

# International Trade Law and the Kyoto Protocol: Potential Incompatibilities

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## Introduction

Early environmental treaties make little mention of potential incompatibilities with international trade rules. Even environmental treaties as recent as the Basel Convention on the control of trans-boundary movements of hazardous wastes and their disposal (UNCRTD, 1989), and the Montreal Protocol (1987) of the Vienna Convention for the protection of the ozone layer (1985), on substances that deplete the ozone layer, both of which contain provisions that restrict trade and could therefore be inconsistent with existing international trade rules, make no mention of the relationship to international trade. However, the growing realization that trade and environment are inextricably linked has forced policy makers to address potential problems of overlap and conflict between the burgeoning regimes of nascent law in these two areas.

Agenda 21, the global agenda for action on sustainable development which came into being at the Earth Summit in Rio De Janeiro in 1992, openly recognized that "universal, multilateral, and bilateral treaty-making" on the environment "should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and that unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."<sup>2</sup> These sentiments were echoed in two multilateral environmental agreements that emerged from the Rio Conference, the Biodiversity and Climate Change Conventions.<sup>3</sup>

A call for provisions balancing trade and the environment also emerged on the trade side following the Earth Summit at Rio. The conclusion of the Uruguay Round of GATT (1994) saw the birth of the World Trade Organization. The preamble of the WTO agreement explicitly recognizes that trade must take into consideration the goals of environmental protection and sustainable development. At the same time, a new Committee on Trade and the Environment (CTE) was created with the mandate of assessing the role of the WTO in environmental matters. The NAFTA negotiations also delved heavily into the trade and environment debate, which resulted in the clear recognition by NAFTA of the necessity for compliance with certain trade-related multilateral environmental agreements (MEAs).<sup>4</sup> The NAFTA negotiations also led to the creation of an important environmental side-agreement to NAFTA, the North American Agreement on Environmental Cooperation (NAAEC).

This emergence of international discourse at the interface of new bodies of international law indicates that there is a growing recognition in the international community of the need for an integrated approach to environment and trade policy-making. With this background, the prospect for an integrated international law of environment and trade looks quite hopeful. However, in spite of the respective acknowledgements and concessions described above, which have been made within the main charters of these areas of law, increasing numbers of academics and practitioners

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<sup>2</sup> Agenda 21; 39.1 (d); A/COF.151/26 (vol. 111) 14 August 1992

<sup>3</sup> The Biodiversity Convention only makes indirect reference (Art. 22), but the Climate Change Convention has several references to its relationship with trade agreements (Art.3.5, 4.2 e)

<sup>4</sup> Article 104

alike have called attention to incompatibilities that could arise between MEAs and international trade agreements. None of these bodies of law have very long track records, but some of the cases that have occurred suggest that policymakers have not yet adequately addressed the trade/environment relationship. Furthermore, to a large extent environmental agreements continue to be negotiated in relative isolation from other international agreements, including those on trade.<sup>5</sup>

The Global Climate Change Convention and its most recent incarnation, the Kyoto Protocol to regulate and control the use of greenhouse gases, have tremendous economic and commercial significance, in that they have the potential of impacting domestic economies and affecting international trade more than any other MEA to date. Thus it is incumbent upon the Parties of the convention, before adopting specific rules, to consider the incompatibilities with international trade that could arise, and on this basis to draft a coherent and balanced agreement which is compatible with and complementary to existing international legal regimes. It is in an effort to further this end that this paper points to possible incompatibilities between the Kyoto Protocol and the WTO, and to a lesser extent the EU and NAFTA.

### **The Kyoto Protocol and Potential Measures Affecting Trade**

The Kyoto Protocol negotiated in December of 1997 lays the foundation for its Parties to achieve average reductions in emissions of the main greenhouse gases of 5.2% by the year 2012. The responsibility for attaining this quantitative commitment, as prescribed under Annex B of the Protocol, is borne by the most-developed countries. In reaching their emission targets, Annex B Parties are given the flexibility to use different implementation methodologies. The first method is through adopting specific domestic policies and measures (PAMS) set out in the FCCC and in Article 2 of the Kyoto Protocol. The second method of implementation is through what are known as 'flexible mechanisms'. These mechanisms allow Parties to achieve their targets by: (a) Emissions trading with other Annex I Parties (Article 17); (b) Regional arrangements known as cooperative 'bubbles' (Article 4); (d) Implementation of projects aimed at reducing anthropogenic gases by reducing sources and enhancing or creating sinks (Article 6); or (e) Using a mechanism referred to in the Protocol as the 'Clean Development Mechanism' (CDM), which involves exchanging the implementation of clean technologies on the one hand for emission credits on the other (Article 12). Of these two methods of implementation, the first technique, policies and measures, is not considered trade-related. However, it is clear that PAMs may impact trade directly when they lead to domestic legislation that imposes regulation in the form of border taxes or technical restrictions on imported products, or indirectly when they lead to selective subsidies of particular products or processes. The second method of implementation has been referred to by some analysts as trade-related environmental measures (TREM). These are measures within agreements for protecting the environment, which use trade instruments to achieve their objectives. The implications of these two implementation techniques for trade rules are considered below.

### **Conflicting Policies and Measures (PAMs)**

Article 2 of the Kyoto Protocol sets forth a menu of policies and measures that each Party should adopt to achieve its quantified emission limitation and reduction commitments under Article 3 (QUEROS), and to promote sustainable development. These include policy options such as the *inter alia* enhancement of energy efficiency in relevant sectors of national economies, the promotion of sustainable forms of agriculture and forest management, the development of new and renewable forms of energy, and the creation of other measures to reduce GHG emissions. Article 2(b) also reiterates the importance of the policies and measures found in Article 4 of the Convention.

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<sup>5</sup> A rough indication of this can be made by scrutinizing the participants list to COP3, only

To fulfil these commitments domestically, Parties are expected to translate the PAMs into laws, policies and binding regulatory regimes that will curb their use of GHGs and enable them to meet their respective targets by the year 2012, the end of the first commitment period. The possibilities for domestic legal instruments that could be employed are theoretically endless, but some plausible examples are taxes on fossil-fuel-intensive sectors, technical regulations such as pollution controls, and subsidies on products or sectors that are deemed comparatively environmentally sustainable or to have minimal negative impact on climate. The economic impact of PAMs could be far-reaching, as the Climate Change Convention pledges to reduce the use of fossil fuel, the most common source of energy for virtually all sectors of society. Such domestic, PAM-guided regimes are likely to affect the competitiveness of national industries. One important area of concern arises in connection with the application of PAM-motivated constraints to imported products. For example, when the competitiveness of domestic industry is diminished by domestic environmental regulation, and similar domestic regulatory measures are placed on imported products to restore the competitiveness of domestic products, by leveling the playing field, the potential for conflicts with WTO rules that regulate the flow of international trade could arise.

Here is a fictitious but plausible scenario of this kind, involving two countries, one of which instates a domestic energy tax.

Country A is an Annex I party to the Kyoto Protocol and has made a commitment to substantially reduce its greenhouse gas (GHG) emissions. Two prongs of the domestic policy it has adopted to achieve this commitment are: to switch to alternative energy sources, and to impose higher standards of emissions control on fossil fuel intensive energy producers and users. The latter translates into cleaner technologies that lessen the emission of green house gases into the atmosphere. As is to be expected, these policies exert an upward pressure on the price of energy in country A.

Country B is also a Party to the Kyoto Protocol. However, it has been very reluctant to impose taxes or other regulation that would increase both the production costs and selling price of domestic energy sources, as its economy could not sustain any significant decreases in the competitiveness of its products.

The methods Country B chooses to carry out its responsibilities under the Protocol are: to increase the efficiency of its manufacturing sectors, impose technical restrictions on household items, and invest in public transportation. It plans to achieve the remainder of its commitment using the flexible mechanisms outlined in Article 12 and 17 of the Protocol. Country A is one of the largest importers of energy from Country B.

Under pressure from complaints by domestic energy producers in Country A that they cannot compete with the cheap energy sources which are unregulated and untaxed in Country B, Country A imposes a border tax on energy imports from Country B. The tax is imposed on imports of both carbon-emitting and non-carbon-emitting energy sources, and it is levied both on the basis of carbon content and of energy content.

Country B protests the tax, which affects the competitiveness of its energy exports and is discriminatory under Article X (MFN) and Article XXX (NT) of the WTO. Country A argues that its energy-import-tax is a legitimate trade barrier under Article XX (b) and (g) of the WTO which allow for environmental exceptions to the general trade rules dictated by its other provisions.

What this fictitious scenario highlights is the type of action that could arise under the WTO. On one hand it raises the question of legitimacy of a nation to protect its environment according to a multilateral environmental agreement (Kyoto Protocol), and in a way that does not endanger the competitiveness of its industries. On the other hand it also affects the competitiveness and economic well being of a second nation which is equally following its international environmental obligations, but under different domestic policies.

The conflicts and imbalances involved in this kind of scenario could become even more acute upon consideration of the fact that the responsibilities under the FCCC and Kyoto Protocol are different for developed<sup>6</sup> and developing countries respectively,<sup>7</sup> and also for the economies in transition (EIT) of the former Soviet Union. Developed countries are obligated to achieve substantial reductions of their emissions by the year 2012, while developing countries do not have the same responsibilities. Similarly, EIT countries have been granted greater flexibility to implement the Climate Change Convention and Kyoto Protocol.

At the same time, many of the countries, which are Parties to the Kyoto Protocol also, belong to the WTO agreement and have responsibilities pertaining to the equal or fair treatment of domestic and foreign products. Would a developed country be justified if, in pursuing its international obligations under the Kyoto Protocol, it imposed domestic legislation on a developing country, which does not share the same international obligations? This is just one example of the many difficult questions that are bound to arise for consideration under the interacting regimes of environment and trade.

#### *NT, MFN and Article XX*

The relationship of WTO Agreement provisions to those of the MEAs is still not completely clear. Article I is a fundamental provision of the WTO and grants most favored nation (MFN) status to reciprocal countries "with respect to custom duties and charges of any kind" on imports or exports of all like products from contracting parties. Although undefined in Article I, MFN status refers to the granting of the same treatment to domestic products as to foreign 'like products'.<sup>8</sup> Analogously, in the area of internal taxation and regulation, Article III of the WTO provides the same basic requirement to treat 'like products' in the same way. Accordingly, when these two clauses are applied to the hypothetical case presented here involving Country A and B, several questions arise. Are the domestic sources of energy and the imported source of energy 'like-products'? How are such determinations best made and according to what standards?

The question of 'like-products' has come up in various contexts under the WTO. However, the most well-known application of the like-products rule within a trade and environment setting occurred in the two panels of the *Tuna Dolphin* case.<sup>9</sup> In evaluating Article III, the first Panel concluded that the application of "laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products" must be no less favorable in its treatment of imported products than in its treatment of 'like' domestic products. The term 'like products' was deemed to refer to the state of the product when it arrives at the border, not, as was

<sup>6</sup> Under the Climate Change Convention these countries are referred to as Annex I countries.

<sup>7</sup> Under the Climate Change Convention these countries are referred to as Non-annex I countries.

<sup>8</sup> MFN status has been defined by the International Law Commission as "accorded by the granting State to the beneficiary state, or to persons or things in a determined relationship with that state, not less favorable than treatment extended by the granting state to a Third state or to persons things in the same relationship with that third State." 1978 Yearbook of the ILC, vol. II pt. 2; ILM 1518 (1978), art. 5

<sup>9</sup> *Dolphin Tuna* Panel 1, 1992 BISD 29S/9. The application of "like products" has come up in various other context see Report of the panel regarding Spanish tariffs coffee on raw coffee, BISD 28S/102 (1982); Australian Subsidies on Ammonium Sulphate Panel, BISD II/188 (1952), par. 9; Japanese Alcohol Panel, BISD 34S/83 (1988), par. 5.5 (b).

maintained in the case of yellowfin tuna imported from Mexico, the method by which it was harvested or produced.<sup>10</sup> In reaching this conclusion, the Panel referred to a 1970 Working Party Report on Border Tax Adjustments, which addressed, *inter alia*, the issue of 'like-products'. The report stated that the criterion for determining the 'alike-ness' of products should be decided upon on a case-by-case basis, and should take account of "the product's end uses in a given market, consumers' tastes and habits, which range from country to country, the product's properties, nature and quality."<sup>11</sup> The report did not specify either production methods or processes as a criterion. The second *Tuna Dolphin*<sup>12</sup> panel, brought up by the EU as an intermediary importer, went further in its opinion on the PPM issue, stating that Article III "calls for the treatment accorded to domestic and imported like products, not for the comparison of the policies or practices of the territory of where the product originated from."<sup>13</sup>

Given these rulings, if the above scenario involving Country A and B were to actually occur, the prospect of Country A successfully defending its border tax on the import of Country B's energy is dim. Inevitably, strong arguments would arise to the effect that all energy sources are 'like-products' regardless of how they are created. In other words, under a strict interpretation of the WTO clauses which are designed to prevent unfair constraints on commerce, whether the production process of the final energy product entails a GHG-emitting fossil-fuel-intensive method such as the burning of coal, or something as clean as wind or solar energy, is irrelevant to a WTO decision. This type of example, of course, is pertinent not only to cases as obvious as the present one, involving energy sources per se. The scope of the Climate Change Convention is such that it could be any fossil fuel product ranging from polyester shirts to automobiles. The WTO apprehension to use PPM as a basis for evaluating a products similarities questions whether a country must sacrifice the competitiveness of its domestic industries in order to pursue its preferred policies under the Kyoto Protocol. By creating this limitation it also challenges the flexibility of policy instruments the parties have methodically woven into the Protocol.<sup>14</sup>

The WTO does, however, provide exceptions under Article XX that could potentially confront such problems of incompatibility between MEAs and the WTO. Article XX (b) and (g) states:

Subject to the requirements that such measures are not applied in a manner which constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on production or consumption....."

In the GATT these exceptions fall under a general heading as they cover a host of possible 'carve-outs' ranging from the importation and exportation of gold and silver<sup>15</sup> to products of prison labour.<sup>16</sup> Despite the expanse of different exceptions under Article XX most abide by somewhat common rules for determining their permissibility. First the measure enacted by the domestic

<sup>10</sup> The WTO has referred to the way in which a product is produced as the "process and production method" (PPM).

<sup>11</sup> Report of the Working party on Border Tax Adjustments, BISD 18S/97 (1972) pr. 18.

<sup>12</sup> *Tuna Dolphin* Panel 2, 1993 39S/155

<sup>13</sup> *Ibid.*

<sup>14</sup> *ut supra*, the Parties have agreed to multiple methods of implementing the Convention and Protocol these include through domestic legislation, emission trading, joint implementation, Clean Development Mechanism, and regional schemes (bubbles).

<sup>15</sup> GATT Article XX (c)

<sup>16</sup> GATT Article XX (e)

authority on the import must be "primarily aimed" at achieving one of the specified objectives deemed by the WTO Agreement as legitimate exceptions. In other words, if the measure is really created either to protect human life or to protect an exhaustible natural resource, then it should be clearly and apparently aimed at achieving this result, and not be readily construed as aimed at 'laying disguised barriers to trade or imports.' To illustrate this point, European Union (EU) law actually gives a good example. During the 1981 Christmas season, Britain imposed a ban on imported meat and poultry, claiming that it was necessary under an EU provision (Article 36)<sup>17</sup>, which is similar to WTO's Article XX, to protect British turkeys from being afflicted by a type of poultry disease.<sup>18</sup> The ban coincided with a period of intense frustration on the part of British farmers with their European poultry competitors. Conveniently, one of the effects of the ban was to give the British farmers a corner on the British turkey market during a season of elevated sales. The European Commission brought the case before the of European Court of Justice and the Court ruled against the British government, finding that the measure had been aimed at protecting local markets rather than being motivated by a valid concern for the protection of poultry flocks. Another example which demonstrates this test in a WTO context is the above 1991 *Tuna Dolphin* case. The case found that US tuna regulation required Mexican tuna fishermen to meet the US 'maximum incidental dolphin taking rates' for the same season, and that the US regulation could not have been met even if the Mexican fisherman had wanted to do so, as it was impossible for the Mexican fisherman to know the rates in advance. Consequently, the Panel, on the basis of this evidence, found that the US measure was not primarily aimed at the protection of dolphins, but rather, was a disguised barrier to trade.<sup>19</sup>

Another dimension of the application of the "primarily aimed" has reference to the concept of extraterritoriality. Returning again to the landmark *Dolphin Tuna* case, the Panel noted in response to the US argument that its tuna measures were primarily aimed at the conservation of dolphins and the Mexican counterclaim that the measure could not be justified as it was applied extrajurisdictionally: "that a country can effectively control the production or consumption of an exhaustible natural resource only to the extent the production or consumption is under its jurisdiction."

This last point would seem to suggest that Parties cannot invoke the Article XX (g) exception clause to protect the global commons. However, the report of the same panel, in determining whether the exception under consideration was a necessary one, also used arguments to the effect that the US action was unjustified because it had not exhausted other efforts under international law to protect dolphins: "The United States had not demonstrated to the panel....that it had exhausted all options reasonably available....in particular through the negotiation of international cooperative agreements..." Although not substantiated thus far in other WTO panels, this ruling implies that internationally adopted standards such as those pursuant to MEAs could be grounds for justifying an exception.<sup>20</sup>

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<sup>17</sup> Article 36 states that provisions of the EU Treaty shall: "not preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy, or public security; the protection of health and life and humans, animals or plants....Such prohibitions or restrictions shall not, however, a disguised restriction on trade.

<sup>18</sup> Case 40/82 [1982] ECR 2793; see for a general description of Article 36 S. Weatherill and P. Beaumont, *EC Law*, Penguin Books, 1993 pp. 393-426.

<sup>19</sup> See 1991, *Tuna Dolphin* panel 1, n.4 above.

<sup>20</sup> This aspect of the Panel's ruling in the *Tuna Dolphin* Case is further considered below in the section on the standards and the 'necessary test' issue. For additional discussion of this point see *Implementation of the United Nations Framework Convention on Climate Change: International Trade Law Implications* James Cameron and Zen Makuch in Cameron, Demaret and Geradin, *Trade and Environment: The Search for Balance*, vol. 1, Cameron and Mae 1994, p. 31.

Thus, the Panel leaves the jurisdictional question unsettled. It is perhaps reasonable to interpret these results as indicating that a unilateral action which has an extraterritorial effect has more weight as a legitimate exception to international trade law if it is carried out pursuant to specific enabling provisions of endowed by an MEA than if it is carried out without any explicit reference to or authorization under an MEA. Such an interpretation would be in keeping with the way certain other exceptions contained in Article XX have been treated. For instance, GATT is explicit when it comes to balancing other areas of international law such as the United Nations Charter. Article XXI (c) provides that the GATT should not restrict any Member from "taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." Trade sanctions under Security Council Resolutions, which are authorized under Article 39 and 41 of the UN Charter, have become commonplace responses to the challenge of peacefully solving international disputes.<sup>21</sup> The United Nations Charter is, of course, a universally accepted document having a substantially constitutive nature. However, legally speaking, international agreements that mirror similar degrees of universality, such as the Climate Change Convention with over 170 should be treated with the same validity and authority including as a legitimate exception under Article XX.

Elsewhere under the WTO rules, the harmonization of international regulations and GATT provisions is also more precisely balanced. For instance, the 1994 Technical Barriers to Trade Agreement (TBT) negotiated in the Uruguay Round recognizes international standards as legitimate foundations for creating national technical regulations that would affect trade, insofar as they are effective or appropriate for some legitimate purpose. Article 2.4 of the TBT Agreement states:

Where technical regulations are required and relevant international standards exist or are imminent, Members shall use them, or relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be ineffective or inappropriate means of fulfillment of the legitimate objectives pursued.

Although the definitional parameters of the two criteria of effectiveness and appropriateness for such international standards remain untested, the provision does imply that standards ranging from those adopted by the International Standardization Organization (ISO) to eco-standards or even standards that are taken pursuant to an MEA such as emission targets could be an accepted basis for exceptions to the technical barriers regulations.<sup>22</sup>

The question of establishing criteria or standards for evaluating the legitimacy of exceptions to international trade law pursuant to MEAs is further complicated by the existence of another essential criterion for such exceptions that also derives from wording found in WTO Article XX. This is the minimal derogation test, sometimes referred to as the 'necessary test'. This test was examined extensively under the *Section 337* case in which the Panel considered subparagraph (d) thereof to be an exception which allows derogation from GATT rules to protect patents, trademarks and copyrights and the prevention of deceptive practices. The case established that "a contracting

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<sup>21</sup> See Edmond Govern, *International Trade Regulation*, Globefield Press 1995, which points out that sanctions have been placed *inter alia* on Rhodesia in 1966 (Res. 232), South Africa in 1977 (Res. 418), Iraq in 1990, (Res. 661), Libya in 1992 (Res. 748), Serbia and Montenegro in 1993 (Res. 757) and Haiti in 1993 (Res. 841) all of which would be considered exception under Article XXI (c).

<sup>22</sup> The TBT Agreement defines a standard as a: "Document approved by a recognized body, that provides for common and repeated use, rules guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method." Environmental standards are also referred to in Agenda 21's Rio Principle 11: "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and unwarranted economic and social cost to other countries, in particular developing countries."

Party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX (d) if an alternative measure which could be reasonably be expected to be employed and which is not inconsistent with other GATT provisions is available.<sup>23</sup> It further stated that if an alternative measure is not available, the measure selected must be the least inconsistent, that is of the available measures, with the GATT. The environmental context of the 'necessary test' was upheld for subparagraph (b) in the *Thai Cigarettes* case,<sup>24</sup> and thereafter in the two *Tuna Dolphin* decisions.<sup>25</sup> In effect, what this test constituted was a stringent threshold that an action or measure must first pass before its legitimacy as an exception can even be considered. In practice what this has meant is that the WTO essentially gives more predominance to the trade rules than environmental measures.

Some authors, however, have questioned whether the 'necessary test' is actually applicable to the second environmental exception contained in sub-paragraph (g) of WTO's Article XX.<sup>26</sup> The ordinary meaning of the words "necessary to" as found in paragraph (a), (b), (d) and (i) implies, as shown, that any deviation from the GATT rules must be justified as being the least trade restrictive of the available possibilities to achieve the environmental objective. However, as has been suggested by the *Automobile Taxes* case<sup>27</sup> and now reinforced by the *Reformulated Gasoline* appellate ruling,<sup>28</sup> whether this test applies to paragraph (g), which uses the language "related to", is still up for debate. The newly established Appellate Body of the WTO in ruling on the *Reformulated Gasoline* case recognized that different language had been used for paragraph (g) so as to give it a different degree of force distinct from those paragraphs in which the word "necessary" is used. Despite the uncertainty, it is reasonable to suggest that at the very least the different language implies a difference in weight between (g) on the one hand and (a), (b), (d), and (i) on the other. However what the precise proportionality that should be maintained between the two has yet to be clarified.

Further complicating the matter is the debate surrounding Article XX's chapeau. The clarification of the issues surrounding the "necessary test" issue described above depends in part upon the clarification of this 'chapeau', which has been argued by some as also containing a "necessary" test which must be passed before any of the subclauses become applicable or pertinent, thereby acting as yet a higher threshold of acceptability for all potential exceptions.<sup>29</sup> An example in which the Panel focused on this threshold issue in the interpretation of Article XX is the *Shrimp and Turtle* panel. The Panel reverted back to the requirement of choosing the "least restrictive" avenue for accomplishing an environmental objective, finding its justification in the wording of the 'chapeau'. Instead of considering the environmental merits of the argument for the exception, the panel chose to focus on the chapeau of the Article which requires that the measure in question be the "least trade-restrictive" of the available possibilities under international law before it can qualify for the consideration of its merits under environmental law which is broadly allowed by the subclauses (b) and (g). Whether this ruling will be upheld by the Appellate Body remains to be seen; however, a clarification of the intentions behind Article XX's (g) construction and the development of a balanced method for evaluating the respective merits of an environmental measure against the demerits of its trade restrictiveness are badly required.

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<sup>23</sup> Section 337 case, 7 November 1990, BISD 36S/345.

<sup>24</sup> *Thai Cigarettes* case, 7 November 1990, BISD 37S/200.

<sup>25</sup> *Dolphin Tuna* case

<sup>26</sup> See Author E. Appleton, *GATT Article XX's Chapeau: A Disguised 'Necessary' Test?: The WTO Appellate Body's Ruling in United States- Standards for Reformulated and Conventional Gasoline*, Review of European Community and International Environmental Law, vol. 6, issue , 1997, pp. 131-138.

<sup>27</sup> *Automobile Taxes* panel report, DS31/R 1994.

<sup>28</sup> United States- Standards for Reformulated and Conventional Gasoline AB-1996-1, April 1996, adopted 20 May 1996, WTO Document WT/DS2/AB/R reprinted in (1996) 35 ILM 605.

<sup>29</sup> *Ibid.*

Perhaps the best approach to balancing trade restrictiveness and exceptions such as those contained in Article XX<sup>30</sup> is the provisions found in both the Technical Barriers to Trade agreement (TBT) and the 1994 Sanitary and Phytosanitary (S&PS) Agreement. Article 2.1 of the TBT Agreement, although very similar to Article XX of the GATT, differs significantly in that it is much clearer on the requirements for exceptions to GATT provisions. Article 2.1 reaffirms that technical barriers should be the 'least-restrictive' of available means, and not created as technical barriers to trade. However, while creating this "necessary" test the TBT agreement also recognizes the right of Member States to take actions which would otherwise be in contravention of international trade law if those actions are deemed to have legitimate objectives, which are made explicit in the document. These objectives include, *inter alia*, "national security requirements; the deception of national practices; protection of human health or safety, animal plant life or health, or the environment."<sup>31</sup> In determining the legitimacy of such objectives, the TBT agreement recognizes that it should take account of "available scientific and technical information related to processing technology or the intended end-uses of the products"<sup>32</sup> These provisions take both the "necessary test" and the legitimacy of the objective and make them mutually subordinate, thus balancing both sides of the issue: trade and the environment. Similarly, Article 2 and 5 of the S&PS Agreement allow each Member State to determine its own sanitary and phytosanitary measures, but these measures can be employed only to the degree necessary to achieve to protect human, animal or plant life.

It seems for the interim that the book on the relationship between WTO rules and measures pursuant to MEAs is still not closed. The ministerial meetings in Singapore in 1996 followed by Geneva in 1998 as well as the work of the Committee on Trade and Environment have struggled to find a consensus to the problem. Two main scenarios have been considered. First, an *ex post* approach that would grant a waiver to MEAs on a case by case basis under Article IX of the WTO, and secondly a *ex ante* approach that would define under what conditions an environmental measure pursuant to an MEA would be allowed. The latter approach is sometimes referred to as an 'environmental window' and would involve an amendment to be negotiated by the WTO Parties.

Neither of these approaches would be required, however, if the ruling of the Panels on the Article XX (g) gave effect to the natural and ordinary meaning of the language contained in the subparagraph. If the language is insufficient to determine the exact meaning then the WTO panels should turn to contextual and purposive interpretation. In the present context, when interpretation of a given article of the WTO is called for, the article should be placed in the context of the whole WTO agreement and interpreted according to the Preamble, which clearly accords sustainable development and environmental preservation status as legitimate objectives under the agreement. It should also look to provisions having similar effect, namely the TBT and S&PS agreements, for insight into how to achieve a balanced approach. To date the WTO panels have not shown such inclination. However, if the kind of political or negotiated solution to the environment/trade imbalance described here is too far off, perhaps a little judicial policy-making is in order. Unfortunately, to date, panels seem to have created considerable precedent in favor of trade objectives over environmental ones.

However, the burden of balancing trade and environment should not be borne only by policy-makers on the trade side. Too often the WTO has been mistakenly singled out as the culprit in the trade and environment imbalance. This is unfortunate because the WTO has been actively considering reforms, and cannot adequately do this without interaction with and cooperation with as many actors as possible from the environmental side. Clearly the onus to act is on both sides. The

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<sup>30</sup> The balance between trade restrictions and their exceptions is sometimes referred to as the proportionality principle.

<sup>31</sup> Article 2.2

<sup>32</sup> Ibid.

WTO and the MEAs must meet somewhere in the middle to work their differences out. For this to happen, it may be necessary for the both the environmental actors and their counterparts in trade to go more than half-way to meet their partners on the other side, so as to gradually enable the process of working back to the middle. In the case of the FCCC and the Kyoto Protocol, the Parties must of course recognize possible incompatibilities and in particular the need for coordinating and mutually reinforcing respective policies and measures with their WTO partners.

### **Trade Related Environmental Measures: Flexible Mechanisms**

Of the over 180 environmental treaties approximately 20 have resorted to trade-related measures as a means of achieving their environmental objectives.<sup>33</sup> The three most well known treaties that incorporate such provisions are: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Basel Convention on the Control of Transboundary Movements of Hazardous Waste, and the Montreal Protocol. These treaties provide for unilateral restrictions or bans on the trade of endangered species or materials that could have a detrimental effect on the environment. The Kyoto Protocol, too, includes trade-related measures, mainly Article 17, which allows parties to meet their quantitative targets through emissions trading. However because of the peculiarity of the item being traded, it raises difficult questions of whether Article 17 or related provisions in the Protocol would indeed conflict with existing WTO rules.

When the WTO rules were created, it is perhaps safe to say that its drafters never envisioned the trading of air pollution among its parties. Nevertheless, stranger things have been traded on international markets, and in many ways trading emissions is not essentially different from trading other types of by-products such as hazardous waste or used oil. Notwithstanding the nature of the item being traded, if it is conceded that emissions are indeed a product or a service to be traded on international markets, then which parts, if any, of the Protocol enabling and regulating this trade, would be likely to come into conflict with WTO rules?

As it stands, the "relevant principles, rules, modalities, rules and guidelines"<sup>34</sup> are still undefined. However, several possibilities are on the negotiating table. Among these are calls for the tight regulation of the emissions trading system by means of a monitoring and verification process. For instance, if the selling party were in compliance with its emission requirements, the trade would be unrestricted. However, if monitoring showed a potential for non-compliance or a serious compliance problem, then the trade would be banned or the seller would be sanctioned for trading while out of compliance.<sup>35</sup> Such a compliance system would of course have implications for WTO rules on 'like-products' and PPM. The Protocols provisions restricting the trading of emissions to Annex B Parties only could also be seen as barrier to trade particularly from the perspective of developing countries (Non-Annex B Parties) which have large inventories of emissions credits<sup>36</sup> and might wish to trade on the emissions market, but could only do so by becoming Annex B members.<sup>37</sup>

<sup>33</sup> UNEP registry of International Treaties and Other Agreements in the Field of the Environment as of October 1994.

<sup>34</sup> Article 17, Kyoto Protocol FCCC/CP/1997/1.7/Add.1

<sup>35</sup> See Donald M. Goldberg, Stephen Porter, Nuno LaCasta and Eli Hillman, *Responsibility for Non-compliance under the Kyoto Protocol's Mechanism for Cooperative Implementation*, Center of International Environmental Law (CIEL) and EURONATURA, 1998; Environmental Defense Fund, *Cooperative Mechanisms under the Kyoto Protocol: The Path Forward*, June 1998; UNCTAD, *Greenhouse Gas Emissions Trading: Defining the Principles, Modalities, Rules and Guidelines for Verification Reporting and Accountability--Draft Version*, June 1998.

<sup>36</sup> If developing countries prescribed to Annex B they would undoubtedly be entitled to the highest number of emission credits because of their level of development.

<sup>37</sup> Annex B Parties have several substantive responsibilities such as reporting obligations and emission targets.

In order to avoid the possibility of the Protocol's trade-related measures arising in the WTO, the Parties to the Protocol must develop a solid trading system, not unlike the WTO's system, which envisions the potential problems and requirements of regulating an international market. This includes creating a dispute settlement and enforcement mechanism that can solve inconsistencies among the parties quickly and efficiently. If such a regulatory regime was created there would be more likelihood that disputes would be resolved within the framework of the Protocol and therefore less incentive to the recourse of going to the WTO. Furthermore, Parties could avoid the possibility of cases arising in the WTO completely if they explicitly set out in the Protocol that WTO rules are not applicable to emissions trading or its related provisions.

### **Other Trade Agreements: European Union and the NAFTA**

#### *European Union (EU)*

Under EU law there exists few potential incompatibilities with the Kyoto Protocol. The EU has developed a relatively strong legal framework, which carefully defines the relationship of Member States and the EU vis-à-vis international agreements. On environmental matters the EU has non-exclusive powers to enter to international agreements on the environment, which means, depending on the competence, the Community and the Member States can participate together as a whole or separately. The competence depends on whether the Community has adopted internal rules on the environmental matter at hand. If it has, the Community alone has the competence to participate. In practice if there exist no internal rules or the rules are of a "minimal requirement", meaning they are only loosely construed, then the Member States and the Community decide together, through the Council, how they will negotiate and sign the international agreement.<sup>38</sup> In the case of the Climate Change Convention, the Member States gave the competence of the negotiations to the Community.<sup>39</sup>

Once an international agreement has been concluded, it can become binding on Member States in several ways. First, international agreements can be given "direct effect" under European Community law. This means that the agreement can confer rights and obligations that are directly applicable to individuals within a Member State's national legal system. The determination of whether an international agreement can actually confer direct effect is done on a case-by-case basis, but generally the European Court has been reluctant to easily grant its application. Largely direct effect depends on the nature of the agreement. For instance, if the Community explicitly gives its Parties the task of implementing the international agreement through national legislation, or if its language is imprecise or hortatory, it is unlikely to have any direct effect. If however, the agreement has direct obligations and comes closer to conferring rights on individuals, then it may have direct effect. Of course the question of direct effect becomes a moot point if the Community implements the provision of the agreement as a Community regulation under Article 189 of the EU Treaty, which in most cases, gives automatic direct effect.

A third way in which an international agreement such as the Kyoto Protocol could be implemented in EU law is as a directive. Directives are binding, but not explicit. They give the overall effect of what must be achieved, while the "form and the method" of the legislation is left up to the Member State to legislate. In some cases a directive can have direct effect, if the language is "unconditional and sufficiently precise" as laid down in *Van Duyn v Home Office*.<sup>40</sup> Increasingly,

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<sup>38</sup> For a detailed analysis of EU and its external relations see MacLeod, Hendry and Hyett *The External Relations of the European Communities*, Oxford 1996.

<sup>39</sup> The Member States cited as the basis for giving authority to the Community on the negotiation of the FCCC as Article 130s(1) and Article 228(3).

<sup>40</sup> *Van Duyn v Home Office*, Case 41/74 [1974] ECR.

EU law is becoming more binding on States to ensure that directives are implemented in national legislation. In *Francovich vs Italy* the European Court ruled that a member state could be held liable for damages suffered by individuals as a result of the Member State's failure to implement a directive.<sup>41</sup>

Because of the manner in which international agreements are negotiated and then implemented, it is unlikely that inconsistencies between EU and Member State law will occur in connection with the Kyoto Protocol. Problems could arise, however, if a Member State decided to implement the Protocol in a manner inconsistent with other EU members. As previously mentioned, one of the dynamic features of the Protocol is that it allows Parties various choices of means of implementation. Consider, for instance, the hypothetical case of a Member State which chooses to introduce a measure according to the Protocol but which is different to the method the other EU Member States have agreed as a group to adopt.<sup>42</sup> Even if such measures are applied equally both to the domestic product in question and the corresponding EU imported product, it is prohibited.<sup>43</sup> Article 30 of the EC treaty states that: "Quantitative restrictions on imports and all measures having equivalent effect shall....be prohibited between Member States." Article 36 does give some powers to derogate from Article 30, but European Court (ECJ) has limited these powers to a large extent. In what is considered by many analysts as an example of creative judicial decision-making, the ECJ in *Cassis de Dijon*<sup>44</sup> stated that domestic measures inconsistent with Article 30 "may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of judicial supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer. " Environmental protection was not included in the list, but since the *1988 Danish Bottle case*<sup>45</sup> it too has been considered a mandatory requirement.

Returning to the hypothetical example in the previous paragraph there is no easy answer. Any responsible ruling would have to look at the application of Article 30's proportionality principle, which calls for an evaluation of the degree to which the measure is required on the one hand, as weighed against the extent of trade restriction the measure would entail, on the other.<sup>46</sup> The judgment would also have to be preceded by a determination of whether or not there existed an alternative means to accomplish the same objective. Arguably, in determining the alternative means it would require the Member State to employ the method of implementation adopted by the Community as a whole when the latter acceded to the international agreement. Therefore, it is reasonable to conclude that since the EU has positive legislation that has a harmonizing effect, as contained in Article 30 and 36, on its Member State's environmental laws, and since the EU in practice tends to work cooperatively in negotiating and implementing international agreements, the Kyoto Protocol would cause few incompatibilities or problems under EU law.

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<sup>41</sup> *Francovich and Others v Italy* Case C-6, C-9/90.

<sup>42</sup> The EU has agreed to implement the Kyoto Protocol according to differentiated targets under Article 4, which aggregately equal 8%. To achieve their respective targets they will employ policy instruments such as (1) positive and negative economic incentives, (2) changes in subsidies--phasing out subsidies on fossil fuel intensive energies, while encouraging subsidies on renewables, (3) negotiated agreements between public authorities and specific industrialized sectors; these would offer in principle, maximum flexibility for industry to act in a cost-effective way (4) Technical options--new technologies, increased R&D (5) Socio-economic research --lifestyles, barriers to new technologies

<sup>43</sup> Article 30 was strictly interpreted in *Procureur de Roi v Dassonville* Case by the European Court stating the phrase "measures having equivalent effect" encompassing all trade rules enacted by Member States which are capable of hindering directly and indirectly, actually and potentially, intra-Community Trade" 8/74 [1974] ECR.

<sup>44</sup> *Rewe-Zentrale v Bundesmonopolverwaltung fur Branntwein* Case 120/78 [1979] ECR.

<sup>45</sup> *Commission v Denmark* Case 302/86 [1988] ECR.

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*North American Free Trade Agreement (NAFTA)*

The NAFTA is a relatively progressive trade agreement in terms of the environment. Its architects have had the foresight to draft its provisions to address many of the potential problems that could arise between it and multilateral environmental agreements. Perhaps the most innovative provision is Article 104 that expressly sets out the relationship of NAFTA rules with certain MEAs containing trade related measures. The Article states "in the event of an inconsistency between specific trade related obligations set out in the international agreements contained in Annex 104.1 shall prevail..." Presently, four agreements are contained in the Annex 104.1: (a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; (b) the Montreal Protocol Substances that Deplete the Ozone Layer (c) the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal and (d) the Canada-United States and Mexico-United States agreements concerning the trans-boundary movement of hazardous waste. In effect, Article 104 gives supremacy to the obligations contained in the MEAs. The only qualification is that the Party, when it has a choice of equally effective means of achieving a given obligation, choose a measure which is the least inconsistent with the NAFTA rules. The Article further elaborates that the Parties may agree in writing to amend the Article by adding more treaties to the list contained in the Annex. Since the Kyoto Protocol contains several trade-related provisions, it, too, should be added to the Annex's list. To do so would render moot any debate over incompatibilities between the NAFTA and the suggested market mechanisms of the Protocol, such as emissions trading.

The policies and measures of the Protocol that are to be implemented domestically would be dealt with under NAFTA's rules concerning standards that are pursuant to legitimate objectives (Article 915.1). NAFTA permits its Parties to set different levels and types of standards to *inter alia* protect its environment in a way which is quite similar to that provided in the EU mandatory requirements and the WTO's Article XX (b) and (g). However, the standards must follow basic rules: they must be non-discriminatory with respect to domestic and imported 'like-products'; (a) it must be an unnecessary obstacle to trade; (b) National standards must be based on international standards; and (c) National standards must require the application of the principle of equivalency when judgement of whether or not domestic and foreign standards are similar is necessary. An innovative provision built into the NAFTA is that standards are also judged according to other factors such as climate, geography, and scientific justification. Whereas under the WTO the basis for the formulation of a standard is not provided, the NAFTA explicitly recognizes how standards and legitimate objectives are to be formulated.

Interestingly, the statutory basis for standards defined in NAFTA may also provide an alternative argument for defending domestic measures enacted to protect the global commons pursuant to an MEA. For example, if the Party can argue that the environment of the global commons is linked to the domestic environment, then the measure could be acceptable on the grounds of Article 915.2. For example, under NAFTA, a domestic standard can use factors such as climate and geography as elements in its foundation. Therefore, in the arena of climate change, a Party to NAFTA and to the Kyoto Protocol, which has considerable low-lying territory might justify a high domestic standard on fossil fuel as follows:

First, the Party could cite the IPPC finding that GHGs are having a discernable impact on climate, together with its further finding that the effects of this impact will be greater in areas more susceptible to climate change, such as low-lying regions. Then, in consideration of its extensive low-lying territory, it could make an argument on the basis of the scientific evidence on the higher sensitivity or susceptibility to climate change of low-lying areas, that a particularly stringent standard is required to protect its lowlands.

One of the greatest challenges to the NAFTA from the Kyoto Protocol will be the "common but differentiated responsibility principle." Both Canada and the U.S. are Annex 1 Parties and have made commitments to six and seven percent targets respectively, but Mexico remains a Non-Annex 1 Party and is therefore not subject to a quantitative reduction target. However, all three countries belong to NAFTA, a binding trade agreement. This situation will undoubtedly lead to trade advantages, distortions and perceived inequities within NAFTA. If it is argued that the policies and measures in the Protocol such as those enlisted to promote the reduction of emissions in agriculture or transportation sectors are related to trade, then they would be given supremacy under NAFTA's Article 104, and any of the countries involved in the dispute could arguably use the Protocol as a justification for blocking imports implicated in climate change. For example, Mexico could argue that it has imposed trade restrictions on specific fossil-fuel-intensive imports on the basis that these restrictions are in accordance with the suggested policies and measures set out in the Protocol. Mexico could then argue that it does not have to impose similar measures on its own 'like-products', because under the Protocol it has no requirement to reduce its emissions. Keep in mind that in this scenario, the national treatment would not be applied, since Article 104 gives prevalence to MEAs. An alternative and perhaps more realistic scenario could occur between Canada and the US, in which either one of these two Parties imposes technical regulations or trade restrictions on products imported from the other, justifying the measure under Article 104 of NAFTA, or even as a legitimate objective under Article 915.1. This type of action could have a restrictive effect on Mexican 'like-products', yet the country imposing the regulations could claim that it is complying with international law, and only pursuing legitimate objectives under the Protocol which are also permitted under NAFTA. Mexico, however, does not share the same obligations under the Protocol which are shared by Canada and the United States, along with other Annex 1 countries. Consequently, although the principle of "common but differentiated responsibility" has given Mexico the right to pursue its own development without the burden of being obliged to enact domestic anti-emissions legislation,<sup>47</sup> in practice under the NAFTA it could be taxed for its emissions.

### **Treaty Compatibility: Successive Treaties and Article 30 of the Vienna Convention**

The issue of treaty compatibility is dealt with under the 1969 Vienna Convention on the Law of Treaties, and to a limited extent the work of this convention has bearing on the relationship between the Kyoto Protocol and international trade rules. The Vienna Convention is of a general nature and cannot provide a panacea for the plethora of problems which might arise at the juncture of these two competing areas of international law, environment and trade. In spite of its limitations, however, it seems appropriate to suggest that the present and future participants in the further development and evolution of the Kyoto Protocol take heed of the precautions which have been outlined at the Vienna Convention, and carefully read between its lines as well as those provisions which are more specifically germane to environmental protection and trade.

Article 30 is the only specific provision of the Vienna Convention which directly refers to treaty compatibility. However, the Article stipulates rules only for treaties which have the same common subject matter, which raises the question of whether the principles therein can actually be applied to treaties which have clearly different purposes, such those concerning trade and environment respectively. If this fundamental question is put aside for a moment, and an assumption is made that environment and trade measures are considered to fall into the same subject category, since they are inseparable from one another, then the guidelines set out by Article 30 are directly pertinent.

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<sup>47</sup> The Parties of the Climate Change Convention have recognized "that the largest share of historical and current global emissions of GHG has originated in developed countries", Preamble UNFCCC.

These guidelines are summarized below:

First, if a treaty establishes a subordinate relationship to another treaty within its text, then the other treaty will take precedence. Second, if all the Parties to an earlier treaty sign a new treaty, the common provisions of the two treaties will have precedence over the other provisions but, according to *lex posterior derogat priori*, the uncommon provisions will remain in force.

Third, for new treaties that do not include all the original parties, the rule is also commonsensical. The parties, which have signed the new treaty, are bound by it over the former treaty, while the Parties that did not sign it remain bound by the original treaty. Thus, the provisions of Article 30 of the Vienna Convention could be considered as a basis for establishing rules or principles of compatibility or balance between an environmental treaty like the Kyoto Protocol and trade law such as that embodied in the WTO Agreement.

However, the Parties to the Vienna Convention still have much to consider in light of the difficult questions emerging from the conflicts which are now occurring at the interfaces of competing bodies of international law. Such conflicts are inevitable, and are likely to continue to occur even after a more integrated system of international law comes into being. However, at the moment, the settlement of certain important issues with regard to these conflicts is particularly urgent at the interface of trade and environment law.

One of the intents of Article 30 is to clarify the rights and responsibilities that accrue to nations that sign successive treaties with related subject matter, so that Parties with multiple memberships in international agreements will be capable of interpreting the interactive effect and implications of these agreements on the basis of a full knowledge of the issues involved in their overlaps, gaps, conflicts, contradictions, and so on.

Unfortunately, in practice, this is far from the reality. National and international agendas for multilateral political negotiations have become overwhelmed with the number and the range of international treaties, agreements and unsettled disputes. Often because of the complexity of the issues and the lugubrious nature of the international legislative process, treaties are negotiated by specialized ministries or by functional organizations in relative isolation. This, of course, leads to treaties whose normative assumptions, principles, or provisions incidentally overlap those of other treaties, in either complementary or conflicting fashion. The conflicts between treaties and agreements may be small or large, simple or complex. In the case of environment and trade, they are both complicated and large.

Article 30 seems only rudimentary in light of the practical demands for a more comprehensive and sophisticated framework for the construction and interpretation of international law.

Moreover, if the remarks of IM Sinclair, one of the original negotiators of the *travail preparatoire* are accepted as definitive, namely that "in determining which treaty is earlier and which the latter, the relevant date is from the adoption of the text and not that of its entry into force."<sup>48</sup>, then, although many treaties on trade such as the TBT or the revised WTO text after the 1994 Uruguay Trade Round would have precedence over the 1992 FCCC, nevertheless, the 1997 Kyoto Protocol would prevail over any of the recent WTO amendments.

Another important consideration here is the interpretation of the words in Article 30 "relating to the same subject matter" It has been argued that the maxim *generalialia specialibus non*

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<sup>48</sup> See IM Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1973; p 68.

*derogant* (general things do not derogate from special things) should be used as a guideline for treaty compatibility. This maxim dictates that in determining the relationship between two treaties which are not directly related, that the specific clause should prevail over the general clause. For environmental treaties, which are often general in nature, this could have disadvantageous repercussions.

This brief analysis of the Vienna Convention leads to the conclusion which is generally agreed on by other authors that its rules on treaty compatibility are residuary. Clearly, in an ideal world, the best way to avoid incidental conflicts between treaties would be always to adequately consider inter-treaty relationships in advance of striking and signing new agreements. This, of course, has little relevance to the real world situation. Nevertheless, it is equally clear that if and when potential incompatibilities are predicted or anticipated, such as those set out in this paper, it would behoove all concerned to exercise a mutual effort in the direction of taking appropriate preventative measures. The objective of establishing the relative strength of respective treaties and their provisions vis-à-vis one another is clearly part of this task, albeit a daunting one.

## Conclusion

In conclusion, it is apparent from the general analysis of the Kyoto Protocol and its relationship with international trade law that certain incompatibilities exist and could develop into difficult and complicated situations in practice. This is particularly true with regard to the possible policies and measures that Parties might pursue to reach their quantitative emissions targets. Potential problems exist at the interface between the emissions trading provisions of the Kyoto Protocol and the trade-protective measures of the WTO. If the details as to how the respective parameters of the two bodies of law are supposed to interact are not clearly settled and distinguished, the Protocol will founder under overwhelming pressure from the international trade law side, in part created by the great energy and momentum with which the latter is being formed.

However, the incompatibilities described in this paper and the serious problems which they are likely to give rise to will be largely avoided if the widening community of participants in the ongoing process of refining the Kyoto Protocol are able to draft specific rules and principles that establish clear guidelines as to which treaty should prevail in a given circumstance and why. One of the most important areas in which such specific rules and principles are needed is in the area of potential conflicts among the member Parties to the Kyoto Protocol, while they are attempting to fulfil their respective obligations under the Protocol. Some of these potential conflicts have been described in the form of hypothetical examples in this paper as a means of generating concrete proposals for such rules and principles.

In addition to the specification of such rules and principles, it is also imperative that the Parties to the Kyoto Protocol devise and come to an agreement which brings into existence a strong mechanism which enables both the enforcement and the sustainability of the Protocol, and establishes in adequate detail the organizational, financial, and tangible means whereby compliance will be maintained, disputes among nations will be resolved, and conflicts among agreements settled.

Specifically, the Parties to the Protocol should consider adopting the following recommendations:

- Create an ad hoc working group of legal and technical experts under the UNFCCC to examine the potential incompatibilities between the FCCC/Protocol and the WTO.

- Re-energize the PAMs debate in the negotiations, concentrating on developing, concretizing, and coordinating the various policy options so that they are more integrated and consistent with international trade rules. In essence, give effect to the measures suggested in Article 4.2 (e) subparagraph (i) of the Climate Change Convention.
- Define ‘emissions’ for the purpose of international trade rules so that it does not fall into the same category as either products or services under the WTO rules on ‘like’ products or services.
- Create a strong overall dispute-settlement and flexible mechanism dispute settlement system so that MEA conflicts are solved within the FCCC.
- Explicitly recognize in the Kyoto Protocol that disputes arising from the provisions of the FCCC should be resolved within the FCCC.
- Give effect to the principle "minimize the effects (of environmental protection measures) on international trade" as contained in Article 3.5 of the Convention and Article 2(3) of the Protocol.
- By the same token, give effect to a reciprocal principle: ‘minimize the effects of international trade on the environment’ in international trade law agreements.

In short, these specific suggestions first call for the reflection on the potential problem of compatibility. However, following such considerations, must be policy responses that weave what are now only abstract principles, soft law, or merely ideas into specific binding treaty provisions that will help concretize the Climate Change regime into a strong and effect agreement which is compatible with international trade law.