PART XI:

CROSS-CUTTING ISSUES

Chapter 28: Trade, Environment and Sustainable Development

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1 Introducing the International Trade, Environment and Development Debate

Issues related to international trade and the environment undoubtedly are of significance to developing countries because they argue that developed countries have depleted resources and indulged in environmentally harmful practices during the past century, in order to achieve unprecedented high standards of living.[1] The developing countries therefore demand a general but differentiated responsibility, seeking open trade and compensation for adopting environmentally restraining policies.[2] Upon further reflection on the link between economic growth activities, environmental protection and social development, the triangular debate on these topics will be highlighted briefly, by introducing the various perspectives.[3]

1.1 The Trade Perspective

Trade creates the wealth, which increases human well-being. Trade can be good for the environment because it creates wealth that can be used for environmental improvement, and the efficiency gains from trade can mean fewer resources used and less waste produced. Increased economic growth leads to more environmental protection and a higher standard of living. The exchange of goods introduces new technologies, which reduce emissions and save raw materials and natural resources.

1.2 The Environmental Perspective

The environment actually represents a higher order than trade and the *status quo* seriously threatens the earth's eco-systems. Developing countries try to protect themselves against costly environmental demands. In contrast, the wealth created by trade will not necessarily result in environmental improvements. Trade liberalisation is deemed to cause greater harm, leading to exports of natural resource allocation to other countries and thereby causing increased environmental degradation.[4]

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1 Ruppel (2009c; 2010g, l).
2 Goyal (2006:11).
3 For further reading see Goyal (2006) and UNEP (2005b).
4 For a detailed discussion see UNEP (2005b:3ff.).

1.3 The Development Perspective

Developing countries' top priority should be to reduce poverty. Openness to trade (market liberalisation) and investment may be a key to doing so by increasing exports, even though the link between market liberalisation and economic growth does not happen automatically. Developed countries protect their industries with subsidies, special trade rules and tariff systems which place a disadvantage at exporters in developing countries. Demands that developing countries comply with the environmental standards of developed countries are unfair, particularly if they are not accompanied by technical or financial assistance. Priorities differ; in Africa, for example, clean water is paramount and, historically, developed countries caused most of the environmental damage in the first place.

1.4 Sustainable Development: The Answer to the Dilemma?

Principle 11 of the 1972 Stockholm Declaration states that:

> The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organisations with view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

In its 1987 report *Our Common Future*, the Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[5] Since the 1992 UN Conference on Environment and Development in Rio de Janeiro, the principle of sustainable development has influenced a broad number of international instruments, both of legal and non-legal in nature. It aims at embracing and balancing ecology, economy, conservation, and utilisation and has become a worldwide governing political *Leitmotiv* for environment and development. It can be broadly understood as a concept that is characterised by (i) the link between the policy goals of economic and social development and environmental protection; (ii) the qualification of environmental protection as an integral part of any developmental measure, and vice versa; and (iii) the long-term perspective of both policy goals, that is the States' inter-generational responsibility.[6]

Apart from the question, whether the principle of sustainable development enfolds normative quality,[7] the concept reflects the idea of distributive justice and can play an important role in the process of bridging the North-South divide in international and

5 The World Commission on Environment and Development (1987).
6 Beyerlin (1996).
7 Cf. Sands (2003:254).

developmental relations.[8] Sands formulated an "integration approach", where economic and social development must be an integral part of environmental protection, and vice versa.[9]

Although many African countries are classified as least-developed countries, the southern African region is endowed with numerous natural resources, fisheries, and minerals. In turn, environmental challenges include among other things, land degradation, poor land use and land management, exploitation of natural resources, water scarcity, bio-diversity loss and climate change. In this regard poverty and challenges of governance often collide with different interests in society and political pressures.[10]

The former executive Director of the United Nations Environmental Programme (UNEP), Klaus Töpfer, once stated that "sustainable development cannot be achieved unless laws governing society, the economy, and our relationship with the Earth connect with our deepest values and are put into practice internationally and domestically." The problem continues to lie, however, in that such laws "must be enforced and complied with by all of society, and all of society must share this obligation".[11] It is also important to acknowledge that not only rests the responsibility on national governments and international organisations but also on corporate businesses to enter a new era of sustainable development:[12]

> Companies don't operate in a vacuum, they operate in the society we find ourselves in, and the situation we find ourselves in. And the one situation is the planet which is in crisis. We have used the natural assets of the planet faster than nature can regenerate them, so the great companies in the world (…) by means of integrated reporting need to tell their stakeholders in future more transparently how they had worked out a long-term strategy on sustainability issues.

The importance of a harmonised interplay between trade and sustainable development is well reflected in the universally applicable (applicable to all countries, not just developing nations and emerging economies) sustainable development goals (SDGs) that have been proposed by the UN Open Working Group[13] and which are universally applicable (to all countries, not just developing nations and emerging economies).

At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development. The Sustainable Development Goals, otherwise known as the Global Goals, build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015. The MDGs, adopted in 2000, aimed at an array of issues that included slashing poverty, hunger, disease, gender inequality, and access to water and

8 Beyerlin (1996) with further references.
9 Sands (2003:263).
10 Kameri-Mbote / Odote (2009:37).
11 Töpfer (2005).
12 Interview was available at http://www.moneyweb.co.za/mw/view/mw/en/page295799?oid=526093&sn=2009+Detail&pid=295799, accessed 30 January 2011.
13 UN Open Working Group Proposal for Sustainable Development Goals https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf, accessed 1 July 2021.

sanitation. Enormous progress has been made on the MDGs, showing the value of a unifying agenda underpinned by goals and targets. Despite this success, the indignity of poverty has not been ended for all.[14]

The SDGs, and the broader sustainability agenda, go much further than the MDGs, addressing the root causes of poverty and the universal need for development that works for all people. With the SDGs the UN aspired to further an understanding of sustainable development within the ever changing social, political, and environmental conditions of the 21st century. The 17 SDGs and 169 targets, demonstrate the scale and ambition of the universal Agenda. The 17 Goals consist of: No poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; life below water; life on land; peace, justice and string institutions; and partnerships for the goals.[15] Unlike its predecessor, the MDGs, the SDGs provide greater detail in both goals and targets setting. All 17 Sustainable Development Goals are relevant to Namibia, while some are particularly central.

Namibia's Fifth National Development Plan, is the nation's blueprint for national development between 2017-2022. It outlines a development strategy to improve the living conditions of every Namibian. NDP5 builds on the successes and achievements of the four previous five-year plans from the Transitional National Development Plan (TNDP) to the Fourth National Development Plan. It also recognises the challenges experienced during the implementation of the previous plans. The current plan is informed by the global, continental, regional and national development frameworks. These include the Global Sustainable Development Goals (Agenda 2030), African Union Agenda 2063, Southern African Development Community (SADC), Regional Integrated Strategic Plan (RISDP), Vision 2030, Harambee Prosperity Plan (HPP) and the SWAPO Party Manifesto. The principle of sustainable development permeates NDP5. As such, the plan frames the achievement of progress within a framework of ensuring the ability of future generations to thrive. In the same spirit, NDP5 has four key goals, namely; achieve inclusive, sustainable and equitable economic growth; build capable and healthy human resources; ensure sustainable environment and enhance resilience; and promote good governance through effective institutions.[16]

14 See https://www.undp.org/publications/millennium-development-goals-report-2015, accessed 1 July 2021.

15 "The 17 Goals", UNDP Sustainable Development Goals, United Nations Development Programme, accessed 2 July 2021, https://sdgs.un.org/goals.

16 GRN (2017a).

2 The Role of Trade for Sustainable Development and the Reduction of Poverty in Africa[17]

Human rights and good governance have an impact on the domestic investment climate, which contributes to growth, productivity and the creation of jobs, all factors essential for economic growth and sustainable reductions in poverty. The furtherance of economic development, reduction of poverty and the promotion of human rights in fact go hand in hand. The relationship has grown closer over the past few years due to increasing discussions in the world community on related matters and issues. The connection can be seen as a two-way relationship insofar as economic development is obliged to respect human rights in a democratic society. Conversely, human rights can be given more effect through economic growth, as a possible outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living.[18]

States have committed themselves to respecting human rights by acceding to specific human rights treaties, conventions or declarations on the international, regional and sub-regional level; including the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.[19] On 10 December 2008, on the 60th Anniversary of the Universal Declaration of Human Rights, the United Nations adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) bringing the possibility of international justice one step closer for millions of excluded people, groups, communities and peoples worldwide. The Optional Protocol is important because it promises to provide victims of economic, social and cultural rights violations that are not able to get an effective remedy in their respective domestic legal systems with an avenue for redress. Both human rights and good governance have an impact on the investment climate, which again contributes to productivity and the creation of jobs, all essential for economic growth, sustainable development, and the reduction of poverty.[20]

Poverty has always been one of the central concerns of the Committee on Economic, Social and Cultural Rights (CESCR). Given the magnitude of the problem, it is often unrealistic for governments to tackle this daunting task without assistance. To achieve sustainable development a holistic approach must be adopted to deal with the concerns of the poor.[21] A need exists for African governments to accelerate the process of creating enabling environments for the private sector to play an effective role in reducing poverty. To create such environments, countries and regions must ensure the efficient

17 The following passages are largely based on Ruppel (2010f, g).
18 Cf. Ruppel (2009a; 2010b); Ruppel / Bangamwabo (2008).
19 Cf. Pillay (2009).
20 Ruppel (2009c).
21 Yahie (2000).

functioning of their markets, facilitate sufficient access of the poor to such markets and create the best possible conditions for competitiveness of their firms.[22] In particular, enterprises in the informal sector are to be considered as part of the enterprise entity, which contributes to the development process.[23]

The evidence of African poverty and growth rates leaves little room for doubt about the need for financial assistance and an improved trade climate. China, for example, is providing substantial funds for investment and development in many African countries. China follows a 'purely capitalist' approach, not attempting to assist in the facilitation of social or political change through the pursuit of wealth and although this approach seems appealing to many African leaders,[24] it is questionable because it does not attempt to improve social welfare in the targeted countries.[25]

Far more than any unconditional investment and development aid, trade can prove to be the catalyst, given favourable conditions, to uplift millions of people from poverty. African countries could gain disproportionately from further global trade reform, but it is widely acknowledged that a level playing field does not yet exist in the current world trade system, at least not to the required extent. Developing countries still face numerous hurdles, including high tariffs against their exports and subsidised competition. Nevertheless, the participation of developing countries in the global trading system is the most effective way of encouraging development and helping to alleviate poverty. A key objective of the on-going round of negotiations within the World Trade Organization (WTO), the Doha Development Round, is to assist developing countries more fully to reap the benefits of international trade. The liberalisation of agriculture in particular is hoped to provide significant benefits to developing countries in Africa.[26] Countries in Southern Africa are more or less in a permanent food security crisis, and policy formulation and response must be geared toward this reality on a continuing basis.[27]

Free trade agreements (FTAs) can also bring about economic benefits by reducing barriers to trade and investment between participating parties. They can open markets faster than would otherwise be possible through the WTO and build on the commitments already agreed in the WTO.[28] Over two-thirds of WTO members are developing and least-developed countries. Members could gain access to a range of special provisions and assistance contained in the rules of the WTO. The WTO's Committee on Trade and Development and its Sub-Committee on Least-Developed Countries

22 Cf. Asche / Engel (2008:11ff.).
23 Ruppel / De Klerk (2009).
24 Politicians often receive so-called 'signature bonuses' for approving resource or other investment deals.
25 Keenan (2009:125f.).
26 Khor / Hormeku (2006); Ruppel (2010i).
27 Zunckel (2010:v).
28 AusAID (2007).

monitor the implementation of provisions designed to assist developing and least-developed countries. The committees also monitor the substantial amount of training and technical assistance provided to developing countries by the WTO.[29] Yet, the design of the multilateral trade regime needs to shift from one which overemphasises a market access perspective to one which prioritises enabling (or at least not disabling) the domestic policy space available to developing countries to make a range of diverse, including unorthodox, policy choices and pursue the concomitant strategies. It should also not be evaluated on the basis of whether it maximises the flow of goods and services, but on whether trade arrangements, current and future, maximise possibilities for human development, especially in developing countries. An implication is that multilateral trade rules will need to adjust 'one-size-fits-all' solutions that really only suit a few powerful members. The global trade governance framework requires additional asymmetric rules in favour of the weakest members. In the long run, such rules will be beneficial for both developed and developing countries.[30] Trade rules therefore have to allow for diversity in national institutions and standards. Countries should have the right to protect their own institutions and development priorities where necessary, and no country has the right to impose its institutional preferences on others. In order to create a trade regime friendly to poverty reduction and human development, governments must have the space to design appropriate policies.[31]

Article 11 of the International Covenant on Economic, Social and Cultural Rights is for instance concerned with the right to food and advocates considering the problems of both food importing and food exporting countries, to ensure an equitable distribution of world food supplies in relation to need. Between the weak and the strong, poor and the rich, liberty is the oppressor and the law is freedom. Article 11(2) ICESCR in recognising the fundamental right of everyone to be free from hunger, compels Parties to take measures to (a) improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.[32] Driven by a global population projected to rise to over 10 billion people by 2050 (from 7.6 billion today) and an increase in the 'consuming class' with the purchasing power to demand more food per capita (including food with a higher environmental footprint), the world could require a doubling in agricultural production from 2005 levels in order to meet demand. Such a trajectory is unsustainable.[33]

29 Ibid.
30 Cf. Malhotra (2006).
31 Cf. Ruppel (2012d).
32 Ruppel (2021:500).
33 World Economic Forum (2020).

Therefore, negotiating and implementing more sustainable trade rules is one of the WTO's basic missions, and its primary vocation in so doing is to regulate, and not to deregulate, as is often thought. It also presupposes the existence of social policies, whether to secure redistribution or provide safeguards for the men and women whose living conditions are disrupted by changes in the international division of labour. It does not suffice unless it is accompanied by policies designed to correct the imbalances between winners and losers; and the greater the vulnerability of economies, societies or individuals, the more dangerous the imbalances. It does not suffice unless it goes hand in hand with a sustained international effort to assist developing countries to build the capacity required to take advantage of open markets.[34]

3 Regional Integration and Natural Resources in Southern Africa

The wealth of natural resources in southern Africa can only promote sustainable economic growth and contribute to poverty alleviation if there is an effective legal framework for environmental protection in place.[35] The spirit of the Chapter is eloquently captured in the following message of past United Nations Secretary-General, Ban Ki-moon (May 2011):

> For most of the last century, economic growth was fuelled by what seemed to be a certain truth: the abundance of natural resources. We mined our way to growth. We burned our way to prosperity. We believed in consumption without consequences. Those days are gone. In the twenty-first century, supplies are running short and the global thermostat is running high. Climate change is also showing us that the old model is more than obsolete. It has rendered it extremely dangerous. Over time, that model is a recipe for national disaster. It is a global suicide pact. So what do we do in this current challenging situation? How do we create growth in a resource-constrained environment? How do we lift people out of poverty while protecting the planet and ecosystems that support economic growth? How do we regain the balance? All of this requires rethinking.
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> Here at Davos – this meeting of the mighty and the powerful, represented by some key countries – it may sound strange to speak of revolution. But that is what we need at this time. We need a revolution. Revolutionary thinking. Revolutionary action. A free market revolution for global sustainability. It is easy to mouth the words "sustainable development", but to make it happen, we have to be prepared to make major changes – in our lifestyles, our economic models, our social organization and our political life. We have to connect the dots between climate change and what I might call here WEF – water, energy and food (…). But as we begin, let me highlight the one resource that is scarcest of all: time. We are running out of time. Time to tackle climate change. Time to ensure sustainable, climate-resilient green growth. Time to generate a clean energy revolution. The sustainable development agenda is the growth agenda for the twenty-first century.[36]

34 Ibid.
35 Ruppel / Ruppel-Schlichting (2012a).
36 Ban Ki-moon (2011).

The United Nations General Assembly specifically proclaimed poverty eradication as an overriding theme of sustainable development.[37] Poverty is a major factor to consider when formulating workable legal frameworks. Thus far, Africa remains poor regardless of its high concentration of natural resources. "[I]neffective and inefficient, as well as narrowly focused, economic and environmental policies" have been identified as the culprits in increasing poverty and environmental degradation.[38]

Table 1: Endowment of SADC Countries with Natural Resources

Angola	petroleum, diamonds, iron ore, phosphates, copper, feldspar, gold, bauxite, uranium
Botswana	diamonds, copper, nickel, salt, soda ash, potash, coal, iron ore, silver
Congo, DR	cobalt, copper, niobium, tantalum, petroleum, industrial and gem diamonds, gold, silver, zinc, manganese, tin, uranium, coal, hydropower, timber
Lesotho	water, agricultural and grazing land, diamonds, sand, clay, building stone
Madagascar	graphite, chromite, coal, bauxite, salt, quartz, tar sands, semiprecious stones, mica, fish, hydropower
Malawi	limestone, arable land, hydropower, unexploited deposits of uranium, coal, and bauxite
Mauritius	arable land, fish
Mozambique	coal, titanium, natural gas, hydropower, tantalum, graphite
Namibia	diamonds, copper, uranium, gold, silver, lead, tin, lithium, cadmium, tungsten, zinc, salt, hydropower, fish; note: suspected deposits of oil, coal, and iron ore
Seychelles	fish, copra, cinnamon trees
South Africa	gold, chromium, antimony, coal, iron ore, manganese, nickel, phosphates, tin, uranium, gem diamonds, platinum, copper, vanadium, salt, natural gas
Swaziland	asbestos, coal, clay, cassiterite, hydropower, forests, small gold and diamond deposits, quarry stone, and talc
Tanzania	hydropower, tin, phosphates, iron ore, coal, diamonds, gemstones, gold, natural gas, nickel
Zambia	copper, cobalt, zinc, lead, coal, emeralds, gold, silver, uranium, hydropower
Zimbabwe	coal, chromium ore, asbestos, gold, nickel, copper, iron ore, vanadium, lithium, tin, platinum group metals

Source: Table compiled by the author based on CIA World Fact Book at https://www.cia.gov/the-world-factbook/africa/, accessed 3 July 2021.

A sound legal framework can play a vital role in regulating sustainable poverty alleviation strategies across the region, but utmost success seems unattainable without national governments' dedication to achieving the same goal. Regional integration is an essential precondition for more effective regional environmental policy because the environment knows no national boundaries. Regional integration is a path towards

37 Resolution on Programme for the Further Implementation of Agenda 21 GA Res 19/2, UN Doc S-19/2 (1997) para. 27.

38 Susswein (2003:303).

gradually liberalising the trade of developing countries and integrating them into the world economy.[39] At first glance it appears that the promotion and protection of the environment is not within the focal range of a regional economic community (REC). However, environment related matters play a vital role. The relationship between environmental protection and economic development has become closer over the past few years due to increasing discussions in the world community on the issue.[40] This connection can be seen as a two-way relationship insofar as economic development is obliged to respect the environment in a democratic society. Conversely, environmental protection can be given more effect through economic growth, as one outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living. Here the principle of sustainable development comes into play. On the one hand, Africa is endowed with natural resources, fisheries, and minerals.[41] On the other, its environmental challenges include inter alia, climate change, land degradation, poor land use and land management, and over-exploitation of natural resources, water scarcity and loss of biodiversity. In this regard poverty and challenges of governance often collide with different interests in society and political pressures.[42]

The stimulation of growth and income levels, for example, potentially enable nations to have opportunities to generate additional resources to address environmental issues more effectively.[43] Increasing awareness about the negative effects of climate change and ongoing communication among international institutions, as well as public dialogue, necessarily leads to revision of and amendment to traditional frameworks. These also lead to fruitful discussions, for example, on new trade and climate change related measures such as carbon labelling or similar standards or regulations or on the imposition of border carbon adjustments, a measure to impose border taxes on the embodied carbon of imported goods, set at the level of equivalent domestic taxes.

Regional integration provides an opportunity to enhance political stability by establishing regional organisations which play an increasing role in defusing conflicts within and between countries and in promoting human rights. In terms of climate change related matters, such organisations are of the utmost relevance, especially when it comes to climate change related disaster management and environmentally induced migration. In this context, regional integration may serve as a tool to maintain political stability by building trust, enhancing understanding between groups and deepening interdependence.

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39 Andresen *et al*. (2001:3).
40 Ruppel (2008a:116).
41 Sands (2003:263).
42 Kameri-Mbote / Odote (2009:37).
43 This and the following two paragraphs are largely based on Ruppel / Ruppel-Schlichting (2012a).

Regional cooperation in environmental related matters including knowledge and technology transfer is another important link between regional integration and environmental protection. Such cooperation can address further interrelated challenges of a trans-national dimension such as food security, biodiversity, natural resources, and disease and pest control. One example in this regard is the considerable hydroelectric, solar and wind energy potential that exists in Southern Africa. Since many African countries share relevant resources, such as cross-border river basins, a regional approach is best suited to attract respective investment.

The African Continental Free Trade Agreement (AfCFTA) is highly relevant in this regard and expected to open new opportunities across the African continent. The Agreement Establishing the African Continental Free Trade Agreement (AfCFTA) entered into force on 30 May 2019 and began on 1 January 2021. The AfCFTA can contribute to eliminating existing obstacles, such as high tariffs on intermediate inputs to stimulate production of final goods and raise productivity. Moreover, the rules-of-origin (RoO) need to be harmonised and designed in a manner to make them easier to apply. Through development policy measures more sustainability can be achieved by regulating supply chains to become flexible to react.[44]

Moreover, regional trade agreements such as the AfCFTA also have high potential to boost intra-African trade and to restore certain imbalances in the world agricultural trade markets,[45] which – for instance – also provides an opportunity to revisit EU-Africa trade policy relations in the fields of food and agriculture, where greater emphasis should be laid on African development, including environmental, climate, health and distributional aspects.[46] This was explicitly reflected in 2014 Malabo Declaration of the African Union on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods where it was declared to boost intra-African trade in agricultural commodities and services, especially through the establishment of the AfCFTA and to enhance resilience of livelihoods and production systems to climate variability.[47]

4 The WTO and the Environment

In the first place, the WTO is concerned with reducing trade barriers and eliminating discriminatory treatment in international trade. However, world trade law is also

44 Ruppel (2021:510).
45 Ibid:520.
46 Kornher / von Braun (2020:5).
47 Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods Malabo, Equatorial Guinea, 26 June 2014, at https://au.int/sites/default/files/documents/31247-doc-malabo_declaration_2014_11_26.pdf, accessed 2 July 2021.

framed by the concept of sustainable development. Although environmental issues have not been negotiated as a separate topic during the Uruguay Round, the agreement establishing the WTO, unlike the General Agreement on Tariffs and Trade (GATT) has anchored the objective of sustainable development and the need to protect and preserve the environment within its Preamble:

> 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.

Although this statement in the Preamble is more of a policy goal than a binding principle, it has significant weight in decision-making and dispute resolution and can make an important difference to the agreement's operation in practice. The importance of the citation of sustainable development in the Preamble has, for example, been highlighted by the WTO's Appellate Body in the so-called Shrimp – Turtle Case.[48] Nowadays, world trade order is *de facto* closely related to international environmental policy and its institutions. Environmental degradation and pollution are largely induced by economic activities and international trade flows.

But what is the WTO's relationship to the environment? At first glance, the WTO provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development.[49] The WTO is not an environmental protection agency. So far, its competence in the field of trade and environment is limited to trade policies and to the trade-related aspects of environmental policies that have a significant effect on trade. However, in addressing the link between trade and environment, the two fields can complement each other. Overall, the GATT/WTO rules already provide significant scope for members to adopt national environmental protection policies. The right of governments to protect the environment is confirmed by WTO agreements under certain conditions. This is regulated by way of exceptions that allow governments under certain conditions to implement policies to protect the environment, but which affect trade. Trade liberalisation for developing country exports, along with financial incentives and technology transfers, are necessary to help developing countries generate the necessary resources to protect the environment and work towards sustainable development. Improved co-ordination on trade- and environment-related issues at the national level between trade and environmental officials, as well as increased co-ordination at

48 WT/DS58 Appellate Body Report, adopted 21 November 2001. The Report is available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm, accessed 2 July 2021. This case will be sketched below in the subsection on relevant WTO disputes.

49 WTO (2015:9); VanGrasstek (2013:3); Van den Bossche / Zdouc (2013:84).

the international level, could enhance mutual support between the trade and environmental regimes.

4.1 The Primary Objectives of the WTO

Today, the WTO with its 164 members[50] sees itself primarily as a forum for governments where international trade agreements are negotiated. The WTO provides a system of trade rules covering goods, services and intellectual property, as well as a legal and institutional framework for the implementation and monitoring of these agreements, and a venue for settling disputes arising from the interpretation and application of WTO agreements. Administering WTO trade agreements, monitoring national trade policies, providing technical assistance and training for developing countries and cooperating with other international organisations are further functions of the WTO.[51] More specifically, the WTO's main activities are:[52]

- Negotiating the reduction or elimination of obstacles to trade (import tariffs, other barriers to trade) and agreeing on rules governing the conduct of international trade (e.g. anti-dumping, subsidies, product standards, etc.);
- administering and monitoring the application of the WTO's agreed rules for trade in goods, trade in services, and trade-related intellectual property rights;
- monitoring and reviewing the trade policies of members, as well as ensuring transparency of regional and bilateral trade agreements;
- settling disputes among members regarding the interpretation and application of the agreements;
- building capacity of developing country Government officials in international trade matters;
- assisting the process of accession of some 30 countries who are not yet members of the organisation;
- conducting economic research and collecting and disseminating trade data in support of the WTO's other main activities; and
- educating the public about the WTO, its mission and its activities.

The WTO's founding and guiding principles remain the pursuit of open borders, the guarantee of the most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities. The opening of national markets to international trade, with justifiable exceptions or with adequate flexibilities, will encourage and contribute to sustainable development,

50 See https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, accessed 26 May 2021.
51 See Article III of the Agreement Establishing the WTO, text at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf, accessed 2 July 2021.
52 See http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm, accessed 2 July 2021.

raise people's welfare, reduce poverty, and foster peace and stability. At the same time, the liberalisation of markets must be accompanied by sound domestic and international policies which contribute to economic growth and development according to each member's needs and aspirations.[53]

Again, the WTO is not an environmental protection agency. However, the fields of trade and environment can complement each other. Trade liberalisation for developing country exports, along with financial and technology transfers, are necessary in helping developing countries generate the necessary resources to protect the environment and work towards sustainable development; coordinating trade and environment issues should be emphasised. An improved coordination at the national level between trade and environmental officials, as well as increased coordination at the international level could contribute to enhancing mutual supportiveness between the trade and environment regimes. The WTO's primary mandate is not to protect the environment but to promote trade. Although the first paragraph of the WTO agreement explicitly refers to the objective of sustainable development, aspiring[54]

> 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.

However, WTO members should not operate on the assumption that the WTO itself has the answers to environmental problems. Moreover, international trade also creates vulnerabilities through supply disruptions, growing unilateralism and competition over natural resources that can be both a cause and a consequence of geopolitical rivalry.[55] The WTO is a crucial institution for the governance of international trade, yet it has been characterised by frequent deadlocks in the past and has suffered from credibility loss due to the persistent failure of the Doha Development Agenda. The WTO has even been subject to trade war dynamics and a dysfunctional appellate body, all of which further exacerbates the need for reforms.[56] Geopolitical frictions hamper reform consensus to revive multilateral institutions, including the WTO, which should be empowered beyond the trade effects of trade.[57]

4.2 The 2001 Doha Declaration and the Environment

The 2001 Doha Declaration envisages trade, the environment and sustainable development to as mutually supportive. The declaration was adopted at the Doha Ministerial Conference in 2001 emphasising the relationship between existing WTO rules and

53 Ibid.
54 Agreement Establishing the World Trade Organisation, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf, accessed 2 July 2021.
55 Zhou *et al*. (2020).
56 Narlikar (2020).
57 Cf. for further reference Ruppel (2021:522).

specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any member that is not a party to the MEA in question; procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status; the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services. The Committee on Trade and Environment was instructed, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development; the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and labelling requirements for environmental purposes. The importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least developed among them was stressed.[58]

Agenda 21 promulgated that international trade and environmental laws should be mutually supportive. In this context, the relationship of the WTO rules and MEAs is not always clear.[59] Of the many MEAs currently in existence, over 20 incorporate trade measures to achieve their goals. Such trade-restricting measures may conflict with WTO rules (this problem is reflected in the Chile – Swordfish case discussed below.

The relationship between MEAs and WTO regulation is mostly not so problematic in cases, where all WTO members concerned are at the same time parties to the specific MEA in question. Then the case can be dealt with under the general obligations of public international law. WTO regulations will in general terms not hinder Members, which are parties to an MEA to apply it accordingly. More problematic are cases in which one of the parties concerned is not a WTO member, respectively not a party to the MEA in question.[60]

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58 The Doha Ministerial Declaration is available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, accessed 2 July 2021.

59 E.g. the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; the 2001 Stockholm Convention on Persistent Organic Pollutants (POPs); the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the 1985 Vienna Convention for the Protection of the Ozone Layer; the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; the 1992 Bonn United Nations Framework Convention on Climate Change and its 1997 Kyoto Protocol; and the 1992 Rio Convention on Biological Diversity, to name but a few of the most prominent MEAs.

60 Stoll / Schorkopf (2006:258f.).

4.3 The Committee on Trade and Environment

The WTO's Committee on Trade and Environment (CTE) was established in 1994 by the Marrakesh Ministerial Decision on Trade and Environment.[61] As subsidiary body of the General Council of the WTO, the CTE is responsible for implementing the mandate the council was given by the Decision on Trade and Environment. The CTE meets several times a year and membership is open to all WTO Members. Observer governments and observers from inter-governmental organisations are invited to participate in CTE meetings. Originally, the CTE was endowed with broad mandates "to identify the relationship between trade measures and environmental measures in order to promote sustainable development", to –[62]

> to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system.

The CTE was *inter alia* mandated to discuss:

- The links between the multilateral trading system and MEAs; relations between the WTO and taxes applied for environmental protection;
- relations between the WTO system and prescriptions established for environmental purposes with regard to products, norms, technical regulations and prescriptions on packaging, labelling and recycling;
- provisions of the WTO relating to the transparency of trade measures applied to the environment and environmental measures that have an impact on trade;
- the interrelationship between dispute settlement mechanisms established by MEAs and those provided by the multilateral trading system;
- the effects of environmental measures on market access;
- services and intellectual property; and
- the export of prohibited products.

Some of the items contained in the original ten items programme are being negotiated in the course of the Doha negotiations.[63] Considering its mandates and the items of its work programme, the CTE is an important institution to find a balance between trade and environment in general, and more particularly between legal implications of the trading system and multilateral environmental agreements. Launched in November 2020 by 53 WTO members, the Trade and Environmental Sustainability Structured Discussions (TESSD) are intended to complement the existing work of the Committee on Trade and Environment and other relevant WTO committees and bodies. The initiative is open to all WTO members and will also involve outreach to representatives

61 See http://www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm, accessed 2 July 2021.
62 See 1994 Marrakesh Ministerial Decision on Trade and Environment at http://www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm, accessed 2 July 2021.
63 See http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm for further information, accessed 2 July 2021.

from the business community, civil society, international organisations and academic institutions. The new Director-General Ngozi Okonjo-Iweala welcomed the discussions, telling participants the initiative is in line with the WTO's founding principle of promoting sustainable development:[64]

> I have said that to remain relevant, the WTO needs to deliver results. And looking to the future, we have to see how we can harness the power of trade to help us have a healthy environment. Trade policies can help unlock the green investment and innovation needed to decarbonize our economies and create the jobs of the future.

Some of the issues suggested as possible topics for discussion include trade and climate change; decarbonising supply chains; the circular economy; biodiversity loss; fossil fuel subsidies; and border carbon adjustments measures. Many members emphasize the importance of broadening participation in the discussions, ensuring the special needs of developing and least developed countries are taken into account, and avoiding duplication of efforts with the work currently taking place in the relevant WTO committees and bodies.

4.4 WTO Agreements and Environmentally Relevant Provisions

4.4.1 The General Agreement on Tariffs and Trade (GATT)

The GATT covers international trade in goods. The workings of the GATT agreement are the responsibility of the Council for Trade in Goods (Goods Council) which is made up of representatives from all WTO member countries. GATT 1994, Articles I and III deal with non-discrimination. One component of the principles of non-discrimination is the Most-Favoured-Nation (MFN) clause (Article I). It regulates that WTO members are bound to treat the products of other members not less favourable than accorded to the products of any other country. No country may give special trading advantages to another or to discriminate against it. This means that all members are on an equal footing, and all share the benefits of any move towards lower trade barriers. The MFN principle ensures that developing countries and others with little economic leverage are able to benefit freely from the best trading conditions, whenever and wherever they are negotiated. Another principle of non-discrimination is the National-Treatment (NT) Principle (Article III); it regulates that once goods have entered a market, they must be treated no less favourably than equivalent domestically-produced goods. Non-discrimination in terms of environmental concerns ensures to prevent the abuse of environmental policies and of their usage as disguised restrictions on international trade.

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64 Cf. https://www.wto.org/english/news_e/news21_e/tessd_08mar21_e.htm, accessed 26 May 2021.

Moreover, GATT Article XI provides for an elimination of quantitative restrictions. Article XI has been violated in the context of a number of environmental disputes in which countries have imposed bans on the importation of certain products; it therefore has relevance for trade and environment discussions. Most importantly, Article XX grants general exceptions from the aforementioned GATT rules. Article XX(b) lists measures necessary to protect human, animal or plant life and health; Article XX(g) lists measures relating to the conservation of exhaustible natural resources. WTO members may be exempted from GATT rules in specific instances. However, measures must be necessary (necessity-test). If the conditions set by Article XX are fulfilled, they must still pass the test of the introductory clause (Chapeau) of Article XX. According to the Chapeau measures may not be pronounced as arbitrary and unjustifiable discrimination between countries where the same conditions prevail and they may not constitute a disguised restriction on international trade. GATT rules provide significant scope for members to adopt national environmental protection policies. GATT rules impose only one requirement in this respect, that of non-discrimination. WTO members are free to adopt national environmental protection policies provided that they do not discriminate between imported and domestically produced like products (NT principle), or between like products imported from different trading partners (MFN clause). Non-discrimination is one of the main principles on which the multilateral trading system is founded. It shall secure predictable access to markets, protect the economically weak from the more powerful, and guarantee consumer choice.[65]

4.4.2 The General Agreement on Trade in Services (GATS)

The GATS is among the World Trade Organisation's most important agreements. The agreement, which came into force in January 1995, is the first and only set of multilateral rules covering international trade in services. It has been negotiated by the member governments and sets the framework within which firms and individuals can operate. The GATS has two parts: the framework agreement containing the general rules and disciplines; and the national schedules which list individual countries' specific commitments on access to their domestic markets by foreign suppliers.[66] GATS contains a general exceptions clause in Article XIV, similar to that of GATT Article XX. In addressing environmental concerns, GATS Article XIV(b) allows WTO members to maintain policy measures inconsistent with GATS if this is necessary to protect human, animal or plant life or health. This must not result in arbitrary or unjustifiable

65 On the trade and environment negotiations see https://www.wto.org/english/tratop_e/envir_e/envir_negotiations_e.htm, accessed 2 July 2021.

66 See http://www.wto.org/english/tratop_e/serv_e/gats_factfiction1_e.htm, accessed 2 July 2021.

discrimination and may not constitute disguised restriction on international trade. GATS Article XIV Chapeau is identical to that of GATT Article XX.

4.4.3 The Agreement on Technical Barriers to Trade (TBT)

The TBT Agreement attempts to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles. Technical regulations and product standards may vary from country to country. Many differing regulations and standards make life difficult for producers and exporters. If regulations are set arbitrarily, they could be used as an excuse for protectionism.[67] The TBT aims to avoid unnecessary obstacles to trade. Product specifications, whether mandatory or voluntary (known as technical regulations and standards), as well as procedures to assess compliance with those specifications (known as conformity assessment procedures), should not create unnecessary obstacles to trade. Article 2.2 provides for legitimate objectives for countries to pursue protection of human health or safety; protection of animal or plant life; and protection of the environment.

4.4.4 The Agreement on Sanitary and Phyto-sanitary Measures (SPS)

The SPS Agreement deals with the following problem: How do we ensure that our country's consumers are supplied with food that is safe to eat and safe by the standards considered appropriate? And at the same time, how can we ensure that strict health and safety regulations are not being used as an excuse for protecting domestic producers?[68] The SPS Agreement is very similar to the TBT Agreement but covers a narrower range of measures. It covers measures taken by countries to ensure the safety of foods, beverages and feedstuffs from additives, toxins or contaminants, or for the protection of countries from the spread of pests or diseases. It recognises the right of members to adopt SPS measures but stipulates that they must be based on a risk assessment, should be applied only to the extent necessary to protect human, animal or plant life or health, and should not arbitrarily or unjustifiably discriminate between countries where similar conditions prevail. The SPS objectives aim to protect human or animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food, beverages and foodstuffs.

67 See http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm, accessed 2 July 2021.
68 See http://www.wto.org/english/tratop_e/sps_e/sps_e.htm, accessed 2 July 2021.

4.4.5 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Namibia is a party to the World Intellectual Property Organization (WIPO) Convention, the Berne Convention for the Protection of Literary and Artistic Works, and the Paris Convention for the Protection of Industrial Property. Namibia is also a party to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks and the Patent Cooperation Treaty. Namibia is a signatory to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.[69]

The TRIPS Agreement introduced intellectual property rules into the multilateral trading system for the first time. Ideas and knowledge are an increasingly important part of trade. Most of the value of new medicines and other high-technology products are contained in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not because of the plastic, metal or paper used to make them. In the past, products were traded as low-technology commodities now contain a higher proportion of invention and design in their value; for example, branded clothing or new varieties of plants. Creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them. These are intellectual property rights. They take various forms. For example, books, paintings and films are protected under copyright; inventions can be patented; brand names and product logos can be registered as trademarks; and so on. Governments and parliaments have given creators these rights as incentive to produce ideas that will benefit society as a whole. The extent of protection and enforcement of these rights varies around the world; as intellectual property became more important in trade, these differences became a source of tension in international economic relations. New internationally agreed upon trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and for disputes to be settled more systematically.[70]

TRIPS stipulates patents are available for inventions in all fields of technology. It however also regulates the permissible exceptions thereto in Section 5, Article 27. The TRIPS Agreement is the most important multilateral agreement on the protection of intellectual property and obliges WTO members to comply with a certain minimum level of protection of these rights, cf. Preamble of TRIPS. Vaccines, technologies for diagnostics or the production of medical equipment, i.e. many "pandemic relevant products" are also covered by this. Part II of TRIPS, which protects copyrights (Section 1), trademarks (Section 2), patents (Section 5) and undisclosed information

69 For additional information see http://www.wipo.int/directory/en/, accessed 2 July 2021

70 From http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm, accessed 2 July 2021.

(Section 7), is particularly relevant for these products. The impact of intellectual property rights on the health of the world's population is largely based on access to medicines and medical treatment. Thus, the question arises to what extent intellectual property protection has an artificial effect on production and access. Two specific factors need to be considered here. First, the existence of medicines and, second, the access to and price of these. In light of the Covid-19 pandemic, the WTO community became increasingly aware that strong patent protection and the accompanying trade liberalisation can have a negative impact on human health. Art. 30 TRIPS allows that the rights granted to the patent holder under Art. 28 TRIPS for patent protection may exceptionally be suspended. To mitigate negative effects, exceptions to patent protection were created in Art. 31 and Art. 31bis TRIPS. Art. 31 provides for the granting of compulsory licenses according to the law of a nation state, which, however, has to be based on certain criteria. For example, the patent for the required drug may only be used in situations of medical emergency without prior attempts to negotiate with the patent holder without the latter's consent, Art. 31 (b) TRIPS. According to Art. 31(c), the compulsory license must be limited in time, and according to Art. 31(h), the patent holder must be paid reasonable compensation for the use. The crux of this provision is that according to Art. 31(f) a predominant use of the patent for the domestic market must be observed. This means that the drug may only be manufactured and distributed within the country's own borders and may not be sold or exported abroad.[71] However, the requirement of exclusive use in the domestic market means that the poorest countries continue to be denied access to medicine. They often lack production facilities and the necessary infrastructure. For this reason, the Doha declaration created Art. 31bis TRIPS. This allows countries to export or import genetically modified medicines produced under a compulsory license, creating more flexibility for developing countries.

4.4.6 The Agreement on Subsidies and Countervailing Measures (SCM)

The SCM Agreement disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. Under the agreement, a country can use the WTO's dispute-settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Alternatively, a country can launch its own investigation and ultimately charge extra duty (countervailing duty) on subsidised imports found to be detrimental to domestic producers.[72] The Agreement on Subsidies and Countervailing Measures applies to non-agricultural products and is designed to regulate the use of subsidies. Certain subsidies referred to as 'non-actionable' are generally

71 Bäumler / Terhechte (2020: para. 28).
72 See http://www.wto.org/english/tratop_e/scm_e/scm_e.htm, accessed 2 July 2021.

allowed. Under Article 8 of the Agreement on non-actionable subsidies, direct reference had been made to the environment. Amongst the non-actionable subsidies that had been provided for under that Article were subsidies used to promote the adaptation of existing facilities to new environmental requirements (Article 8.2(c)). However, this provision expired in its entirety at the end of 1999. It was intended to allow members to capture positive environmental external factors when they arise.

4.4.7 Trade in Agriculture[73]

In the decades following the Second World War, both the United States and nations of Western Europe provided generous subsidies to their agricultural producers and imposed both tariff and non-tariff import barriers to protect these producers from foreign competition.

The 1947 General Agreement on Tariffs and Trade (GATT) generally exempted agriculture from the GATT's trade liberalisation obligations: Trade in agriculture has been distorted by subsidies and protectionism to the detriment of both producers and consumers. Trade in agricultural products at the same time contributes to global food security by helping countries to obtain food supplies from world markets. Agricultural imports can be risky if they crowd out more expensive local production. This can have negative income effects for producers and thereby continuously weaken local agriculture. In the case of acute supply bottlenecks, such effects can often only be quickly remedied by imports, provided that enough food is available on the world market at affordable prices.[74]

Since the start of the *Brexit* negotiations, the agri-food sector suffered under a lack of certainty regarding the future relationship between the European Union (EU) and the United Kingdom (UK). Existing supply chains and trade flows for agricultural goods and food products, within the EU but also with respect to imports from and export to third countries, suggest a significant challenge for farmers and food businesses in the UK, in Ireland, across the EU and around the world. Issues of relevance range from market access to plant protection, food safety, and food and quality labelling.[75]

International trade of food commodities induces a virtual transfer of embodied land, carbon, and other land-based resources, while most of the environmental impacts of agricultural production remain in the producing countries the role of trade in food security is expected to increase due to climate change, population growth and changing

73 Cf. for further reference Ruppel (2021:517).
74 Rudloff / Wieck (2020).
75 Fratini Vergano (2018).

diets.[76] The causes of, and contributing factors to, global food insecurity are numerous and complex. It is clear, however, that the WTO and international trading rules play an important role in the pursuit of global food security.[77]

GATT Article XXI forms a controversial WTO provision recognising certain flexibilities for states in the international trading system, permitting ordinarily trade-restrictive measures for the purpose of national security. Article XXI(b)(iii) on "security exceptions" states that nothing in the GATT must be construed to prevent any WTO Member "from taking any action which it considers necessary for the protection of its essential security interests" in times of "emergency in international relations". This provision can justify certain trade restrictions introduced in pursuit of certain political objectives.

In 2019 in the case of *Russia – Measures Concerning Traffic in Transit* the WTO Dispute Settlement Panel found that "essential security interests" could be generally understood as referring to those interests relating to the quintessential functions of the state. The Panel observed that the specific interests at issue will depend on the situation and perceptions of the state in question and can be expected to vary with changing circumstances. For these reasons, the Panel held that it is left in general to every Member to define what it considers to be its essential security interests.[78]

According to Article XI of the GATT, supply risks explicitly justify otherwise prohibited trade restrictions and bans for food. Since trigger criteria and deadlines are not regulated, export bans are implemented rapidly, which in principle drives prices up and results in supply risks for other import-dependent countries. On the import side, protective tariffs can seal off sectors in particularly threatening situations, as is often the case for reasons of supply to stimulate production. In bilateral agreements, the weaker partners often condemn this protection option as too restrictive. At the same time, caution should be given against premature isolation, as it often makes sense to secure supplies through less expensive imports. In principle, the WTO complicates such incentives for specifications on production processes that do not lead to physical product differences, as is usually the case when considering sustainability.[79]

Article XI GATT has been violated in the context of a number of environmental disputes in which countries have imposed bans on the importation of certain products; it therefore has relevance for trade and environment discussions. Article XX grants general exceptions from the aforementioned GATT rules. Article XX(b) lists measures necessary to protect human, animal or plant life and health; Article XX(g) lists measures relating to the conservation of exhaustible natural resources. WTO members may be exempted from GATT rules in specific instances. However, measures must be

76 See Zhou *et al*. (2020).
77 Stewart / Manaker Bell (2015).
78 Cf. https://bit.ly/2NlydMZ, accessed 10 February 2021.
79 Rudloff / Wieck (2020).

necessary (necessity-test). If the conditions set by Article XX are fulfilled, they must still pass the test of the introductory clause (Chapeau) of Article XX. According to the Chapeau, measures may not be pronounced as arbitrary and unjustifiable discrimination between countries where the same conditions prevail, and they may not constitute a disguised restriction on international trade. GATT rules provide significant scope for members to adopt national environmental protection policies. GATT rules impose only one requirement in this respect – that of non-discrimination. WTO members are free to adopt national environmental protection policies provided that they do not discriminate between imported and domestically produced like products (NT principle), or between like products imported from different trading partners (MFN clause). Non-discrimination is one of the main principles on which the multilateral trading system is founded. It secures predictable access to markets, protects the economically weak from the more powerful, and guarantees consumer choice.[80]

Certification and appropriate, non-deceptive labelling in line with WTO rules, in particular the Agreement on Technical Barriers to Trade (TBT), can enable consumers to make sustainable food choices avoiding unjustified barriers to trade. International food-safety as well as plant and animal health standards, based on the SPS Agreement, are essential for reaping the benefits of agricultural trade and for avoiding potential risks to human, animal and plant health, while unjustified sanitary and phytosanitary restrictions on food trade can exacerbate food insecurity.[81]

Article XX of the GATT 1994 states that measures "necessary to protect human, animal or plant life or health" (b) and those "relating to the conservation of exhaustible natural resources" (g) can be interpreted as a legally accepted exception. While this could be most relevant for the protection of soil, a typical measure that can fall under this exception may be requiring export countries to comply with certain policies prescribed by the importing country.[82]

Further exceptions in accordance with Article XX of the GATT could possibly also be used to justify border carbon adjustment (BCA) measures as a tool for addressing carbon leakage. Such measures could, for instance, be the inclusion of certain imported goods in a Carbon Emissions Trading Scheme (ETS), a customs duty, or a border tax:[83]

> To adhere to WTO principles of non-discrimination, countries cannot ask for more or different compliance from importers than they ask of their own firms producing comparable products. That means that only price-based climate policies can be associated with a price at the border. A domestic carbon tax can be complemented by a border tax.[84]

80 On the trade and environment negotiations see https://www.wto.org/english/tratop_e/envir_e/envir_negotiations_e.htm, accessed 10 February 2021.
81 Cf. https://bit.ly/3plgHG0, accessed 10 February 2021.
82 Van den Bossche / Zdouc (2017).
83 Cf. for further reference Ruppel (2021:516).
84 Droege / Fischer (2020).

The Paris Agreement does not explicitly state but implies counteracting like products and services with a higher footprint, which can take place in a number of different ways, and not necessarily through discrimination against only foreign goods (MFN/NT).[85] The Paris Agreement does not prescribe border carbon adjustment measures. Whether a carbon tax yields a better result for global food security than carbon sequestration remains open for discussion beyond the scope of this article. Yet, the rapidly increasing food import volumes or price decreases may legitimise safeguarding action by countries which have had to transform their non-tariff barriers (NTBs) into tariffs. Basically, however, rules and limits apply to four categories of protection and support policies. Border protection should be limited to tariffs. The maximum rates (bound/scheduled) should not be increased without compensation as per Article XXVIII of the GATT. Import quotas are prohibited under Article XI of the GATT. A time-limited border protection is available against imports threatening or jeopardising local production, which are generally available safeguards under Article XIX of the GATT.[86] In addition, in Article XXIV(5) of the GATT, WTO members may exclude customs unions and bilateral or regional free-trade areas from compliance with WTO disciplines in certain circumstances. These regional agreements are important, as they establish disciplines which might affect both the adoption of domestic and international carbon rules and measures to promote sustainable development and environmental cooperation.[87]

The Agreement on Agriculture (AoA) entered into force at the time of the inception of the WTO on 1 January 1995. In principle, all WTO rules on trade in goods apply to agriculture. These rules include, inter alia, the GATT and pacts such as those dealing with sanitary and phytosanitary measures, customs valuation, import licensing, pre-shipment inspection, safeguarding measures, subsidies in general, and various standards, regulations and labelling requirements that imports have to meet (known as "technical barriers to trade"). The AoA was negotiated in the Uruguay Round (1986–1994) and was a significant step towards fairer competition and a less distorted sector. WTO member governments agreed to improve market access and reduce trade-distorting subsidies in agriculture. The AoA seeks to reform trade in agricultural products and provides the basis for market-oriented policies. In its Preamble, the Agreement reiterates the commitment of members to reform agriculture in a manner which protects the environment. Under the Agreement, domestic support measures with minimal impact on trade (known as green box policies) are excluded from reduction commitments (contained in Annex 2 of the Agreement).[88]

85 Häberli (2018:20).
86 Ibid:8.
87 See with further references Gehring / Hepburn (2013).
88 Ruppel (2018:790).

The AoA primarily covers three aspects which need to be adapted to improve international agricultural trade, namely market access, export competition and domestic support. Market access is set out in Articles 4 and 5 of the AoA, and requires member states to convert their non-tariff barriers into tariffs and then to reduce those tariffs to improve agricultural trade market transparency and to strengthen the connection between domestic and international agricultural markets. The AoA also highlights the need for stricter regulation of domestic support measures under Articles 3, 6 and 7 to avoid their use for protectionist strategies which promote unfair competition, and categorises domestic agricultural support measures into 3 boxes according to the level of their trade-distorting effect, namely amber box, blue box and green box measures. Exemptions for reductions in support measures include green box subsidies which are considered minimal or non-trade distorting and include support for public stockholding for food security purposes and domestic food aid, as well as development measures which assist support of agricultural and rural development objectives. Export competition, as set out in Articles 9 and 10 of the Agreement on Agriculture, required member states to make reduction commitments on their export subsidies. Article 20 recognises the importance of taking into account non-trade concerns and special and differential treatment for developing country members, resulting in many developing countries, through negotiating groups bringing forward proposed amendments to the AoA on the elimination of export subsidies, the use of public stockholding in the context of food security purposes and trade remedies such as special safeguard mechanisms.[89]

The AoA in Article 21(1) stipulates that the GATT and all other WTO agreements on trade in goods (officially Annex 1A of the Marrakesh Agreement establishing the WTO) apply but if there is a conflict, then the rules in the Agriculture Agreement prevail.[90] While the "AoA professed to ameliorate the double standards in global agricultural trade", it has been said that[91]

> It was riddled with ambiguities that enabled wealthy countries to continue to subsidize their agricultural producers while requiring market openness in developing countries. Since most developing countries had already liberalised their markets pursuant to structural adjustment programs, the impact of the AoA was to preclude these countries from adopting these subsidies in the future beyond de minimis levels. Agricultural subsidies in the United States and European Union, however, actually increased in the aftermath of the AoA.

In terms of agricultural product subsidies there is no outright prohibition, but because they are considered to distort trade, they are limited for all WTO members. The conditions for unlimited governmental programmes are narrowly defined. The Developing Country Green Box (Article 6(2) AoA) allows, for instance, certain credit schemes and subsidies, for example for irrigation construction, and even for the running costs of low-income and resource-poor producers. Article 6(2) provides in relevant parts that

89 Cf. for further reference Ruppel (2021:518).
90 World Trade Organization (2015).
91 Gonzales (2014:106).

measures which are "an integral part of the development programmes of developing countries (...) shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures". These are "*investment subsidies* which are generally available to agriculture in developing country Members and *agricultural input subsidies* generally available to low-income or resource-poor producers in developing country Members".[92]

Nevertheless, there is still a need to update global trade rules to reflect market and policy shifts that have occurred in recent years and to address contemporary agricultural and food challenges in reducing trade-distorting agricultural support of the past.[93] This does not come as a surprise, as the AoA has given rise to a relatively large number of disputes reflecting the fact that agriculture is a sensitive sector in many member countries. In its 2019 recent panel report DS511 on China – Domestic Support for Agricultural Producers the DSB found that China was not in compliance with its domestic support commitments pursuant to Articles 3(2) and 6(3) of the Agreement on Agriculture after the United States contended that China has provided market price support to its agricultural producers of wheat and rice in excess of its commitments under the AoA.[94]

The agriculture, forestry, and other land use (AFOLU) sector is an important sector that services national food requirements and export earnings for many developing countries around the world. It is unique in the sense that it is the only sector within which both sources and sinks for greenhouse gases can be found. AFOLU plays a central role in food security, sustainable development and climate change mitigation and adaptation and could also be considered as a valid motive under Article 6(2) AoA through measures that do not distort trade. Effective climate-smart support to farmers can also improve the comparative advantage of agriculture in countries that will be negatively affected by changing climate, allowing them to become competitive and achieve a better balance in export and import performance.[95]

Further relevant provisions for trade in agricultural products are found in the WTO Agreement on Subsidies and Countervailing Measures (SCM). SCM exerts discipline over the use of subsidies and regulates the actions that countries can take to counter the effects of subsidies. Under the agreement, a country may use the WTO's dispute-settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Alternatively, a country can launch its own investigation and ultimately charge extra duty (countervailing duty) on subsidised imports found to be detrimental to domestic producers.[96] In line with Article 13 AoA, the SCM agreement now also applies to agricultural export (and import displacement) measures. Although export

92 Häberli (2018:9).
93 Cf. https://bit.ly/3qfnlic, accessed 10 February 2021.
94 Cf. https://bit.ly/3qeGiS7, accessed 10 February 2021.
95 Deutz *et al*. (2020).
96 See http://www.wto.org/english/tratop_e/scm_e/scm_e.htm, accessed 2 July 2021.

subsidies – a long-term concern of many competitive agricultural product exporters – were finally prohibited in 2015, there still is no agreement on the implementation details (e.g. schedule changes) nor on the rules tightening mandated for all export competition measures under the Doha Development Agenda (DDA). This failure is also reflected in the stalling reform process under Article 20 of the AoA to agree on additional disciplines making trade patterns more sustainable, more resilient under a climate change perspective.

> The key for an economic impact assessment of agricultural subsidies in a climate perspective would probably be the contribution of a differentiating subsidy under the Paris Agreement. Here again, not all countries are equal. Some temperate climate countries may actually benefit from global warming, with little or no justification for a subsidy. For countries located closer to the Equator, adaptation subsidies and Official Development Assistance (ODA) might find economic justification especially for farmers without meaningful support from their governments.[97]

This could contribute to global efforts to control atmospheric greenhouse gas concentrations, foster AFOLU-related mitigation pathways and at the same time lead to improved soil conditions. In this regard, trade could become more central in climate change mitigation efforts and this would also benefit soil protection. If trade could provide the necessary signals to farmers to produce low carbon footprint products, emissions could be reduced globally. In practice, this would necessitate the imposition of a carbon tax (or an equivalent mitigation measure) on agricultural products domestically, combined with a corresponding tariff adjustment at the border to discriminate against high carbon footprint imports.[98]

WTO provisions offer flexibility for waivers or exemptions from complying with the non-discrimination principle. While sufficient space for policy discussions needs to be pursued at the intersection of the WTO and the Paris Agreement, the principle of differentiated responsibilities, respective capabilities, and the special and differential treatment of developing countries remain ever relevant when discussing and implementing transformative policies for climate change adaptation and mitigation to make agriculture meet contemporary challenges.[99]

4.4.8 The Environmental Goods Agreement

In 2014, various WTO members launched plurilateral negotiations for an Environmental Goods Agreement (EGA). The negotiations relate to promoting trade and investment that is needed to protect the environment, and to developing and disseminating relevant technologies. Under the EGA, members are engaged in negotiations seeking to eliminate tariffs on a number of important environment-related products. These

97 Leal-Arcas / Morelli (2018:25).
98 Cf. for further reference Ruppel (2021:520).
99 FAO (2018:97).

include products that can help achieve environmental and climate protection goals, such as generating clean and renewable energy, improving energy and resource efficiency, controlling air pollution, managing waste, treating waste water, monitoring the quality of the environment, and combatting noise pollution. The participants to these negotiations account for the majority of global trade in environmental goods. The benefits of this new agreement will be extended to the entire WTO membership, meaning all WTO members will enjoy improved conditions in the markets of the participants to the EGA.[100]

The talks aim at securing a tariff-cutting deal on selected environmental goods, and they build on a list[101] of specific environmental goods put together by countries of the Asia-Pacific Economic Cooperation forum. Included are goods such as wind turbines, air quality monitors and solar panels. Meanwhile, several participating countries have presented indicative lists of product nominations related to cleaner and renewable energy, as well as energy efficiency, among others. The EGA talks will – no doubt - contribute to the movement of sustainable development and environmental concerns towards the centre of discourse among WTO members.

4.5 The WTO's Dispute Settlement Body

The Dispute Settlement Body (DSB) is the WTO's judicial body. The dispute settlement mechanism of the WTO, one of the pillars of the multilateral trading system, is governed by Articles XXII and XXIII of GATT, and the Dispute Settlement Understanding (DSU). In simplified terms, the full dispute settlement process can be subdivided in four phases:[102] The process begins with consultations between the countries in dispute. If consultations fail, the process enters the second stage, the panel. Panels consist of three or five experts from different countries who examine the evidence and issue a report. The report becomes the Dispute Settlement Body's (DSB) ruling or recommendation unless a consensus rejects it. The third stage of the dispute settlement process is an appeal to the Appellate Body, if so requested by one or both parties to the dispute. The respective appeals report has to be accepted or rejected by the DSB. The final stage is that of adoption and implementation of the DSB's rulings and recommendations. The number of cases that went for dispute settlement has amounted to close to 600 as of 26 May 2021 with over 350 rulings issued.[103] The majority of cases relate to the European Union and the United States.

100 Cf. https://www.wto.org/english/tratop_e/envir_e/ega_e.htm, accessed 26 May 2021.
101 List available at http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm/2012_aelm_annexC.aspx, accessed 2 July 2021.
102 For more details see Delich (2002:71).
103 See https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, accessed 2 July 2021.

Historically, Africa's involvement in the dispute settlement process of the WTO is rather small. Although the involvement of developing countries in WTO related cases has increased significantly and account for over 40% of the cases, it is mostly the large Asian and Latin American countries which are making use of the dispute settlement process. While African countries have been respondents in nine cases (Egypt in four cases, South Africa in five cases and Marocco in two cases), Tunisia is the only country on the African continent that has so far initiated proceedings as complainant under the DSU.[104] The participation as third party is slightly higher.[105]

The reasons for Africa's minor role in the proceedings under the DSU are manifold.[106] Although Africa's share in world trade is growing, it is still relatively small compared to that of other regions with a share of about 3% on average in trade in goods and services.[107] With a narrow range of primary export products (mainly fuels and mining products),[108] it is understandable that the participation of African countries in the dispute settlement system is still limited.[109]

Further reasons for Africa's limited participation through litigation under the DSU are the agreements granting preferential access to key trade markets. Moreover, African priorities are rather focused on market access negotiations than on taking disputes to the WTO's judicial body. However, it is predictable that the African share of world trade will increase, and as such, there may be need to resolve disputes that arise. With increasing economic development and regional integration strengthening the position of African economies, combined with a growing base of legal expertise in trade related issues, the participation of African countries in the dispute settlement system will undoubtedly improve.

4.6 Some Environmental Case References

A few of the environment-related cases that have been brought before the GATT/WTO dispute settlement mechanism are listed below in brief.

104 See https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm, accessed 2 July 2021.
105 African countries which have participated as third parties are Benin, Cameroon, Chad, the Ivory Coast, Egypt, Ghana, Kenya, Madagascar, Malawi, Mauritius, Namibia, Nigeria, Senegal, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. See http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#respondent, accessed 1 January 2021.
106 Horlick / Fennell (2013:164); Zunckel / Botha (2012:3); Alavi (2007:25-42).
107 WTO (2021:3).
108 See WTO Database on International Trade and Market Access Data; Profile for Africa at http://webservices.wto.org/resources/profiles/MT/TO/2012/AFR_e.pdf, accessed 2 July 2021.
109 See World Bank (2011:xiii); Rugwabiza (2012).

4.6.1 United States – Canadian Tuna (1982)

In the United States – Canadian Tuna case,[110] an import prohibition was introduced by the United States after Canada seized nineteen fishing vessels and arrested US-fishermen for harvesting Albacore tuna, without authorisation from the Canadian Government, in waters considered by Canada to be under its jurisdiction. The United States did not recognise this jurisdiction and introduced an import prohibition to retaliate against Canada under the Fishery Conservation and Management Act. The Panel found that the import prohibition was contrary to GATT Article XI:1 and was not justifiable under Articles XI:2 and Article XX(g).[111]

4.6.2 Canada – Salmon and Herring (1988)

This case[112] deals with the 1970 Canadian Fisheries Act, under which Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The United States complained that these measures were inconsistent with GATT Article XI. Canada argued that these export restrictions were part of a system of fishery resource management aimed at preserving fish stocks, and therefore were justified under Article XX(g).

The panel found that the measures maintained by Canada were contrary to GATT Article XI:1 and were justified neither by Article XI:2(b), nor by Article XX(g).[113]

4.6.3 United States – Tuna (Mexico) (1991, not adopted)[114]

The US Marine Mammal Protection Act (MMPA) required a general prohibition of the "taking" and importation into the United States of marine mammals, except when explicitly authorised. The Act governed, in particular, the taking of marine mammals incidental to harvesting, yellow fin tuna in the Eastern Tropical Pacific Ocean (ETP), an area where dolphins are known to swim above schools of tuna. Under the MMPA, the importation of commercial fish or products from fish which were caught using commercial fishing technology which results in the incidental killing or injury of ocean mammals in excess of US standards, were prohibited. In particular, the importation of

110 See http://www.wto.org/english/tratop_e/envir_e/edis01_e.htm, accessed 2 July 2021.
111 United States – Prohibition of Imports of Tuna and Tuna Products from Canada, adopted on 22 February 1982.
112 See http://www.wto.org/english/tratop_e/envir_e/edis02_e.htm, accessed 2 July 2021.
113 Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, adopted on 22 March 1988.
114 See http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm, accessed 2 July 2021.

yellow fin tuna harvested with purse-seine nets in the ETP was prohibited (primary nation embargo), unless the competent US-authorities established that the Government of the harvesting country had a programme regulating the taking of marine mammals, comparable to that of the United States, and the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such taking by US vessels. The average incidental taking rate (in terms of dolphins killed each time in the purse-seine nets) for that country's tuna fleet were not to exceed 1.25 times the average taking rate of US vessels in the same period.

Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo were also prohibited (intermediary nation embargo). Mexico claimed that the import prohibition on yellow fin tuna and tuna products was inconsistent with Articles XI, XIII and III. The United States requested the panel to find direct embargo was consistent with Article III and, the alternative, was covered by Article XX(b) and (g). The United States also argued that the intermediary nation embargo was consistent with Article III and, the alternative, was justified by Article XX(b), (d) and (g) because the tuna was caught in a manner harmful to dolphins.

The panel found that the import prohibition under the direct and the intermediary embargoes did not constitute internal regulations within the meaning of Article III, were inconsistent with Article XI:1 and were not justified by Article XX(b) and (g). Moreover, the intermediary embargo was not justified under Article XX(d). Allowing the American import measures, the import prohibition, would undermine the multilateral trading system.[115]

4.6.4 United States – Gasoline (1996)[116]

Following the 1990 amendment to the Clean Air Act, the US Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States. The Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold. The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. It required any domestic refiner which was in operation for at least six months in 1990 to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990. EPA also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in

115 United States – Restrictions on Imports of Tuna, circulated on 3 September 1991, not adopted.
116 See http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm, accessed 2 July 2021.

1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

Venezuela and Brazil claimed that the Gasoline Rule was inconsistent, *inter alia*, with GATT Article III, and was not covered by Article XX. The United States argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in Article XX(b), (g) and (d). The panel found that the Gasoline Rule was inconsistent with Article III and could not be justified under paragraphs (b), (d) or (g). The appeal on the panel's findings on Article XX(g), the Appellate Body found that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g) but failed to meet the requirements of the Chapeau of Article XX.[117]

4.6.5 Chile – Swordfish (WTO/ITLOS, 2000)[118]

Swordfish migrate through the waters of the Pacific Ocean. During their extensive journeys, swordfish cross jurisdictional boundaries. For ten years, the European Community and Chile were engaged in controversy over swordfish fisheries in the South Pacific Ocean, resorting to different international law regimes to support their positions. However, the European Community decided in April 2000 to bring the case before the WTO, and Chile before the International Tribunal for the Law of the Sea (ITLOS) in December 2000.

With regard to the proceedings at the WTO on 19 April 2000, the European Community requested consultations with Chile regarding the prohibition on the unloading of swordfish in Chilean ports established on the basis of the Chilean Fishery Law. The European Community asserted that its fishing vessels operating in the South East Pacific were not allowed, under Chilean legislation, to unload their swordfish in Chilean ports. The European Community considered that, as a result, Chile made transit through its ports impossible for swordfish. The European Community claimed that the above-mentioned measures were inconsistent with GATT 1994, and in particular Articles V and XI. On 12 December 2000, the Dispute Settlement Body (DSB) established a panel further to the request of the European Community. In March 2001, the European Community and Chile agreed to suspend the process for the constitution of the panel (this agreement was confirmed in November 2003).

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117 United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996.

118 See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm and http://www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf, accessed 2 July 2021.

Proceedings started on 19 December 2000 at the ITLOS by Chile and the European Community. Chile requested, *inter alia*, the ITLOS to declare whether the European Community had fulfilled its obligations under UNCLOS:

- Article 64: Calling for cooperation in ensuring conservation of highly migratory species;
- Articles 116-119: Relating to conservation of the living resources of the high seas;
- Article 297: Concerning dispute settlement; and
- Article 300: Calling for good faith and no abuse of right.

The European Community requested, *inter alia*, the Tribunal to declare whether Chile had violated:

- Articles 64, 116-119 and 300 of UNCLOS, as well as
- Article 87: Freedom of the high seas including freedom of fishing, subject to conservation obligations; and
- Article 89: Prohibiting any State from subjecting any part of the high seas to its sovereignty.

On 9 March 2001, the parties informed the ITLOS that they had reached a provisional arrangement concerning the dispute and requested that the proceedings before the ITLOS be suspended. This suspension was recently confirmed. The case therefore remains on the docket of the Tribunal.

4.6.6 United States – Shrimp: Initial Phase (1998)

To date, seven species of sea turtles have been identified worldwide. They spend their lives at sea, where they migrate between their foraging and their nesting grounds. Sea turtles have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the United States on the importation of certain shrimp and shrimp products. The US Endangered Species Act of 1973 (ESA) listed as endangered or threatened the five species of sea turtles that occur in US waters and prohibited their take within the United States, in its territorial sea and the high seas. Pursuant to ESA, the United States required that US shrimp trawlers use 'turtle excluder devices' (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. Section 609 of Public Law 101-102, enacted in 1989 by the United States, provided, *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation did not pose a threat

to sea turtles. In practice, countries having any of the five species of sea turtles within their jurisdiction and harvesting shrimp with mechanical means had to impose on their fishermen requirements comparable to those borne by US shrimpers, essentially the use of TEDs at all times, if they wanted to be certified and to export shrimp products to the United States.

The Panel considered that the ban imposed by the United States was inconsistent with Article XI and could not be justified under Article XX. The Appellate Body found that the measure at stake qualified for provisional justification under Article XX(g), but failed to meet the requirements of the Chapeau of Article XX, and, therefore, was not justified under Article XX of GATT 1994.[119]

4.6.7 United States – Shrimp: Implementation Phase (2001)

Malaysia introduced an action pursuant to Article 21.5 of the Dispute Settlement Understanding (DSU), arguing that the United States had not properly implemented the findings of the Appellate Body in the Shrimp – Turtle dispute. The implementation dispute revolved around a difference of interpretation between Malaysia and the United States on the findings of the Appellate Body. In Malaysia's view, a proper implementation of the findings would be a complete lifting of the US ban on shrimps. The United States disagreed, arguing that it had not been requested to do so, but simply had to revisit its application of the ban. In order to implement the recommendations and rulings of the Appellate Body, the United States had issued Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the Revised Guidelines). These Guidelines replaced the ones issued in April 1996 that were part of the original measure in dispute. The Revised Guidelines set forth new criteria for certification of shrimp exporters. Malaysia claimed that Section 609, as applied, continued to violate Article XI:1 and that the United States was not entitled to impose any prohibition in the absence of an international agreement allowing it to do so. The United States did not contest that the implementing measure was incompatible with Article XI:1, but argued that it was justified under Article XX(g). It argued that the Revised Guidelines remedied all the inconsistencies that had been identified by the Appellate Body under the Chapeau of Article XX.

The implementation panel concluded that the protection of migratory species was best achieved through international cooperation. However, it found that the Appellate Body had instructed the United States to negotiate (not necessarily to conclude) an international agreement for the protection of sea turtles with the parties to the dispute.

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119 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report, adopted on 6 November 1998.

The panel found that the United States had indeed made serious *bona fide* efforts to negotiate such an agreement and ruled in favour of the United States. Malaysia subsequently appealed against the findings of the implementation Panel. It argued that the panel erred in concluding that the measure no longer constituted a means of "arbitrary or unjustifiable discrimination" under Article XX. Malaysia asserted that the United States should have "negotiated and concluded" an international agreement on the protection and conservation of sea turtles before imposing the import prohibition. The Appellate Body upheld the implementation panel's finding and rejected Malaysia's contention that avoiding "arbitrary and unjustifiable discrimination" under the Chapeau of Article XX.[120]

4.6.8 Brazil – Measures Affecting Imports of Re-treaded Tyres (2007)[121]

On 20 June 2005, the European Community (EC) requested consultations with Brazil on the imposition of measures that adversely affect exports of re-treaded tyres from the EC to the Brazilian market. The EC would like to address the following measures:

- Brazil's imposition of an import ban on re-treaded tyres;
- Brazil's adoption of a set of measures banning the importation of used tyres, which are sometimes applied against imports of re-treaded tyres, despite the fact that these are not used tyres;
- Brazil's imposition of a fine of 400 BRL per unit on the importation, as well as the marketing, transportation, storage, keeping or keeping in deposit or warehouses of imported, but not for domestically re-treaded tyres; and
- Brazil's exemption of re-treaded tyres imported from other MERCOSUR[122] countries from the import ban and from the above-mentioned financial penalties, in response to the ruling of a MERCOSUR panel established at the request of Uruguay.

The EC considers that the foregoing measures are inconsistent with Brazil's obligations under Articles I:1, III:4, XI:1 and XIII:1 GATT 1994.

- Brazil justifies its foregoing by Articles XX(b) and (d), XXIV GATT 1994.
- Upon Brazil's acceptance Argentina joined the consultations on 20 July 2005.
- Brazil justifies its foregoing by Articles XX(b) and (d), XXIV GATT 1994.
- On 6 March 2006, the European Communities requested the Director-General to compile the panel.

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120 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Appellate Body Report and Panel Report, adopted on 21 November 2001.

121 See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm, accessed 2 July 2021.

122 MERCOSUR (Spanish: Mercado Común del Sur; Portuguese: Mercado Comum do Sul; English: Southern Common Market) is an economic and political agreement between Argentina, Brazil, Paraguay and Uruguay.

Did Brazil impose an import prohibition on re-treaded tyres inconsistent with Article XI:1 GATT 1994? The Panel found that the prohibition on granting of import licences is an import prohibition inconsistent with the requirements under Article XI:1 GATT 1994.

Was Brazil's import prohibition justified under Article XX(b) GATT 1994 to protect human, animal or plant life or health? Risks are posed to human life or health by the accumulation of waste tyres. The accumulation of waste tyres cause mosquito-borne diseases and tyre fires cause toxic emissions. The Panel finds that risks posed by mosquito-borne diseases such as dengue, yellow fever and malaria to human health and life exist in Brazil in relation to the accumulation as well as transportation of waste tyres. The existence of risks to human life and health fall within the meaning of Article XX(b) GATT. The Panel found that Brazil's policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres – the import ban – falls within the range of policies covered by Article XX(b).

Was the measure 'necessary' within the meaning of Article XX(b)? The necessity of a measure should be determined through "a process of weighing and balancing a series of factors":

- The relative importance of the interests or values furthered by the challenged measure;
- the contribution of the measure to the realisation of the ends pursued by it; and
- restrictions on international commerce.

Comparison is to be undertaken between the challenged measure and possible alternatives. The Panel's decisions on necessity are affirmative. The prohibition on the importation of re-treaded tyres contributes to the objective pursued by Brazil, as it can lead to a reduction in the overall number of waste tyres generated in Brazil because re-treaded tyres have a shorter lifespan than new tyres. This can in turn reduce the potential for exposure to the specific risks to human, animal, plant life and health. The Panel is of the view that alternative measures to the import ban (measures to reduce the number of waste tyres; measures to improve the management of waste tyres; other disposal methods e.g. land filling; stockpiling) are not reasonably available to Brazil in light of the level of protection Brazil pursues in relation to the health risks concerned. Stockpiled waste tyres pose similar types of risks such as mosquito-borne diseases and tyre fires to those posed by the accumulation of waste tyres in general and thus cannot constitute an alternative to the import ban.

When considering the Chapeau of Article XX, was the import ban on re-treaded tyres applied in a manner that resulted in discrimination? The Panel has determined that discrimination arises in the application of the measure at issue from two sources:

The MERCOSUR exemption can be considered to form part of the manner in which the import ban imposed by Brazil on re-treaded tyres, the measure provisionally justified under Article XX(b), is applied and that it gives rise to discrimination within the

meaning of the Chapeau of Article XX, between MERCOSUR and non-MERCOSUR countries.

The importation of used tyres under court injunctions: in the case at hand, re-treaded tyres may be *produced* in Brazil from imported *casings* (while re-treaded tyres using the same casings cannot be imported). Court injunctions permitted imports of *used* tyres. This results in discrimination in favour of tyres re-treaded in Brazil using imported casings, to the detriment of imported re-treaded tyres. Discrimination also arises from the importation of used tyres under court injunctions.

Was the discrimination in the application of the measure arbitrary / unjustifiable under the Chapeau of Article XX? Arbitrary means dependent on will or pleasure, based on mere opinion or preference as opposed to the real nature of things, capricious, unpredictable, inconsistent, unrestrained in the exercise of will or authority; despotic, tyrannical. Unjustifiable means, not justifiable, indefensible. The Panel's decision on arbitrary or unjustifiable discrimination was as follows:

The MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination. The Panel found, that, as of the time of its ruling, the operation of the MERCOSUR exemption has not resulted in the measure being applied in a manner that would constitute arbitrary or unjustifiable discrimination

The importation of used tyres through court injunctions was, however, considered to be unjustifiable. The Panel found that since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination.

Did the discrimination in light of the Chapeau of Article XX occur between countries where the same conditions prevail? The Panel concluded that since used tyre imports have been taking place under court injunctions at such frequencies that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is applied in a manner that constitutes a means of unjustifiable discrimination where the same conditions prevail.

Was the measure applied in a manner that constituted a disguised restriction on international trade under the Chapeau of Article XX? The imports of used tyres through court injunctions constituted such disguised discrimination. Since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic re-treading industry, the import ban on re-treaded tyres is applied in a manner that constitutes a disguised restriction on international trade.

The MERCOSUR exemption did not constitute disguised discrimination. The MERCOSUR exemption, although it also has the potential to similarly undermine the achievement of the stated objective of the measure, has not been shown to date to result in the measure at issue being applied in a manner that would constitute such a disguised restriction on international trade. In conclusion, the Panel found that the importation of used tyres through court injunctions results in the import ban being applied in a

manner that constitutes a means of unjustifiable discrimination and a disguised restriction to trade within the meaning of the Chapeau of Article XX. In light of this conclusion, the Panel found that the measure at issue was not justified under Article XX GATT 1994.

4.6.9 China – Measures Related to the Exportation of Various Raw Materials

The case was initiated by a request for consultations by the United States on 23 June 2009,[123] deals with China's restraints on the export from China of various forms of raw materials. The consultations have been joined by Canada,[124] the European Communities,[125] Mexico[126] and Turkey.[127] The dispute deals with certain measures imposed by China affecting the exportation of certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc. China is a leading producer of each of the raw materials which are used to produce everyday items as well as technology products. Four types of export restraints imposed on the different raw materials at issue have been challenged, namely export duties, export quotas, minimum export price requirements, and export licensing requirements.

The DSB established a panel and Argentina, Brazil, Canada, Chile, Colombia, Ecuador, the European Union, India, Japan, Korea, Mexico, Norway, Chinese Taipei, Turkey and Saudi Arabia reserved their third-party rights. The United States considered that China was in violation of Articles VIII, X, and XI of the GATT 1994; and several provisions of the Protocol on the Accession of the People's Republic of China (the Accession Protocol) by imposing temporary duties on exports of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc; and by furthermore subjecting exports of yellow phosphorus to a duty in excess of the *ad valorem* rate listed for item No. 11 in Annex 6 to the Accession Protocol. The European Union claimed that China has violated the obligation assumed under the note to Annex 6 to consult "with other affected WTO Members prior to the imposition" of the export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and certain forms of zinc.

Article XX of the GATT 1994 and in particular its provisions relating to environmental matters play a major role in this case. China[128] *inter alia* argued that the export duty applied to fluorspar was justified pursuant to Article XX(g) because it is a

123 WT/DS394/1.
124 WT/DS394/4.
125 WT/DS394/2.
126 WT/DS394/5.
127 WT/DS394/3.
128 In its first written submission see WT/DS394/R/Add.1, WT/DS395/R/Add.1, and WT/DS398/R/Add.1.

measure relating to the conservation of an exhaustible non-renewable mineral resource, and is applied together with restrictions on domestic production and consumption. The export duties applied to coke, magnesium metal, and manganese metal are justified pursuant to Article XX(b) because they are necessary for the protection of human, animal, and plant life or health by virtue of their contribution to the reduction of the polluting and energy-intensive production of coke, magnesium metal, and manganese metal.

On 5 July 2011, the panel[129] ruled in favour of the claimants and found that the wording of the Accession Protocol did not allow China to use the general exceptions in Article XX of the GATT 1994 to justify its WTO-inconsistent export duties and that even if China were able to rely on certain exceptions available in the WTO rules to justify its export duties, it had not complied with the requirements of those exceptions. The panel recommended that China bring its export duty and export quota measures into conformity with its WTO obligations such that the series of measures do not operate to bring about a WTO-inconsistent result.

Upon appeal the Appellate Body[130] upheld the Panel's finding that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations under Paragraph 11.3 of the Accession Protocol. The Appellate Body report and the panel report, as modified by the Appellate Body report have been adopted by the DSB[131] and China informed the DSB of its intention to implement the rulings and recommendations and rulings.

4.6.10 China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum[132]

On 13 March 2012, the US,[133] Japan[134] and the EU[135] requested consultations with China under the WTO's dispute settlement system. Canada has also requested to join the consultations.[136] The case deals with China's restrictions on the export of various

129 WT/DS394/R; WT/DS395/R; WT/DS398/R.
130 WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R.
131 At its meeting on 22 February 2012, see WT/DS394/16, WT/DS395/15, WT/DS398/14.
132 Panel Report at http://www.wto.org/english/tratop_e/dispu_e/431_432_433r_e.pdf, accessed 2 July 2021. On this case, see also Baroncini (2012).
133 WT/DS431/1; G/L/982, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm, accessed 2 July 2021.
134 WT/DS433/1; G/L/984, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds433_e.htm, accessed 2 July 2021.
135 WT/DS432/1; G/L/983, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds432_e.htm, accessed 2 July 2021.
136 WT/DS431/4; WT/DS432/4; WT/DS433/4.

forms of rare earths,[137] as well as tungsten and molybdenum. Rare earths feature unique magnetic, heat-resistant and phosphorescence properties and are used, inter alia, to produce highly efficient magnets, phosphors, optical and battery materials. These materials are key components of products such as helicopter blades; wind-power turbines; energy-efficient light bulbs; motors for electric and hybrid vehicles; flat screens and displays; hard drives; medical equipment; and many others. Although reserves of rare earth elements are dispersed throughout the world with China holding only 50% of the world's reserves, China has a near-monopoly position with more than 97% of the world's rare earth production.[138] The country has curbed output and exports since 2009 to conserve mining resources and protect the environment. The complaint relates to China's restrictions in the form of export duties; export quotas; minimum export price requirements; export licensing requirements; and additional requirements and procedures in connection with the administration of the quantitative restrictions. The complainants claim that China's measures are inconsistent with Articles VII, VIII, X and XI of GATT 1994 and several provisions of China's Protocol of Accession. It is argued that China administers export restrictions on various forms of rare earths, tungsten, and molybdenum, and that the requirements and procedures in connection with these export restrictions are administered in a manner that is not uniform, impartial, reasonable, or transparent. On 29 August 2014, the DSB adopted the Panel and Appellate Body reports, which found that China's export restrictions on rare earths, tungsten and molybdenum were in breach of China's WTO obligations and were not justified under the GATT exceptions.

4.6.11 European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)[139]

In 2009, the European Union (EU) established a general prohibition of the marketing of seal products in its market, alleging that the hunting of seals inflicts suffering contrary to the European public morality on "animal welfare." The EU included some exceptions to this general prohibition, allowing, for example, the importation and marketing of seal products derived from seal hunts traditionally conducted by Inuit

137 A set of 17 chemical elements, usually referred to as rare earths. These include 15 lanthanides (lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium and lutetium) as well as scandium and yttrium. The request specifically refers to certain materials falling under but not limited to a vast number of Chinese Customs Commodity Codes.

138 Humphries (2013).

139 European Communities – Measures Prohibiting the Importation and Marketing of Seal Products: Request for Consultations by Canada, WT/DS400/1 and Add.1, 4 November 2009; WTO, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products: Request for Consultations by Norway, WT/DS401/1 and Add.1, 10 November 2009.

populations and other indigenous communities because these hunts contribute to the subsistence of these communities. Canada and Norway presented complaints against the indicated EU regime before the WTO dispute settlement mechanism, alleging that it was inconsistent with the multilateral trading system rules. The dispute raised fundamental questions regarding the relationship between public morals and international trade and raised the question of whether WTO members can impose trade restrictions based on moral or ethical concerns in a way that trumps commitments to liberalisation of trade and justifies protectionist measures.[140] The crux of the issue in this case, is the balancing of sustainable development and international trade by the WTO. According to the WTO Preamble, the "multilateral trading system is a vehicle through which parties wish to attain higher living standards; ensure full employment; ensure a large and steadily growing volume of real income and effective demand; and expand 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".[141] The case brought up a "trilemma" for the international law regime in the balancing of three, sometimes competing, interests. This "trilemma" bridges interests of trade liberalisation, where free and unencumbered trade is a priority; animal welfare in the pursuit of environmental protection which is restrictive of trade; and the interests of Arctic indigenous peoples' whose livelihoods are dependent on the trading of these banned products. In 2009 the EU enacted a regime that banned seal products including meat, oil, fur skins and clothing from being placed on the EU market.[142] The ban was enacted as a response to the moral outrage in Europe against the inhumane killing and hunting of seals in the production of seal products and thus prohibited the importation and sale of seal products on animal welfare grounds, but provided for three exceptions to the ban covering products from seals hunted ; by Inuit or other indigenous communities (IC); for the purposes of marine resource management (MRM); and those products brought into the EU by travellers under certain conditions (travellers exception).[143] It was these exceptions, specifically that of the indigenous communities that gave rise to dispute. Canada and Norway challenged the new regime under the WTO Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade 1994 (GATT), claiming that the regime was discriminatory, in terms of Article 2.1, and more restrictive than necessary, in terms of Article 2.2 of the TBT. The ban was also challenged as being in violation of Article I of GATT – the most-

140 Conconi / Voon (2016:211).
141 Ruppel (2016:440).
142 Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, Official Journal of the European Union, L Series, No. 286 (31 October 2009) and Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, Official Journal of the European Union, L Series, No. 216 (17 August 2010) 1.
143 Conconi / Voon (2016:212).

favoured-nation-clause and Article III:4 - the national treatment clause. The Appellate Body was eventually tasked with settling this trilemma by choosing to either rule against the EU, finding that the ban was not in conformity of the Chapeau of Article XX of the GATT, upholding the ban on the basis of trade liberalisation by finding it to be discriminatory to products outside of the EU, or to uphold the ban based on environmental and moral concerns.[144] Whilst the panel held that the TBT applies as the seal regime constituted a "technical regulation", the Appellate Body overruled this finding as a technical regulations provide for product characteristics – the exceptions based on the identity of the hunter and the purposes of the hunt were not found to describe product characteristics and thus found the panel's findings under the TBT devoid of legal effect. [145] However, the Appellate Body in its report found that the prohibition did in fact violate both GATT Article I and GATT Article III:4.[146] The EU defended these claims by citing Article XX(a) and XX(b) of the GATT as they believed the measures were necessary to protect public morals and necessary in the protection of animal life.[147] In assessing this defence, the Appellate Body considered the regulatory objective behind the EU measure; whether such measures were necessary to protect public morals under Article XX(a); and whether the measures nonetheless constituted an arbitrary or unjustifiable discrimination. The EU maintained that its ban addressed the moral concerns of EU citizens regarding animal welfare, the EU defended the IC exception on the basis that it differentiated between commercial hunts subsistence hunts of an indigenous community, citing two international law documents providing for the protection of cultural rights for indigenous communities. [148] The Appellate body found that the main objective of the EU's ban was to address public morals regarding seal welfare and as such fell within the scope of Article XX(a) and held that "members should be given some scope to define and apply [such standards] for themselves".[149] The Appellate Body then needed to apply a balancing test, weighing the importance of the ban, the importance of the objective (environmental / animal welfare) and the contribution of the measure to that objective.[150] It upheld the panel's conclusion that the measures contributed to some extent in reducing the global demand for seal products.[151] It also found that the measure of "necessity" was also met as

144 Hogic / Ibrahim (2021:14).
145 Panel Report, European Communities – Measures Prohibiting the Importation and Marketing of Sea; Products, WT/DS400/R, WT/DS401/R (Nov. 25, 2013) (adopted 18 June 2014), hereinafter Panel Report, para. 5.58-5.59 and 5.70.
146 Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (adopted 18 June 2014), hereinafter AB Report.
147 Shaffer / Pabian (2015).
148 Panel Report para. 7.274.
149 AB Report para. 5.199.
150 Shaffer / Pabian (2015:4).
151 AB Report para. 5.289.

alternative measures were not reasonable available and would not necessarily meet the goals of the ban.[152] The EU nonetheless lost the case in terms of Article XX as the exceptions were deemed to be applied in a manner which constitute a means of arbitrary or unjustifiable discrimination between countries. The Appellate Body maintained that the chapeau is designed to "prevent the abuse" of members invoking exceptions and that the burden lies on the member invoking the exception to show that by its design, it does not lead to arbitrary or unjustifiable discrimination.[153] However, the decision still largely upheld the EU's defence in respects of animal welfare grounds, making it the first time that the Appellate Body has found that a trade ban based on animal welfare grounds falls within the exceptions listed under Article XX(a) GATT as a measure necessary protecting public morals.[154]

4.7 The WTO and the North-South Divide

Helping developing and least-developed countries secure a share in the growth of international trade commensurate with the needs of their economic development has steadily gained importance in recent years. Developing and least-developed country members can gain access to a range of special provisions and assistance contained in the rules of the WTO – in general, referred to as special and differential treatment. The WTO provides no explicit definition as to which country is considered to be a developing country. The status of a member as a developing country is to a large extent based on self-selection and members announce whether they consider themselves developing countries. In some cases, the developing country status is part of the accession negotiations.[155] Least-developed countries, being those that have been designated as such by the United Nations,[156] benefit from additional special and differential treatment.

Altogether, over two-thirds of WTO members are developing and least-developed countries. In recent years, they have participated more actively and efficiently in WTO negotiations and decision-making. In the course of recent negotiations, developing countries, including least-developed countries, have been able to make their voice heard and their concerns considered.[157] Developing countries are represented in several (sometimes overlapping) negotiating groups, such as the African group or the group of least-developed countries. These groups aim to speak with one voice using a single

152 Ibid.
153 Ibid: paras 5.297- 5.302.
154 Shaffer / Pabian (2015:1).
155 Van den Bossche / Zdouc (2013:105).
156 Which is currently the case for 46 countries. See https://unctad.org/topic/least-developed-countries/list, accessed 2 July 2021.
157 Van den Bossche / Zdouc (2013:148).

co-ordinator or negotiating team and have gained in influence in WTO negotiations and decision-making. The standard procedure for decision-making in the WTO is based on consensus. Under WTO rules, this means that "the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."[158] Where consensus is not possible, the WTO agreement allows for taking decisions by voting on the basis of one country, one vote, and with a vote being won with a majority of the votes cast. This, however, is implemented only very exceptionally.

There is a broad variety of provisions granting special and differential treatment to developing countries.[159] GATT for example contains a special section on trade and development. In very general terms, the WTO framework includes provisions allowing developed countries to treat developing countries more favourably than other WTO members, and provisions granting extra time for developing countries to fulfil their commitments under certain WTO agreements. Other provisions are designed to increase developing countries' trading opportunities through greater market access, or require WTO members to safeguard the interests of developing countries when adopting domestic or international legislation. Moreover, provisions on technical assistance for developing countries are part of WTO efforts in favour of developing countries. Legal assistance and training of Government and other officials are special fields of support to developing countries In sum, it can be stated that the WTO's legal framework contains numerous provisions for special and differential treatment for developing countries. Technical support forms an important pillar for dealing with the special needs of developing countries.

Concerns have been raised with regard to the effectiveness of the numerous provisions on special and differential treatment for developing countries, which have been considered as best-endeavour provisions that are not enforceable.[160] Nevertheless, some of the developing countries do play an increasingly important and active role in the WTO as they become more important in the global economy. Integrating developing economies into the global trading system is an important and controversially discussed issue at multilateral trade negotiations and remains one of the challenges facing the WTO. As to the challenges between sustainable development and trade, these are notably driven by advanced economies as well as civil society. For the time being, developing countries are wary of potential agreements on trade and the environment. The on-going negotiations on climate change are exemplary in this regard.

158 See footnote 1 to Article IX of the WTO Agreement.

159 For detailed information on the special and differential treatment provisions, and their use, see https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, accessed 2 July 2021.

160 Keck / Low (2004).

A very important factor in the current discussions on development, and on special and differential treatment in the WTO, is the Doha Development Round of negotiations. It was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001 and was never successfully completed. One fundamental objective of the Doha Development Agenda was to improve the trading prospects of developing countries.

In December 2013, WTO members concluded negotiations on a Trade Facilitation Agreement at the Bali Ministerial Conference, as part of a wider 'Bali Package'. Since then, WTO members have undertaken a legal review of the text. In line with the decision adopted in Bali, WTO members adopted on 27 November 2014 a Protocol of Amendment to insert the new Agreement into Annex 1A of the WTO Agreement. The Trade Facilitation Agreement will enter into force once two-thirds of members have completed their domestic ratification process. The Trade Facilitation Agreement is expected to provide significant advantages for developing countries to couple intra-regional trade with infrastructure development efforts and to boost considerable growth potential that has so far largely remained untapped in Africa.[161]

The "Nairobi Package" was adopted at the WTO's 10th Ministerial Conference (MC10), held in Nairobi, Kenya, from 15 to 19 December 2015. It contains a series of six Ministerial Decisions on agriculture, cotton and issues related to least-developed countries (LDCs). A Ministerial Declaration outlining the Package and the future work of the WTO was adopted at the end of the Conference. The Nairobi Package contained a series of Ministerial Decisions[162]

> on agriculture, cotton and issues related to least-developed countries. These include a commitment to abolish export subsidies for farm exports, which (the then) Director-General Roberto Azevêdo hailed as the "most significant outcome on agriculture" in the organization's 20-year history. The other agricultural decisions cover public stockholding for food security purposes, a special safeguard mechanism for developing countries, and measures related to cotton. Decisions were also made regarding preferential treatment for least developed countries (LDCs) in the area of services and the criteria for determining whether exports from LDCs may benefit from trade preferences.

The 12th Ministerial Conference (MC12) was scheduled to take place in December 2021 in Geneva, Switzerland but was postponed due to COVID-19. However, Heads of WTO member delegations recently exchanged views about issues on which they can realistically reach agreements and what needs to happen to make such deals possible. Fisheries subsidies, agriculture and the COVID-19 pandemic featured

161 Cf. WTO website for the latest version of the Agreement (WT/L/931, previously issued under WT/PCTF/W/27).

162 The decisions are available at https://www.tralac.org/news/article/8699-10th-wto-ministerial-conference-nairobi-resource-box.html, accessed 27 May 2021.

prominently in the discussions, with several members stressing that delivering concrete negotiated results was critical for the WTO's credibility. At this meeting[163]

> WTO Director-General Ngozi Okonjo-Iweala said three concrete deliverables stood out: an agreement to curb harmful fisheries subsidies; outcomes on agriculture, with a focus on food security; and a framework that would better equip the WTO to support efforts against the COVID-19 pandemic and future health crises (...). On fisheries subsidies, she urged members to exercise the necessary flexibility to overcome the remaining hurdles (...). Noting that for many members, meaningful outcomes on agriculture were necessary to make MC12 a success, DG Okonjo-Iweala said that the pandemic, and rising hunger around the world, made a strong case for a WTO "food security package". Elements for a prospective package included public stockholding, the proposed exemption from export restrictions of World Food Programme humanitarian purchases, domestic support and transparency, with some delegations also raising cotton and the special safeguard mechanism. The Director-General welcomed the view expressed by many delegations that MC12 can deliver concrete responses on trade and health. The WTO's spotlight on export restrictions and the need to increase vaccine production volumes was gaining attention and engagement from leaders, she said (...). With regard to dispute settlement, where many members called for resolution to the impasse over the Appellate Body, the Director-General expressed hope that by MC12 members can reach a shared understanding on the types of reforms needed (...). She (further) noted that groups of members had signalled a desire to move ahead in areas such as services domestic regulation, e-commerce, investment facilitation, women's economic empowerment, micro, small, and medium-sized enterprises as well as issues related to trade and climate change. For issues not in a position to be concluded this year, the Director-General said members had called for post-MC12 work programmes on multilateral issues relating to agriculture, services, and special and differential treatment as well as in joint statement initiatives in areas including plastics pollution and environmental sustainability.

4.8 Climate Change and WTO Law

The international trade regime under the WTO is also strongly related to the international climate change regime. In fact, both regimes recognise that climate change may provide opportunities as well as challenges for international development.[164] The WTO is a remarkable example of institutional evolution, and its dispute settlement system is as effective as it is impartial. However, similar to the international climate change negotiations, the Doha Development Round of multilateral trade negotiations have been complex and without sufficient success so far. Both negotiation processes seem to lack the necessary consensus of the parties involved. The only difference between the two negotiation processes lies in the fact that "the climate doesn't have time for a Doha-like approach."[165]

With regard to the persistence of global poverty and socio-economic inequalities, international trade rules often allow affluent countries to continue to protect their markets – with tariffs, quotas, anti-dumping duties, export credits and huge subsidies to

163 Cf. https://www.wto.org/english/news_e/news21_e/hod_03may21_e.htm, accessed 27 May 2021.
164 See WTO / UNEP (2009).
165 Houser (2010).

domestic producers. This is at the expense of potential agricultural and textile exports from developing countries.[166] International trade should therefore be considered as a means to an end, but not as the end in itself. An effective international trade regime must first and foremost be friendly to the environment, poverty reduction and sustainable development.[167] Increasing awareness of the negative effects of climate change, and continuing communication among international institutions, as well as public dialogue, necessarily lead to rethinking and eventually to the adjustment of traditional frameworks. These also lead to fruitful discussions – for example, on new trade and climate-change-related measures, such as carbon labelling or similar standards or regulations on the imposition of border carbon adjustments, which impose border taxes on the embodied carbon of imported goods, set at the level of equivalent domestic taxes.[168]

World trade law "can both constrain and enable climate action".[169] It has the potential to promote community goals, namely the enhancement of economic development. However, a closer look at world trade law[170]

> sadly shows that accordingly solidarity is poorly implemented. The flaw is not in WTO law itself: WTO law allows developed countries to act in favour of developing countries. But developed countries can choose not to implement relevant exceptions and too often implement them poorly.

While the question of response measures remains sensitive in United Nations Framework Convention on Climate Change (UNFCCC) negotiations, the forum could provide for a multilateral dialogue to examine the implications of unilateral climate action designed to promote the ultimate objective of the UNFCCC. In some cases, the WTO dispute settlement mechanism could also enter the scene if the measure in question falls under WTO agreements.

In all cases, however, the focus should shift from the relatively simplistic choice between multilateral action, unilateral action or no action towards exploring ways in which interaction between a plural mix of legal regimes and jurisdictions in a global context can best serve the ultimate objective of the UNFCCC to avoid dangerous anthropogenic climate change.[171]

Thus, more international co-operation in economic areas is necessary to ensure more coherence and global welfare.[172] As stated by Delbrück[173]

166 Pogge (2010:534).
167 Ruppel / Ruppel-Schlichting (2012a:46).
167 See Spier (2012).
168 Ruppel / Ruppel-Schlichting (2012a).
169 Moncel / van Asselt (2012).
170 Hestermeyer (2012:57).
171 Kulovesi (2012).
172 Tietje (2001).
173 Delbrück (2012).

> [I]t is not surprising that given the broad scope of subjects covered by international economic law in general and the law of the WTO in particular – cooperation in these fields show the variety of modes and mechanisms to implement obligations to cooperate.

After all, while world trade has, no doubt, contributed significantly to greenhouse gas emissions, it also offers a variety of options in terms of new technologies and services, which will be crucial in mitigating further climate change. In that sense, WTO reform to better accommodate climate change measures is an increasingly urgent issue. Such reform could entail legal changes, namely amending the WTO agreements to accommodate climate change measures; introducing a waiver that temporarily relieves WTO members from their legal obligations under the WTO agreements when pursuing climate action; adopting an authoritative interpretation clarifying the scope of WTO rules in relation to climate policies; and introducing a time-limited peace clause pursuant to which WTO members will not challenge the climate policies of other members. Such changes would, however, involve complex political processes that – for a variety of reasons – would be difficult to implement in practice.[174]

In the meantime, existing flexibilities under current WTO law should be utilised to advance climate action, while it is not unlikely that conflicts between the trade and climate regimes will sooner or later surface in the WTO's dispute settlement system. It has been rightfully stated that international courts and tribunals must become the new environmental sentinels in international law.[175] In the interest of global soil protection and for the sake of sustainable food security, the challenge will be to bridge the gap where measures claiming to implement the Paris mitigation commitments collide with present trade rules. This will require commitment to overcome substantial barriers at various institutional (and conceptual) levels as well as adequate and corresponding regulatory frameworks. With more ambitious NDCs expected in the future, countries can take trade-related climate measures that are likely to assume increasing importance.[176] The fact is that the climate protection goals of the Paris Agreement can only be reached if, in addition to the decarbonisation of the global economy, more areas of land are used to extract carbon dioxide (CO_2) from the atmosphere.[177]

5 Multilateral Environmental Agreements (MEAs) and the Multilateral Trading System

International environmental treaties or Multilateral Environmental Agreements (MEAs) as they are commonly referred to, regulate the relationships between states pertaining to the environment. Generally, the first objective of any MEA is the

174 Ruppel (2021b:69).
175 Desai / Sidhu (2020).
176 Kasturi *et al*. (2018:6).
177 WBGU (2020).

protection and conservation of the environment. International trade agreements focus on the exchange of goods, services and capital across international borders. That there is *de facto* a close interrelationship between trade and the environment can be taken from the respective legal documents: Environmental agreements contain trade measures and trade agreements provide for measures for environmental protection, as has been sketched in the previous section. This close relationship and a call for mutual supportiveness of trade and environment agreements with a view to achieving sustainable development has been emphasised by Chapter 2 of Agenda 21 and various environmental and trade agreements.

Different trade measures are provided for in MEAs, which are taken to protect the environment and have an impact on international trade flows. The most direct such measure is to prohibit or restrict trade in certain goods or products. Trade measures may be imposed in different forms, such as import or export licences, product standards, labelling, certification systems, notification procedures, taxes or subsidies. By applying trade measures, environmental agreements typically either aim to control and monitor trade activities with regard to the over-exploitation of natural resources, or to combat trade activities considered being sources of pollution.

The 1973 Convention on International Trade in Endangered Species (CITES) for example contains several trade measures to control the trade of species in danger of extinction or which might become endangered. The species to which the trade measures are applicable are specified in the annexes to CITES. Trade measures here include export and import licenses, quotas and certificates on the country of origin.

The 2000 Cartagena Protocol on Biosafety, agreed upon by the Parties to the 1992 Convention on Biological Diversity, is another important example of MEAs that have an impact on international trade flows. The Protocol provides for specific steps states may take to regulate trade in genetically modified organisms (GMOs) in order to ensure safety of international transfers and of the use of any living GMOs resulting from biotechnology as trans-boundary movements of GMOs may have adverse effects on the conservation of biological diversity. The import of living GMOs may thus be restricted as part of a detailed risk management procedure. The Protocol establishes trade control measures based on a compulsory procedure of notification by the exporting country.

The 1985 Vienna Convention for Protection of the Stratosphere was developed as a framework convention establishing general objectives and a basis for cooperation on ozone layer protection. In order to achieve the elimination of the production of ozone depleting substances, the 1987 Montreal Protocol on Substances that Deplete the Stratospheric Ozone Layer, established trade restriction measures. Certain substances are listed as ozone depleting and all trade in those substances is generally banned between parties and non-parties. Bans may also be implemented against parties as part of the Protocol's non-compliance procedure.

Whereas the 1992 United Nations Framework Convention on Climate Change (UNFCCC) does not provide for specific trade measures, the 1997 Kyoto Protocol contains more detailed obligation related to the reduction of greenhouse gases and provides for trade affecting techniques such as tax impositions on carbon dioxide emissions, the adoption of certain treatment or emission rules for greenhouse gas emissions not covered by the Montreal Protocol or the elimination of subsidies adversely affecting the objective of the UNFCCC.

Aiming to protect human health and the environment against the adverse effects which may result from the production and management the 1989 Basel Convention on the Control of Trans-Boundary Movement of Hazardous Wastes and their Disposal contains trade measures establishing a notification and consent procedure for any envisaged trans-boundary movement of hazardous and other wastes. The Convention acknowledges the sovereign right of states to ban the entry of hazardous wastes in their territories and contains obligations concerning transport, disposal, packaging and labelling. Parties may only export a hazardous waste to another party that has not banned its import and that gives written consent to the import. In general, parties may not import from or export to a non-party. Parties are also obliged to prevent the import or export of hazardous wastes if there is an indication that the wastes will not be treated in an environmentally-sound manner at their destination.

The above examples of trade measures in MEAs show that measures generally designed to protect the environment may have a direct impact on the freedom of international trade. Although the provisions in the fields of trade and environment should mutually complement each other according to Agenda 21 and many other international rules, it may occur that MEAs and trade agreements address the same issues differently whereby conflicts between the two fields of international law may arise. In such instances, disputes may be resolved according to the procedures as described in the respective MEA. However, disputes on trade measures in MEAs could also be taken to the WTO's DSB, especially, if the Party affected by the trade measure is not a party to the MEA, but a member of the WTO. So far, MEAs have not been challenged directly under the WTO's DSU. However, conflicts may arise between WTO rules and trade related measures where trade restrictions provided for in MEAs are used by a party to the MEA against a non-party to the MEA if both parties are members of the WTO. In such cases, the MFN and national-treatment principles, as well as provisions on eliminating quantitative restrictions are potentially infringed.[178] Neither the WTO's legal framework nor the wordings of MEAs claim to be hierarchically superior to the other. On the contrary, the concept of mutual supportiveness of trade and environment agreements is emphasised by both regimes without offering express solutions to solve possible conflicts resulting from the coexistence of trade and environment agreements. Generally, it can be stated that in case of a conflict between MEAs and WTO rules,

178 For more details see UNEP (2005b:65ff.).

the rules of treaty interpretation under the Vienna Convention on the Law of the Treaties and general rules of interpretation would have to be applied in order to determine which rules would take precedence over others.[179] So far, trade measures within MEAs have not been in the centre of attention of international trade proceedings. However, WTO members may choose to take a case relating to trade measures in MEAs to the DSB of the WTO. Included in the Doha development agenda, and thus subject to ongoing negotiations, is the task of clarifying the relationship between trade measures in MEAs and WTO rules, the responsibility for which has been given to the WTO's Committee on Trade and Environment.

6 The Trade and Investment Environment in Namibia

Since Independence in 1990, Namibia has been a member of the WTO. As a member of the African Union (AU) African Economic Community, the Southern African Development Community (SADC), and the Southern African Customs Union (SACU), Namibia is committed to a liberal trade regime. Namibia's economy is closely linked to the economy of South Africa. The Namibia dollar is pegged to the South African rand and some common trade and investment policies make economic trends including inflation closely follow those in South Africa. Monitoring national trade policies is one of the WTO's fundamentally important activities. The main surveillance mechanism is the Trade Policy Review Mechanism (TPRM). WTO members are reviewed, the frequency of each country's review varying according to its share of world trade. Namibia was part of the Trade Policy Review of the Southern African Customs Union (SACU, including Namibia, Botswana, Swaziland, South Africa and Lesotho). The fourth review of the trade policies and practices of SACU took place on 4 and 6 November 2015. The basis for the review is a report by the WTO Secretariat and a report by the Governments of Namibia, Botswana, Swaziland, South Africa and Lesotho.[180]

Namibia's Vision 2030 is aiming to provide long-term policy scenarios on the future course of development in the country at different points in time until 2030. Vision 2030 formulates a target of 10.2% investment growth by 2030.[181] Namibia welcomes foreign investment and provides a strong foundation of stable, democratic governance and good infrastructure on which to build businesses. The Namibian government prioritises attracting more domestic and foreign investment to stimulate economic growth, combat unemployment, and diversify the economy.[182]

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179 For a detailed discussion see Goyal (2006:356ff.).

180 Details of the Trade Policy Review are contained in WTO document WT/TPR/S/324, available at https://www.wto.org/english/tratop_e/tpr_e/tp424_e.htm, accessed 3 July 2021.

181 GRN (2004a:63).

182 From https://www.state.gov/reports/2020-investment-climate-statements/namibia/, accessed 27 May 2021.

The Ministry of Industrialisation, Trade and SME Development is responsible for the development and management of Namibia's economic regulatory regime, on the basis of which the country's domestic and external economic relations are conducted.[183] This Ministry is also responsible for promoting growth and development of the economy through the formulation and implementation of appropriate policies to attract investment, increase trade, develop and expand the country's industrial base. It is also the governmental authority primarily responsible for carrying out the provisions of the Foreign Investments Act No. 27 of 1990 (FIA 1990) as amended by the Foreign Investments Act No. 24 of 1993 (FIA 1993) and to be repealed by the Namibia Investment Promotion Act No. 9 of 2016 (NIPA). However, this act has not been enforced due to substantive legal concerns raised by the private sector. Therefore, the FIA 1993 remains the guiding legislation on investment in Namibia.[184] The FIA calls for equal treatment of foreign investors and Namibian firms, including the possibility of fair compensation in the event of expropriation, international arbitration of disputes between investors and the government, the right to remit profits, and access to foreign exchange. As a post-apartheid country with one of the highest rates of inequality in the world, Namibia continues to look for ways to address historic economic imbalances. Namibia has ratified Bilateral Investment Treaties (BITs) with Austria, Finland, France, Germany, Italy, Malaysia, the Netherlands, Spain, and Switzerland. Angola, Cuba, China, the Russian Federation, and Vietnam have signed investment agreements with Namibia, but the agreements are not in force. Namibia has double taxation agreements with Botswana, France, Germany, India, Malaysia, Mauritius, Romania, the Russian Federation, South Africa, Sweden, and the United Kingdom.[185]

There is no bilateral investment agreement between the United States and Namibia. There is also no taxation treaty between Namibia and the United States. In 2008, SACU (of which Namibia is a member) signed a Trade, Investment, and Development Cooperation Agreement (TIDCA) with the United States. Namibia has double taxation agreements with Botswana, France, Germany, India, Malaysia, Mauritius, Romania, the Russian Federation, South Africa, Sweden, and the United Kingdom.[186]

The Competition Act No. 2 of 2003 establishes the legal framework to "safeguard and promote competition in the Namibian market." The Competition Act establishes a legal and regulatory framework that attempts to safeguard competition while boosting the prospects for Namibian businesses and recognizing the role of foreign investment. There is a free flow of financial resources within Namibia and throughout the Common Monetary Area (CMA) countries of the South African Customs Union (SACU). Capital flows with the rest of the world are relatively free, subject to the South African

183 Partially based on Ruppel / Shifotoka (2015).
184 Ibid.
185 Ibid.
186 Ibid.

currency exchange rate. The Namibia Financial Institutions Supervisory Authority (NAMFISA) registers portfolio managers and supervises the actions of the Namibian Stock Exchange (NSX) and other non-banking financial institutions. Namibia's central bank, the Bank of Namibia (BON), regulates the banking sector. Namibia has a highly sophisticated and developed commercial banking sector that is comparable with the best in Africa. The Namibian dollar is pegged at parity to the South African rand, and rand are accepted as legal tender in Namibia.[187]

7 Cotonou and Post-Cotonou Agreement

The partnership between the European Union and African, Caribbean and Pacific States (ACP) is one of the EU's oldest and broadest trade cooperation's with other countries. So far, the EU-ACP partnership focused on the eradication of poverty and sustainable development. The Cotonou Agreement, was adopted in 2000 to replace the 1975 Lomé Convention. It was concluded for a 20-year period. The Cotonou Agreement was initially due to expire in February 2020. Its provisions have been extended until 30 November 2021, unless the new partnership agreement between the EU and the ACP countries is provisionally applied or enters into force before that date. The Cotonou Agreement aims to reduce and eventually eradicate poverty and contribute to the gradual integration of the ACP countries into the world economy. It is based on development cooperation, economic and trade cooperation and the political dimension thereto.

The joint ACP-EU ministerial trade committee discusses any trade-related issue of concern to all ACP states. It monitors the negotiations and implementation of Economic Partnership Agreements. It also examines the impact of the multilateral trade negotiations on ACP-EU trade and the development of ACP economies. The EU has negotiated a series of economic partnership agreements (EPAs) with the 79 ACP countries. These agreements aim to create a shared trade and development partnership backed up by development support.[188] The EU signed an EPA on 10 June 2016 with the SADC EPA Group comprising Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini. Angola has an option to join the agreement in future. The agreement became the first regional EPA in Africa to be fully operational after Mozambique started applying the EPA in 2018. The EU is the Southern African Development Community EPA Group's largest trading partner, with South Africa accounting for the largest part of EU imports to and EU exports from the region. The EPA gives asymmetric access to the partners in the SADC EPA group. They can shield sensitive products from full liberalisation and safeguards can be deployed when imports from the EU are

187 Ibid.
188 Cf. https://www.consilium.europa.eu/en/policies/cotonou-agreement/, accessed 27 May 2021.

growing too quickly. A detailed development chapter identifies trade-related areas that can benefit from funding. The agreement also contains a chapter on sustainable development which covers social and environmental matters.[189]

The new post-Cotonou agreement includes a broader range of policy areas, such as climate protection, human rights and migration issues. The post-Cotonou negotiations started in September 2018 with the aim was to agree on a new agreement to succeed the Cotonou Agreement and adapt the relations to the new realities. The Cotonou Agreement was initially due to expire in 2020, but its application was prolonged until 30 November 2021, unless the new Agreement enters into force or is provisionally applied before that date. Concretely, the new Agreement is composed of a "common foundation", which sets out the values and principles that bring partners together and indicates the strategic priority areas that both sides intend to work on. These are: (i) Human Rights, Democracy, and Governance in People-Centred and Rights-Based Societies (ii) Peace and security, (iii) Human and social development, (iv) Environmental sustainability and climate change, (v) Inclusive sustainable economic growth and development, and (vi) Migration and mobility. The Agreement combines this foundation part with three specific, action-oriented regional protocols (Africa, Caribbean, Pacific) which focus on each region's needs. The regional protocols will have their own specific governance to manage and steer the relations with the EU and different regions involved, including through regional parliamentary assemblies. There will also be an overarching joint OACPS-EU framework with a strong parliamentary dimension. In April 2020, the ACP Group of States became the Organisation of African, Caribbean and Pacific States (OACPS), an international organisation with 79 members, following the entry into force of the revised Georgetown Agreement.[190]

8 Concluding Remarks

Natural resources represent a significant and growing share of world trade, and properly managed, provide a variety of products that (continue to) contribute greatly to the quality of human life. They, however, also represent challenges for policy makers. Natural resources are scarce, economically useful, distributed unevenly and exhaustible. Their production, trade and consumption can have negative externalities[191] on people and the environment. Natural resources are dominated by national

189 Cf. https://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/, accessed 27 May 2021.

190 Cf. http://www.acp.int/content/post-cotonou-negotiations-new-euafrican-caribbean-and-pacific-partnership-agreement-conclude, accessed 27 May 2021.

191 An example of such negative externality would be when a production or mining process results in pollution affecting the health of people who live nearby, or that damages the natural environment, animal or plant life or reduces the livelihood of people.

economies, they are highly volatile.[192] The 'curse' of natural resources, climate change, water stress, food security and the prevalence of poverty *inter alia* remain challenges for Africa. All of these are also linked to international trade and certainly go hand in hand with poverty reduction, self-reliant sustainable development and the rational use of Africa's natural resources.

With regards to trade, over-exploitation of natural resources, widespread dumping of sub-standard products and services, second-hand and re-conditioned machinery, including of transport goods to increase the share in exports in organically-grown agricultural products to create technical data bases on a wide range of exportable products, implementing and monitoring plans for detection of heavy metals, pesticides, microbiological and contaminants in food items are issues that need to be addressed. Another remaining challenge in terms of the WTO and the environment (e.g. biodiversity) is to control the transfer of genetically modified goods, including when delivered as food aid. The balancing act of bringing the interests of trade, environmental protection and sustainable development in line with each other can only succeed with a joint effort from all relevant stakeholders.

Scarce natural resources, climate change, water stress, food security and the prevalence of poverty, inter alia, remain major challenges. All of these are also linked to international trade and certainly go hand-in-hand with poverty reduction, self-reliant sustainable development and the rational use of natural resources. Although various legal provisions in the framework of the WTO provide a solid foundation for modern-day trade to fully embrace the concept of sustainable development and preservation of the environment, there is still ample scope for state and organisational practice to exploit its full potential in this regard.

Countries should increase efforts through the international architecture, specifically the WTO, to develop green trade agreements that facilitate and incentivise increased trade in commodities produced without conversion of natural habitats. While subsidies are, for the most part, deployed within the country granting the subsidies and can only be reformed through the actions of domestic governments, reforming harmful subsidies still requires an international effort. International organisations can facilitate changing the status quo on subsidies reform and encourage governments to cooperate on ways to implement change.[193]

While every country must have the right to develop its own agricultural model to feed its population, respect for the needs of other countries and international obligations remains key. Policies must therefore assure that trade can meet global challenges, facilitates the sustainable and efficient use of land, protects biodiversity and prevents overexploitation and degradation of land and natural resources. In particular, nationally appropriate measures to conserve natural resources and combat climate change

192 WTO (2010).
193 Deutz *et al*. (2020:66).

that are respectful of international commitments related to sustainable development, e.g. the Paris Agreement on Climate Change, the Rio Declaration on Environment and Development and the Convention on Biological Diversity.