Introduction

While the World Trade Organisation (WTO) does not have as its primary objective the protection of the environment, the importance of this policy goal is clearly acknowledged in its Preamble and various Agreements. The WTO places no constraints on governments implementing within their borders whatever legitimate policy options they wish with respect to the environment. Notwithstanding that, it has been argued that there is a natural or in-built potential for conflict between trade policy and policies relating to the environment. Furthermore it is alleged that the GATT - and now the WTO - did not respond responsibly to the concerns of environmentalists. This belief, coupled with a number of specific events resulted in attention being paid to trade and environment issues in the GATT and the WTO in the early Nineties. These relate primarily to the public concern leading to the Stockholm Conference, the Rio Conference and the adoption of Agenda 21 and the very unpopular (at least with environmentalists) GATT Panel Reports on the Tuna Dolphin cases. As these concerns post-dated the launching of the Uruguay Round negotiations, trade and environment did not find a place on the agenda.

Nevertheless, discussions towards the end of Round led to a Ministerial Decision on Trade and Environment (adopted in Marrakesh in April 1994) calling for the establishment of a Committee on Trade and Environment (CTE). This Committee has a wide remit and has discussed many of the principal issues in the trade and environment debate. What has become apparent, however, is the extent to which the reactions of governments at both the national and multilateral level has the potential to touch on some of the most important areas of the work of the WTO. This has raised concerns about the respective roles of various national and multilateral institutions.

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1 The WTO is a relatively new organisation, coming into being on 1 January 1995. A legally separate entity, it took over the functions of the General Agreement on Tariffs and Trade and administers the Agreements that emerged as a result of the Uruguay Round. These encompass the General Agreement on Tariffs and Trade (GATT-1947), to which a number of Understandings were attached to create the GATT-1994, as well as a number of new agreements. The texts of the Agreements are to be found in WTO, The Results of the Uruguay Round Negotiations: the Legal Texts, WTO, Geneva, 1995.

2 The Preamble to the Agreement Establishing the World Trade Organisation states that WTO Members recognize: "that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living … while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so . . . ."

3 A great deal of excellent material has been written about all these topics. The interested reader could refer to titles such as Duncan Brack, (editor), Trade and Environment: Conflict or Compatability?, The Royal Institute of International Affairs and Earth scan, London, 1997.
international institutions and agreements, and the role (if any) of the WTO in dealing with environment related matters.

The purpose of this paper is to enquire into the potential overlap of WTO rules with national regulatory systems and multilateral agreements designed to deal with the environment. The outline is as follows. There is first a discussion of the institutional response to concerns in the form of the creation of the Committee on Trade and the Environment CTE. The work of the CTE is described. There is then a discussion of the relevance of the work of other institutions to the work of the CTE. The paper also deals with some of the most fundamental sources of potential conflict between WTO rules and those contained in regulations and agreements at the national and multilateral level. The relationship between the WTO and MEAs is specifically addressed in the light of these fundamentals.

WTO Process

The Committee on Trade and the Environment was established by the WTO General council in January 1995. It compromises all 134 WTO Members and sixteen observers from inter-governmental organizations. There are no observers from Non Governmental Organisations (NGOs) despite a number of requests. The CTE reports to the General Council and is mandated to address a variety of areas of work and to make recommendations on whether any modifications of the provisions of the multilateral trading system are required to "enhance a positive interaction between trade and environmental measures".

The CTE has a standing agenda, and under normal circumstances, is expected to meet formally two to three times a year. It addresses the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes; in particular, the relationship between the WTO rules and compliance procedures and those of Multilateral Environmental Agreements (MEAs). Environmental charges, taxes, standards, technical regulations and packaging, labelling and recycling requirements used for environmental purposes are addressed as well as their implications for the multilateral trading system. The transparency of trade measures used for environmental purposes is also an agenda item.

A further item is the possibility of reaping environmental benefits through removing trade restrictions and distortions in developed countries, particularly those impeding the exports of developing countries. The discussion has been restricted to environmental benefits of increased imports in the importing (developed) country and has not extended to the possible environmental damage of expanded exports in the exporting (developing) country. The logic of this is the unwillingness of developing countries facing opposition to their exports on the grounds that increased exports could be environmentally harmful according to standards established outside their borders.

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4 It may meet more frequently if necessary. For example, it met on seven occasions in 1996 to conduct normal business and to prepare the Report for the Singapore Ministerial Meeting. It meets informally whenever required; this may be quite frequently if upcoming meetings (eg. Ministerial Meeting in Seattle) require it.
Other matters addressed relate to problems surrounding the export of domestically prohibited goods, whether additional environment provisions should be written into the General Agreement on Trade in Services, and the significance for the environment of the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). The Committee has also discussed the appropriate arrangements for relations with intergovernmental and non-governmental organizations.

The Ministerial Decision referred to above mandated the CTE to report to the first biennial meeting of the Ministerial Conference which could review the work and terms of reference of the CTE in the light of recommendations of the CTE. This report was heavily negotiated, forwarded to Ministers, and adopted in Singapore in December 1996. It summarized the discussions of the CTE since its establishment, as well as the conclusions which it reached.

The Report contains a number of useful policy conclusions. One example, is that environmental policy should not be left to trade officials, but to those that have the appropriate expertise - both nationally and internationally. This means that while the relevant authorities in WTO Members should have total discretion as to their domestic environment policies, by far the best way to deal with transboundary environmental problems is to develop standards and compliance mechanisms in the context of MEAs. To support this discussion, the Members of the CTE invited representatives of the relevant MEA secretariats to participate in a number CTE meetings and explain the nature of the trade-related provisions in their respective agreements. The interaction with the MEA Secretariats, and the greater understanding WTO trade officials now have of these agreements, may well be one of the principal contributing factors to the fact that no trade-related measure taken under an MEA has ever been brought to the WTO Disputes Settlement Process.

Involvement of other institutions

When describing the key principles which form the basis of the WTO Agreements, transparency is normally cited along with non-discrimination as one of the most important. The GATT and now the WTO, have however, been regularly criticised for their lack of transparency vis a vis those outside the WTO process; the rationale being that if the WTO is non-transparent, it must have something to hide. In this respect, WTO openness and cooperation with respect to intergovernmental organisations is particularly important. In fact, transparency has taken on an increased importance in the light of forthcoming events and the need for public support for the future WTO negotiations. WTO Members will, at the national level need to develop national positions in consultation with various interest groups for the 1999 Seattle Ministerial Meeting and beyond. To do this effectively, governments need to have the right tools in hand, and in this process, there is an important role to be played at the multilateral level through co-operation with other organisations.

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5 See Report (1996) of the Committee on Trade and Environment, WT/CTE/, 12 November 1996. This will be referred to in the following as the CTE Report.

The General Council adopted a Decision on 8 July 1996 on "Guidelines for Observer Status for International Intergovernmental Organisations in the WTO". A number of intergovernmental organisations have requested observership in one or more WTO Committees, and their participation has been approved by the General Council in accordance with the Guidelines.\(^7\) There are, for example, 16 Intergovernmental Organisations that have observer status in the Committee on Trade and Environment. The fact that Non Governmental Organisations are not permitted to attend WTO meetings has led to a number of proposals buttressed with a variety of arguments as to how their direct involvement would enrich the functioning of the WTO.\(^8\) What is not being sought in these proposals is a role for non governmental organisations in the process of inter-governmental negotiation. This, it is invariably acknowledged, is a role for governments alone.

WTO Members are clearly of the view that observer status of relevant MEAs in WTO bodies can play a positive role in creating a clearer appreciation of the mutually supportive role of trade and environmental policies. For example, the usefulness of the CTE inviting representatives of MEAs to brief it on the use of trade measures applied pursuant to the MEAs, is well accepted.\(^9\) It provides the CTE with an opportunity to express its view to MEA authorities on trade measures which are contemplated in an MEA. Consultation and cooperation between the Secretariats of the WTO and MEAs is also useful, especially during initial negotiations and amendments of MEA. It should be possible to enhance transparency, dialogue and cooperation between MEAs, relevant international organizations and the WTO from the initial stage of negotiation of an MEA to its implementation. This cooperation may include exchange of information, mutual participation in meetings, mutual access to documents and databases, and briefing sessions, as necessary. A guide containing WTO principles could be compiled by the WTO Secretariat which, after being agreed by the CTE, could be used by MEA negotiators in their consideration of proposed trade measures. There could be cooperation agreements between the WTO and competent MEA institutions, providing: (i) for the WTO Secretariat to respond to requests for factual information about relevant WTO provisions; and (ii) for MEAs to inform the WTO of all envisaged trade provisions, which would be examined by the CTE and the report of the meeting would be communicated back to the MEA authorities.

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\(^7\) Cite Guidelines, conditions and give numbers.


\(^9\) At the September meeting of the CTE, eight MEAs were invited to send representatives to the Meeting of the CTE for this information sharing exercise. These were the UN Framework Convention on Climate Change; UNEP Chemicals on the Convention on the Prior Informed Consent (PIC) Procedure for certain Hazardous Chemicals and Pesticides in International Trade and the negotiations for a global treaty on Persistent Organic Pollutants (POPs); the UN Economic Commission for Europe on the ECE POPs Protocol; the Basel Convention on the transboundary Movement of Hazardous Wastes and Their Disposal; the Convention Biological Diversity; the International Tropical Timber Organisation; the Intergovernmental Forum on Forests; and the International Commission on the Conservation of Atlantic Tunas.
Trade liberalisation and the environment

When confronted with the criticism that trade is bad for the environment, a starting-point favoured by the trade community is that it is inappropriate resource usage and consumption patterns - not trade per se - that damages the environment. In fact, when adverse production and consumption externalities are adequately integrated into decision-making processes, trade and environmental objectives can be mutually supportive. The Committee on Trade and the Environment has been charged by Ministers to study the effect of environmental measures on market access, especially in relation to developing countries, and the environmental benefits of removing trade restrictions and distortions. In so doing, the CTE has explored the possibilities of trade liberalisation in developed countries leading to a double-barrelled advantage or a "win-win scenario". The first win is for developed countries. It comes from removing trade restrictions that distort production and consumption and are environmentally harmful in their own countries. The second win is for developing countries. It comes from the expansion of exports that follows the removal of environmentally harmful trade restrictions and improved market access for their exports. There is in fact a third win. Numerous empirical studies have demonstrated that the link between trade liberalisation and economic growth is unequivocal. Those countries that have opted for an outward-oriented development strategy have been the fastest growing of the developing countries. Higher gross domestic product per capita and less resources used to produce each unit of output means a higher national income and more resources available for the implementation of sound environmental policies.

That there is a problem to respond to in terms of inappropriate government intervention is clear. The Report of the High Level Advisory Group on the Environment to the Secretary General of the OECD noted that government interventions in the marketplace are frequently "economically perverse, ecologically destructive and trade distorting, sometimes all at the same time. The OECD has a crucial leadership role to play in … proposing policy reforms that would ensure that market forces can work both for the environment and the economy simultaneously and not one at the expense of another."

A number of priority sectors emerge as containing products where win-win scenarios exist. To achieve concrete results in this area, a greater degree of specificity is required for trade negotiators along with close cooperation with those institutions which have an expertise in the area. These institutions operate at the national level (trade developments, environmental developments) and multilateral level (FAO, UNEP, OECD, etc.)

In the case of fisheries, subsidies are widespread, trade distorting and undermine the sustainable use of fish resources. Both New Zealand and the United States have made submissions to the CTE on the environmental benefits of removing trade restrictions and

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10 For a discussion of this process of "internalising the externalities" see Dan Esty, Greening the GATT, International Institute for Economics, July, 1994, Washington D.C.

11 This does not mean, however, that the link between growth and liberalisation cannot be challenged. Economic growth may lead to more wealth but does not in itself ensure an egalitarian society. Nor does it mean that growth will automatically lead to an improvement in the environment.

distortions in the fisheries sector. This work has been complemented with constructive and detailed analysis on the part of representatives of civil society. The agricultural sector reveals direct, negative, and often significant environmental effects stemming from market access restrictions, domestic support policies and export subsidies. Over-subsidisation leads to intensified land use, increased applications of agro-chemicals, the adoption of intensive animal production practices and overgrazing, the degradation of natural resources, loss of natural wildlife habitats and biodiversity, reduced agricultural diversity and the expansion of agricultural production into marginal and ecologically sensitive areas. In the forest product sector, many types of measures are known to affect trade; tariffs and tariff escalation; subsidies; labelling of forest products; promotion of less-used forest species; financing and technology to improve sustainable forest management; and measures to increase value-added processing of wood and wood products. Energy also emerges as a priority sector as unlike other sectors, production is not an end in itself. Energy is an important input to almost all economic activities. By distorting prices, energy subsidies exacerbate environmental problems linked to energy production and use. These measures are the focus of much of the climate change discussion. Finally, there seems no reason to justify why the highest quality environmental goods and services should not be available on the world market at the most competitive prices. Free trade in this sector would be a constructive outcome of the future negotiations. A general point, however, is that not all trade restrictions and distortions are, of course, environmentally unfriendly. The process described above has as its objective the assigning of priority to trade distorting measures that adversely affect the environment. The value of subsidies designed to facilitate the adoption of environmentally friendly technology, for example, is well recognised in the WTO Agreements and correspondingly provided for.

Fundamentals

As noted above, the WTO does not inhibit governments from protecting (as they wish) against damage to the environment resulting from the production and consumption of products produced and consumed within national boundaries. There are, however, some features of the WTO rules based system that underpin the potential source of conflict of WTO rules with national environmental regulation and multilateral agreements.

Final products, for example, can be taxed and other charges levied for any purpose thought to be appropriate by national governments. Similarly, there are no problems from a WTO perspective with governments levying taxes according to the process used to produce a product within their territory. However, the understanding that permeates a number of WTO Agreements is that the WTO flexibility only extends to regulation of products produced domestically, domestic production processes, and imported products. It does not extend to the extraterritorial application of measures relating to production processes in exporting countries. This means the manner in which a foreign product is produced is not a basis on which WTO

13 There are, of course, many other sectors where the removal of trade restrictions and distortions will lead to a win win scenario. These sectors include ferrous metals, non-ferrous metals, leather products, textiles and clothing.
The underlying thesis is that should any country wish to influence the manner in which products are produced in other countries - regardless of how appropriate this may be thought by interest groups in the importing country - this should not be translated into discriminatory trade measures. From the perspective of the environment, environmentally unfriendly goods, services - and the production processes that produce them - are categorically different from environmentally friendly ones. While the rationale for environmental regulation is to make discrimination between goods and services mandatory (e.g. based on life cycle analysis), the rationale for WTO rules is to remove it.

Permitting discrimination on the basis of production methods would profoundly affect the application of the principle of non-discrimination which lies at the heart of the WTO legal system. Most notably, WTO Members are bound to grant to the products of other Members treatment no less favourable than that accorded to the products of any other country. Thus, no Member is to give special trading advantages to another or to discriminate against a particular product because of the manner in which it was produced. The GATT also stipulates that once goods have entered a market, they must be treated no less favourably than equivalent domestically-produced goods. This has profound implications for environmentalists where the manner in which goods are produced is the rationale for discrimination.

It is also source of one of the fundamental concerns of developing countries that permeates much of the discussion in the WTO, not only on matters relating to the environment. Namely, changing WTO rules and practices that enable the extension of domestic production standards in developed countries into developing countries in order for their exports to be acceptable for import into the developed countries. The strength of feeling on the part of many developing countries can not be underestimated. Dealing with attempts to discriminate on the basis of production methods turns potentially constructive debates looking for solutions to important concerns on the part of many Members into damage limitation exercises on the part of the majority of WTO Members. If environmentally unfriendly production methods, or unacceptable labour standards in production processes are the basis for restricting trade then it is frequently argued that this opens the door to protectionist abuse irrespective of how justified the concerns are.

Different Standards different Agreements

As incomes and public awareness increase in many countries, so does concern over the protection of public health and the environment. One outcome of this increased concern is a growth in number of mandatory regulations, voluntary standards and conformity assessment

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14 An imported product can not be discriminated against only because the production process was energy intensive, for example.
procedures.\textsuperscript{16} With more sophisticated products and production processes, not only has the number of regulations increased, so too has their complexity, and the potential for these measures to be used for protectionist purposes. When standards differ between countries, they have the potential for seriously impeding trade. In fact, a large part of the business community consider dealing with standards in different countries to be the most significant barrier to trade which they currently face.\textsuperscript{17} Thus, a particularly important consideration for the maintenance of an open trading system is determining when national standards affecting trade are responding to legitimate concerns.

Concern over the implications of standards for international trade is expressed in various WTO Agreements; in particular, the Sanitary and Phyto Sanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement. Both these agreements have as their objective the avoidance of the use of standards as unnecessary obstacles to trade; protection of health and the environment are perfectly legitimate reasons for establishing national standards that are more demanding than international ones. They also recognise the sovereign right of governments to adopt whatever standards are appropriate to fulfill their legitimate objectives, taking into account the risks that non-fulfilment would create. Determining what are the appropriate standards in the light of scientific evidence and what constitutes legitimacy in terms of public preferences, promises to be one of the most contentious areas of future work for environmentalists and trade officials alike. There have already been serious trade disagreements on the appropriate standards for hormone and anti-biotic treated meat. Those relating to the consumption and trade in products derived from genetically modified organisms (GMOs) have even greater commercial, health, social and ethical considerations at stake. Similarly, the WTO has already experienced the ramifications of the use of trade measures for the enforcement of standards for fishing practices to conserve endangered and other species of marine life, and may experience the same problems with respect to measures relating to climate change.

While the WTO is neither a standard setting, nor a standard enforcing body, the relevance of standards for its work can be broadly dealt with under two headings. The first relates to implementing the rules that permit national sovereignty in the choice of domestic standards without them being used as disguised barriers to trade. To minimise any potential problems in this respect, a common element of the WTO Agreements is that they encourage Members to adopt common standards established by international bodies (such as ISO), and in the event of there being no such standard, encourage the recognition of the equivalence of the standards of other Members. The second relates to the role of the WTO with respect to trade measures used to enforce international standards (such as those established by multilateral agreements), as well as unilateral trade measures used to enforce the international adoption of preferred domestic standards where such agreements do not exist.

\textsuperscript{16} Unless otherwise specified, the term "standard" will be used to cover both mandatory regulations and voluntary standards.

\textsuperscript{17} As part of the "Cecchini Report", a survey was undertaken of eleven thousand business leaders in the European communities who were asked to rank the importance of national standards and regulations, along with seven other general categories of trade impediments, as a hindrance to intra-Community trade. In four major EC countries, business leaders ranked divergent national standards and regulations, \textit{at the top} of their list of internal market barriers. The EC-wide average of all responses placed standards as the \textit{second} most important obstacle to intra-Community trade. See Checchini (1988), "The European Challenge, 1992, The Benefits of a Single Market".
The relative weight assigned to science and societal choice in the determination of standards underpins much of the possible future disagreement over the legitimacy of standards (as against disguised restrictions on trade) within the context of dispute resolution in the WTO. What is the minimum degree of scientific validation that is required for a trading partner (i.e., current or potential supplier of imports) to be obliged to accept a standard as being appropriate? What is the role of "precaution" if there is insufficient scientific evidence to establish a standard based on scientific evidence, but the consequences of error to society of not setting the standard are substantial? It would most be surprising if matters relating to risk assessment and risk management do not become increasingly important in WTO legal proceedings, and as a consequence, the agreements that deal with them.

The Precautionary Principle is an increasingly important concept in environmental matters. It responds to the gap between banning a product or procedure until science has proven its complete harmlessness, and not banning the product or procedure until science has proven that there is a real risk. The theoretical underpinnings of the Precautionary Principle are, however, elusive and difficult to define. Precaution is a "culturally framed concept … muddled in policy advice and subject to the whims of international diplomacy and the unpredictable public mood over the true cost of sustainable living." Not surprisingly, the Precautionary Principle has flexibility in its application and can fit many existing policies.

The Precautionary Principle has already secured its place in a number of international agreements. According to the Rio Declaration on Environment and Development: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” The Biodiversity Convention states that “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat”.

It can not be disputed that precautionary measures should be taken when there is sufficient scientific proof for action and when inaction would lead to irreversible harm to the environment. One controversial issue of the Precautionary Principle concerns the determination of when the threshold shifts the burden of proof towards protection of the environment, or heath and safety. This threshold can be high, such as ‘serious or irreversible harm to the environment’, or a lower threshold, as ‘may cause harm to the environment’. Not surprisingly there is no consensus with respect to the acceptance of the Precautionary Principle as a basis for establishing

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20 See UNEP, Convention on Biological Diversity, Convention, Preamble, Paragraph 9, UNEP/CBD/94/1, Geneva, November 1994, Switzerland.
obligations in national and international rules. The potential implications for a number of WTO Agreements are significant.

The Agreement on Sanitary and Phytosanitary (SPS) Measures, an outcome of the Uruguay round, applies to measures to protect humans, animals and plants from additives, contaminants, toxins or disease causing organisms in food substances as well as the spread of disease by pests or animals or plants. SPS measures must be based on science, should be applied only to the extent necessary to protect human, animal or plant life or health, and should not arbitrarily or unjustifiably discriminate between Members where similar conditions prevail. While other multilateral agreements, regulation must be on the basis of science; only emergency measures can be taken in the absence of science. This is a very different approach to precaution which is found in, for example, the Biosafety Protocol. Likewise, the WTO Technical Barriers to Trade Agreement recognizes the rights of governments to adopt measures, to the extent they consider appropriate for the protection of human, animal or plant life or health, or for the protection of the environment. The Agreement encourages WTO Members to use, whenever appropriate, relevant standards or conformity assessment guides/recommendations issued by international standardizing bodies as a basis for their technical regulations and conformity assessment procedures. Nevertheless, the Agreement recognises that there are good reasons for mandatory regulations and voluntary standards to differ between countries. In this respect, the TBT Agreement specifically recognises priorities with respect to the environment; "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, and plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate". While legitimate differences can be fully reflected in domestic regulations, here too, scientific evidence is required as a basis for regulations that differ international norms. The absence of a formal recognition of the precautionary principle makes a significant difference with other relevant agreements such as the Climate Change Convention.

Multilateral Environment Agreements

One of the most actively discussed items on the agenda of the Committee on Trade and Environment is the relationship between the provisions of the multilateral trading system and the use of trade measures in Multilateral Environmental Agreements (MEAs). As the WTO and MEAs represent two different bodies of international law, it is clear that the relationship between them should be fully understood and coherent. There are many practical implications. An example is what would be the implications of a measure taken in accordance with a Multilateral Environment Agreement (MEA) but which violated the same country's obligations under the WTO. Under which body of law would disputes be resolved.

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22 The Agreement lists policy objectives that may be deemed "legitimate" including national security requirements; prevention of deceptive practices; protection of human health or safety, protection of animal and plant life or health, or the environment.

23 The Committee was also charged under this heading to examine the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system.
A number of Multilateral Environment Agreements contain provisions relating to trade. For example, the three of the most comprehensive MEAs that contain trade measures, the Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Basel Convention on the Control of the Transboundary Movements of Hazardous Waste, all use a combination of trade measures and incentives in order to reach their intended environmental objectives. The nature of the measures differ as well as the conditions pursuant to which the measures are taken. The United Nations Framework Convention on Climate Change provides some useful insights as to why serious consideration should be given to the possible inconsistencies between the provisions of MEAs and the WTO. Importantly, the Climate Change Agreement is still under negotiation and the possibility exists to ensure that whatever is agreed to is consistent with WTO provisions, or, alternatively, the appropriate formal recognition of any inconsistencies is fully registered by WTO Members. Further, the commercial and political importance of the Climate Change Agreement is such that the implications of a lack of coherence between the trade and climate change regimes would be no small matter.

Differing views have been advanced in the CTE with respect to how the possible inconsistency between WTO rules and those in an MEA could be addressed. In a broad perspective, it could be argued that that when account is taken of the limited number of MEAs that contain trade provisions, and the fact that no trade dispute has arisen over the use of those provisions, no real problem exists. A more proactive view comes from a recognition of the increasing commercial and political importance of some MEAs dealing with transborder

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24 The Montreal Protocol (1989 entry into force; 161 signatories) has as its intention the prevention of further depletion of the ozone layer that protects the earth against ultra violet rays. The Protocol countries signatory countries to ban, or phase out, the production of CFCs and other ozone depleting substances. The signatories are prohibited from trading in these products with any country that has not signed the Protocol, unless that Party can prove that it meets the environmental requirements of the Protocol. See Donald M. Goldberg et al CIEL, Effectiveness of Trade and Positive Measures in Multilateral Environmental Agreements: Lessons from the Montreal Protocol, 1998. The Convention on International Trade in endangered Species (1975 entry into force; 132 signatories) is the oldest of the board based MEAs that uses trade measures to protect the environment. The Convention bans trade in either live endangered species or the parts of dead ones. For a discussion see Dale Andrew, Experience with the Use of Trade Measures in CITES Joint Session of Trade and Environment Experts, OECD document OECD/GD(97)106. The Basle Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (1992 entry into force; 113 signatories) imposes bans on the trade in hazardous wastes for final disposal between OECD and non OECD countries. For a discussion of the Basle Convention see Jonathan Krueger, The Basel Convention and Transboundary Movements of Hazardous Wastes. The Royal Institute of International Affair, Briefing Paper No. 45, May 1998. The Biosafety Protocol (under negotiation) has as its intention the creation of an advanced informed agreement procedure for importing or exporting living things that have been genetically modified.


problems currently under negotiation, such as those to addressing climate change. This leads to
the view that it is important to ensure that the appropriate measures are in place to avoid any
conflict of the trade and environment regimes; to adopt a preventive attitude and provide greater
certainty as concern grows about the collective impact of individual countries on the global
commons. As a result of the extensive discussion on this topic in the CTE, a vast array of
proposals have emerged as how best to accommodate the relationship between MEAs and the
WTO.\(^\text{27}\)

What has clearly emerged from the discussion in the CTE is the acceptance by Members
that MEAs are the best way of coordinating policy action to tackle global and trans-boundary
environmental problems cooperatively. Also, WTO Members have made clear that they do not
want the WTO to become an environment policy-making organisation or an environmental
standards enforcement agency. It is clear to WTO Members that they have no special expertise
on how to deal with environmental problems, and that MEAs are the best way of coordinating
policy action to tackle global and trans-boundary environmental problems cooperatively. The
argument has been advanced that clarifying the relationship between MEAs and the WTO should
be a priority.

The framework for the relationship could be created through amending one or more of
the WTO Agreements, or through the drafting of an Understanding on Interpretation as was the
case with certain GATT Articles in the Uruguay Round. For example, there could be an
amendment to the Exceptions provisions of the WTO. Measures taken to protect the
environment that would otherwise be inconsistent with the WTO could be automatically
accepted if they were taken pursuant to an MEA that provided for such measures. There would
need to be agreement on which MEAs were relevant. While a list could be drawn up or the
characteristics of a relevant the MEA defined, it is hard to imagine that this could be the
responsibility of trade officials alone. Close coordination with environment ministries would be
of primary importance. The issue remains, however, as to whether it is appropriate to provide
for differentiated treatment for trade measures applied pursuant to the environment agreement,
depending on whether they apply between Parties or against non-Parties, and whether or not the
measures are specifically mandated in the environment agreement.

There is also the possibility for Members to seek, in exceptional circumstances, a waiver
from a WTO obligation, subject to approval at a minimum by three-quarters of the
WTO membership. A waived obligation is time-limited, and must be renewed periodically.
While this approach provides a measured case-by-case response to inconsistent measures taken
for environmental purposes, its time bound nature can limit its acceptability. Modified waiver
procedures could, however, open the door to abuse if used as a general basis for legitimising
WTO inconsistent measures. It would have to be clear that they would relate to mesures for
environmental purposes taken in accordance with a relevant MEA.

\(^{27}\) For a particularly comprehensive presentation of these and other proposals made in the CTE, see Kenneth P.
Ewing and Richard D. Tarasofsky,\textit{, The Trade and Environment Agenda: Survey of Major Issues and Proposals,
from Marrakesh to Singapore}, IUCN (The World Conservation Union), Environment Policy and Law Paper No. 33,
The charge is laid by some that the WTO is ignoring its responsibilities by not dealing with environment problems more directly. The Preamble to the Agreement Establishing the WTO and the desire for the "optimal use of the world's resources in accordance with the objective of sustainable development" is cited in this respect. It is argued that by not taking decisions on the environment (e.g. by not permitting unilateral action on the part of some countries or formally authorizing multilateral action by countries taking trade measures under certain conditions), the WTO is on a de facto basis a player in the field of environment policy. The argument countries that by denying access to the WTO dispute settlement mechanism for the purposes of enforcing environmental standards prohibits the use by environmentalists to a powerful and effective tool.

Conclusion

In the larger picture what is being sought in the present discussion is a framework within which the instruments of global governance can be dealt with in a coherent manner. This broader objective lies behind the search for a consistent and mutually supportive role for trade and environment policies in the international arena. What is critical for this approach to be successful is a full appreciation of the interlinkages between the various agreements multilateral and close cooperation and co-ordination at the national level.