

Environment

1. Introduction

In the almost 90 years since the first modern multilateral trade treaty was ratified,¹ over 400 Regional Trade Agreements ('RTAs') have been concluded,² with the World Trade Organization ('WTO') providing legal principles and an institutional foundation for the world trading system. Meanwhile, human-made environmental problems, and domestic and international laws responding to these problems, have also multiplied. These laws include restrictions on imports of products identified as environmentally-harmful, as well as the introduction of national environmental standards and regulatory requirements that complicate the free movement of goods and services. In various capacities and circumstances, the WTO has evaluated the compatibility of environmental trade restrictions with key WTO principles. A recurring question has been whether regulation that restricts trade in imported goods on environmental grounds can be reconciled with the core WTO principle of non-discrimination based upon origin. Further, countries have made treaty commitments under a wide range of Multilateral Environmental Agreements; in some cases these clash with WTO obligations. Finally, the trade liberalization that the WTO and RTAs have facilitated has contributed to macroscopic trends of economic globalization. These include increased international transit of goods, increased resource

¹ The 1929 Convention on Abolition of Import and Export Prohibitions and Restrictions ('Prohibitions Convention').

² See the WTO website: https://www.wto.org/english/tratop_e/region_e/regfac_e.htm

exploitation and CO2 emission resulting from economies of scale, and the ‘export’ of environmental regulation and standards (or lack thereof) to foreign firms seeking market access.

These many intersections have led to vigorous debate about what is often described as the trade and environment relationship. In this chapter I focus on how environmental protection has been understood and addressed within the WTO and its predecessor, the General Agreement on Tariffs and Trade (‘GATT’). I also take account of the contributions of external meaning makers, notably civil society, academics and corporate lobbies, who helped shape these discourses.

At the core of the WTO’s understanding of the environment is a consensus enshrined in the texts of WTO treaties: that trade and environment are ‘mutually supportive’. Treaties proscribe legal obligations, often characterized as ‘soft’ or ‘hard’ depending on how precise and binding they are.³ These obligations are agreed by consensus among WTO Members, who comprise virtually all the world’s governments; thus they bridge a vast array of national positions. When considering the extent to which the WTO should take account of, and respond to, the demands of environmental protection, there is a large degree of divergence, making hard obligations difficult to achieve. The concept of ‘mutual supportiveness’ entails no binding action or duty. The term can be described as positively ambiguous: positive because the presumption is one of harmony; ambiguous because this positivity can be interpreted as assertion or aspiration.

³ See eg KW Abbott and D Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization*, 421-456.

Section 2 develops a mind map of varying discourses on ‘environment’ in the context of the concept of mutual supportiveness. Section 3 traces discursive change regarding the term through the history of the world trading system. Section 4 reflects on an emerging dichotomy that complicates existing discourses identified herein, separating those who advocate multilateral approaches to trade liberalization and environmental protection from those who discredit multilateral approaches as well as their goals. Section 5 concludes.

2. Mind map

The existence of ‘mutual supportiveness’ between trade and environmental policies comprises a normative understanding that economic development, through trade liberalization, will lead to better environmental protection. This is made clear in the WTO’s current negotiating framework and its founding treaty; many major international environmental treaties contain similar or identical language affirming that an open multilateral trade system will benefit the environment. This understanding resolves perceived conflicts between ‘environment’ and ‘development’, examined further below, through an emphasis on ecological modernization.

Yet WTO negotiations and reports of the WTO and GATT Secretariats make clear that many Members have expressed competing conceptions of the trade and environment relationship. One is that trade liberalization and environmental protection are mutually antagonistic: growing environmental regulation described as ‘green protectionism’ which undermines free trade and the broader goal with which it is often

conflated, economic development. Developing countries often complain that developed countries impose complex environmental regulatory requirements as trade barriers.⁴ At times developed countries, notably the US, have also criticized environmental regulation that impedes important export markets, such as Genetically Modified crops.⁵ This underscores that countries' positions vis-à-vis particular environmental regulations are shaped by their export interests and the corporate lobbies that represent them, the latter thus forming another environmental 'meaning maker'.

Another important discourse that has run through the WTO and the GATT before it is that of mutual exclusion: environmental protection is sometimes described as a 'non-trade' issue, falling outside the 'WTO mandate'. Even while the WTO's founding treaty sets out its objective of securing sustainable development, WTO Members have also circumscribed its mandate as consisting of 'trade issues'. As the argument goes, the WTO does not have the capacity or expertise to respond adequately to environmental problems. In practice this prohibition serves to delimit the WTO's environmental responsibilities. It led, for example, to the selection of CTE negotiating items in which trade liberalization will benefit the environment (such as trade in Environmental Goods and Services).

Mutual supportiveness provides a pragmatic formulation to span these contentious discourses. It provides a basis for consensus by avoiding the establishment of any formal hierarchy, which would threaten the interests of many stakeholders. Indeed, the concept treads a somewhat contradictory line: it purports to address, but also negates the possibility of, conflict. As multilateral treaty language, its non-binding nature and the positive

⁴ GP Sampson, *The WTO and Sustainable Development* (Tokyo: United Nations University Press, 2005), 20-21. See also JH Jackson, 'WTO Trade Rules and Environmental Policies: Conflict or Congruence?' (1992) 49 *Washington and Lee Law Review*, 1230.

⁵ R Eckersley, 'The Big Chill: the WTO and Multilateral Environmental Agreements' (2004) 4(2) *Global Environmental Politics*, 44.

ambiguity surrounding its interpretation contribute to its success. Additionally, while the negotiations makes clear that mutual supportiveness implies an obligation to seek good faith solutions in the event of conflict, the concept does not proscribe any precise legal obligation. In sidestepping this challenge, Members circumscribe the WTO's environmental ambition.

A final discourse, most evident in academic literature, presents the WTO's approach to the environment in evolutionary terms as an arc of progress from the GATT to the WTO. There has been progress, but deep divisions between WTO Members mean that the hallmark of the WTO approach to the environment has been caution. WTO negotiators and the Appellate Body have maintained ambiguity regarding the 'tough questions' that arise when there are actual or potential clashes. The result is to preserve, passively, the primacy of WTO obligations.

3. Discursive change

A. Origins of the multilateral trade system

The WTO website states that the awareness of the relationship between trade and the environment of its predecessor, the GATT, dates back to 1970.⁶ Trade scholars often echo this message, asserting that the environment was not on the agenda of GATT negotiators in the late 1940s as it was simply not a recognized international concern.⁷

⁶ 'Early years: emerging environment debate in GATT/WTO, available at: https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm

⁷ See, eg: 'Despite the current recognition, the original GATT agreementdid not consider the environmental effects of its trade rules on the production of goods.... This inattention to environmental

Sympathetic academics, the WTO Secretariat and trade negotiators often portray the WTO's support for, and understanding of, environmental protection in an evolutionary light. While some GATT rulings were problematic, later disputes, notably the so-called 'Shrimp-Turtle' World Trade Organization ('WTO') dispute of 1998, marked the emergence of adequate 'policy space'⁸ for environmental regulation.

However, while there was an explosion of multilateral environmental agreements (MEAs) and domestic environmental regulation starting in the 1970s, which drove these issues higher up the GATT agenda, 'trade' and 'environment' treaties have been coordinated and interconnected. International efforts to manage wildlife trade and conservation arose contiguously with early trade treaties. Negotiators recognized that trade restriction played an important role in enabling wildlife conservation treaties to achieve their goals. In 1900, European colonial powers signed the Convention for the Preservation of Wild Animals, Birds and Fish (London Convention); in the same year the US passed its first federal law protecting wildlife, the Lacey Act, which prohibited trade

matters may have been due to the fact that environmentalism was a relatively new concern in national and international policy areas.' S Alam, 'Trade-Environment Nexus in Gatt Jurisprudence: Pressing Issues for Developing Countries' (2005) 17(2) *Bond Law Review*, 2; 'There is likewise little evidence that any of the GATT's provisions were drafted to advance global environmental interests. This is not surprising, since at the time there was little governmental knowledge of, or interest in, domestic or international environmental issues' JL Dunoff, 'Institutional Misfits: the GATT, the ICJ and Trade-Environment Disputes', (1994) 15 *Michigan Journal of International Law*, 1043; S Schmidheiny, 'Changing Course: A Global Business Perspective on Development and the Environment' (1992) 2(1) *Business Strategy and the Environment*, 74 ("It is hardly surprising that GATT does not deal effectively with environment or sustainable development issues, as neither was an international concern when it was set up."); EB Weiss, 'Environment and Trade as Partners in Sustainable Development: A Commentary' (1992) 86 *American Journal of International Law*, 728. ("In the immediate postwar period, countries were not concerned with the environment, because they had not yet recognized their capacity to degrade it irreversibly...."). The latter two references and quotes are drawn from Dunoff.

⁸ See note 7; also H Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions', (2015) 18 *Journal of International Economic Law*, 383-405; S Charnovitz, 'The WTO's Environmental Progress', (2007) 10(3) *Journal of International Economic Law*, 685-706.

in animals hunted illegally.⁹ During the years leading up to World War II further multilateral treaties were concluded for conserving natural and living resources.¹⁰ In 1929, the Convention for the Abolition of Import and Export Prohibitions and Restrictions (‘Prohibitions Convention’) was also concluded. Its original 29 signatories included the same trade powers behind the London Convention and the Lacey Act. Aware that promoting free movement of goods could undermine these efforts, they excluded from coverage ‘measures taken to prevent them [animals or plants] from degradation or extinction’.¹¹

Soon after the end of World War II the United Nations launched negotiations for an International Trade Organization. The proposed Havana Charter founding the ITO incorporated similar language on measures to protect animals and plants. The ITO also acknowledged that existing treaties on wildlife conservation should take precedence in the event of a conflict. It contained an exception for measures ‘taken in pursuance of any inter-governmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals’.¹² In this respect it was more deferent to environmental treaties than the current WTO, which contains no such exception. Indeed, incorporating such an exception into the WTO, which declares that Multilateral

⁹ US Fish and Wildlife Service, ‘The Lacey Act’, available at: <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html>

¹⁰ These included the Convention Relative to the Preservation of Flora and Fauna in their Natural State (1933) and the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (1940)

¹¹ Protocol to the Convention, Section III, Ad. Article 4. Available at: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0651.pdf>

¹² United Nations Conference on Trade and Employment held at Havana, Cuba (‘Havana Charter’), Final Act and Related Documents, 1948, Article 45, General Exceptions to Chapter IV, (1)f. Available at: https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf

Environmental Agreements should prevail in a conflict, is a proposal often made by environmental advocates.¹³

The ITO formed part of the UN and its larger aims to achieve peace and prosperity, economic and social development.¹⁴ As well as giving employment equal billing to trade as a treaty objective (the ‘Havana Charter on Trade and Employment’), it also safeguarded labour standards, an issue which has continued to elude formal recognition by WTO Members. Doomed by its deep ambition to regulate the global economy, which included management of countries’ trade balances, it was never ratified, but remains an alternative vision for an international trade organization with more broadly-conceived aims and objectives.

The General Agreement on Tariffs and Trade in 1947 became the *de facto* governing instrument for international trade. The GATT included a General Exception, Article XX. Its negotiators neglected to include a specific exception for ‘conservation of fisheries resources, migratory birds or wild animals’ discussed in the preparatory work for the Havana Treaty.¹⁵ It does, however, permit trade-restrictive measures that fall into certain categories with antecedents in the Prohibitions Convention, Articles XX(b) and (g), which apply to measures protecting human, animal or plant life or health, and conserving exhaustible natural resources, respectively. The chapeau to Article XX applies an additional non-discrimination test, requiring that the measure should not constitute ‘arbitrary or unjustifiable discrimination’ or ‘disguised restriction on international trade’ in ‘countries where the same conditions prevail’. GATT 1947, including Article XX, was

¹³ Eckersley, above n. 5, at 44.

¹⁴ Havana Charter, above n. 12, Chapter 1, Purpose and Objectives, Article 1.

¹⁵ See United States – Restrictions on Imports of Tuna. Not adopted, circulated 3 September 1991.

[Hereinafter *Tuna-Dolphin*], para. 3.30. Available at:
http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm

incorporated into the WTO Agreements in the form of GATT 1994, still often invoked by WTO Members in disputes. Thus GATT Article XX(b) and (g) remain important in disputes on environmental regulation; many such disputes in the GATT and later the WTO have turned on the interpretation of these phrases.¹⁶

B. The 1970s: Pollution, regulation, development

In the 1970s two parallel narratives about the trade and environment relationship developed. First, the GATT was positioned as a body with competence to address negative impacts of environmental regulation on trade, feeding its expertise and priorities into international environmental negotiations. Second, as a settlement of the North-South divide, the UN Conference on the Human Environment ('UNCHE') arrived at a positive construction of the relationship between environmental and development. This laid the groundwork for subsequent treaties to position trade – a driver of economic development – as a support for environmental protection.

By the 1970s the GATT was a heterogeneous global organization including newly-independent former colonies.¹⁷ As the GATT proved its utility in facilitating tariff reduction, the final two rounds of GATT negotiations in the 1970s and 80s increasingly focused on reducing non-tariff barriers to trade.¹⁸ The GATT obligates countries to treat the products from all WTO Members equally vis-à-vis one another (the Most Favoured

¹⁶ See, eg, *US – Gasoline* (1996), *US – Shrimp* (1998), *Brazil – Tyres* (2007), *US – Tuna II* (2012), and *EC – Seal Products* (2014).

¹⁷ HV Milner, 'Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries' (2005) 59 *International Organization*, 107–143

¹⁸ 'The GATT years: from Havana to Marrakesh', WTO website: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm

Nation Principle set out in Article I:1) and vis-à-vis domestic products (the National Treatment Principle set out in Article III). As opposed to tariffs that are collected at the border, these non-discrimination provisions focus primarily on internal domestic regulation. They apply not only to laws that specify different treatment of products based on their origin (*de jure* discrimination) but also to *de facto* discrimination from origin-neutral laws. Determining whether a domestic regulation contravenes these provisions requires intensive judicial review.

This emphasis on non-discrimination was significant as the 1970s also marked the beginning of the global environmental movement and an explosion of domestic environmental regulation worldwide. The 1972 UN Conference on the Human Environment in Stockholm (UNCHE) was the first to focus on environmental issues. In negotiations, developing countries threatened to boycott on the basis that they were being asked to take responsibility for problems they did not create. There was concern among countries long subject to colonization that binding international commitments would infringe upon sovereign use of natural resources.¹⁹ This resulted in a broad yet shallow treaty that focused on linking the environment to the imperative of encouraging development and global equality. In the words of Indira Gandhi, who represented India: ‘Are not poverty and need the greatest polluters?...The environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.’²⁰

Gandhi’s statements illustrate the premise that provided a basis for international

¹⁹ K Mickelson, ‘The Stockholm Conference and the Creation of the North-South Divide in International Environmental Law and Policy,’ in Mickelson et al., *International Environmental Law and the Global South* (Cambridge University Press: 2015), 109-129.

²⁰ I Gandhi, ‘The Unfinished Revolution’ (1972) 28 Bulletin of the Atomic Scientists, 35.

consensus on the need to protect the environment. It is summarized neatly by the motto of the UN Environment Programme, founded at the UNCHE: ‘environment for development’. This justification for environmental protection draws from ecological modernization, a school of thought that focuses on the contributions of environmental protection to economic development, and the environmental Kuznet’s curve, which posits that increasing GDP leads to better domestic environmental outcomes.²¹

The idea of ‘mutual supportiveness’ between trade and environment had not yet been adopted. By linking trade with economic development and prosperity, it extends the same premise that was so useful in achieving consensus in the UNCHE context. Yet when the GATT Secretariat was invited to contribute to UNCHE it raised concerns about regulation for environmental protection. It produced a report on ‘Industrial Pollution Control and International Trade’,²² which examined ways in which the proliferation of environmental regulation might distort free trade. It analysed different forms of regulation or trade restriction that countries might impose in order to compensate domestic industries for the costs of increased anti-pollution regulation, ranking them in terms of their trade-distorting effects and likelihood to contravene GATT obligations.²³

C: 1980s and 90s: Treaty harmony, civil society rage

As these contrasting narratives of harmony and conflict between economic development and environmental protection were further developed, their potential for incongruence

²¹ See D Stern, ‘The rise and fall of the environmental Kuznet’s curve (2004) 32(8) *World Development*, 1419-1439.

²² ‘Industrial Pollution Control and International Trade’, Report by the GATT Secretariat, L/3538, 9 June 1971, available at: https://www.wto.org/gatt_docs/English/SULPDF/90840247.pdf

²³ *Ibid* at 13-19.

became clearer. During the late 1980s and early 1990s a number of major environmental treaties proclaimed the contribution of trade liberalization to environmental protection; simultaneously, there was increasing protest against the GATT's environmental record.

In 1989, the World Commission on Environment and Development produced 'Our Common Future', also known as the Brundtland Report, which established the term 'sustainable development' as a locus for international law. The term itself frames a resolution of the UNCHE challenge: constructing the relationship between environmental protection and development in a positive and general enough manner to create international consensus. Trade was positioned as a force to support environmental protection. During the 1992 Earth Summit in Rio, environment ministers suggested that the only contribution GATT should make to sustainable development was to conclude the Uruguay Round successfully.²⁴ The non-binding Agenda 21 (an Agenda for the 21st century) concludes that an open multilateral trading system is consistent with sustainable development; improved market access for developing countries' exports will have a positive environmental impact.²⁵ Agenda 21 includes the first treaty reference to mutual supportiveness: '[t]he international community should provide a supportive international climate for achieving environment and development goals by...making trade and environment mutually supportive'.²⁶ Indeed, both sustainable development and mutual supportiveness provide the same broad-brush reconciliation of potential conflict.²⁷

²⁴ United Nations, *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, Chapter 1, Objectives 2.9(a) 3.

²⁵ 'Agenda 21', United Nations Conference for Environment and Development, Rio de Janeiro, Brazil, Article 2.5. Available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

²⁶ Pavoni argues that mutual supportiveness is the 'interpretative pillar' of sustainable development: R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21(3) *European Journal of International Law*, 662.

²⁷ See also: E Lydgate 'Sustainable development in the WTO: From mutual supportiveness to balancing', (2012) 11(4) *World Trade Review*, 621-639.

In fact, tensions between major export industries and environmental lobbies were growing. The first GATT dispute on environmental regulations took place in 1991: United States – Restrictions on Imports of Tuna, often referred to as *Tuna – Dolphin*.²⁸ Mexico complained that the US Marine Mammal Protection Act, which banned tuna caught by ‘purse seine’ nets that also trapped and killed dolphins, was discriminatory. The US aimed to protect dolphins that were not in its own domestic territory, but rather that of Mexico. The GATT Panel decided a country taking trade action to attempt to enforce its own laws in another country could not take recourse to the Article XX exception detailed above.²⁹ It also ruled that the US could not legally ban tuna because it objected to the way that it was produced.

The GATT Secretariat published a study underscoring the Panel’s ruling. After concluding that trade benefits the environment, it warned that protectionist interests can exploit environmental regulation, stating that:

*If the door were opened to use trade policies unilaterally to offset the competitiveness effects of different environmental standards, or to attempt to force other countries to adopt domestically-favoured practices and policies, the trading system would start down a very slippery slope.*³⁰

It identified environmental policies as a ‘potentially serious source of new protectionism’.³¹ US environmentalists responded by launching protests against ‘GATT-

²⁸ *Tuna-Dolphin*, above n. 15.

²⁹ A useful summary of the dispute is available on the WTO website: ‘Mexico etc versus US: ‘tuna-dolphin’, https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm

³⁰ ‘Trade and the Environment’, GATT/1529, 3 February 1992, 6. Available at: https://www.wto.org/gatt_docs/English/SULPDF/91600309.pdf

³¹ *Ibid* at p. 34.

zilla' trampling over national regulation. The strength of the public protest contributed to the decision of the US and Mexico that the ruling should not be implemented.³²

But the ruling simply put into practice concerns of GATT Members about 'unilateral' trade-restrictive regulation to address transboundary environmental problems. Regulation based upon processes and production methods, or PPMs in WTO parlance, are split into the categories of product-related and non-product-related ('NPR'). The former, while physically invisible, have to do with quality or functionality. This dispute concerned the latter: invisible distinctions based on NPR PPMs, in this case a ban applied to fish caught following a particular fishing process. Basing trade distinctions on such distinctions intrudes deeply into the production process in order to impose foreign values; many GATT members rejected the legitimacy of basing trade restrictions on such distinctions.³³ The earlier chapter in this volume, on Protectionism, provides a useful companion analysis here.

The ruling and report clarified that countries could not utilize trade restriction to achieve environmental objectives if it required exporting countries to modify their production practices. This undermined national environmental regulation, and threw into doubt the GATT-legality of national trade restrictions responding to multilateral obligations. A sub-set of MEAs utilize trade restrictions, such as import or export bans, requirements for packaging or shipping, requirements receive consent from importing countries, or simply reporting requirements. These restrict trade in environmentally-

³² For an overview of the dispute and its aftermath, see RW Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What we can learn from the *Tuna-Dolphin* conflict' (1999-2000) 12 *Georgetown International Environmental Law Review* 1, 43-47.

³³ For a useful overview of the early evolution of this issue please see: S Charnovitz, 'The Law of Environmental 'PPMs' in the WTO: Debunking the myth of illegality (2002) 27(1) *Yale Journal of International Law*, 59-110.

harmful goods,³⁴ and encourage MEA participation and compliance.³⁵

In describing the negotiations of the Montreal Protocol, Brack stated that the "trade provisions of the Protocol ... were a vital component in (a) building the wide international coverage the treaty has achieved and (b) preventing industrial migration to non-parties to escape the controls on ODS [ozone depleting substances]."³⁶ Parker well-summarized the utility of trade restrictions in achieving stronger outcomes for MEAs with a rhetorical question: 'Can a world of over 150 nation-states effectively preserve what is left of its global commons by consensus only, without any use of trade leverage?'³⁷ As described above, early trade negotiators were mindful that trade restrictions were necessary to curb species extinction, and deferred to relevant MEAs. In contrast, the GATT ruling suggested that national efforts to implement trade-related obligations of MEAs would be GATT-illegal.

Despite these dismal implications, the 1992 Rio Declaration on Environment and Development incorporated the central premises of the GATT report on Trade and Environment. Principle 12 states that '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.' It then draws from language of the chapeau of GATT Article XX, concluding that environmental trade policy measures should not 'constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'.

³⁴ Eg, CITES bans trade in endangered species; the Basel Convention bans export in hazardous waste without meeting particular procedures for consent.

³⁵ Eg, the Montreal Protocol on Substances that Deplete the Ozone Layer bans Parties from importing ozone-depleting substances from non-Parties; the Basel Convention prohibits import and export of hazardous wastes between Parties and non-Parties.

³⁶ D Brack, *International Trade and the Montreal Protocol* (Earthscan Ltd: 1996), xvii.

³⁷ Parker, above n. 33, at 3.

It finally states that countries should avoid attempting to regulate environmental challenges in other countries through trade measures on a unilateral basis, urging international cooperation.³⁸

In 1992 European countries convened the Group on Environmental Measures and International Trade (EMIT group). The group had not been convened since its founding in 1971, but GATT Members faced unprecedented countervailing environmental pressures. On the one hand, many Members, in particular developing countries, were concerned about the proliferation of environmental regulation. On the other, the GATT's poor environmental record formed a significant focus of protest. Though clearly these stakeholders had opposing goals, both prompted greater environmental responsiveness from GATT Members.

The remarks of the Chairperson summarizing Members' positions after the first meeting encapsulate the core discourses prevalent among GATT Members and illustrate how they attempt to reconcile countervailing objectives. The Chairperson affirmed that the GATT's competence was limited to trade policies and aspects of environmental policies that would affect trade. He underlined the ecological modernization view that the multilateral trade system could help address environmental degradation and over-exploitation in developing countries. Finally, he concluded that the trade system and sustainable development do not need to contradict; but trade rules should not be undermined by environmental measures.³⁹ These statements reveal the utility to

³⁸ Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development. Available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

³⁹ Summary of the First Meeting, Held at the International Conference Centre Geneva, 2 December 1992, SR48/1, 5 January 1993., at [10]-[13].

negotiators of positive ambiguity in steering a route through the opposing goals of relevant meaning makers, a theme further examined in the sections below.

D: Founding of the WTO: progress?

These same pressures that motivated the EMIT group shaped the decision to place more emphasis on the environment in the WTO, which was founded two years later (in 1994), replacing the GATT as the multilateral institution governing trade. As well as incorporating the original GATT, it contained additional Agreements on areas such as services, subsidies, technical regulation, sanitary and health regulation and intellectual property rights. Elements of some of these Agreements pertained to the environment, and arguably the most significant developments were the enshrining of sustainable development as a WTO objective in the Preamble to the founding Marrakesh Agreement, and the establishment of a Committee on Trade and Environment (CTE). The latter formalized and expanded the work of the EMIT group as a standing Committee of the WTO. ‘Making international trade and environmental policies mutually supportive’⁴⁰ is its aim: this is the first mention in WTO treaty texts of the phrase, echoing its use in Agenda 21. In a 1996 report, the CTE expanded on this, stating that the aims of the WTO and that of environmental protection ‘are both important and they should be mutually supportive in order to promote sustainable development’. It also reiterated that the WTO’s competence was limited to trade-related aspects of environmental protection.⁴¹

⁴⁰ Decision of 14 April 1994, MTN/TNC/45(MIN)

⁴¹ Report (1996) of the Committee on Trade and Environment, 12 November 1996, WT/CTE/1, paras. 167-168.

The CTE responded to concerns about trade impacts on the environment fomented by *Tuna – Dolphin*. Yet it also provided for greater scrutiny of domestic trade-restrictive environmental regulation. As stated by Eckersley, ‘These twin, and somewhat contradictory, objectives had already surfaced in the EMIT and they reflect persistent differences among the members – particularly between developed and developing countries.’⁴² [footnote omitted]

The CTE embraced, but also circumscribed, the WTO’s environmental responsibilities. The Decision on Trade and Environment, founding the CTE, states the need to coordinate trade and environment policies, but:

... without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members...

Thus, despite the WTO’s expansion of thematic coverage, it did not re-capture the breadth and ambition of the abandoned ITO. Indeed, as noted by Lang, not only trade negotiators but also academic trade lawyers have reinforced this division: in both contexts, the environment is often described as a ‘non-trade’ issue.⁴³ In becoming reflexive, this rhetorical separation circumscribes the way that we understand the responsibility of the international trade system to examine its environmental impacts. Lang further stated that

It is not self-evident, of course, that the major international institution presiding over the global trade system has no business addressing the social and

⁴² Eckersley, above n. 13, at 30.

⁴³ A Lang, ‘Reflecting on ‘Linkage’: Cognitive and Institutional Change in the International Trading System,’ (2007) 70(4) *Modern Law Review*, 537.

*environmental impacts of that system, and that such impacts are not 'trade issues'*⁴⁴

The narrowness of the GATT and then WTO, in focusing only on 'trade issues', was attributed by some commentators to its success in achieving its aims.⁴⁵ In practical terms, the division between 'trade' and 'non-trade' has shaped the issues that the CTE has negotiated, addressed further below.

The Decision on Trade and Environment also avoided key questions such as the WTO-compatibility of the NPR PPMs that gave rise to such controversy in the *Tuna - Dolphin* GATT dispute, as well as the use of trade sanctions for environmental outcomes, either in the context of MEAs or by individual governments. As stated by Parker, 'The...Committee on Trade and Environment...has declined even to discuss a possible role for unilateral trade measures in *obtaining* conservation agreements: the Committee's mandate was deliberately drafted to exclude it.'⁴⁶

In so doing, the CTE *de facto* empowered the Appellate Body to develop an institutional position on these issues; it was soon required to rise to the challenge. The 1998 *US – Shrimp* dispute focused on the US requirement that shrimp fishing operations include a 'Turtle Excluder Device' on nets so that endangered sea turtles would not end up as bycatch. Unlike in GATT *Tuna - Dolphin*, the WTO's powerful dispute settlement mechanism bound the US and the complainants, who included Thailand and Malaysia.

⁴⁴ Ibid.

⁴⁵ H Horn and P Mavroidis, 'MEAs in the WTO: Silence speaks volumes', (2014) 10(1) *International Journal of Economic Theory*, 147-166.

⁴⁶ Parker, above n. 33, at 5.

This ruling is a cornerstone of the narrative that the WTO has made significant environmental progress.⁴⁷ The Appellate Body departed from *Tuna – Dolphin*. It concluded that the US regulation failed to meet the non-discrimination test imposed by the Article XX chapeau, as the US had not made sufficient efforts to negotiate with, and provide information and technical support to, the complaining countries.⁴⁸ Thus it critiqued the manner in which the US imposed its regulation, rather than the fact that it had such a regulation at all. In so doing it implicitly accepted the legitimacy of regulatory distinctions based upon NPR PPMs.

When establishing that endangered sea turtles were an ‘exhaustible natural resource’, the Appellate Body also made reference to various MEAs and the WTO Preamble’s reference to ‘sustainable development’ to justify including living resources in this category.⁴⁹ This progressive interpretation⁵⁰ implicitly deferred to MEA obligations, in particular CITES’ endangered species’ classifications. Also, in the context of Article XX(g), the Appellate Body wondered whether it was necessary for a natural resource being protected, in this case sea turtles, to exist within the territory of the United States, the country defending its measure. Crucially it acknowledged that a degree of unilateralism is a common aspect of regulations that fall under the subparagraphs of Article XX.⁵¹ But it avoided establishing in principle that unilateral regulation with extraterritorial impacts could be WTO-legal, stating that there was a territorial ‘nexus’, as

⁴⁷ This is apparent from reading the WTO website’s presentation of the dispute at: https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

⁴⁸ WTO Panel Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products (*US – Shrimp*), WT/DS58/R, adopted 15 May 1998, and Appellate Body Report, WT/DS58/AB/R, adopted 15 June 2001, paras. 163, 166, 172

⁴⁹ *Ibid* at paras. 152, 153, 155.

⁵⁰ Although the fact that protecting threatened species was a concern of trade negotiators in the first half of the 20th century somewhat undermines the Appellate Body’s celebrated evolutionary interpretation.

⁵¹ Appellate Body Report, *ibid* at para. 121.

sea turtles passed through the waters of the US.⁵² Thus the gains of the ruling were presented subtly; environmental activists certainly did not interpret it as an end to the struggle.

E. 2001 – present: The Doha Development Agenda

Countries undertook final negotiations on the Doha Ministerial Declaration (‘DMD’) against the backdrop of the Battle in Seattle. The ferocity of the protest was unprecedented, and much of it focused on environmental impacts of globalization.⁵³ There was tremendous pressure on the WTO to respond to this ‘legitimacy crisis.’⁵⁴ The successful conclusion of the DMD in 2001 moved forward negotiations on environmental issues by providing the CTE with a specific mandate. Yet, in keeping with the Decision on Trade and Environment, it responds to countervailing goals. The text is organized around the concept of mutual supportiveness, demonstrating its distinct interpretations: first as assertion, second as selection criterion and finally as aspiration.

Paragraph 6 states that:

It is the potential impact of economic growth and poverty alleviation that makes trade a powerful ally of sustainable development. The multilateral trading system is an important tool to carry forward international efforts aimed at achieving this goal. The purpose of trade liberalisation and the WTO’s key principle of non-

⁵² Appellate Body Report, above n. 46 at para. 133.

⁵³ World Trade Organization protests in Seattle, Archives, [seattle.gov, https://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle](https://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle)

⁵⁴ D Esty, ‘The World Trade Organisation’s Legitimacy Crisis’ (2002) 1(1) *World Trade Review*, 7-22.

*discrimination is a more efficient allocation of resources, which should be positive for the environment.*⁵⁵

The CTE focuses on ‘triple wins’, sectors in which it is possible simultaneously to liberalize trade, improve economic development and protect the environment. Paragraph 31(iii) calls for ‘the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services (‘EGS’), as the removal of trade barriers to EGS will increase environmentally-preferable practices.’⁵⁶ Paragraph 31 also calls attention to fisheries subsidies (though this negotiation is taking place under the Committee on Rules⁵⁷). The WTO website identifies the removal of fisheries subsidies as a triple-win:⁵⁸ they lead to overfishing and benefit largely developed countries, such that liberalization would have positive environment and development results. In 2014, a subset of largely developed countries who account for the majority of trade in EGS agreed to pursue a plurilateral Environmental Goods Agreement. Given that different countries have different export interests, there has been disagreement about which goods should be on that list. Despite concerns from China in particular, negotiators are optimistic for progress.⁵⁹

Paragraphs 31(i) and (ii) address institutional linkages between the WTO and other Multilateral Environmental Agreements, calling for examination of the relationship between the Multilateral Environmental Agreements and the WTO, with ‘a view toward

⁵⁵ Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

⁵⁶ See the WTO website, http://www.wto.org/english/tratop_e/envir_e/envir_neg_serv_e.htm

⁵⁷ See the WTO website on the Rules Negotiations http://www.wto.org/english/tratop_e/rulesneg_e/rulesneg_e.htm, visited 14 September 2012.

⁵⁸ See the WTO website, http://www.wto.org/english/tratop_e/envir_e/win_e.htm, visited 14 September 2012.

⁵⁹ ‘Ministerial Talks to Clinch Environmental Goods Agreement Hit Stumbling Block’, 8 December 2016, 20(42) Bridges. Available at: <https://www.ictsd.org/bridges-news/bridges/news/ministerial-talks-to-clinch-environmental-goods-agreement-hit-stumbling>

enhancing mutual supportiveness....’ [emphasis added] Thus the CTE confronts only one area of potential conflict between environmental and trade obligations: the WTO-MEA relationship. Aside from facilitating information-sharing, they have made little progress on settling the relationship between WTO obligations and the trade obligations imposed in MEAs. Various countries have made proposals for clarifying the relationship between them.⁶⁰ Barring consensus, the CTE has simply affirmed that cooperation is better than unilateral action, and that both regimes are worthy of respect. Further, negotiations do not address disputes between MEA Parties and non-Parties, thus avoiding the most difficult questions arising from clashes of obligations.⁶¹

Members have made reference to MEAs in disputes. In the 2004 *EC – Biotech* dispute between the EU and the US, the EU invoked the Cartagena Protocol on Biosafety (‘CPB’) to justify its precautionary approach to GMOs. The Panel concluded that the obligations of the CPB did not apply in the dispute because the complainant, the US, was not a party.⁶² In 2016 *India – Solar Cells*, in the context of Article XX(d),⁶³ India argued that local content requirements were integral to fulfilling its obligations under the UNFCCC. The Appellate Body construed the language of Article XX(d) narrowly in

⁶⁰ While the EU and Switzerland have focused on the possibility of disputes and the need to provide guidance and clarity, the Australia, Argentina, the US and several developing countries have focused on the lack of existing conflict and the adequacy of existing rules and principles; for a draft negotiating text that attempts to reconcile some of these positions, see Committee on Trade and Environment in Special Session, World Trade Organization, TN/TE/20, 21 April 2011.

⁶¹ Doha Declaration, above n. 53, Paragraph 31(i), ‘The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question.’

⁶² Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products (‘*EC – Biotech*’), WT/DS/291; WT/DS/292; WT/DS/293, para. 7.75.

⁶³ Article XX(d) applies to measures: ‘necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement....’

order to conclude that the UNFCCC obligations were not ‘laws and regulations’ as defined by the Article, as they had not been transposed into Indian domestic law.⁶⁴

The DSU calls upon Members to clarify WTO provisions in the light of customary rules of interpretation of public international law.⁶⁵ In reference to this requirement, the Appellate Body famously declared that the GATT ‘is not to be read in clinical isolation from public international law.’⁶⁶ Further, as discussed above, the Appellate Body called upon CITES to justify an evolutionary interpretation of ‘living’ natural resources. Yet, while there has not been a resolved dispute that dealt with direct conflict,⁶⁷ the Appellate Body has ruled on treaty conflicts with Regional Trade Agreements, consistently affirming that WTO jurisdiction and obligations prevail over those set out in RTAs.⁶⁸ Paragraph 32 of the DMD affirms the basis for this preeminence:

The outcome of the negotiations carried out under paragraph 31(i) and (ii) ... shall not add to or diminish the rights and obligations of Members under existing WTO agreements... nor alter the balance of these rights and obligations....

The Appellate Body has referenced similar language set out in the Dispute Settlement Understanding to avoid interpreting or applying treaty commitments external to the WTO.

⁶⁴ WTO Appellate Body Report, India – Certain Measures Relating to Solar Cells and Solar Modules, (*India – Solar Cells*), WTO/DS456/AB/R, adopted 16 September 2016, at paras. 5.142-5.149.

⁶⁵ Article 3(2), Dispute Settlement Understanding: ‘...The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law....’

⁶⁶ *US – Gasoline*, Appellate Body Report, p. 17.

⁶⁷ A longstanding fisheries dispute between Chile and the EU which involved clashing requirements of the GATT and the UN Convention on the Law of the Sea was resolved at the stage of consultations. See: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm

⁶⁸ See, for example, *Mexico – Soft Drinks* (2006); *Brazil – Tyres* (2007); *Peru – Agricultural Products* (2015).

Vidigal argues that the Appellate Body's approach involves attempting to establish the 'common understanding' of WTO Members vis-à-vis the external international legal rule at stake; evolving norms and subsequent practice inform its interpretation.⁶⁹ This suggests a mixed picture: in the event of a dispute, the Appellate Body would be very cautious about elevating MEA obligations above those of the WTO, but also would attempt to ascertain any 'common understanding' of the importance of the objectives it pursued.

Formally, there is no hierarchy between MEAs and the WTO, but institutionally the WTO has stronger enforcement mechanisms. As Eckersley has poetically concluded:

*Judged in terms of size and teeth, we might regard the WTO as a large tiger and MEAs as a ragged collection of small cats. The irony is that in the one area where certain MEAs do possess effective sanctions (ie trade restriction), they remain vulnerable to legal challenge in the WTO.*⁷⁰

Eckersley further argues that simply the existence of the WTO and its dispute settlement system has a chilling effect on MEAs: it dissuades countries from strong adoption of trade restrictions as they know that these can be effectively challenged.⁷¹

In fact, head-on collision in a dispute is undesirable for both sides. While asserting the preeminence of WTO obligations would contribute to more 'Battles in Seattle', deferring to MEA trade obligations in principle would prove controversial among WTO Members. This remains the key area to watch in terms of the WTO's ability to deliver 'mutual supportiveness'.

⁶⁹ G Vidigal, 'From Bilateral to Multilateral Law-Making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO' (2013) 24(4) *European Journal of International Law*, 1027-1053.

⁷⁰ Eckersley, above n. 13, at 24.

⁷¹ *Ibid.*

In considering specific instances in which environmental regulation comes into conflict with WTO obligations, the Appellate Body inevitably plays a key role in establishing whether mutual supportiveness can be achieved in specific regulatory scenarios. Indeed, Sampson sets out a potential resolution of contradictory assertions that trade liberalization and environmental protection are mutually supportive, but also threaten one another. He writes:

*Those promoting the virtues of trade liberalisation would not deny that trade liberalisation and growth can be harmful to the environment, or that trade liberalisation per se will not necessarily achieve sustainable development....The WTO response is that, for benefits to be realised and for trade-induced growth to be sustainable, national environmental, income distribution and social policies should be put in place.*⁷²

In other words, national environmental regulation is essential to bring about mutual supportiveness. Formally, the WTO supports Members in setting such policies. As the Preamble to the Agreement on Technical Barriers to Trade ('TBT Agreement') states:

*No country should be prevented from taking measures necessary...for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate.*⁷³

In the context of Article XX, the Appellate Body has made clear that the level of protection a Member desires will be respected.⁷⁴

⁷² Sampson, above n. 6, at 55.

⁷³ Agreement on Technical Barriers to Trade, Article 12.

⁷⁴ It has affirmed this multiple times, eg in *Brazil – Tyres*, where it stated that '[Brazil's import ban on re-treaded tyres] illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context.' WTO

If desired environmental protection is compatible with WTO obligations, this suggests that less trade-restrictive means are normally available to achieve the goal. However, as Brack asserted with reference to the Montreal Protocol, trade-restriction can be a useful strategy in achieving environmental aims. In fact, the existence of direct conflict can be deduced by Appellate Body's own approach: under GATT Article XX and loosely analogous provisions elsewhere, notably the TBT Agreement, it undertakes a kind of limited proportionality reasoning.⁷⁵ This includes examining whether a measure's structure and application are designed to discriminate against imported products, determining the appropriateness of the means-ends relationship between the regulation and the goal, and assessing the reasonable availability of other measures to achieve that goal.

Examining the importance of the regulatory goal at stake implies that more important goals justify more trade restriction. Elsewhere the Appellate Body has utilized the concept of balancing between competing objectives. The Appellate Body Report of *US – Clove Cigarettes*, a 2012 dispute under the TBT Agreement, concluded that:

*...the object and purpose of the TBT Agreement is to **strike a balance** between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate....*⁷⁶ [Emphasis added]

Thus the approach of the Appellate Body mirrors the ambiguity of the CTE regarding the mutual supportiveness of trade liberalization and environmental regulation.

Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Tyres)*, WT/DS332/AB/R, adopted 3 December 2007.

⁷⁵ See E Lydgate, 'Sorting out Mixed Messages Under the National Treatment Principle: A proposed approach' (2016) 15(3) *World Trade Review*, 423-450.

⁷⁶ WTO Appellate Body Report on *Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 4 April 2012, para. 174.

It simultaneously affirms the compatibility of domestic environmental regulation with WTO obligations and recognizes that there can be tradeoffs between them. Note that the Appellate Body also maintained this mirroring through its careful agnosticism in *US – Shrimp* on the WTO-legality of extraterritorially-applied domestic regulation.

The WTO Secretariat has also continued to feed into ongoing international environmental developments. In 2009 the WTO Secretariat co-authored a long, detailed report on climate change with the UN Environment Programme (UNEP), which examines ‘linkages’ between trade and climate.⁷⁷ The report does not shrink from controversy: it acknowledges that trade opening contributes to climate change. It also offers a critical assessment of the Kuznet’s curve idea underlying the concept of ‘mutual supportiveness’ between trade and environment; namely, that higher incomes lead to less CO2 emission.⁷⁸

This stands in contrast to the Report the Secretariat prepared for the Rio + 20 Conference of 2012, which encapsulated debates that remain largely unchanged from the 1970s. One of the main obstacles to concluding an outcome document was developing countries’ concern that pursuing a green economy, a central focus of the Conference, meant sanctioning green protectionism to give rich countries a competitive advantage, and de-emphasizing poverty reduction.⁷⁹ Recalling the GATT contribution for the UNCED in the early 1970s, the Secretariat’s report provided an outline of what types of environmental regulations countries might adopt, and which WTO provisions were

⁷⁷ Trade and Climate Change: WTO-UNEP report
https://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf

⁷⁸ *Ibid.* at 53-56

⁷⁹ ‘Countries agree to extend negotiations on Rio+20 outcome document’, 5 May 2012, UN News, <http://www.un.org/apps/news/story.asp?NewsID=41933#.WZQkTYqQyLI>

applicable to each situation.⁸⁰ It also proposed language for the outcome document, ‘The Future we Want’. The Report incorporated many of these recommendations, stating:

We affirm that green economy policies in the context of sustainable development and poverty eradication should:

...h) Not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country, and ensure that environmental measures addressing transboundary or global environmental problems, as far as possible, are based on an international consensus....⁸¹

This demonstrates that the core discourses surrounding the ‘trade and environment’ relationship have not transcended traditional divides.

Finally, the 2015 UN Sustainable Development Goals reflect a harmonious conception of the trade and environment relationship, noting that trade, and the conclusion of the Doha Round of negotiations,⁸² will contribute to the achievement of a number of the goals.

4. Current developments

⁸⁰ ‘Harnessing Trade for Sustainable Development and a Green Economy, World Trade Organization (2012), V. *Green economy measures and guarding against trade protectionism*’, 9. Available at: https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf

⁸¹ Paragraph 58, ‘The Future We Want’, United Nations Conference on Sustainable Development, 22 June 2012, <https://sustainabledevelopment.un.org/rio20/futurewewant>

⁸² See WTO website: https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm. Note also SDG indicator 17.10 at <https://sustainabledevelopment.un.org/sdg17>

At the time of writing, tectonic shifts are occurring in the global trading system, which are influencing established narratives, likely including those on ‘trade and environment’. The Trump administration has abandoned the postwar consensus that trade openness underpinned by a rules-based system leads to peace and prosperity. Trump has indicated that the US will not follow Appellate Body rulings with which it does not agree,⁸³ and has attempted to undermine the functioning of the Appellate Body.⁸⁴ At the time of writing, one year into Trump’s first term, I speculate on relevant implications.

5. New alliances between ‘multilateralists’

The US’s undermining of the WTO demonstrates what Slaughter describes as a ‘transactional’ view of foreign policy: international institutions are abandoned except when they serve the needs of the moment.⁸⁵ The EU in contrast has positioned itself as champion of the WTO and multilateral trade liberalization, as celebrated in recent remarks by WTO Director General Azavedo.⁸⁶ The US has also announced that it will withdraw from the Paris Agreement; in response the EU and China, another champion of the multilateral trade system, have intensified their commitment to upholding it.⁸⁷ Thus

⁸³ ‘Trump Administration would ignore WTO rulings it sees as anti-US: FT’, March 1, 2017, *Reuters*, <http://uk.reuters.com/article/us-usa-trump-wto-idUKKBN16832U>

⁸⁴ G Shaffer, et al, ‘Trump is fighting an open war on trade. His stealth war on trade may be even more important,’ *Washington Post*, 29 September 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?utm_term=.70d818d0e1cf

⁸⁵ A Slaughter, ‘The Return of Anarchy?’ March 15, 2017, *Journal of International Affairs*, Columbia University. Available at: <https://jia.sipa.columbia.edu/return-anarchy>

⁸⁶ ‘DG Azevêdo welcomes EU trade ministers’ strong support for global trading system’, 2 March 2017, WTO website:

https://www.wto.org/english/news_e/news17_e/dgra_02mar17_e.htm

⁸⁷ D Boffey and R Neslen, ‘China and EU strengthen promise to Paris deal with US poised to step away’, 1 June 2017, *Guardian*. Available at: <https://www.theguardian.com/environment/2017/may/31/china-eu-climate-lead-paris-agreement>

the WTO and UNFCCC/Paris Agreement are united as international law instruments made newly-vulnerable by US opposition. Trump has claimed in the past that China invented climate change in order to damage US manufacturing.⁸⁸ This rhetoric conflates China's role as great trade and manufacturing power with its commitment to climate change prevention. Further, the EU and Japan have recently concluded the first trade agreement that commits them to implementing the Paris Agreement.⁸⁹

The EU has been critiqued for climate change unilateralism: exporting its regulatory requirements as a condition of market access.⁹⁰ In the wake of US withdrawal from the Paris Agreement, some commentators, including then-French Presidential candidate Nicolas Sarkozy, suggested that the EU should retaliate by imposing carbon taxes on all US products.⁹¹ While such an approach encompasses unilateralism and domestic protectionism, it also responds to concerns that the integrity of the global commitment to addressing climate change will be undermined by the US's action. Countries who wish to maintain existing structures of international law in the face of US opposition are united by attempts to shore up these institutions. In such a situation, MEAs and the WTO find the emphasis on what they have in common rather than what sets them apart.

B: Trade versus non-trade issues

⁸⁸ See tweet of 6 November 2012,

<https://twitter.com/realdonaldtrump/status/265895292191248385?lang=en-gb>

⁸⁹ 'EU – Japan Economic Partnership Agreement' European Commission News, 6 July 2017:

https://ec.europa.eu/commission/news/eu-japan-economic-partnership-agreement-2017-jul-06_en

⁹⁰ J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23(2) *European Journal of International Law*, 469-494.

⁹¹ B Kentish, 'Nicolas Sarkozy promises to hit America with a carbon tax if Donald Trump rips up landmark Paris climate deal' 15 November 2016, *Independent*. Available at:

<http://www.independent.co.uk/news/world/europe/donald-trump-us-carbon-tax-nicolas-sarkozy-global-warming-paris-climate-deal-a7418301.html>

Trump has depicted trade liberalization as resulting in US unemployment,⁹² a perceived failure echoed by other populist movements.⁹³ This charge is led from the right of the political spectrum, an outlook not celebrated by environmental activists. Nonetheless, the attack on traditional assumptions regarding trade liberalization's contribution to prosperity signifies a period of deep popular scrutiny of the assumptions behind the WTO and regional trade and investment agreements. For environmentalists, perhaps the best-case scenario for a period in many ways destructive to their aims would be to prompt constructive re-imagining of the international trade project by its remaining advocates. There is a settled narrative that WTO law must reconcile trade and 'non-trade' issues, with environment constituting the latter. This division is pervasive in scholarship of international trade lawyers, yet underscores the very dichotomy it seeks to address. Perversely, it narrows the understanding of what trade liberalization should be 'about' by situating environmental protection as an auxiliary concern.⁹⁴ As documented herein, a more expansive vision of the remit and responsibilities of an international trade organization is evident in the never-ratified ITO, which placed employment on equal footing with trade and explicitly deferred to existing MEAs.

With both the WTO and MEAs under unprecedented attack, it is a fertile moment to revisit, and shore up, assumptions underlying the 'trade and environment' relationship.

⁹² See, eg: 'Donald Trump's Speech on Trade', June 18, 2016, *Time*. Available at: <http://time.com/4386335/donald-trump-trade-speech-transcript/>

⁹³ Eg concerns about EU citizens taking UK jobs due to free movement of people and economic integration fueled the UK vote to leave the EU. 'Voting to leave the EU could mean more jobs will go to Britons rather than foreign workers, according to research', M Reynolds, 'Three of four EU workers will be kicked out in Brexit' 6 May 2016, *Express*. Available at: <http://www.express.co.uk/news/politics/667952/EU-Brexit-jobs-Britons-EU-workers>

⁹⁴ Lang, above n. 43.

Ultimately, an attempt to understand these discourses requires reckoning with ideological assumptions polarized among some meaning makers. We must ask: how can we move beyond the limits of ‘mutual supportiveness’?

5. Conclusion

The WTO and major international environmental law treaties, in order to achieve consensus, have found language that simultaneously encourages environmental protection, promotes poverty reduction and enshrines trade opening. I have argued that the concept of ‘mutual supportiveness’ has been useful in this respect, but has underpinned limited environmental ambitions. This begs the question: what would a more ambitious approach to foregrounding environmental protection in the world trading system entail? While a full examination is beyond the scope of these concluding remarks, I outline briefly three potential approaches. The first does not have to do with the WTO at all: a similar aim would be achieved if the system of treaties and international organizations responsible for protecting the environment were strengthened. This would correct the ‘chilling’ effect on MEAs identified by Eckersley: if MEAs possessed equally strong enforcement mechanisms, countries would not prioritize their WTO obligations.

Another strategy would be for the WTO to incorporate MEAs with trade obligations as part of the WTO covered agreements. This would prevent treaty conflict and put MEAs on a level playing field. While this approach has obvious appeal, in that relevant MEAs would receive the benefits of the WTO’s strong dispute settlement system, Horn and Mavroidis provide a compelling analysis of some of the administrative

and negotiating challenges that would result from an attempt to address trade and environmental goals through a single multilateral organization.⁹⁵

Finally, within in easiest reach, the WTO could simply increase the ambitions of its existing agenda. For example, CTE negotiations should be expanded to include fossil fuel subsidies, surely the most environmentally-meaningful trade liberalization ‘triple win’.⁹⁶ Negotiations on the MEA-WTO relationship should have the goal of deferring appropriately to MEA trade obligations, and should expand to include disputes involving non-Parties. The WTO should establish stronger institutional partnerships with UNEP and relevant MEAs of the type that led to the 2009 joint report on climate change.

In the end, the feasibility of reform comes back to political will. In a WTO-sponsored debate, Mark Halle of the International Institute for Sustainable Development stated:

*...the Preamble [of the Marrakesh Agreement] calls for an approach to trade that is supportive of sustainable development. For a long time this was dismissed as, well sure that is our aspirational goal, but we have business to do. What’s happening is that we are realizing that trade has to serve an ultimate goal, and that ultimate goal is the kind of world we want our children to live in. And I think there’s a real opportunity now to get there.*⁹⁷

In the context of deep structural reform, the WTO’s multilateral strength is also its weakness. It suffers in comparison to many Regional Trade Agreements, which go

⁹⁵ H Horn and P Mavroidis, ‘MEAs in the WTO: Silence speaks volumes’, (2014) 10(1) *International Journal of Economic Theory*, 147-166.

⁹⁶ See JP Trachtman, ‘Fossil Fuels subsidy reduction and the World Trade Organization’, Issue Paper: Climate and Energy, ICTSD, October 2017.

⁹⁷ ‘Debate: Trade and Sustainable Development’, World Trade Organization, 18 June 2012, https://www.youtube.com/watch?v=Ly5FsL_dpBI, at 9:08

further in safeguarding domestic environmental laws and MEA commitments.⁹⁸ On the global stage that the WTO provides, deep divisions remain about what our world should ideally look like and how the world trading system can facilitate its realization.

⁹⁸ See EU-Japan Economic Partnership Agreement, above. CETA also contains a chapter on Trade and Environment requiring, among other things, that Parties should not weaken environmental protection in order to encourage trade and investment. Comprehensive Economic and Trade Agreement, Chapter 24, Article 24.5. Available at: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>