

Sustainable Development in World Trade Law: New Instruments

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Introduction

In recent years as international trade compacts have proliferated and the scope of World Trade Organization (WTO) activities has extended beyond purely economic parameters, there has been a growing awareness that the implications of trade have developmental, social, environmental and health aspects. Given these nexuses, it is crucial that trade law regulating transactions is informed by a holistic perspective that takes into account potential impacts from a sustainable development point of view. The infrastructure of sustainable development must reconcile three premises: the trade perspective is adamant that economic liberalization provides the most efficient way of environmental protection and societal betterment; the environmental viewpoint asserts that the status quo is fatally harming natural capital and must be modified and the development schema prioritizes curtailing the incidence of poverty.

On a theoretical level, trade is not automatically good or bad for the environment and social development.¹ Rather, the specific contours of international trade rules and regimes and modes of implementation dictate the degree to which trade advances sustainable development goals. Public international law, the umbrella under which international trade law is situated, can and should adopt a principled approach to ensure that it can deliver on its global objective of sustainable development. Balanced and integrated legal analysis is a prerequisite to ensure that prescriptions resonate with developmental initiatives. A nuanced understanding of recent developments in world trade law, focusing on intersections between economic, social and environmental fields of law and policy, can enhance the positive (and mitigate any negative) aspects of this complex

¹ See for example WTO, Press Release, WTO Doc. PRESS/140, "Trade liberalization reinforces the need for environmental cooperation" (8 October 1999), about Hakan Nordström/Vaughan Scott, *Trade and Environment, Special Study 4* (Geneva: WTO Publications, 1999), online: WTO <http://www.wto.org/english/news_e/pres99_e/environment.pdf>.

relationship.

In the context of ongoing trade law debates that encompass the negotiations in the 2003 Cancun Ministerial and the 2005 Hong Kong Ministerial, there has been anxiety that the WTO and other international trade institutions cannot adequately respond to the principal opportunities and threats that were identified by representatives of over 180 countries at the 2002 World Summit for Sustainable Development (WSSD):

“Globalization offers opportunities and challenges for sustainable development. We recognize that globalization and interdependence are offering new opportunities to trade, investment and capital flows and advances in technology, including information technology, for the growth of the world economy, development and the improvement of living standards around the world. At the same time, there remain serious challenges, including serious financial crises, insecurity, poverty, exclusion and inequality within and among societies.”²

While any single international organisation or process would be hard-pressed to address this broad range of challenges alone, measures can certainly be taken to increase the likelihood that emerging international trade regimes will support sustainable development. Indeed, despite the negotiating gridlock that has characterized the latest Round, there are even tentative signs of progress toward this goal.³

² 2002 *Johannesburg Plan of Implementation, in Report of the World Summit on Sustainable Development*, 26 August to 4 September 2002, UN Doc. A/AC.257/32, “Sustainable development in a globalizing world,” c. V at para. 47.

³ See Preamble, *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154 (entered into force 1 January 1995) [*WTO Agreement*], which recognises that WTO Members: “relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, ... *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” See also WTO, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R

This paper explores emerging issues related to sustainable development that have gained prominence in the context of the recent ‘Doha Development Agenda’ (DDA) of trade negotiations, taking into account the outcomes of the 2002 WSSD in Johannesburg, South Africa.⁴ It aims to discuss the recent development of a constructive global trade and sustainable development law agenda mainly through specific analysis of developing rules, procedural and substantive innovations, controversial or emerging issues that are currently up for negotiation and case studies on various levels. World trade law is a multi-layered system; it envelops supranational, regional and bilateral components.⁵ In many of the latter agreements, innovative mechanisms are being tested to ensure mutual supportiveness⁶ between trade, environment and development law. Depending on the modalities chosen, intersections of these issue-areas can create both an overlapping and crosscutting latticework of rules and stipulations. Not only do the linkages have a legal character, collaboration between IGOs (UNDP, UNEP), NGOs and Multilateral Environmental Accords (i.e. UNCBD, UNFCCC) have resulted in institutional ties as well. With this in mind, the remainder of the paper analyses the core negotiations and controversy surrounding the Doha Development agenda as well as the relevant international economic law jurisprudence that has been accreting in recent years. Attempts will be made to identify areas where further research or closer adherence to principles and practices of sustainable development law might contribute to trade laws configured to deliver on sustainable development objectives.

(1999), at para. 129, n. 107, where the WTO Appellate Body observes that the Preamble to the *WTO Agreement* specifically refers to “the objective of sustainable development” and characterizes it as a concept that has “been generally accepted as integrating economic and social development and environmental protection.”

⁴ M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004) at 25-43.

⁵ *Marrakesh Agreement*, *supra* note 3.

⁶ Integration as part of the concept of sustainable development has mainly been proposed in trade policy discussions by the demand to “[e]nsure that environment and trade policies are mutually supportive, with a view to achieving sustainable development [...]” (United Nations, *Agenda 21, Report of the UNCED, I* (1992) UN Doc. A/CONF.151/26/Rev.1, (1992), 31 I.L.M. 874 at para. 2.10, online: UNDSO <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>> [*Agenda 21*]).

I. Contours of Sustainable Development within International Law

Development can be defined as the processes of expanding people's choices, enabling improvements in collective and individual quality of life, and the exercise of full freedoms and rights.⁷ Amartya Sen, in *Development as Freedom*, describes development as a process of amplifying the domain of personal freedoms people can enjoy.⁸ Sen characterizes the expansion of freedoms as the 'instrumental' and 'constitutive' roles of development (the means and the ends respectively), recognising in particular five instrumental freedoms⁹ that encompass the manners in which individual opportunities and capabilities of citizens living in developing countries could be improved. Sen's second category of "economic facilities" has an intrinsic human rights element. When regimes and regulations allow the opening and stabilization of developing country markets there is often a concomitant augmentation in the exercise of fundamental rights and freedoms. However, in order for this positive spill over to actuated economic policies must reflect and not sideline other developmental aspirations.¹⁰

The concept of sustainable development is widely accepted by the global community; its underlying ideas have governed the practices of many ancient cultures and traditions for thousands of years.¹¹ The term itself appears to have originally emerged in laws governing forest industry management practices, which were established in European forestry laws (*Forstordnungen*) toward the end of the 18th century.¹² According to

⁷ See, e.g., United Nations Development Programme, *Human Development Reports*, available online: UNDP <<http://hdr.undp.org/>>. See also United Nations Development Programme, *Making Global Trade Work for People* (London: Earthscan Publications, 2003) at xi. For further discussion, see H. Jessen, "Trade and Development Law," in this volume.

⁸ Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) at 35.

⁹ *Ibid.* at 38 (the five sub-categories are (1) political freedoms, (2) economic facilities, (3) social opportunities, (4) transparency guarantees and (5) protective security).

¹⁰ *Ibid.* at 39.

¹¹ As observed by H.E. Judge C.G. Weeramantry in his extraordinary Separate Opinion for the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] I.C.J. Rep. 7.

¹² See *Lexikon der Nachhaltigkeit*, online: <<http://www.nachhaltigkeit.aachenerstiftung.de>>.

these laws, the rate of logging was calculated according to the speed of natural replenishment. Thus, forests were treated as natural capital and managed with longevity in mind. Significantly, from inception the concept of sustainable development did not revolve around impinging on economic activity but rather *re-directed* it in order to ensure the potential for long-term, *sustained* yields.

At present, the most generally accepted definition of sustainable development is found in the 1987 *Brundtland Report*, where it is seen as “[...] development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹³ It focuses on ‘needs,’ especially the essential needs of the world’s poor, to which overriding priority should be given, and the ‘limitations’ imposed by the current state of technology and social organization on the environment’s ability to meet human needs. The impetus of development was predicated on a long term, balanced reconciliation and integration of economic, environmental and social priorities.

The 2002 WSSD in Johannesburg, South Africa, raised considerable global awareness about the solidifying sustainable development ethos. However, from an international law standpoint, sustainable development remains somewhat unrefined and difficult to definitively locate. At present it is tenuous to describe sustainable development as a binding principle of customary law.¹⁴ It is also doubtful that the concept is principally (or solely) situated within international environmental law. Given the ambiguity surrounding the situations of sustainable development law (SDL) in classical international law terms, it might make sense to think of it as a novel type of legal norm—an ‘interstitial’ concept that facilitates and requires reconciliation of other legal norms relating to environmental protection, social development and economic growth.¹⁵ Furthermore, sustainable development, in one formulation or another, has been enshrined as an explicit object and

¹³ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43.

¹⁴ As noted by Vaughan Lowe, “the argument that sustainable development is a norm of customary international law, binding on and directing the conduct of states, and which can be applied by tribunals, is not sustainable.” See V. Lowe, “Sustainable Developments and Unsustainable Arguments” in A. Boyle and D. Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) at 26.

¹⁵ *Ibid.* See also Segger and Khalfan, *supra* note 4 at 46.

purpose of over fifty binding international treaties.¹⁶ It is also central to the mandate of many international organizations, and the subject of numerous ‘soft law’ declarations and international guidelines. As an objective, the concept of sustainable development guides domestic and international law in many areas of economic, social and environmental policy, particularly where these fields intersect. As such, SDL can be conceptualized as an autonomous, emerging area of international law in its own right consisting of the “body of legal principles and instruments at the intersection of environmental, social and economic law, those which aim to ensure development that can last.”¹⁷ SDL comprises:

“a group of congruent norms, a corpus of international legal principles and treaties, which address the areas of intersection between international economic law, international environmental law and international social law in the interests of both present and future generations. Procedural and substantive norms and instruments, which help to balance or integrate these fields, form part of this body of international law and play a role in its implementation.”¹⁸

Ten years before the 2002 WSSD, a declaration from the 1992 United Nations Rio Conference on Environment and Development (UNCED), called for “[t]he further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns”¹⁹ and identified a “need to clarify and strengthen the relationship between existing

¹⁶ Segger and Khalfan, *ibid.* at 45–50, 95–98. See also, for general discussion, D. French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005); J. F. Weiss and N. Schrijver, eds., *International Law and Sustainable Development: Principles and Practice* (Leiden: Martinus Nijhoff, 2004); and A. Boyle and D. Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999).

¹⁷ Segger and Khalfan, *ibid.* at 368. The main principles of international law related to sustainable development are proposed in the *New Delhi Declaration on Principles of International Law Relating to Sustainable Development*, International Law Association Resolution 3/2002, Report of the 70th Conference of the International Law Association, April 2002, online: Centre for International Sustainable Development Law www.cisd.org/pdf/ILAdclaration.pdf.

¹⁸ Segger and Khalfan, *ibid.*

¹⁹ *Agenda 21*, *supra* note 6, s. 39.1 (a).

international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries.”²⁰ The 2002 Johannesburg Plan of Implementation (JPOI) made a collective commitment to “advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels.”²¹ These commitments encompassed the central tenets of the emerging international sustainable development law agenda. In summary, it can be convincingly argued that a commitment to promote sustainable development in international law requires a balanced reconciliation or integration between economic growth, social justice and environmental protection objectives achieved through participatory mechanisms that ameliorate the collective quality of life enjoyed at present without compromising the needs of future generations.²²

II. World Trade Law as an Instrument for Sustainable Development?

A. Negotiating Sustainable Development in the WTO?

The current international trade regime had its origins in the Havana Charter,²³ a constitution drafted to create the International Trade Organization (ITO). Along side the World Bank and the International Monetary Fund, the ITO was supposed to supplement the regulation of world economic policy within the trading sphere.²⁴ In addition to

²⁰ *Ibid.*, s. 39.1 (b).

²¹ *Johannesburg Declaration on Sustainable Development*, in *Report of the World Summit on Sustainable Development*, 26 August to 4 September 2002, UN Doc. A/CONF.199/20 at 7.

²² M. C. Cordonier Segger, “Governing and Reconciling Economic, Social and Environmental Regimes” in M.C. Cordonier Segger and C. G. Weeramantry, eds., *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff, 2004).

²³ See United Nations Conference on Trade & Development, *Havana Charter For An International Trade Organization*, Final Act and Related Documents, U.N. Doc. E/Conf. 2/78 (1948), s. 46.1, [*Havana Charter*].

²⁴ John. H. Jackson, *The World Trading System—Law and Policy of International Economic Relations*, 2d ed. (Cambridge, MA: MIT Press, 1997).

regulations about tariffs and trade, the proposed Charter contained labour, agricultural and investment provisions. However, failing to win the approval of the U.S. Senate, the ITO was effectively stillborn. In its place, the General Agreement on Tariffs and Trade (GATT)—concerned solely with economic transactions—was created as a stopgap mechanism and came into being by virtue of its non-legal status.²⁵ The GATT was devised at least partially in response to the unreceptive U.S. domestic environment; multilateral decisions were to be taken by the “CONTRACTING PARTIES acting jointly” and not by any organizational body.²⁶ Other notable characteristics of the GATT were a small secretariat and decision-making and dispute settlement bound by consensus. Different majorities of the CONTRACTING PARTIES collaborated for decisions of interest; amendments usually required two-thirds of the group and were only binding on those who assented.²⁷ In effect, a simple majority had judicial power to interpret the General Agreement and the administrative authority to service it as well as the ability to facilitate operation and further objectives of the agreement (i.e. launching new rounds and administering the dispute settlement process).²⁸ While a less fragmented world economic policy might have had fewer problems ensuring the enmeshment of sustainable development principles into the trading system, the status quo arrangement continues to struggle in its delimitation of the proper scope of WTO jurisdiction.

Tariff liberalization under the GATT proceeded for several decades before inconsistencies in plurilateral agreements complicated institutional cohesion and changing comparative advantages²⁹ led powerful parties to pressure for the inclusion of new issues. The Tokyo Round saw the proliferation of non-tariff barriers (in the guise of voluntary export restraints) and the phenomena of GATT à la carte

²⁵ Vernon, R. “The World Trade Organization: A New Stage in International Trade and Development” (1995) 36 Harv. Int’l L.J. 329 at 330.

²⁶ Hoekman, B. and M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (Oxford: Oxford University Press, 2001) at 38.

²⁷ R. Steinberg, “In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO” (2002) 56:2 International Organization 339 at 344.

²⁸ *Ibid.*

²⁹ Services, TRIPS and TRIMS were among the new areas of comparative advantage. The international context also included an affinity to export-oriented. See A. Narlikar, *The World Trade Organization: A Very Short Introduction* (Oxford: Oxford University Press, 2005).

emerged as CONTRACTING PARTIES selectively applied rules and dispute settlement processes. Developing countries participated in the GATT from 1948 onwards, but it was only during the Kennedy Round, which lasted from 1963 to 1967, that actual textual changes were invoked to attempt to address specific development needs. In the early 1960s, many newly independent countries acceded to the GATT. In 1965 saw the inauguration of Part IV of the GATT dealing with 'Trade and Development.' Construed as a set of guidelines, this additional chapter prioritized the retrenchment of trade barriers maintained by developed states on products of interest to developing countries but failed to amend the institutional architecture of the GATT. Many developing countries expressed dissatisfaction that Part IV did not adequately influence the course of Kennedy negotiations. Responding to these concerns and an augmenting awareness that a myopic view on the economic aspects of trade was untenable from a developmental point of view, the GATT Committee on Trade and Development was established at this juncture.

The institutionalisation of the United Nations Conference on Trade and Development (UNCTAD) in 1964 did not have the substantive impact developing states presaged. UNCTAD was only modestly able to mitigate the GATT's initial lack of progress in addressing trade and development concerns. The organization gained certain prominence as an intergovernmental forum for North-South dialogue, for the facilitating of negotiations on economic issues of interest to developing countries (including debates on the 'New International Economic Order'), its analytical research and policy advice on trade and development issues and the finalization of several international accords (including commodity agreements). In 1968, the GATT and UNCTAD jointly established an International Trade Centre (ITC) to facilitate trade promotion and consult on strategic market specialization for developing countries.

During the 1970s, UNCTAD continued to play a key role in trade and development discussions. Development economics in this era endorsed and prioritized the use of development assistance and gave less attention to reforming the structure of trade laws. In accordance with the philosophy, UNCTAD assisted in setting a target for official development aid (ODA) levels by developed countries to the poorest countries of 0.7% of GDP. However, despite formal adoption and reiteration of the target in all major UN Conferences and Summits since that date the majority of states have failed to live up to their obligations.

Further attempts to facilitate development interests through world trade law were made in the Tokyo Round (1973–1979) and resulted in an ‘enabling clause’ on “Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries” (also known as ‘Special and Differential Treatment’). The enabling clause established an exception from Article I of GATT allowing special and differential treatment for developing countries. Although this double standard has been controversial from inception it has only recently been challenged in the Dispute Settlement Mechanism of the WTO. Another attempt to abet development of struggling states involved labelling; UNCTAD identified a group of Least Developed Countries (LDCs) that began to serve as the focal point for their economic development and technical assistance needs. Partly due to such efforts, the participation of developing countries in the Uruguay Round, which lasted from 1986–1994, was much greater than in previous negotiations.

It is hard to overestimate the degree to which the Uruguay Round (‘the Round’) of the GATT Multilateral Trade Agreements was a watershed moment for the international trade regime. The Uruguay Round negotiations involved one hundred twenty countries and produced sixty agreements and decisions totalling five hundred fifty pages.³⁰ The negotiations produced a large, intricate array of compacts aimed at remedying the stagnant process of liberalization in particularly contentious sectors, promoting further tariff reduction, creating a permanent trade body, buttressing dispute settlement procedures and facilitating new trade arrangements in services, investment and intellectual property.³¹ Thus, the Round was unprecedented in terms of scope and institutional restructuring aimed at applying a predictable framework of rules thereby strengthening the system of international trade.

³⁰ *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994, in *The Legal Texts, Results of the Uruguay Round of Multilateral Trade Negotiations* (1994), 1867 U.N.T.S. 14, 33 I.L.M. 1143. The primary document is the Agreement Establishing the WTO (enshrining the ‘single undertaking’ character of the endeavor), within which there are Annexes pertaining to agreements on goods, services, intellectual property, dispute settlement, trade policy review mechanism and plurilateral agreements.

³¹ C. Hamilton and J. Whalley, *The Trading System after the Uruguay Round* (Washington, DC: The Institute for International Economics, 1996) at 1.

The erosion of an effective international trade regime was a galling scenario for both developed and developing countries alike as the global economy had become immensely intertwined and national prosperity was increasingly predicated on high levels of market access. The augmenting friction within the GATT system was one of the predominant reasons why developing countries sought enhanced engagement and leverage in the Uruguay Round negotiating process. Through out the process developing states were focused on making substantive market access concessions in order to be taken seriously and to receive reciprocal benefits from the new accord. At the crux of this strategy was an emphasis on openness and market-based policy reform as a prelude to garnering more foreign investment and becoming essential stakeholders (not just “rule-takers”) within the multilateral trade policy-making fora.³² Beyond merely reacting to this altered strategy, in the years leading up to the Round, developed countries surmised that their developing counterparts were becoming more compelling trading partners and in many cases had exciting growth potential in sought after commodities.³³

Much emphasis is placed on the “grand bargain” struck between developed and developing states when assessing the results of the Round. Ostry defines the “grand bargain” in the following terms:

“It was essentially an implicit deal: the opening of OECD markets to agriculture and labor-intensive manufactured goods, especially textiles and clothing, for the inclusion into the trading system of trade in services (GATS), intellectual property (TRIPS) and (albeit to a lesser extent than originally demanded) investment (TRIMS). And also—as a virtually last minute piece of the deal—the

³² R. Safadi and S. Laird, “The Uruguay Round Agreements: Impact on Developing Countries” (1996) 24 *World Development* 1223. Since the launching of the round in 1986, sixty developing states unilaterally lowered barriers to imports in conjunction with a reorientation of domestic policies.

³³ C. Bach *et al.*, “Market Growth, Structural Change and the Gains from the Uruguay Round” (2000) 8:2 *Review of International Economics* 295. During timeframe of the Uruguay Round, developing countries embodied higher growth rates of output, employment and trade when compared to industrialized countries; see W. Martin, and A. Winters, *The Uruguay Round and Developing Countries*, (Cambridge: Cambridge University Press, 1996).

creation of a new institution, the WTO, with the strongest dispute settlement mechanism in the history of international law.”³⁴

The 1970s also saw the emergence of significant global concern for human rights, and the environment, particularly in developed countries. This generated considerable controversy for developing countries,³⁵ as the latter planned to focus on the full exploitation of their natural resources in order to promote pressing priorities related to economic growth.³⁶ One study, “Limits to Growth,” predicted a global disaster if international policies were not changed to balance economic development and the utilization of non-renewable natural resources.³⁷ In 1983, States established the World Commission on Environment and Development (WECD) an independent investigatory body composed of international policy and scientific experts in accordance with UN General Assembly (UNGA) Resolution Res. 38/161. The outcome of the WCED process, the *Brundtland Report*, led to UNGA Resolution 42/187, which resolved that sustainable development “should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises.”

Based on this foundation in the UN system, the concept of sustainable development became an overarching theme of the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, which attracted over 140 heads of state—the largest global Summit in history,³⁸ at that time. One of the conference outcomes, Agenda 21, highlighted that achieving enduring social and economic

³⁴ S. Ostry, “The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations,” *The Political Economy of International Trade Law*, University of Minnesota, September 2000 at 5, online: University of Toronto <<http://www.utoronto.ca/cis/Minnesota.pdf>>.

³⁵ See D. Hunter, J. Salzman and D. Zealke, *International Environmental Law and Policy*, 2d ed. (New York: Foundation Press, 2001).

³⁶ See *Permanent Sovereignty over Natural Resources*, GA Res. 1803(XVII), UN GAOR, 1962, Supp. No. 17, UN Doc. A/5217 at 15.

³⁷ See D. L. Meadows *et. al.*, *Limits to Growth* (Cambridge, MA: MIT Press, 1972).

³⁸ Among the outcomes of the UNCED were three international treaties (on climate change, biological diversity and, a little later, desertification and drought) which recognised both environmental and sustainable development objectives, as well as the non-binding *Rio Declaration on Environment and Development*, 14 June 1992, U.N.Doc.A/CONF.151/26/Rev.1 (Vol. I) at 3-8, 31 I.L.M. 874 [*Rio Declaration*] and Agenda 21, *supra* note 6, which were adopted by governments.

dimensions of development required that international trade and environment policies needed to be mutually supportive.³⁹

The negotiation of the Preamble of the 1994 WTO Agreement is not very well documented, but was likely influenced by the outcomes of the 1992 UNCED. The words ‘sustainable development’ were added to the preambular text in a penultimate session. The Preamble of the WTO Agreement now states that:

“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...”

*Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”*⁴⁰ (emphasis added)

While preambular statements are not technically legally binding in the same way that operational provisions can be,⁴¹ they can certainly play

³⁹ Agenda 21, *supra* note 6 at para. 2.19, stated that “Environment and trade policies should be mutually supportive. An open, multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to lessening demands on the environment. It thus provides additional resources needed for economic growth and development and improved environmental protection. A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.”

⁴⁰ Preamble of the *WTO Agreement*, *supra* note 3.

⁴¹ In general international law the preamble is part of the context in which the international treaty has to be interpreted. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 31: “General rule of interpretation at 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning

a role in interpretation of a treaty, particularly in identifying the treaty's object and purpose. Thus, it is important to understand the intended meaning of the Preamble to the WTO Agreement. In the Preamble, the concept of sustainable development is mentioned in connection with the optimal use of the world's resources. This may be partly because the Preamble was drafted as an expansion of the GATT 1947 Preamble, which referred conclusively to the need for "[...] developing the full use of the resources of the world..." It may also refer to the historical origins of the concept itself, which as noted above, emerged from the management practices of an important agro-forestry industrial sector. It is important to note, however, that the Preamble specifically recognises the need to raise standards of living and income for people, to protect the environment, and to do so in a way that is consistent with the needs and concerns of developing countries, so international trade can contribute to these countries' development needs.

Indeed, two years later in the 1996 Singapore Ministerial Declaration,⁴² the Preamble of the WTO Agreement did not inspire new negotiations on binding rules. Instead, a short note appears in para. 16, limited only to trade and environment issues, stating: "Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development."⁴³ In this reference, sustainable development objectives are clearly linked to the implementation of the international trade regime, rather than simply the optimal use of natural resources. It is an expanded recognition of the concept, nonetheless, the text manages to give the impression that sustainable development is a natural result of liberalized trade. In the 1998 Geneva Ministerial Conference, there was further movement

to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes..." The preamble can contain important information about the object and purpose of the treaty.

⁴² Please note that the Ministerial declarations are generally political statements and not legally binding upon Members. An exception is the decision to engage in trade negotiations. If negotiations are commissioned the Ministerial declaration acquires quasi legal status, because each formulation constitutes a negotiation mandate and sets the limitations of these negotiations. Nonetheless, ministerial declarations are adopted unanimously and reflect the political opinion of the overall development of the organization.

⁴³ *Singapore Ministerial Declaration*, WTO Doc. WT/MIN(96)/DEC/W (1996), 36 I.L.M. 218; all WTO documents are available online: <<http://docsonline.wto.org>>.

towards establishing sustainable development as more than a reason for enhanced trade, or a way to constrain environmental measures. The preamble of the Ministerial Declaration states, at para. 4: “We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development.”⁴⁴

In 1998, the organization and member states formally recognized that sustainable development is not only related to natural resources or is an inevitable result of the economic liberalization process, but is actually one of the goals of the WTO itself. The links between this concept and the concept of sustained economic growth are also put into relief. By 1998, several countries and regions had introduced the goal of sustainable development into their laws and policies,⁴⁵ and it is likely that they sought to reflect this commitment in one of the most important international economic law-making processes of the decade. Indeed, this position echoed developments in the other important forum in which WTO rules and regimes are clarified and interpreted: the dispute settlement system.

B. ‘Sustainable Developments’ in Recent WTO Disputes?

While there is no *stare decisis* in world trade law, WTO panels and appellate bodies do appear to find the *acquis* of past GATT and the WTO cases highly persuasive for the purpose of deciding future disputes. Resultantly, it is worthwhile to briefly highlight certain elements of two particular decisions which serve to explain the WTO’s view of the

⁴⁴ *Geneva Ministerial Declaration*, WTO Doc. WT/MIN(98)/DEC/1 (1998).

⁴⁵ For example, large trading countries such as Germany amended their Constitutions to include the goal of sustainable development, see art. 20a Grundgesetz [GG] (German Constitution); and trading regions such as the European Union had accepted sustainable development as an objective of their integration, see art. 2 *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, October 2 1997, (1997) O.J. (C 340), 37 I.L.M. 56 [*Treaty of Amsterdam*]. See also the outcomes of the Summit of the Americas on Sustainable Development, Santa Cruz de la Sierra, Bolivia, 7-8 December 1996, particularly the non-binding *Declaration of Santa Cruz de la Sierra*, online: <<http://www.summit-americas.org/Boliviadec.htm>>, as discussed generally in M.C. Cordonier Segger and M. Lechner Reynal, eds., *Beyond the Barricades: An Americas Trade and Sustainability Agenda* (Aldershot: Ashgate, 2005).

concept of sustainable development in world trade law, as it currently stands: the *US–Shrimp Case*,⁴⁶ and the *EC–Tariff Preferences Case*.⁴⁷

The *US–Shrimp Case* concerned a regulation under the 1973 US *Endangered Species Act* to protect five different species of endangered sea turtles. The US requires that US shrimp trawlers use “turtle excluder devices (TEDs)” in their nets. A different law then prohibited shrimp imports from regions which were not equipped with TEDs in the presence of sea turtles. India, Malaysia, Pakistan and Thailand complained that the prohibition was inconsistent with US GATT obligations. The panel and the Appellate Body decided in favour of the complainants and asked the US to bring its laws into compliance with GATT 1994 obligations.

In the case, the US proposed that Art. XX GATT should be interpreted in the light of the preamble of the WTO Agreement; “[a]n environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the Marrakesh Agreement Establishing the World Trade Organization (the ‘WTO Agreement’) acknowledges that the rules of trade should be ‘in accordance with the objective of sustainable development,’ and should seek to ‘protect and preserve the environment.’”⁴⁸ In its arguments, the US omitted the reference to the world’s resources and the statement concerning the “respective needs and concerns at different levels of economic development.”

The Appellate Body decision considers the Preamble, but does not follow the US argument:

“The words of Article XX(g), ‘exhaustible natural resources,’ were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay

⁴⁶ See WTO, Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (1998). See also WTO, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 3.

⁴⁷ WTO, Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (2004).

⁴⁸ WTO, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 3 at para. 12.

Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement*—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges ‘the objective of *sustainable development*.’⁴⁹ (emphasis added)

The enclosed legal note, as part of the Appellate Body’s decision,⁵⁰ deserves particular attention in this volume. The Appellate Body refers to the objective of sustainable development and in a footnote, expands on its relevance to the case. The Appellate Body explained that “[t]his *concept* has been generally accepted as integrating economic *and* social development *and* environmental protection” (emphasis added). This is remarkable for two reasons. First, the WTO Appellate Body delineated its stance on the nature of sustainable development and agrees that it should be framed as a ‘concept’ (as opposed to a principle, policy or rule), in world trade law. Second, a reading of the definition demonstrates the WTO’s recognition of the need to integrate all three elements or ‘pillars’ of sustainable development—social development, economic development and environmental protection. The recognition of the social dimension of the concept, effectively laid the groundwork for subsequent focus on this element in the 2002 WSSD.

The Appellate Body continued with their interpretation of the preamble in WTO law: “[w]e note once more that this language demonstrates recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately

⁴⁹ *Ibid.* at 129; n. 107 reads “This concept has been generally accepted as integrating economic and social development and environmental protection.” See e.g., G. Handl, “Sustainable Development: General Rules versus Specific Obligations” in *Sustainable Development and International Law* (ed. W. Lang, 1995), p. 35; World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 43.”

⁵⁰ *Ibid.* at para. 123.

read with the perspective embodied in the above preamble.”⁵¹ This addition of “colour, texture and shading” seems to amplify the previous language: ‘interpretation based on the context of the agreement.’ It indicates that the Appellate Body understands the concept of sustainable development to inform Members’ intention in all of the annexed agreements.

The Appellate Body insisted “[w]e also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the “CTE”). In their Decision on Trade and Environment, Ministers expressed their intentions, in part, as follows: [...] *Considering* that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.”⁵² In this Decision, Ministers took ‘note’ of the Rio Declaration on Environment and Development,⁵³ Agenda 21,⁵⁴ and ‘its follow-up in the GATT, as reflected in the statement of the Council of Representatives to the CONTRACTING PARTIES at their 48th Session in 1992.’^{55,56}

⁵¹ *Ibid.* at para. 153.

⁵² Preamble of the *Decision on Trade and Environment*, WTO Doc. MTN.TNC/W/141 (1994), online: WTO <http://www.wto.org/english/docs_e/legal_e/56-dtENV_e.htm>.

⁵³ We note that Principle 3 of the *Rio Declaration*, *supra* note 38, states: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” Principle 4 of the *Rio Declaration on Environment and Development* states that: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

⁵⁴ *Agenda 21*, *supra* note 6, is replete with references to the shared view that economic development and the preservation and protection should be mutually supportive. For example, para. 2.3(b) states: “The international economy should provide a supportive international climate for achieving environment and development goals by [...] [m]aking trade and environment mutually supportive [...]” Similarly, para. 2.9(d) states that an ‘objective’ of governments should be: “To promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive.”

⁵⁵ Preamble of the WTO, *Decision on Trade and Environment*, *supra* note 52.

Crucial explanatory comments are again found in the footnotes. The Appellate Body cites specific rules and provisions of the Rio Declaration and Agenda 21, which refer to balancing with regard to the needs of developing countries. As such, the Appellate Body presently interprets the preamble constructing linkages between the connection to 1992 UNCED and the 1992 Rio Conference outcomes.

This reasoning was adopted and applied in subsequent WTO Panel and Appellate Body reports related to the *US-Shrimp Case*, when Malaysia took recourse to Article 21.5 of the WTO Dispute Settlement Understanding,⁵⁷ arguing that the measures taken by the US did not comply with the recommendations and rulings of the DSB. In particular, the Panel stated that: “In that framework, assessing first the *object and purpose* of the WTO Agreement, we note that the WTO preamble refers to the notion of ‘sustainable development.’⁵⁸ This means that in interpreting the terms of the chapeau, we must keep in mind that sustainable development is one of the objectives of the WTO Agreement.”⁵⁹ On appeal, this interpretation was not overturned by the WTO Appellate Body.⁶⁰

The *EC-Tariff Preferences Case*⁶¹ concerned the scheme of generalised tariff preferences for developing countries. India complained

⁵⁶ WTO, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 3 at para. 154.

⁵⁷ WTO Doc. WT/DS58/17 (2000).

⁵⁸ WTO, Panel Report, *United State—Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, WTO Doc. WT/DS58/RW (2001), para. 5.54 n. 202: “See the final texts of the agreements negotiated by Governments at the United Nation Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil, 3–14 June, 1992, specifically the Rio Declaration on Environment and Development (hereafter the “Rio Declaration”) and Agenda 21 at www.unep.org; the concept is elaborated in detailed action plans in Agenda 21 so as to put in place development that is sustainable—i.e. that “meets the needs of the present generation without compromising the ability of future generations to meet their own needs.” See World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1988).”

⁵⁹ *Ibid.*

⁶⁰ WTO, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc. WT/DS58/AB/RW (2001).

⁶¹ WTO, Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, *supra* note 47.

that special preferences based on certain drug arrangements adopted by beneficiary countries were inconsistent with the most-favoured nation clause (Article 1.1 GATT 1994) and could not be justified under the *Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries* (the “Enabling Clause”).⁶² Similar provisions exist for environmental and labour rights, but in the end were not challenged. The panel found that the EC’s scheme was indeed inconsistent with Article 1.1 GATT and could not be justified under the enabling clause, because developed countries were compelled to grant identical tariff preferences under GSP schemes to all developing countries without differentiation and that it should apply to all developing countries. The Appellate Body reversed these last two findings but concluded that the drug due to a closed list of beneficiary countries and unclear criteria for the selection of these countries.

The EC argued that because the Enabling Clause was designed to fulfill the objectives of the WTO, it should not be interpreted as an exception to Article 1.1 GATT but rather as an incentive for developed countries to confer preferences on their less developed counterparts.⁶³ The Appellate Body considered this argument and agreed with the initial observation. Indeed, it overturned one of the panel’s findings—interpreting non-discrimination according to the objectives of the GATT and the WTO—and accepting that the differentiation between developing countries according to their needs was possible. The Appellate Body, citing its *US-Shrimp* decision, found that the objectives of the WTO could be fulfilled through “General Exceptions.” Indeed, they noted that ‘the optimal use of the world’s resources in accordance with the objective of sustainable development’ could be achieved through application of the WTO exceptions, such as Article XX (g) GATT.

However, the Panel in the same case found that the EC could not justify its drug arrangements under Article XX (b) GATT, because it could not prove that its system was designed to protect human health in the European Union. Rather the panel agreed with India’s argument that increased market access was intended to contribute to sustainable development of the beneficiary countries. As the fight against illicit drug

⁶² GATT C.P. Dec. L/4903, 26th Supp. B.I.S.D. (1979) 203.

⁶³ WTO, Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, *supra* note 47 at para. 93. Interestingly a similar argument was made by one dissenting panel member in the panel case.

production and exports were deemed to be part of a broader sustainable development objective (as confirmed by several multilateral instruments and the official justification to the Regulation setting up the EC System), these could not be justified as a measure which only sought to benefit the EC. This decision demonstrates that both the ‘environmental’ and the ‘development’ aspects (including health) are part of the concept of sustainable development that the WTO dispute settlement body recognises as a WTO objective.

The most recent decision in *Brazil–Retreated Tyres* is unique in that it was the first decision where a developing country invoked Art. XX GATT against a challenge by an industrialised country, in this case the European Communities.⁶⁴ Brazil banned the import of retreaded tyres arguing that the large quantities of retreaded tyres imported from the EC created environmental problems including dangers associated with mosquitoes that breed in tyres and tyres catching fire. The EC argued that Brazil had not shown that the ban on retreaded tyres was necessary to protect human health. The panel citing the US–Shrimp Appellate Body decision and the overall importance of the goal of sustainable development interprets Brazil’s reference to environmental protection as meaning the protection of human, animal or plant life or health (Art. XX b) GATT). China in its submission in the case also emphasized the importance of sustainable development:

“China hopes that the Panel will give considerations to the fact that the defending party in this case is a developing country. In fact, developing countries are facing more difficulties than developed countries in balancing their economic development and environment protection. In addition, in dealing with environmental problems, developing countries usually are less sufficient in terms of funding and less efficient in terms of technology. Therefore, the multilateral trade system should give more support and tolerance to developing countries’ endeavour to improve the environment.”⁶⁵

The reasoning of the WTO dispute settlement body in these cases, taken together, demonstrates that the objective of sustainable development

⁶⁴ WTO, Panel report, *Brazil–Measures affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/R (2007).

⁶⁵ *Ibid.* at para. 5.37.

has become an integral part of the world trading system. Legal arguments encompassing an integrated developmental and environmental approach have been made by the parties and accepted by the relevant dispute settlement organs. On the other hand, it is clear that the panels and the Appellate Body will not accept sustainable development as a trump card. It also shows that sustainable development is not a one-way relationship between developed and developing countries but rather promotes mutual understanding and can also be successfully employed by both groups. A solid legal understanding of the objective and its underlying principles, as well as the appropriate application of specific facts of each case embedded in a reasoned legal argument is required to make a successful sustainable development argument in world trade law.

III. New Instruments in Trade Law for Sustainable Development

A highly practical example of the integration of economic, social and environmental concerns (as envisaged by sustainable development) is found in the increasing use of impact assessment tools in the international arena.⁶⁶ These tools come in various forms, ranging in scope from environmental impact assessments and human rights impact assessments to the broadest tool, sustainability impact assessments. Impact assessments operate as a formalised consideration of the wider effects of particular policies (usually trade policies or development projects), and aim to ensure that trade and development decisions result from processes that promote sustainability and public participation. Although it remains unusual for any national development decision or regional or bilateral trade agreement to require some form of impact assessment, the European Union, the United States and Canada have all adopted the tool to some degree, to be used either before or after the decision or agreement has been concluded.

The 1992 Rio Declaration recognised the potential of impact assessment in Principle 17:

“Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a

⁶⁶ For details, see M. Gehring, J. Hepburn & M.C. Cordonier Segger, *World Trade Law in Practice* (London: Globe Law and Business Publishing, 2007) at 131 ff.

significant adverse impact on the environment and are subject to a decision of a competent national authority.”

At the international level, certain environmental treaties contain obligations to perform environmental impact assessments in situations where one country’s activity may flow across a border or when areas of common concern, such as the high seas⁶⁷ or the Antarctic,⁶⁸ are involved. The application of such instruments to trade agreements is relatively new, but developing rapidly, and in some instances the assessments include a regulatory dimension.

In Canada, the Framework for Conducting Environmental Assessments of Trade Negotiations⁶⁹ has been used since 2001 to conduct environmental assessments of new bilateral and regional trade negotiations, and since 2005 this has also been applied to investment agreements. The assessments seek to assist Canadian negotiators in integrating environmental considerations into the negotiating process (as envisaged by the Doha Development Agenda), and to address public concerns. The framework includes provisions for actively seeking public input into assessments from non-governmental organisations, businesses, indigenous peoples and the general public. Similarly, the Office of the US Trade Representative has conducted environmental reviews of all bilateral and regional trade agreements signed by the United States since 1999, in which regulatory impacts, public advice and potential impacts in the territory of the proposed new trading partner are taken seriously and addressed.⁷⁰ Developing countries have, in some cases, also found such assessments useful for economic policy making. For instance, as discussed by the International Institute for Sustainable Development, Senegal recently found that stocks of certain species of fish with high

⁶⁷ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1245 (entered into force 16 November 1994), at Preamble and arts. 192, 194.

⁶⁸ *Protocol to the Antarctic Treaty on Environmental Protection*, 4 October 1991, 30 I.L.M. 1461, art. 23(1).

⁶⁹ Online: Foreign Affairs and International Trade Canada <www.dfait-maeci.gc.ca/tna-nac/Environment-en.asp>.

⁷⁰ Available online: <http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html>.

market values were being seriously depleted through the use of trade impact assessment.⁷¹

Sustainability impact assessments are more complex, innovative studies which take economic, environmental and social impacts into account to provide a complete picture of the expected effects of a trade policy or project. They include target-related indicators, which attempt to measure sustainability against a set of defined goals, and process-related indicators, which are based on the principle that the process itself by which policies and decisions are adopted plays a substantial role in achieving sustainable development goals. Indicators of sustainability used in the assessments fall into three categories:

- economic indicators, including average real income, fixed capital formation and employment rates;
- social indicators, including poverty rates, health and education levels and equity; and
- environmental indicators, including air and water quality indicators, biological diversity and natural resources.⁷²

Sustainability impact assessments are mostly in use within the European Union, which developed a framework for analysis in 1999 and has since applied it to the WTO Doha Round negotiations and EU bilateral and regional trade agreements with Chile, Mercosur, the African-Caribbean-Pacific nations and the Gulf Cooperation Council nations. EU sustainability impact assessments place much emphasis on consultation both within EU member states and in the third country trade partners. The assessments themselves are conducted by independent experts commissioned by the European Union, which then receives a response paper from the European Commission. All results are made public.

IV. Sustainable Development in the Doha Development Agenda

During the Seattle negotiations several countries made sustainable development related submissions and the public spotlight focussed on the

⁷¹ IISD & UNEP, *Environment and Trade: A Handbook*, 2d ed. (Winnipeg: IISD, 2005) at 112, online: IISD <<http://www.iisd.org/publications/pub.aspx?pno=754>>.

⁷² European Commission, *Sustainability Impact Assessment*, online: EUROPA <http://ec.europa.eu/comm/trade/issues/global/sia/index_en.htm>.

trade and environment and the trade and development debates. The successful conclusion of the Doha Ministerial Declaration resonated in some ways with these submissions and discussions. Ministers agreed in para. 6 of the Ministerial Declaration:

“We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules, no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO’s continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.”⁷³

As is clear from this excerpt, the DDA was intended to be informed by sustainable development objectives. Ministers recognized sustainable development as a fundamental goal of the WTO, and placed it into a strengthened context, referring to practical measures such as the need for cooperation other international environment *and development* organizations in the lead-up to the WSSD. From a macroperspective, the Doha Declaration provides an indication that sustainable development objectives are starting to be understood as involving both environmental

⁷³ WTO, *Ministerial Declaration, Ministerial Conference, Fourth Session–Doha, 9-14 November 2001*, WTO Doc. WT/MIN(01)/DEC/W/1 (2001).

and social development actors and organizations. Indications are that states may be prepared to move away from the traditional “trade only” or “trade and environment only” approach. While expectations about a sustainable development infused WTO should be hedged because of recalcitrant powerful members, coherence between the preamble and the Appellate Body’s balanced and integrated definition is legally compelling.⁷⁴ References to this objective in the Doha Ministerial Declaration clearly recognise environmental protection and social development aspects to be part of the mandate of a mainly economic organization.

Indeed, the Ministers went further, seeking to operationalise the sustainable development goal for the WTO itself. At Para 51, a mechanism was created to ensure that this objective would be translated into concrete action.⁷⁵ In the organization and management of the work programme section of the Declaration, WTO member governments agreed that “[t]he Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.”⁷⁶ An initial proposal by Canada, that the Committee on Trade and Environment should debate the environmental aspects of the expected Seattle negotiations, was broadened in the negotiations to include the Committee on Trade and Development.⁷⁷ It is unclear whether these two Committees will be able to fulfill their mandates to identify and debate environmental and development aspects of the negotiations in addition to helping to ensure that sustainable development can be appropriately reflected in the trade negotiations.

The WTO clearly considers itself bound by its commitment to sustainable development as an objective, and arguably, may also be influenced by sustainable development in its role as an ‘interstitial norm’ in public international law. As such, the outcomes of trade negotiations

⁷⁴ See Seattle proposals (all made *after* the Appellate Body’s *US-Shrimp* decision discussed above, *supra* note 3).

⁷⁵ *Supra* note 73 at 51. This section of the Ministerial Declaration is binding for the negotiations.

⁷⁶ *Ibid.*

⁷⁷ *Supra* note 52 at 3.

may present opportunities to modify certain trade rules in order to ensure that they can better support sustainable development. Many caveats remain and these have become doubly apparent in subsequent Doha Round negotiations in Cancun and Hong Kong. At first there were high initial expectations for the agenda underpinning the DDA as it was widely understood as intending to place development priorities at the very heart of the new negotiations. However, in spite of recent Appellate Body and WTO statements on the importance of delivering on the development promises of world trade, and of ensuring that trade law contributes to the objective of sustainable development, the process has been inconsistent and repeatedly obstructed. While developing countries have made great efforts to ensure that their voices and interests are heard and taken into account, there has been little tangible advancement on important development issues. Similarly, progress has been scant in constructively addressing overlaps between trade and human rights questions or trade and environment questions, in a way that seamlessly integrates development interests.

Conclusion

The norm development is not over—the content of the concept of sustainable development itself is still contested. Furthermore, while Members of the WTO may now be bound by a particular reading of sustainable development objectives at the global level, this may not mean they feel obliged to develop “sustainable” trade laws or policies either internally, or in their further bilateral and regional trade treaties with other countries.⁷⁸ According to the letter of international trade law, all countries are free to choose their own economic system and trade policies. However, where ‘discrimination’ is alleged, clashes with principles of the WTO will ultimately result in binding dispute settlement procedures for its Members. To ensure that international trade law can deliver on sustainable development in the current context, a constructive, integrated approach is needed to address overlaps between social development, economic development and environmental protection. This approach

⁷⁸ See Jarrod Hepburn *et al.*, “Sustainable Development in Regional Trade and Investment Agreements: Policy Innovations in Asia?,” in *CISDL Working Paper 2007*, online: Boell Foundation <www.boell.de>.

must focus specifically on achieving solid results for developing countries and for development in general.