How to Overcome the Dichotomy Between WTO Rules and MEAs?

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Introduction

The Johannesburg Summit[1] reaffirmed the commitment to sustainable development, which is based on principles and a programme of action as provided for by the 1992 United Nations Conference for Environment and Development, which was convened in 1992 in Rio de Janeiro.[2] Sustainable development links economic and social development and environmental protection.[3] As an important element of welfare and economic development, trade has already been addressed by the 1992 Rio Declaration. The Declaration[4] calls for "a supportive and open international economic system" to promote economic growth, sustainable development, and to better address the problems of environmental degradation. Furthermore, it is stated that trade measures for environmental purposes should neither constitute a means of arbitrary or unjustifiable discrimination nor a disguised restriction on international trade and that transboundary or global environmental problems should be addressed on the basis of an international consensus. About two years after the Rio Conference, the WTO was established and its vast body of substantial law entered into force. To some degree, the new trade regime does accommodate the results of the Rio Conference and – most importantly – its principle of sustainable development. The first paragraph of the preamble of the Agreement Establishing the WTO refers to that principle and the need for protection and preservation of the environment.[5] Furthermore, a high-ranking institution, the Committee on

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[1] See Johannesburg Declaration on Sustainable Development, adopted at the 17th plenary meeting of the World Summit on Sustainable Development, on 4 September 2002, <www.un.org\esa\sustdev\-documents\WSSD_POI_PD\English\POI_PD.htm> and the Johannesburg Plan of Implementation, <www.un.org\esa\sustdev\documents\WSSD_POI_PD\English\POIToc.htm>.

[2] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26.

[3] Johannesburg Declaration, para. 5.

[4] Principle 12 reads as follows: "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."

[5] Para. 1 of the preamble of the Agreement establishing the WTO reads in part: "... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable devel-

Trade and Environment (CTE), was established to address issues of the interrelationship between the trade regime and environmental issues.[6]

Around the same time, a broad discussion began on the relationship between environment and trade, which was based on the 1991[7] and 1994[8] GATT panels on import restrictions regarding tuna. This interrelationship is to this day a delicate and a difficult one, attracting much attention, both from the general public and within academia.[9] However, unilateral environmental measures, which were the subject of those two panels, do only represent one side of the coin. The other part of the problem relates to multilateral environmental agreements (MEAs) and the trade-related measures which they provide for.

Multilateral action is based on some consensus and agreement, represented by multilateral environmental agreements (MEAs). Such action has not been the subject of dispute settlement so far.[10] However, potential clashes between MEAs and trade rules could raise questions concerning the coherence of the international legal order and damage the reputation of both regimes at stake. In the following, the relationship between MEAs and trade rules and related work of the CTE will be briefly outlined (I.), including a number of proposals which aim at clarifying that relationship (II.). Meanwhile, the issue has progressed from analysis and discussion to negotiation. The mandate of the new WTO round, the Doha round, envisages negotiations on the issue.[11] As will be seen, however, the mandate is a rather limited one (III.). The Johannisburg Summit did support and endorse the mandate of the Doha round without any further specification.

As will be shown, inconsistencies between substantive MEA and trade rules may occur and, even more, MEA compliance procedures and WTO dispute settlement may be invoked in parallel without proper coordination. However, in order to achieve a state of affairs where environmental and trade regimes are mutually

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opment, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, ...".

[6] Trade and Environment, Decision of 14 April 1994 of the Marrakech Conference, MTN/TNC/45(MIN). See Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

[7] United States: Restrictions on Imports of Tuna, GATT Doc. DS21/R (3 September 1991), largely referred to as *Tuna/Dolphin I*.

[8] United States: Restrictions on Imports of Tuna, GATT Doc. DS29/R (16 June 1994) (known as *Tuna/Dolphin II*).

[9] See for an overview: Selective Bibliography on Trade and Environment 1995-2002, Note by the Secretariat, WT/CTE/W/213, 12 June 2002 and Annotated Bibliography of Selected Literature Concerning Compliance and Dispute Settlement in the WTO and in Multilateral Environmental Agreements, Note by the Secretariat, WT/CTE/W/197, 25 June 2001 and Gabrielle Marceau, Conflicts of Norms and Conflicts of Jurisdictions. The Relationship Between the WTO Agreement and MEAs and Other Treaties, Journal of World Trade (JWT) 35 (2001), 1081–1131, Doaa Abdel Motaal, Multilateral Environmental Agreements (MEAs) and WTO Rules. Why the "Burden of Accommodation" Should Shift to MEAs, JWT 35 (2001), 1215–1233; Sabrina Shaw/Risa Schwartz, Trade and Environment in the WTO. State of Play, JWT 36 (2002), 129–154.

[10] See, however, the *Swordfish* case, *infra*, at note 43.

[11] See the Doha Declaration, *infra* note 76 and II. 1.

supportive, more is required than just troubleshooting in situations where inconsistencies occur. Such inconsistencies result from an incoherence in national and international policymaking. In order to address such environment-and-trade dichotomy, one would have to carefully take this institutional and political dimension into account.

I. Understanding the Environment-and-Trade Relationship

In the environment-and-trade discussion, the CTE has assumed a very helpful and important role. The relationship between MEAs and trade rules has been part of the work programme of the CTE from the very beginning, which is based on the decision on trade and environment of the Marrakesh Conference.[12]

The CTE has extensively discussed various aspects of the interrelationship between trade and MEAs, including a discussion on particular MEAs, their dispute settlement systems,[13] and the co-operation between the secretariats of MEAs and the WTO.[14]

It addressed some of the often-cited examples of trade-related measures. One is the restriction on trade by export and import controls as envisaged by Article II and III of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) in view of endangered species and species threatened with extinction, according to Appendix I to the Convention.[15] Another example is the ban on imports of ozone-depleting substances from non-parties according to Article 4 *lit.* a of the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987.[16] Also, the Basel Convention[17] has been mentioned in this regard. According to its Article 4.1 *lit.* a, Parties have a right to ban import of hazardous waste. If they do so, the other Party involved is obliged to prohibit export of covered waste to Parties that have banned such imports, *lit.* b.

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[12] See *supra*, note 6. According to that decision, item 1 of the work programme of the CTE relates to "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements". Additionally, item 5 of the work programme of the CTE is relevant, which relates to "the relationship between the dispute settlement mechanisms of the multilateral training system and those found in multilateral environmental agreements". See Shaw/Schwartz (note 9), at 130 et seq.

[13] UNEP Meeting on Compliance, Enforcement and Dispute Settlement in Multilateral Environmental Agreements and the WTO, 26 June 2001, WT/CTE/W/199, 20 July 2001; Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements, Note by the WTO and UNEP Secretariats, WT/CTE/W/191 of 6 June 2001; Dispute Settlement Provisions in Multilateral Environmental Agreements – Note by the Secretariat, PC/SCTE/W/4, 20 October 1994; see also *infra*, at I D.

[14] See for details, *infra*, at III. 2.B.

[15] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973.

[16] Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 and Amendments.

[17] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989.

1. The CTE Matrix on Trade Measures Pursuant to Selected MEAs

An important outcome of the work of the CTE has been the "matrix on trade measures pursuant to selected MEAs" [18], which indicates some 30 MEAs out of 238 instruments which contain potential trade measures.[19]

As regards the type of agreements, the list may be summarized as follows: Potential trade measures are contained in all MEAs concerning the transboundary transfer of a certain hazardous material, including instruments on the transboundary movement of hazardous waste and their disposal – the Basel Convention – [20] on certain hazardous chemicals and pesticides,[21] on genetically modified organisms,[22] and persistent organic pollutants.[23] All these instruments have in common that they encourage the import State to take an informed decision on the import of those materials. The same holds true for instruments relating to the protection of plants.[24]

Another group of instruments relates to the protection of certain ecosystems and species. It includes CITES and, for instance, the International Convention for the Protection of Birds of 1950[25]. Also, a number of instruments for the protection of nature, fauna[26] and flora are mentioned in this regard.[27]

A third category of instruments concerns the conservation, management, and use of certain stocks of living resources,[28] especially marine living resources[29] and species.[30]

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[18] Matrix on Trade Measures Pursuant to Selected MEAs, Note by the Secretariat, Revision, WT/CTE/W/160/Rev.1, 14 June 2001.

[19] List of MEAs Containing Potential Trade Measures, ibid. Annex.

[20] *Supra*, note 17.

[21] Rotterdam Convention on the Prior Informed Consent Procedure (PIC) for Certain Hazardous Chemicals and Pesticides in International Trade, 1998 (not yet in force).

[22] Cartagena Protocol on Biosafety, 2000 to the Convention on Biological Diversity, 1992 (not yet in force).

[23] Stockholm Convention on Persistent Organic Pollutants (POPs), 2001 (not yet in force).

[24] International Plant Protection Convention, 1951; Plant Protection Agreement for the South-East Asia and Pacific Region, 1956; Agreement Concerning the Cooperation in the Quarantine of Plants and their Protection against Pests and Diseases, 1959; Phyto-Sanitary Convention for Africa, 1967.

[25] See also the Benelux Convention Concerning Hunting and the Protection of Birds, 1970.

[26] European Convention for the Protection of Animals During International Transport, 1968; Wellington Convention for the Prohibition of Fishing with Long Drift Nets in the South Pacific, 1989.

[27] Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933, which was superseded by the African Convention on the Conservation of Nature and Natural Resources, 1968; ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985 (not yet in force); Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, 1940; African Convention on the Conservation of Natural Resources, 1968; Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Protocol of the Cartagena Convention), 1990.

[28] International Tropical Timber Agreement (ITTA), 1994.

[29] International Commission for the Conservation of Atlantic Tunas (ICCAT), 1966; Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries, 1978; Convention on the

Furthermore, instruments relating to climate change[31] and the protection of the ozone layer and especially the Montreal Protocol are mentioned.

As the matrix indicates, MEAs envisage trade-related means in various ways. Trade bans, even in view of non members,[32] import and export controls and measures[33] which relate to the transfer of technology and intellectual property rights[34] may be mentioned here. Also, one has to distinguish between mandatory provisions, rules which oblige members to achieve certain aims without precisely spelling out the measures to be adopted and, cases where States are given the authority to take certain measures without an obligation to do so.[35]

2. Early Stocktaking: the Singapore Consensus

Already the 1996 report of the Committee, submitted to the Singapore WTO Ministerial Conference, contained important conclusions[36] which were later on referred to as the "Singapore Consensus"[37].

The Committee held that "WTO agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals and ... due respect must be afforded to both."[38] It was considered that, while trade measures are not necessarily the most effective instrument to be used in MEAs, they can play an important role in certain cases.[39] Furthermore, the Committee concluded that "a range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to MEAs".[40] The Committee was confident that any

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Conservation of Antarctic Marine Living Resources (CCAMLR), 1980; Convention for the Conservation of Southern Bluefin Tuna, 1993; United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement), 1995 (not yet in force).

30 Convention for the Conservation and Management of the Vicuña, 1979.

31 United Nations Framework Convention on Climate Change (UNFCCC), 1992 and the Kyoto Protocol, 1997 (not yet in force).

32 See, for instance, the Montreal Protocol, *supra*, text accompanying note 16.

33 See the Basel Convention and similar regimes, *supra*, text accompanying notes 20 to 23.

34 Shaw/Schwartz (note 9), at 138 et seq.

35 This is especially relevant in view of the ongoing negotiations in the Doha round, which relate to specific trade obligations, see *infra*, at III B 1.

36 Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

37 Multilateral Environmental Agreements (MEAs) and WTO Rules; Proposals Made in the Committee on Trade and Environment (CTE) from 1995-2002, Note by the Secretariat, TN/TE/S/1 of 23 May 2002, at III.

38 Ibid., para. 171.

39 Ibid., paras. 173 and Multilateral Environmental Agreements (MEAs) and WTO Rules; TN/TE/S/1 of 23 May 2002, at III.

40 Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, paras. 174 (ii) et seq.

dispute arising could be effectively dealt with by the WTO dispute settlement system, even including cases where specific expertise was needed.[41]

As a result of the stock-taking exercise, it was highlighted that only a relatively small number of MEAs included trade measures and that at that time, no GATT dispute settlement had been initiated in this regard.[42] However, it should be noted that meanwhile, such a dispute did arise in the case of the EU-Chile controversy on swordfish. It was, however, settled.[43]

3. Conflicts Between Particular Rules and Norms

In more general terms, the relationship between environment and trade is often considered a conflict between agreements.[44] However, from a legal perspective, potential inconsistencies will rather occur between particular rules of certain agreements. Such inconsistencies are not likely to occur in great number and can be prevented by some trade mechanisms. However, it is not entirely foreclosed that such inconsistency may happen.

As the CTE has concluded, only a few MEAs contain trade-related rules. Also, a number of those rules are discretionary and thus allow for some flexibility on the side of State parties or competent treaty bodies to find ways to adopt measures which are in conformity with WTO rules.

A. Reconciling Environment and Trade Issues by Trade Mechanisms

Furthermore, the WTO legal order and especially the exemptions provided for by Article XX GATT 1994 are considered to bear some potential to accommodate the objectives and rules of environmental instruments.[45]

Article XX GATT 1994 pays tribute to the sovereignty of WTO members. It allows for action of members in a whole range of specified policy areas by exempt-

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[41] Ibid., paras. 178 et seq.

[42] Ibid., para. 174 (i).

[43] On 26 April 2000, the European Union requested consultations within the WTO dispute settlement procedure, see Chile – Measures Affecting the Transit and Importation of Swordfish, Request for Consultations by the European Communities, WTO WT/DS193/1. In turn, Chile brought the matter to the International Tribunal for the Law of the Sea, see Case concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile / European Community)*, Constitution of Chamber, Order 2000/3 (following: Order 2000/3), 20 December 2000, see Peter-Tobias Stoll/Silja Vöneky, *The Swordfish Case: Law of the Sea vs. Trade*, Symposium "Enforcement and Dispute Settlement in a Progressive International Legal System" on the occasion of Rüdiger Wolfrum's sixtieth birthday, ZaöRV 62 (2002), 21-35; Jan Neumann, Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen. Die Problematik paralleler Streitbeilegungsverfahren am Beispiel des *Schwertfisch*-Falls, ZaöRV 61 (2001), 529-573.

[44] Cf. Marceau (note 9), at 1083 et seq.

[45] Cf. GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g), WT/CTE/W/203, 8 March 2002.

ing the application of measures taken for certain objectives from WTO rules and concessions under some conditions. As far as environmental measures are concerned, Article XX *lit.* g) and b) are relevant.

Lit. g) concerns measures "relating to the conservation of exhaustible natural resources" and specifically requires that such measures "are made effective in conjunction with restrictions on domestic production or consumption ...". *Lit.* g) is understood to cover a wide range of policies and measures taken to the conservation of environmental goods and, most importantly, also covers living resources.[46]

Furthermore, Article XX *lit.* b) is relevant in this regard, which allows for measures "necessary to protect human, animal or plant life or health".[47] There is much agreement that both exemptions cover an important range of possible environmental policies and measures.

In order for a measure to be exempted from general WTO obligations and concessions, in addition to matching one of the particular cases mentioned in *lit.* a-j, the introductory clause of Article XX requires 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".[48]

Article XX of GATT 1994 is considered an important element in the environment-and-trade interrelationship for a number of reasons. First of all, it does not refer to different rules but rather to the adoption or enforcement of measures and their application. Thus, rather than addressing a conflict of rules at an abstract level, Article XX focuses on their application. Furthermore, it is widely agreed that the additional criteria of the chapeau of Article XX contain important principles regarding environmental measures, which are considered important to observe and to maintain. At this very point, it becomes clear that, rather than giving preference to MEAs or trade rules in their entirety, an approach is favoured which aims at applying rules of both agreements in parallel.[49]

B. Conflict of Rules Addressed by the International Law of Treaties

While Article XX GATT 1994 is deemed to appropriately accommodate multilateral environmental policies and rules, it cannot be considered to solve the problem entirely. There is at least some remote possibility that the exemption clause, in spite of its flexibility, will fall short of covering all potential aspects of a MEA rule.

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[46] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report and Panel Report, 6 November 1998, WT/DS58.

[47] See, for instance: *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report and Panel Report, 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

[48] See WT/CTE/W/203, at para. 57 et seq.

[49] This can be considered to be in line with Principle 12 of the Rio Declaration, see *supra*, note 4.

If all efforts fail to achieve an interpretation which allows for the application in harmony of a MEA provision and trade rules, general principles of the international law of treaties, such as the *lex posterior* and the *lex specialis* rules will have to be applied.[50]

However, it is questionable whether the implication of those principles could provide for satisfactory solutions in cases of a conflict between MEA and trade rules. Both the international environmental and the international trade legal order have seen some rapid developments over the last few years, including the amendment and the adoption of additional agreements and protocols which will make it very difficult to apply the *lex posterior* rule. Also, environmental and trade agreements have different objectives, which will render it very difficult to ascertain which one is more specific with regard to the principle of *lex specialis*. In sum, it appears that in a small but relevant number of cases, an irreconcilable conflict of environmental and trade rules will occur, while there exist doubts as to whether the existing international law mechanisms to solve those conflicts will provide for satisfactory solutions. Even taking into account the small number of probable cases, this result raises some concerns with a view to the coherence of the international legal order.

4. Conflicting Compliance and Dispute Settlement Procedures

The relevance of the exemptions under Article XX GATT 1994 within the context of the interrelationship between MEAs and trade rules is also due to the fact that the trade dispute settlement system under the WTO is a very efficient procedure which is likely to attract a large number of potential controversies in this subject area.[51] This raises the further question whether WTO dispute settlement can properly take into account MEA rules and, even more, whether it does duely respect the proper procedures within MEAs for the settlement of disputes and for ensuring compliance.

As far as substantive MEA rules are concerned, they can be and often are taken into account when panels or the Appellate Body judge upon a particular measure and its appropriateness and necessity to apply Article XX GATT 1994. However, due to their proper task to apply and enforce trade rules, it would be difficult for WTO dispute settlement bodies to conclude that a MEA provision takes preference over a trade rule on the basis of the international law of treaty principles and to apply such provision instead of trade rules in a given case.[52]

If a MEA provides for a proper compliance or dispute settlement procedure, situations may arise where both such procedures and the WTO dispute settlement are initiated in parallel. This was the case in the swordfish controversy between

[50] Marceau (note 9), at 1086 et seq.
[51] Shaw/Schwartz (note 9), at 145 et seq.; Marceau (note 9), at 1101 et seq.
[52] Marceau (note 9), at 1102 et seq.

Chile and the EU. As the proceedings were settled in an early stage, there is still no precedence that gives an idea of how to handle those cases. Suggestions include an element of deference to be applied, [53] a postponing of one of the procedures, some sort of cooperation between bodies involved, and a ruling of the International Court of Justice.[54]

5. The Conflict Between Environmental and Trade Bodies and their Activities

Apart from conflicts concerning particular rules or jurisdiction, there is a third dimension of the interrelationship between MEAs and the trade order, which relates to the institutional setting. This dimension becomes relevant in view of the further implementation and development of MEAs. Due to the fact that MEAs often extensively rely on the work of their bodies in view of their further implementation, this aspect plays an important role. Indeed, the CTE matrix contains a number of examples of decisions of MEA bodies concerning trade-related environmental measures.[55]

6. The Issue of Non-parties to a MEA

Although MEAs and WTO are multilateral treaties which enjoy much support around the world, their membership is likely to differ to some extent. Measures taken under a MEA may affect trade with non-parties and – even more – some MEAs do specifically provide for action against non-members.[56] The ban on trading controlled substances with non-parties to the Montreal Protocol may serve as an example in this regard. Such measures affect rights and obligations under the WTO. In general, a State has to refrain from taking actions which are inconsistent with its trade obligations.[57] However, Article XX GATT 1994 may to some extent even cover measures which are taken on the basis of a MEA against a non-member. As has been seen, Article XX focuses on a particular measure rather than on the

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[53] See II.3 and Neumann (note 43), at 462 et seq.

[54] Marceau (note 9), at 1108 et seq.

[55] Matrix on Trade Measures Pursuant to Selected MEAs, WT/CTE/W/160/Rev.1 under II – International Commission for the Conservation of Atlantic Tunas (ICCAT), 1966 – Resolution by ICCAT Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, 1994, *lit.* f. (providing for non discriminatory trade measures) and under III – CITES (note 15), Resolutions Conf. 10.10, 10.14, 10.12 concerning trade quotas for ivory, leopard skins and sturgeons and IV – Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), 1980, conservation measures 118/XVII, 119/XVII, 170/XVIII, V – Montreal Protocol (note 17), the IXth Meeting of the Parties – Trade Controls in Methyl Bromide, VI – Basel Convention, 5th. Conference of the Parties – "Basel Declaration on Environmentally Sound Management".

[56] See *supra*, text accompanying note 32.

[57] Marceau (note 9), at 1093.

underlying legal commitment. If conditions and criteria stipulated by that Article are met, a measure will be exempted from general WTO disciplines. The existence of an international legal commitment or authority to adopt measures is neither required nor sufficient in this regard. However, MEAs can and have been taken into account when considering the particular conditions and criteria. They may indicate the existence of an environmental problem or the necessity of certain measures under Article XX *lit.* b GATT 1994. They may also be considered to assess whether a measure is taken "in view of conservation of exhaustible natural resources" under Article XX *lit.* g of GATT 1994.

7. Summing Up: A Dichotomy and its Causes

Looking at existing instruments, the MEA-and-Trade relationship bears some outstanding conceptual challenges. The case of irreconcilable rules and – even more – a potential duplication of procedures represent a formidable challenge for international law scholars and practitioners. Already the pure possibility of such inconsistencies has to be taken serious, as it may damage the coherence und hence the reputation of the international legal order. It has to be recalled that both environmental and trade policies very much depend on such order and its integrity in order to achieve their goals. However, it has to be added that in practice, potential inconsistencies are likely to occur in a rather limited number of situations only. Also, so far, those situations have been handled quite reasonably and there is some potential to resolve such difficulties on a case-by-case basis.

Apart from the exercise of resolving particular cases concerning existing instruments, however, a closer look to the causes of a "conflict" between MEAs and the trade system is required with a view to their future relationship. Sooner or later, any discussion on a potential conflict between environmental and trade rules has to face the fact that inconsistencies between multilateral environmental and trade rules reflect an inconsistency of policymaking by States. This point is often made in the debate.

However, inconsistent policymaking has an international dimension, too. This dimension relates to the issue-oriented architecture of the international system. International regimes focus on certain issues and objectives. Environment and trade are organized separately. Thus, a lack of coherence in policymaking has two dimensions: a national and an international one.

Inconsistent policymaking does hardly occur by accident only. It may also result from pressures by different communities and groups which act both at national and international level. International regimes are likely to attract a lot of support and effort from communities which pursue similar goals. However, such regimes may experience even more difficulties than national governments in achieving coherence in policymaking in areas which are intensively debated as a result of a divide, not only of regimes and governmental agencies, but also of societies as a whole.

In sum, due to its separated regimes, the international institutional structure to promote coherence in the future is rather limited. A dichotomy between environment and trade issues therefore has a strong institutional and political dimension.

II. Towards a New Environment-and-Trade Interface: The Options

While most members within the CTE agree on the analysis regarding the interrelationship between MEAs and trade rules, views vary considerably concerning the conclusions to be drawn therefrom. A number of members and commentators consider the existing structures of the interrelationship to be sufficient. They maintain that according to recent decisions in dispute settlement, the exemptions available under Article XX GATT 1994 are suitable and sufficient to allow for environmental objectives to be pursued by trade means. Also, some members might fear that their trade interests and rights might be put at risk if some more flexibility was to be afforded to environmental objectives within the trade system. [58]

On the other hand, a number of proposals have been made which are felt to be required in order to clarify the MEA-and-trade relationship.[59] In the discussion, two issues have been raised in this regard: *ex ante* predictability and *ex post* scrutiny. The former relates to the predictability of the conformity of an environmental measure with trade rules. The latter concerns the kind of test applied to an environmental measure in WTO dispute settlement.

1. Proposals Concerning Article XX GATT 1994

The proposals focus on the exemption mechanism in Article XX GATT 1994. They are aimed at broadening the scope of the exemption under that article, while at the same time defining some additional procedural elements.

Such broadening, it is proposed, could be achieved by specifically mentioning measures taken under MEAs[60] or more generally the protection of the environment[61] within the catalogue in Article XX.

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[58] Shaw/Schwartz (note 9), at 131, 134 et seq.; Motaal (note 9), at 1219.

[59] Shaw/Schwartz (note 9), at 135 et seq.

[60] A proposal of the EU would add a new *lit.* k to Article XX which would read: "Taken pursuant to specific trade provisions of an MEA complying with the 'Understanding on the Relationship between Trade Measures taken Pursuant to MEAs and WTO Rules'.", see Non-Paper, 19 February 1996, cited by: Multilateral Environmental Agreements (MEAS) and WTO Rules; Proposals Made in the Committee on Trade and Environment (CTE) from 1995-2002, Note by the Secretariat TN/TE/S/1, 23 May 2002, 6; see Motaal (note 9), at 1224 et seq.

[61] According to another proposal of the EU, Article XX *lit.* b of GATT 1994, which reads "necessary to protect human, animal, plant life or health" would be amended by adding "... or the environment; and measures taken pursuant to specific provisions of Multilateral Environmental Agreements

Those two proposals for amendment of Article XX GATT 1994 would be accompanied by an understanding, which would contain a definition of MEAs, pointing to their legal binding character.[62] It would contain a presumption to that effect that measures taken pursuant to the MEAs are considered "necessary" in view of Article XX GATT 1994 if a number of requirements are met.

A MEA qualifying for such presumption should be open "to participation by all parties concerned about the environmental objectives of the agreement". It should furthermore "reflect through adequate participation, the interests of parties concerned, including parties with relevant significant trade and economic interests ..." Also, MEAs would be required to "inform the WTO of trade measures whose use they envisage ...". These measures "should be subject to the transparency requirements of WTO".

Also, it was suggested to reverse the burden of proof in cases of measures taken under a MEA. In this connection, the objectives and the necessity of a measure taken under a MEA would not have to be proven by the defending party in WTO dispute settlement.[63]

A quite similar approach suggests that the necessity under Article XX *lit.* b will not be tested in dispute settlement if the MEA at hand has met certain criteria to be set up as a understanding or code of conduct.

2. A Multi-Year WTO Waiver

Trade related measures undertaken under MEAs could also be accommodated by a waiver.[64] Under Article IX: 3 of the WTO Agreement, an obligation imposed on a member may be waived by a decision of the Ministerial Conference taken by $^3/_4$ of its members. Article IX: 4 further disciplines such waivers by requiring that the exceptional circumstances justifying the decision and the terms and conditions governing the application of the waiver and the date of its termination shall be indicated in the decision. Waivers which are granted for more than one year, shall be reviewed – according to that provision – annually, in order to examine whether the

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complying with the provisions of the 'Understanding on the Relationship between measures taken pursuant to MEAs and WTO Rules'.", ibid. at 7.

[62] Proposal by the EU, ibid. at 7, "A MEA is an international written instrument adopted in conformity with the customary international law as codified by the Vienna Convention on the Law of Treaties, creating a legal obligation among Parties and aimed at solving environmental problems the solution of which requires action at the international level."

[63] However, such presumption or reversal of burden of proof is opposed by other Members, see, for instance a statement made by India: "Various factors influence the formulation of MEAs, and it cannot be assumed a priori that trade measures incorporated in MEAs will successfully pass the tests of necessity, effectiveness, least trade distortion and proportionality." Non-Paper, 23 July 1996, cited according to: Proposals Made in the Committee on Trade and Environment (CTE) from 1995-2002, Note by the Secretariat TN/TE/S/1, 23 May 2002, at 8; cf. Motaal (note 9), at 1225 et seq.

[64] Shaw/Schwartz (note 9), at 134 et seq.; Motaal (note 9), at 1221 et seq.

exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been fulfilled.

Proposals are made to allow for the automatic renewal of a waiver and to relax the disciplines contained in Article IX: 4 in view of the reviews. Furthermore, some guidelines were proposed which could define the criteria to be met by requests for a waiver. Such guidelines could build on the requirement of a "genuine international consensus" secured by openness and equity in negotiation and participation and proper reflection of consumer and producer nations. Furthermore, notifications to the WTO could be required during negotiations.[65] However, it is understood that the proposal would not entirely foreclose the review option. Also, it is hold that trade measures applied under a waiver would still be open to review in dispute settlement.

3. Deference to be Provided for in the WTO Legal Framework

In more general terms, the promotion of mutual supportiveness is aimed at by proposing an element of deference. On the basis of an interpretative decision, it could be clarified that environmental and trade regimes should both focus on their primary area of competence, while showing deference against each other. In this regard, trade measures taken under a MEA could be presumed to be in conformity with the WTO legal order, while the implementation would still be subject to review under the WTO dispute settlement system.[66]

4. A Voluntary Consultative Mechanism (VCM)

Quite apart from those discussions regarding substantive rules, New Zealand has taken a procedural approach in proposing a Voluntary Consultative Mechanism (VCM).[67] The mechanism envisages "consultation with the country/countries on which trade measures are to be applied". It is supposed to "assist in providing the countries involved with an opportunity to consider a range of policy instruments

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[65] Proposal by Hong Kong, Non-Paper, 22 July 1996, cited in: Multilateral Environmental Agreements (MEAS) and WTO Rules; Proposals Made in the Committee on Trade and Environment (CTE) from 1995-2002, Note by the Secretariat TN/TE/S/1, 23 May 2002: "(1) The MEA should reflect a genuine international consensus. The terms for negotiation and participation should be open and equitable for all interested parties. Participation should reflect the interests of consumer and producer nations of the products covered. MEA negotiators should notify the WTO before the negotiation of a new MEA and inform the WTO of developments at important stages of negotiations; (2) the headnote to Article XX should be met; and (3) the granting of a waiver should not prejudice the rights and obligations of any WTO Member under the WTO DSM (irrespective of whether they are party to the MEA)".

[66] Multilateral Environmental Agreements (MEAs) and WTO Rules; TN/TE/S/1 of 23 May 2002, at II. 11.

[67] WT/CTE/W/162, 10 October 2000, para. 10 et seq.; WT/CTE/W/180, 9 January 2001, paras. 3 et seq.; Shaw/Schwartz (note 9), at 136.

suitable to resolve the specific environmental problem". It is supposed to identify "first-best policy options, targeted at the source of the environmental problem". Such consultations "would minimize conflict between parties on trade and environment policies, while avoiding inefficient environmental and economic outcomes".[68] The proposal envisages applying such consultations also in view of "global environmental problems not covered by a MEA". Furthermore, it is suggested to include such VCMs in MEAs and to use such mechanism prior to applying any measure. The proposal is much in line with the procedural approach taken in the *Shrimps-Turtle* case.

5. Accomodation of Trade Concerns by MEAs

The environment-and-trade relationship could also be addressed by MEAs. Indeed, some recently concluded MEAs do address those questions. The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC-Convention) of 1998[69] as well as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol)[70] concluded in 2000 and, to a somewhat lesser degree, also the Stockholm Convention on Persistent Organic Pollutants of 2001[71] contain preambular language in this regard.[72] Preambular paras 9 et seq. of the Biosafety Protocol, which is nearly identical with the wording in the PIC-Convention, may be cited as an example:

> "Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
>
> Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,
>
> Understanding that the above recital is not intended to subordinate this Protocol to other international agreements, ..."

However, a closer look reveals that the substance of these provisions is quite limited. The first paragraph can be considered a reference to the principle of sustainable develop-

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[68] WT/CTE/W/162, 10 October 2000, para. 10.

[69] Of 15 July 1998, UNEP/FAO/PIC/CONF/2. Preambular paras. 8 et seq. read: "Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development, ... Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection, ... Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements, ...".

[70] 29 January 2000, UNEP/CBD/ExCOP/1/3, Annex.

[71] Stockholm Convention on Persistent Organic Pollutants, 23 May 2001, para. 9 reads: "Recognizing that this Convention and other international agreements in the field of trade and the environment are mutually supportive, ...".

[72] It should be noted, that according to Article 31 para. 2 of the Vienna Convention on the Law of Treaties, for the purpose of interpretation of a treaty, the preamble forms part of the context to be taken into account.

ment and its implications for the relationship between environment and trade. Taken together, the second and third paragraph may be understood to merely recall that the protocol as well as trade rules do coexist at equal level, while their integrity is to be maintained.[73]

Suggestions are made to provide for some sort of prior consultations and procedures in MEAs with regard to potential trade implications of measures. This would be very much in line with the VCM proposal and could prevent inconsistencies in substance as well as in procedural perspective.[74]

7. The Options: Different Approaches

The options represent quite different approaches. Those relating to Article XX chapeau GATT 1994 address substantial questions. They could indeed provide for a clarification and better predictability of the consistency of a measure with WTO rules. Any such changes would be applicable to existing and new MEAs. The proposals would require an amendment of Article XX or some authoritative statement concerning its interpretation and the conclusion of additional rules.[75] The same holds true for the deference option. It would be especially helpful if it would cover not only substantial issues, but could also apply to the conduct of dispute settlement or compliance procedures. However, to achieve clarification, a deference clause would have to be supplemented by more specific guidance.

A waiver could cover a MEA and its application even beyond the confines of Article XX GATT 1994. Such waiver would have to be granted for specific MEAs and would require a qualified decision of the Ministerial Conference and the related political goodwill. A waiver could help to solve particular problems where an inconsistency between environmental and trade rules cannot be reconciled by other means. However, waivers are designed to accommodate exceptional situations on a case-by-case basis and therefore doubts arise if they can be deemed fit to address the MEA-and-trade relationship in its entirety.

The VCM could improve communication and cooperation between States in an early stage of environmental policy implementation. It can be applied on a voluntary basis without any formal decision.

Exploring ways to address the relationship from the MEAs' point of view is required to complement the set of options at hand and may contribute considerably to achieving mutual supportiveness between environment and trade regimes.

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[73] Marceau (note 9), at 1091.

[74] Motaal (note 9), at 1229 et seq.

[75] It has to be emphasized, that any amendment to Article XX GATT 1994, which would specifically address MEAs would broaden the flexibility in view of those agreements, while still allowing for unilateral measures. It is understood, that for most WTO members this would be unacceptable, unless some sort of a limitation is provided for to curb unilateral action, Motaal (note 9), at 1220.

III. Environment on the Trade Agenda: The Doha Mandate

At the 4th WTO Ministerial Conference in Doha, in November 2001, a new WTO round was initiated and its agenda defined. For the first time, environmental issues figure explicitly on that agenda. Para. 6 of the Ministerial Declaration[76] reaffirms the commitment of the WTO system to the principle of sustainable development, which is appraised in the preamble of the WTO agreement. The Declaration further states "that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".

In accordance with this aim, both, the CTE and the Committee for Trade and Development were mandated each to "act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected".[77] Thus, both committees are entrusted with a crosscutting function concerning environmental and developmental aspects, which covers the whole range of negotiations.

Furthermore, the Ministerial Conference instructed the CTE, within its current terms of reference, to give particular attention to a number of issues, including the effect of environmental measures on market access, the TRIPs-agreement and labelling requirements for environmental purposes.[78] Such work, according to the mandate, shall serve to identify "any need to clarify relevant WTO rules" and to make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. A report shall be prepared for the 5th Ministerial Conference, which will take place in Cancun in September 2003.

1. Negotiations Ahead

Most importantly, aside from such instruction regarding the CTE, the Doha mandate in para. 31 also contains a mandate for negotiations. According to para. 31, Ministers agreed to negotiations on three particular issues: (i) the relationship between existing WTO rules and specific trade obligations set out in MEAs, (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees and (iii) "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services".

As far as the relationship between existing WTO rules and specific trade obligations is concerned, the mandate clarifies that "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

[76] Adopted on 14 November 2001, WT/MIN(01)/DEC/120, November 2001.
[77] Para. 51.
[78] Para. 32.

is not a party to the MEA in question ..." Thus, the difficult question concerning the legal effects of MEAs on non-parties and their related rights under the WTO is not covered.

However, this mandate for negotiations has a rather limited scope. According to para. 32 of the Declaration, "... negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries".

2. Work Under the Doha Mandate

In order for the negotiations to take place, the Trade Negotiations Committee (TNC) ordered the CTE to meet in a special session.[79]

A. Substantial Matters

As regards the substantial questions concerning the "relationship between existing WTO rules and specific trade obligations set out in MEAs" (para. 32 i of the Declaration), it became clear soon that the term "specific trade obligation" (STO) is different and more limited in scope than the notion of a "trade measure" which has so far been used within the CTE.[80] Different views are voiced in view of the scope of such STOs.[81] It was widely agreed that provisions are covered which are mandatory and clearly define a certain trade measure.[82] It is understood that the regulation of trade in specimens of species included in Appendix I-III in Articles 3 to 6 of CITES fall under this category.[83] Also, the import prohibition of hazardous waste, the requirement of notification, and the export prohibition, Article 4.1, 6 to 9 and 13 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, are mentioned in this regard.

However, different views were voiced in view of obligations which were not explicit in view of the measure to take but amount to an "obligation de résultat".[84]

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79 Summary Report on the First Meeting of the Committee on Trade and Environment Special Session, TN/TE/R/1, 19 April 2002; Summary Report on the Second Meeting, TN/TE/R/2, 25 July 2002, Summary Report on the Third Meeting, TN/TE/R/3, 31 October 2002.

80 See Summary Report of the Second Meeting, TN/TE/R/2, para. 10.

81 Compilation of Submissions under para. 31(I) of the Doha Declaration, Note by the Secretariat, TN/TE/S/3, 31 January 2003, IV.

82 Submission by India, TN/TE/W/23, 20 February 2003, para. 8.

83 Submission by Japan, TN/TE/W/10, 3 October 2002, para. 11.

84 See submission by Japan, ibid. and submission by Switzerland, TN/TE/W/16, 6 November 2002, para. 7.

Another issue concerns the limits of the mandate as stipulated by para. 32 of the Doha mandate. It is understood to exclude the amendment of existing WTO rules, but according to some statement, will allow the adoption of an interpretative decision, according to Article IX: 2 of the WTO Agreement.[85]

B. MEA – WTO Cooperation

Para. 31 (ii) of the Doha mandate addresses an important procedural question. As already pointed out, cooperation between MEAs and the WTO is crucial in view of a coherent policymaking for sustainable development. The Doha mandate thus envisages "procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status" as an issue for negotiations. However, work on the mandate has not yet resulted in specific proposals.

As regards cooperation and information exchange, much has been achieved in the last few years. Especially the CTE actively promoted an information exchange with MEA by creating MEA Information Sessions and inviting communications from MEA secretariats.[86] Furthermore, a cooperation arrangement between the WTO and UNEP secretariats was concluded in 1999.[87] Further exchange has been proposed by a submission of UNEP in the areas of technology transfer, the promotion of sustainable trade, integrated assessment, and economic incentives.[88]

Of course, the participation of MEAs in WTO as observers plays an important role in this regard. Such observer status has already been granted to MEAs by certain WTO bodies in a number of cases. It has been suggested to facilitate obtaining such status and also to grant it for the CTE special sessions.[89]

3. Support by the Johannesburg Summit

The Johannesburg Summit largely addressed issues of globalization and trade. The Plan of Action called for the promotion of "open, equitable, rules-based, predictable and non-discriminatory multilateral trading and financial systems that benefit all countries in the pursuit of sustainable development".[90] Furthermore, the Plan reflects various issues of the Doha ministerial, such as the capacity of building

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[85] Submission by Switzerland, TN/TE/W/16, 6 November 2002, para. 9 et seq.

[86] Existing Forms of Cooperation and Information Exchange Between UNEP/MEAs and the WTO, Note by the Secretariat , TN/TE/S/2, 10 June 2002, paras. 11 et seq. and Annex.

[87] See TN/TE/S/2, 10 June 2002, para. 4.

[88] UNEP-MEA Meeting on Enhancing MEA and WTO Information Exchange, Chairman's Summary, Submission by UNEP, TN/TE/INF/3, 23 December 2002, para. 19.

[89] TN/TE/S/4, 31 January 2003.

[90] World Summit on Sustainable Development, WTO-Doc. WT/COMTD/W/106, WT/CTE/W/220, para. 45 *lit.* a.

initiatives taken, issues concerning implementation[91], market access commitments, special and differential treatment, and trade and agriculture.[92]

Furthermore, the Plan emphasizes the further enhancement of "the mutual supportiveness of trade, environment and development with a view to achieving sustainable development through actions at all levels."[93] It addresses both the WTO Committees for Trade and Environment and the one for Trade and Development "to each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve an outcome which benefits sustainable development ..."[94]. Furthermore, the environmental effects of subsidies[95], specific issues of technical assistance, and environmental impact assessments are mentioned.[96] More generally, States are called for to "cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries to better address the problems of environmental degradation."[97]

Among those various issues, the question of the interrelationship between the multilateral trading system and MEAs is addressed. Para. 92 of the Plan of Action reads:

> "Promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments."[98]

4. Outlook

In Doha, finally, the environment was put on the international trade agenda. The role assigned to CTE and the Committee on Trade and Development in promoting sustainable development throughout the agenda is a very important step in this regard. Even more, the relationship between environment and trade became a subject of negotiations. Such negotiations can build on the work of the CTE, which has resulted in some rich analysis and a number of useful proposals and options. However, a closer look reveals that the negotiation mandate is quite limited in scope. It is questionable if it is sufficiently broad to table the various substantial proposals discussed within the CTE. The prospects for negotiations on issues of cooperation between MEAs and the WTO under para. 32 ii are more promising. The Johannesburg Summit did support those activities but abstained from addressing the issues

91 Para. 85.
92 Para. 85 et seq.
93 Para. 91.
94 Para. 91 *lit.* a.
95 Para. 91 *lit.* b.
96 Para. 91 *lit.* c and d.
97 Para. 95.
98 Para. 92.

in substance. Sustainable development and environment regimes could contribute to achieving mutual supportiveness of environment and trade regimes by exploring proper ways of addressing the trade implications of their actions.

A small number of potentially irreconcilable inconsistencies between environment and trade rules and the yet unresolved relationship between MEA and WTO dispute settlement or compliance procedures taking place in parallel raise concerns in view of the integrity of the international legal order. When speaking about a MEA-and-trade dichotomy, however, one also has to take into account the institutional and political dimension. The kind of inconsistencies just mentioned at least in part also reflect a policy divide, both nationally and internationally. Trade and environment issues are taken care of by different international regimes. In the absence of a hierarchy and oversight structure to take the overall responsibility, those regimes have to achieve coherence through cooperation on their own. Providing mutual support of international environment and trade policies to achieve sustainable development, however, is not a mere exercise of preventing and ironing out particular legal inconsistencies. Environmental and trade regimes need to address the underlying policy divide. Building a consensus and understanding about the interlinkeages between environmental protection, economic and social development and trade is crucial for the implementation of sustainable development and the maintenance of the integrity of the international legal order.