likely scenario of a conflict. Time is taken up with debate over exactly what is included within these negotiations.

One of the least satisfactory aspects has been that the negotiations are purely held within the WTO, which excludes more global solutions that may be more amenable to the WTO/MEA relationship. The solutions that have can only be considered would mean changing or amending the rules, most probably Article XX. This will result in a standoff between members of the WTO as they are divided on this issue.

It is therefore necessary to look outside the WTO for a possible solution, which can provide clarification and ensure that environment is placed equally with trade within our international community. A new global regime would be the preferred option. It could bring together the environmental treaties under one roof and allow for environmental experts to share information to ensure that our environment is protected. A coordinated approach between the WTO and GEO could head off potential problems between domestic trade and environmental policy before they occur.

However, it is unlikely that a GEO will evolve in the near future and so as an interim measure this paper has suggested that an Understanding or Declaration is formed which can guide countries when they are drafting trade measures or their own legislation. This approach will take into account the differences inherent in both the WTO and MEA systems that will allow them to work in their own ways without the fear that one would be superseded by the other. It will allow the continuation and development of MEAs without the fear of a conflict.

What is evident from this research is that although the issue is simple enough the practical implications are complex. It is apparent that WTO rules cannot be interpreted in isolation of international law of which MEAs are an integral part. There is a need to develop further internationally agreed principles to guide the use of trade measures within the context of MEAs with the objective being to reconcile international environmental law and the multilateral trading system to avoid clashes between the two systems.