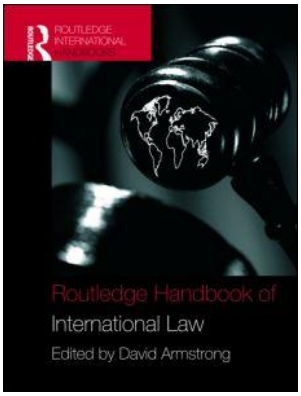

Routledge Handbook of International Law

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WTO Law and Sustainable Development

Publication details
https://test.routledgehandbooks.com/doi/10.4324/9780203884621.ch26
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Published online on: 22 Dec 2008

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WTO law and sustainable development

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This chapter focuses on the interface between trade and sustainable development. It first gives an introduction and overview of WTO law then briefly examines the historical development of the WTO as a legal order explaining the most important legal principles, such as most favored nation and national treatment. After a short explanation of the dispute settlement system, the chapter illustrates some of the most important sustainable development challenges as defined in the World Summit on Sustainable Development. It proposes three fields of study of the trade – sustainable development interface: negotiation, trade disputes and innovative instruments. The chapter discusses how limited attempts have been made to introduce the concept of sustainable development into the international trading system. This hesitation, largely due to a "trade-only" ethos of the organization, was only overcome after certain seminal disputes had been decided. After the decision in U.S.–Shrimp that sustainable development figured prominently in the Doha Development Agenda. Two more recent disputes help to illustrate the nature of sustainable development arguments made in the WTO dispute settlement. The chapter then points to innovative mechanisms that have been used by WTO member states to integrate trade and environment or trade and sustainable development more broadly.

The chapter argues that the relationship between WTO law and sustainable development is not yet fully determined. To ensure that international trade law can deliver on sustainable development in the current context, a constructive, integrated approach is needed to address overlaps between social development, economic development and environmental protection. This approach must focus specifically on achieving solid results for developing countries and for development in general.

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

capital and must be modified; and the development schema prioritizes poverty eradication or at least reduction.

Trade law

The nature of the legal order of the World Trade Organization is an important starting point. Trade law is one of the oldest areas of international law. Most very early "international" treaties granted trade concessions and allowed products to be traded from one ancient city state to another. As such, there is no right to free trade in international law. This can be contrasted with, for instance, the freedom of the high seas, and means that it is every country's sovereign decision to allow trade with another country or not.

Early works by economists such as Adam Smith, David Ricardo, and John Stuart Mill suggested that countries could benefit economically from free trade between them, as it allows each to build on their respective comparative advantages. The advent of free trade treaties brought a moderate degree of liberalization, but by the 1860s many countries quickly returned to protectionist policies in response to fears of British economic dominance. After a period of relative stability based on the gold standard, countries began to exercise their sovereign right to determine trade relations, leading to a period of high protectionism after the depression of the late 1920s and 1930s. Several important countries sought to raise barriers and isolate themselves from the world economy, in order to protect their own industry. However, most countries returned to multilateralism in the late 1930s by developing reciprocity in their trading relationships, granting tariff concessions between countries on a mutual basis.

This multilateralism also formed the basis for the allied post-war economic discussions, which eventually led to the negotiation of the Charter for an International Trade Organization (the so-called Havana Charter), which included provisions mandating cooperation in many areas such as trade, labor, and competition. This comprehensive economic agenda failed, largely because the U.S. Senate did not approve the treaty. Nevertheless, one part of the Havana Charter, the General Agreement of Tariffs and Trade (GATT), was enacted provisionally in 1947 and formed the basis for almost 50 years of operation. The GATT focused specifically on trade in goods and did not include any other area of international trade or economic regulation. This narrow scope was part of its success in attracting many countries as contracting parties and achieving significant tariff reductions in seven rounds of trade negotiations. After significant tariff reductions, the GATT 1947 contracting parties recognized that other barriers – outside the purview of "trade in goods" – were becoming more important and impeded exports. Thus, during the late 1970s, in the Tokyo Round of trade negotiations, additional agreements were adopted, dealing with technical barriers to trade, food standards, dumping and subsidies. In 1994, after nearly a decade of deliberations and negotiations, the GATT was replaced by the WTO.

Today's world trade law is based on several levels of international trading regimes, and can be found in two major sets of agreements:

- law concerning the WTO
- international trade law stemming from bilateral or regional trade agreements.

The WTO, despite unsuccessful attempts to renegotiate some of its rules and a shift of focus within the international community towards regional trade agreements, is still at the heart of the international trade regime. At the time of publication, it has 152 extremely diverse member states, with some important international economic actors such as Russia involved in membership negotiations. Arguably, the exponential increase in trade in goods during recent decades was due to the stability and predictability of the international trading system. The Uruguay Round of

negotiations leading to the creation of the WTO also saw the inclusion of new issues such as trade in services and trade-related intellectual property rights (IPRs), and aimed to bring agriculture and textiles back under GATT disciplines.

Fundamentally, the WTO is a member-driven organization with a comparatively small Secretariat. The WTO's mandate is to:

- administer the WTO agreements
- provide a forum for trade negotiations
- settle trade disputes
- monitor national trade policies
- facilitate technical assistance and training for developing countries and
- promote cooperation with other international organizations.

In addition to the development of the WTO regime, there has been rapid growth in regional trade agreements and bilateral agreements, which exist parallel to the ambit of the WTO but must conform to its principles. According to GATT rules, regional trade agreements should serve as "building blocks," not "stumbling blocks," to facilitate the functioning of the world trading system. This means that a multilayered analysis of agreements governing trade is crucial; it is not sufficient to only analyze the implications of WTO law, while ignoring preferential rules enshrined among trading partners in regional trade agreements or national rules which implement international trade law regimes.

WTO agreements

The WTO agreements and dispute settlement outcomes – the latter having at least strong persuasive power or *de facto* precedent character – largely determine international trade rules with relevance for both the private and public sector. These WTO agreements also contain guidelines governing international commercial conduct and guard against trade distorting behavior such as unlawful subsidizing practices and "dumping" (i.e. product sale in a foreign country below the sales price in the country of origin or below cost plus distribution price).

The WTO agreements are broadly organized into three pillars – goods, services and intellectual property rights (see Table 26.1). The goods pillar is the largest, including agreements on many different aspects of international goods trade. There are also plurilateral agreements signed only by a subset of the WTO membership, and various cross-cutting accords.

Of course, such an overview of the WTO treaty framework provides only the beginnings of an accurate picture of WTO law. The main commitments of WTO members are contained in individual detailed country schedules attached to GATT (tariff schedules) and GATS (services schedules). These two documents are comprehensive listings of all the products for which the WTO member in question has accepted a commitment to a binding tariff at a particular level. For example, the tariff for microwave ovens for imports into the United States is bound at 4% according to value, and the United States has completely liberalized architectural services in cross-border supply.

Settlement of disputes in world trade law

Trade disputes were a common phenomenon in the later years of GATT 1947. Indeed, the animosity and absence of middle ground in some disputes between the United States and the European Union triggered a new approach to dispute settlement in the WTO. Instead of a positive vote to adopt a dispute settlement decision, as was required by the GATT, the WTO now operates in reverse, so that decisions under its dispute settlement mechanism can only be dismissed by the unanimous vote of all members. This negative consensus means that even the party who won the case must agree for a report

Table 26.1 Three pillars of WTO agreements

Pillar 1: Trade in goods	Agriculture
General Agreement on Tariffs and Trade (GATT)	Sanitary standards
	Textiles
	Technical standards
	Trade-related investment measures
	Antidumping measures
	Customs valuation methods
	Pre-shipment inspection
	Rules of origin
	Import licensing
	Subsidies and countermeasures
	Safeguards
Pillar 2: Trade in services	Movement of natural persons annex
General Agreement on Trade in Services (GATS)	Air transport annex
	Financial services annex
	Shipping annex
	Telecommunications annex
Pillar 3: Intellectual property rights	
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)	
Cross-cutting agreements	Dispute settlement understanding
	Trade policy review mechanism
Plurilaterals	Agreement on trade in civil aircraft
	Agreement on government procurement

to be dismissed in the formal adoption meeting of the Dispute Settlement Body (which is identical to the General Council but acts under a different chairperson). This system makes the WTO's Dispute Settlement Understanding (DSU) highly effective and contributes to its objective of providing "a central element in providing security and predictability to the multilateral trading system" (Article 3.2 of the DSU). The requirement to settle disputes formally rests with the WTO members, which often devote significant time to the use of other prejuridical techniques such as consultation and other arbitration-like elements of the dispute settlement mechanism. If these preliminary attempts to defuse a trade-related conflict fail to satisfy either party, the DSU process is set in motion and carried out first by a WTO panel (composed of three trade experts chosen ad hoc to hear the case and determine the facts) and, second, by the WTO Appellate Body (a standing body of nine trade law experts, of whom three are called to hear legal appeals on the panel's determination).

Trade and sustainable development

On a theoretical level, trade is not automatically good or bad for the environment and social development (see, e.g. Nordström and Scott 1999). Rather, the specific contours of international trade rules and regimes and modes of implementation dictate the degree to which trade advances sustainable development goals. Public international law, the umbrella under which international trade law is situated, can and should adopt a principled approach to ensure that it can deliver on its global objective of sustainable development. A nuanced understanding of recent developments in world trade law,

focusing on intersections between economic, social, and environmental fields of law and policy, can enhance the positive (and mitigate any negative) aspects of this complex relationship. In the context of ongoing trade law debates that encompass the negotiations in the 2003 Cancun Ministerial and the 2005 Hong Kong Ministerial, there has been anxiety that the WTO and other international trade institutions cannot adequately respond to the principal opportunities and threats that were identified by representatives of over 180 countries at the 2002 World Summit for Sustainable Development (WSSD):

> Globalization offers opportunities and challenges for sustainable development. We recognize that globalization and interdependence are offering new opportunities to trade, investment and capital flows and advances in technology, including information technology, for the growth of the world economy, development and the improvement of living standards around the world. At the same time, there remain serious challenges, including serious financial crises, insecurity, poverty, exclusion and inequality within and among societies.[1]

While any single international organization or process would be hard pressed to address this broad range of challenges alone, measures can certainly be taken to increase the likelihood that emerging international trade regimes will support sustainable development. Indeed, despite the negotiating gridlock that has characterized the latest round, there are even tentative signs of progress toward this goal.[2]

The next sections of this chapter explore emerging issues related to sustainable development that have gained prominence in the context of the recent "Doha Development Agenda" (DDA) of trade negotiations, taking into account the outcomes of the 2002 WSSD in Johannesburg, South Africa (Cordonier Segger and Khalfan 2004: 25–43). It aims to discuss the recent development of a constructive global trade and sustainable development law agenda mainly through specific analysis of developing rules, procedural and substantive innovations, and emerging issues. World trade law is a multilayered system; it envelops supranational, regional, and bilateral components. In many of the last sort of agreement, innovative mechanisms are being tested to ensure mutual supportiveness[3] between trade, environment, and development law. Depending on the modalities chosen, intersections of these issue areas can create both an overlapping and crosscutting latticework of rules and stipulations. Not only do the linkages have a legal character, collaboration between IGOs (UNDP, UNEP), NGOs and multilateral environmental accords (i.e. UNCBD, UNFCCC) has resulted in institutional ties as well. The core negotiations and controversy surrounding the Doha Development Agenda along with relevant international economic law jurisprudence are particularly relevant, and in certain areas, closer adherence to principles and practices of sustainable development law might contribute to longer lasting and better world trade law.

Negotiating sustainable development in the WTO?

In the 1970s there emerged significant global concern for human rights and the environment, particularly in developed countries. This generated considerable controversy for developing countries (Hunter et al. 2001) as the latter planned to focus on the full exploitation of their natural resources in order to promote pressing priorities related to economic growth.[4] One study, "Limits to Growth," predicted a global disaster if international policies were not changed to balance economic development and the utilization of non-renewable natural resources (Meadows et al. 1972). In 1983, states established the World Commission on Environment and Development (WCED), an independent investigatory body composed

of international policy and scientific experts in accordance with U.N. General Assembly (UNGA) Resolution Res. 38/161. The outcome of the WCED process, the *Brundtland Report*, led to UNGA Resolution 42/187, which resolved that sustainable development "should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises."

Based on this foundation in the U.N. system, the concept of sustainable development became an overarching theme of the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, which attracted over 140 heads of state – the largest global summit in history,[5] at that time. One of the conference outcomes, Agenda 21, highlighted that achieving enduring social and economic dimensions of development required that international trade and environment policies needed to be mutually supportive.[6] The outcomes of the 1992 UNCED influenced the drafting of the WTO 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.
>
> *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.[7]
>
> (emphasis added)

While preambular statements are not legally binding in the same way that operational provisions can be,[8] they can play a role in interpretation of a treaty, particularly in identifying the treaty's object and purpose. Thus, it is important to understand the intended meaning of the Preamble to the WTO Agreement. In the Preamble, the concept of sustainable development is mentioned in connection with the optimal use of the world's resources. This may be partly because the Preamble was drafted as an expansion of the GATT 1947 Preamble, which referred conclusively to the need for "developing the full use of the resources of the world." It may also refer to the historical origins of the concept itself, in the "sustainable yield" management practices of an important agro-forestry industrial sector. It is important to note however, that the Preamble specifically recognizes the need to raise standards of living and income for people, to protect the environment, and to do so in a way that is consistent with the needs and concerns of developing countries, so that international trade can contribute to these countries' development needs.

Indeed, two years later in the 1996 Singapore Ministerial Declaration,[9] the Preamble of the WTO Agreement did not inspire new negotiations on binding rules. Instead, a short note appears in Paragraph 16, limited only to trade and environment issues, stating: "Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development."[10] In this reference, sustainable development objectives are clearly linked to the implementation of the international trade regime, rather than simply the optimal use of natural resources. It is an expanded recognition of the concept; nonetheless, the text manages to give the impression that sustainable development is a natural result of liberalized trade. In the 1998 Geneva Ministerial Conference, there was further movement towards establishing sustainable development as more than a reason for enhanced trade, or a

way to constrain environmental measures. The preamble of the Ministerial Declaration states, at Para. 4: "We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development."[11]

As such, in 1998 the WTO and its member states formally recognized that sustainable development is not only related to natural resources or an inevitable result of the economic liberalization process, but is actually one of the goals of the WTO itself. The links between this concept and the concept of sustained economic growth are also put into relief. By 1998 several countries and regions had introduced the goal of sustainable development into their laws and policies,[12] and it is likely that they sought to reflect this commitment in one of the most important international economic law-making processes of the decade. Indeed, this position echoed developments in the other important forum in which WTO rules and regimes are clarified and interpreted: the dispute settlement system.

"Sustainable developments" in recent WTO disputes?

The WTO's view of the concept of sustainable development as it currently stands can be explained by examining: the *U.S.–Shrimp Case*,[13] the *E.U.–Tariff Preferences Case*,[14] and most recently the *Brazil–Retreaded Tires Case*.[15]

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

In the case, the U.S. proposed that Art. XX GATT should be interpreted in the light of the preamble of the WTO Agreement; "[A]n environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement') acknowledges that the rules of trade should be 'in accordance with the objective of sustainable development', and should seek to 'protect and preserve the environment'."[16] In its arguments, the U.S. omitted the reference to the world's resources and the statement concerning the "respective needs and concerns at different levels of economic development."

The Appellate Body decision considers the Preamble, but does not follow the U.S. argument:

> The words of Article XX(g), "exhaustible natural resources," were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* – which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges "the objective of *sustainable development*."[17]
>
> (emphasis added)

The enclosed legal note, as part of the Appellate Body's decision,[18] deserves particular attention. The Appellate Body refers to the objective of sustainable development and in a footnote, expands on its relevance to the case.

The Appellate Body explained that: "[T]his *concept* has been generally accepted as integrating economic *and* social development *and* environmental protection" (emphasis added). This is remarkable for two reasons. First, the WTO Appellate Body delineated its stance on the nature of sustainable development and agrees that it should be framed as a "concept" (as opposed to a principle, policy or rule), in world trade law. Second, a reading of the definition demonstrates the WTO's recognition of the need to integrate all three elements or "pillars" of sustainable development – social development, economic development and environmental protection. The recognition of the social dimension of the concept, effectively laid the groundwork for subsequent focus on this element in the 2002 WSSD.

The Appellate Body continued with their interpretation of the preamble in WTO law: "[W]e note once more that this language demonstrates recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble."[19] This addition of "colour, texture and shading" seems to amplify the previous language: "interpretation based on the context of the agreement." It indicates that the Appellate Body understands that the concept of sustainable development informs members' intentions in all of the annexed agreements.

The Appellate Body insisted: "[W]e also note that since this preambular language was negotiated, certain other developments have occurred, which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the CTE). In their Decision on Trade and Environment, Ministers expressed their intentions, in part, as follows: . . . *Considering* that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other."[20] In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development,[21] Agenda 21,[22] and its follow-up in the GATT, as reflected in the statement of the Council of Representatives to the 48th Session in 1992.[23]

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

This reasoning was adopted and applied in subsequent WTO Panel and Appellate Body reports related to the *U.S.–Shrimp Case*, when Malaysia took recourse to Article 21.5 of the WTO Dispute Settlement Understanding,[24] arguing that the measures taken by the U.S. did not comply with the recommendations and rulings of the DSB. In particular, the Panel stated that: "In that framework, assessing first the *object and purpose* of the WTO Agreement, we note that the WTO preamble refers to the notion of "sustainable development."[25] This means that in interpreting the terms of the chapeau, we must keep in mind that sustainable development is one of the objectives of the WTO Agreement.[26] On appeal, this interpretation was not overturned by the WTO Appellate Body.[27]

The *E.U.–Tariff Preferences Case*[28] concerned the scheme of generalized tariff preferences for developing countries. India complained that special preferences based on certain drug arrangements adopted by beneficiary countries were inconsistent with the most favored nation clause (Article 1.1 GATT 1994) and could not be justified under the *Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries* (the "Enabling Clause").[29] Similar provisions exist for environmental and labor rights, but in the end these were not challenged. The panel found that the E.U.'s scheme was indeed inconsistent with Article 1.1 GATT and could not be justified under the enabling clause. This was because developed countries were compelled to grant identical tariff preferences under GSP schemes to all developing countries without differentiation and the panel found that it should apply to all developing countries. The Appellate Body reversed these last two findings but concluded that the drug criteria due to a closed list of beneficiary countries and unclear criteria for the selection of these countries were not covered by the exception.

The E.U. argued that because the Enabling Clause was designed to fulfill the objectives of the WTO, it should not be interpreted as an exception to Article 1.1 GATT but rather as an incentive for developed countries to confer preferences on their less developed counterparts.[30] The Appellate Body considered this argument and agreed with the initial observation. Indeed, it overturned one of the panel's findings – interpreting non-discrimination according to the objectives of the GATT and the WTO – and accepting that the differentiation between developing countries according to their needs was possible. The Appellate Body, citing its *U.S.–Shrimp* decision, found that the objectives of the WTO could be fulfilled through "General Exceptions." They noted in particular that "the optimal use of the world's resources in accordance with the objective of sustainable development" could be achieved through application of the WTO exceptions, such as Article XX (g) GATT.

However, the Panel in the same case found that the E.U. could not justify its drug arrangements under Article XX (b) GATT, because it could not prove that its system was designed to protect human health in the European Union. Rather the panel agreed with India's argument that increased market access was intended to contribute to sustainable development of the beneficiary countries. As the fight against illicit drug production and exports were deemed to be part of a broader sustainable development objective (as confirmed by several multilateral instruments and the official justification to the Regulation setting up the E.U. System), these could not be justified as a measure which only sought to benefit the E.U. This decision demonstrates that both the "environmental" and the "development" aspects (including health) are part of the concept of sustainable development that the WTO dispute settlement body recognizes as a WTO objective.

The most recent decision in *Brazil–Retreaded Tires* is unique in that it was the first decision where a developing country invoked Art. XX GATT against a challenge by an industrialized country, in this case the European Union.[31] Brazil banned the import of retreated tires arguing that the large quantities of retreaded tires imported from the E.U. created environmental problems including dangers associated with mosquitoes that breed in tires and tires catching fire. The E.U. argued that Brazil had not shown that the ban on retreaded tires was necessary to protect human health. The panel cited the *U.S.–Shrimp* Appellate Body decision and the overall importance of the goal of sustainable development and interpreted Brazil's reference to environmental protection as meaning the protection of human, animal or plant life, or health (Art. XX (b) GATT).

The E.U. as one of the main exporters of used tires (they are very hard to sell in Europe) requested formal consultations in June

2005.[32] Shortly after the E.U. launched formal consultation Brazil raised the issue and justified its actions in the Committee on Trade and Environment: "Moreover, in order to achieve the cited objectives, and in harmony with the widely accepted *principle of sustainable development* – included in the preamble of the WTO Agreement – Brazil banned imports of used and retreaded tires"[33] (emphasis added). This submission can be considered an interesting choice of words, because previously only developed countries had sought to invoke a legally binding principle of sustainable development.

Among other legal issues the *Brazil–Retreaded Tires* case centered on a discussion of Art. XX GATT, particularly the exceptions that Brazil allowed for retreaded tires from Mercosur countries and due to court orders to the benefit of retreading companies. The panel found that the measure generally fulfilled Art. XX (b) GATT to protect animal, plant and human life, or health but constituted a disguised restriction on international trade and was thus not justified under Art. XX GATT.

It further emphasized the importance of the Preamble to the WTO Agreement: "The objective pursued is also the protection of *animal and plant life and health*. The risks at issue relate to: (i) the exposure of animals and plants to toxic emissions caused by tire fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals. The Panel acknowledges that the preservation of animal and plant life and health, which constitutes an essential part of the protection of the environment, is an important value, recognized in the WTO Agreement. The Panel recalls that in *U.S.–Shrimp*,[34] the Appellate Body underlined that the preamble of the Marrakesh Agreement establishing the WTO showed that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.[35] Therefore, the Panel finds that the objective of protection of animal and plant life and health should also be considered important."[36] Interesting here is again the footnote which makes first reference to other WTO disputes and then to international documents related to sustainable development, even with specific relevance for the waste problem at hand, and then finally refers to the citation of the document by the opposing party, here the E.U. This use of the preamble is arguably further reaching than in other decisions and it suggests that the Doha negotiations might have influenced the importance that the panel attaches to the objective of sustainable development.

The Appellate Body upheld the panel's conclusion on the applicability of Art. XX (b) GATT. It added:

> We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time – can only be evaluated with the benefit of time. In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue

> is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.[37]

While Brazil was not ultimately successful, in this case the Appellate Body underscored the long-term sustainability of a measure adopted by the parties and vis à vis the *E.U.–Asbestos* decision further lowered the burden of proof in environmental cases.

The reasoning of the WTO dispute settlement body in these cases, taken together, demonstrates that the objective of sustainable development has become an integral part of the world trading system. Legal arguments encompassing an integrated developmental and environmental approach have been made by the parties and accepted by the relevant dispute settlement organs. On the one hand, it is clear that the panels and the Appellate Body will not accept sustainable development as a trump card. It cannot simply be invoked in order to justify non-compliance with established WTO disciplines. A solid legal understanding of the objective and its underlying principles, as well as the appropriate application of specific facts of each case embedded in a reasoned legal argument is required to make a successful sustainable development argument in world trade law.

New instruments in trade law for sustainable development

A highly practical example of the integration of economic, social, and environmental concerns is found in the increasing use of impact assessment tools in the international arena.[38] Impact assessments operate as a formalized consideration of the wider effects of particular policies (usually trade policies or development projects), and aim to ensure that trade and development decisions result from processes that promote sustainability and public participation. These tools come in various forms, ranging in scope from environmental impact assessments and human rights impact assessments to the broadest tool, sustainability impact assessments. Although it remains unusual for any national development decision or regional or bilateral trade agreement to require some form of impact assessment, the European Union, the United States and Canada have all adopted the tool to some degree to be used either before or after the decision or agreement has been concluded. Others such as New Zealand and Japan are considering similar steps.

At the international level, certain environmental treaties contain obligations to perform environmental impact assessments in situations where one country's activity may flow across a border or when areas of common concern, such as the high seas[39] or the Antarctic,[40] are involved. The application of such instruments to trade agreements is relatively new, but developing rapidly, and in some instances the assessments include a regulatory dimension.

In Canada, the Framework for Conducting Environmental Assessments of Trade Negotiations[41] has been used since 2001 to conduct environmental assessments of new bilateral and regional trade negotiations, and since 2005 this has also been applied to investment agreements. The assessments seek to assist Canadian negotiators in integrating environmental considerations into the negotiating process (as envisaged by the Doha Development Agenda), and to address public concerns. The framework includes provisions for actively seeking public input into assessments from non-governmental organizations, businesses, indigenous peoples and the general public. Similarly, the Office of the U.S. Trade Representative has conducted environmental reviews of all bilateral and regional trade agreements signed by the United States since 1999, in which regulatory impacts, public advice and potential impacts in the territory of the proposed new trading partner are taken seriously and addressed.[42] Developing

countries have, in some cases, also found such assessments useful for economic policy making. For instance, as discussed by the International Institute for Sustainable Development, Senegal recently found that stocks of certain species of fish with high market values were being seriously depleted through the use of trade impact assessment.[43]

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

- economic indicators, including average real income, fixed capital formation and employment rates
- social indicators, including poverty rates, health and education levels and equity
- environmental indicators, including air and water quality indicators, biological diversity and natural resources.[44]

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

Sustainable development in the Doha development agenda

During the Seattle negotiations several countries made sustainable development related submissions and the public spotlight focused on the trade and environment and the trade and development debates. The successful conclusion of the Doha Ministerial Declaration resonated in some ways with these submissions and discussions. Ministers agreed in Para. 6 of the Ministerial Declaration:

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

> especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.[45]

As is clear from this excerpt, the DDA was intended to be informed by sustainable development objectives. Ministers recognized sustainable development as a fundamental goal of the WTO, and placed it into a strengthened context, referring to practical measures such as the need for cooperation with other international environment *and development* organizations in the lead-up to the WSSD. From the macro perspective, the Doha Declaration provides an indication that sustainable development objectives are starting to be understood as involving both environmental and social development actors and organizations. There are indications that states may be prepared to move away from the traditional "trade-only" or "trade and environment only" approach. While expectations for a sustainable development infused WTO should be hedged because of recalcitrant powerful members, coherence between the preamble and the Appellate Body's balanced and integrated definition is legally compelling.[46] References to this objective in the Doha Ministerial Declaration clearly recognize environmental protection and social development aspects to be part of the mandate of a mainly economic organization.

Indeed, the ministers went further, and sought to operationalize the sustainable development goal for the WTO itself. At paragraph 51, a mechanism was created to ensure that this objective would be translated into concrete action.[47] In the organization and management of the work program section of the Declaration, WTO member governments agreed that: "[T]he Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected."[48] The initial proposal by Canada, that the Committee on Trade and Environment should debate the environmental aspects of the expected Seattle negotiations, was broadened to include the Committee on Trade and Development.[49] It is unclear whether these two committees will be able to fulfill their mandates to identify and debate environmental and development aspects of the negotiations in addition to helping to ensure that sustainable development can be appropriately reflected in the trade negotiations.

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

Conclusion

The norm development is not concluded – the content of the concept of sustainable development itself is still contested. Furthermore, while members of the WTO may now be bound by a particular reading of sustainable development objectives at the global level, this may not mean they feel obliged to develop "sustainable" trade laws or policies either internally, or in their further bilateral and regional trade treaties with other countries (see Gehring and Cordonier Segger 2005). According to the letter of international trade law, all countries are free to choose their own economic system and trade policies. However, where "discrimination" is alleged, clashes with principles of the WTO will ultimately result in binding dispute settlement procedures for its members. To ensure that international trade law can deliver on sustainable development in the current context, a constructive, integrated approach is needed to address overlaps between social development, economic development and environmental protection. This approach will be important to ensure more coherent – and lasting – world trade law.

[Author note: This chapter shares thoughts with the Introduction of *Sustainable Development in World Trade Law* edited by Markus Gehring, and Marie-Claire Cordonier Segger (2005) and with *World Trade Law in Practice* by Markus Gehring, Jarrod Hepburn, and Marie-Claire Cordonier Segger (2007).]

Notes

1 "Johannesburg Declaration on Sustainable Development and Johannesburg Plan of Implementation", in Report of the World Summit on Sustainable Development (September 4, 2002) U.N. Doc A/CONF.199/L20 [45].

2 See Marrakesh Agreement Establishing the World Trade Organization (signed April 15, 1994, entered into force January 1, 1995) 1867 UNTS 4, 33 ILM 1144, Preamble; which recognizes that among WTO members: "Relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development . . . *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." See also WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products Sector–Report of the Appellate Body* (September 20, 1999) WT/DS58/AB/R [129] n 107; where the WTO Appellate Body observes that the Preamble to the WTO Agreement specifically refers to "the objective of sustainable development" and characterizes it as a concept that has "been generally accepted as integrating economic and social development and environmental protection."

3 Integration as part of the concept of sustainable development has mainly been proposed in trade policy discussions by the demand to "[e]nsure that environment and trade policies are mutually supportive, with a view to achieving sustainable development." "Agenda 21 (Annex 2)" in Report of the U.N. Conference on Environment and Development Vol. I (June 13, 1992) U.N. Doc A/CONF.151/26 (Vol. I); 31 ILM 874 [2.10].

4 See "Permanent Sovereignty over Natural Resources" UNGA Res 1803 (XVII) (December 14, 1962) U.N. Doc A/Res/1803 (XVII).

5 Among the outcomes of the UNCED were three international treaties (on climate change, biological diversity, and, a little later, desertification and drought) which recognized both environmental and sustainable development objectives, as well as the non-binding 1992 Rio Declaration and Agenda 21, which were adopted by governments. See "Rio Declaration on Environment and Develop-

ment (Annex 2)", Report of the U.N. Conference on Environment and Development Vol. I (June 13, 1992) U.N. Doc A/CONF.151/26 (Vol. I), (1992) 31 ILM 874; Agenda 21 (n 3).

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

7 Marrakesh Agreement (n 2) Preamble.

8 In general international law the preamble is part of the context in which the international treaty has to be interpreted; see Vienna Convention on the Law of Treaties (singed May 23, 1969, entered into force January 27, 1980) 1155 UNTS 331, 8 ILM 679, art 31; "General rule of interpretation at 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes." The preamble can contain important information about the object and purpose of the treaty.

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

10 Singapore Ministerial Declaration (December 18, 1996) WT/MIN(96)/DEC, 36 ILM 218. Available at http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf.

11 Geneva Ministerial Declaration (20 May 1998) WT/MIN(98)/DEC/1. Available at http://docsonline.wto.org.

12 For example, large trading countries such as Germany amended their Constitutions to include the goal of sustainable development, see Grundgesetz für die Bundesrepublik Deutschland (German Constitution) art 20; and trading regions such as the European Union had accepted sustainable development as an objective of their integration, see Treaty of Amsterdam Amending the Treaty on European Union (signed October 2, 1997, entered into force May 1, 1999) [1997] OJ C 340/1, art 2. Available at http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf; see also the outcomes of the Summit of the Americas on Sustainable Development, Declaration of Santa Cruz de la Sierra (adopted December 7, 1996). Available at http://www.summit-americas.org/Boliviadec.htm; as discussed generally in Cordonier Segger and Leichner Reynal 2005.

13 See WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products Sector–Panel Report* (15 May 1998) WT/DS58/R; see also *United States: Shrimp–Appellate Body Report* (n 2).

14 WTO, *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries–Appellate Body Report* (20 April 2004) WT/DS246/AB/R.

15 WTO, *Brazil: Measures affecting Imports of Retreaded Tires–Panel Report* (June 12, 2007) WT/DS332/R.

16 *United States: Shrimp–Appellate Body Report* (n 2) [12].

17 Ibid. n 107; in the Appellate Body Report, reads: "This concept has been generally accepted as integrating economic and social development and environmental protection. See, e.g. Handl 1995: 35.

18 *United States: Shrimp–Appellate Body Report* (n 2) [123].

19 *United States: Shrimp–Appellate Body Report* (n 2) [153].

20 Ministerial Decision on Trade and Environment (April 15, 1994) LT/UR/D-5/8, 33 ILM 1267, preamble http://docsonline.wto.org.

21 We note that Principle 3 of the Rio Declaration on Environment and Development states: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 of the Rio Declaration on Environment and Development states that: "In order to achieve sustain-

able development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

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

23 Ministerial Decision on Trade and Environment (n 20).

24 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products Sector–Recourse by Malaysia to Article 21.5 of the DSU* (October 13, 2000) WT/DS58/17.

25 In the Panel Report, this citation reads: "*See* the final texts of the agreements negotiated by Governments at the United Nation Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil, June 3–14, 1992, specifically the Rio Declaration on Environment and Development (hereafter the "Rio Declaration") and Agenda 21 at www.unep.org; the concept is elaborated in detailed action plans in Agenda 21 so as to put in place development that is sustainable – i.e. that "meets the needs of the present generation without compromising the ability of future generations to meet their own needs"; see World Commission on Environment and Development (n 13).

26 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products Sector, Recourse to Article 21.5 by Malaysia–Panel Report* (June 15, 2001) WT/DS58/RW.

27 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products Sector, Recourse to Article 21.5 by Malaysia–Report of the Appellate Body* (October 22, 2001) WT/DS58/AB/RW.

28 WTO, *European Communities: conditions for the Granting of Tariff Preferences to Developing Countries* – Appellate Body Report (20 April 2004) WT/DS246/AB/R.

29 Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (November 28, 1979) L/4903, BISD 26S/203.

30 Ibid. [93]; interestingly a similar argument was made by one dissenting panel member in the panel case.

31 WTO, *Brazil: Measures affecting Imports of Retreaded Tires–Panel Report* (June 12, 2007) WT/DS332/R.

32 On June 20, 2005, the European Communities requested consultations with Brazil under Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") regarding Brazil's imposition of measures that adversely affect exports of retreated tires from the European Communities to the Brazilian market.

33 Committee on Trade and Environment, *Trade in Used and Retreaded Tires– Submission by Brazil* (July 12, 2005) WT/CTE/W/241; see also Committee on Trade and Environment, *Report of the Meeting held on 6 July 2005* (September 2, 2005) WT/CTE/M/40 [82].

34 *United States: Shrimp–Appellate Body Report* (n 2) [129].

35 The preamble of the Marrakech Agreement establishing the WTO reads in its relevant part: "Recognizing that their relations in the field of trade and economic endeavor 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" (emphasis added). Moreover, in the 1994 Ministerial Decision on Trade and Environment, Ministers took note, *inter alia*, of the Rio Declaration on Environment and Development and Agenda 21. Of particular relevance is paragraph 4.19 of Agenda 21, which states, in part: "Society needs to develop effective ways of dealing with the problem of disposing of mounting levels of waste products and materials. Governments, together with industry, households and the public, should make a concerted effort to reduce the generation of wastes and waste products." The European Communities referred to the Rio Declaration and Agenda 21 in its response to question 37 by the Panel and in paragraph 138 of its first written submission.

36 *Brazil: Tires–Panel Report* (n 31) [7.112].
37 WTO, *Brazil: Measures affecting Imports of Retreaded Tires–Report of the Appellate Body* (December 3, 2007) WT/DS332/AB/R [151].
38 For details, see Gehring 2007; Gehring et al. 2007: 131.
39 United Nations Convention on the Law of the Sea (signed December 10, 1982, entry into force November 16, 1994) 1833 UNTS 396, 21 ILM 1245.
40 Protocol on Environmental Protection to the Antarctic Treaty (opened for signature October 4, 1991, entry into force January 14, 1998) 30 ILM 1461.
41 Department of Foreign Affairs and International Trade Canada, "Framework for Conducting Environmental Assessments of Trade Negotiations" http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/Environment.aspx.
42 Office of the United States Trade Representative, "Environmental Reviews in FTAs" www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html.
43 International Institute for Sustainable Development, *Environment and Trade: A Handbook* (2nd edn, UNEP, Geneva 2005): 112. Available at http://www.iisd.org/pdf/2005/envirotrade_handbook_2005.pdf.
44 European Commission, *Sustainability Impact Assessment*. Available at http://ec.europa.eu/comm/trade/issues/global/sia/index_en.htm.
45 Doha Ministerial Declaration (November 14, 2001) WT/MIN(01)/DEC/1. http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf.
46 See Seattle Proposals (all made *after* the Appellate Body's *U.S.–Shrimp* decision discussed earlier).
47 Doha Ministerial Declaration (n 45) [51]; this section of the Ministerial Declaration is binding for the negotiations.
48 Ibid.
49 Ibid. 3.