The articles in the present Review are based on lectures given during the 14th University of Eastern Finland – UNEP Course on Multilateral Environmental Agreements, which was held from 9 to 19 November 2017 in Chambéry, France and Geneva, Switzerland. The special theme of the course was "Trade and environment". The aim of the Course was to convey key tools and experiences in the area of international environmental law-making to present and future negotiators of multilateral environmental agreements. In addition, the Course served as a forum for fostering North-South co-operation and for taking stock of recent developments in the negotiation and implementation of multilateral environmental agreements and diplomatic practices in the field.

The lectures were delivered by experienced hands-on diplomats, government officials and members of academia. The Course is an event designed for experienced government officials engaged in international environmental negotiations. In addition, other stakeholders such as representatives of non-governmental organizations and the private sector may apply and be selected to attend the Course. Researchers and academics in the field are also eligible.

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International Environmental Law-making and Diplomacy Review 2017

Tuula Honkonen and Seita Romppanen (editors)

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Foreword

The compilation of papers in the present Review is based on lectures presented during the fourteenth University of Eastern Finland – UN Environment Programme Course on Multilateral Environmental Agreements (MEAs), held from 9 to 19 October 2017 in Chambéry, France and Geneva, Switzerland.

The publication is aimed at equipping present and future negotiators of MEAs with information and experiences of others in the area of international environmental law-making in order to improve the impact and implementation of these key treaties. The ultimate aim is to strengthen and build environmental negotiation capacity and governance worldwide.

For the past fourteen years, the University of Eastern Finland (previously, the University of Joensuu) has partnered with the UN Environment Programme to conduct a training course on MEAs annually, with each Course focusing on a specific theme. From each Course, selected papers written by lecturers, and participants, have, after a rigorous editing process, been published in the Course Review (2004–2016), for the benefit of both Course participants and a wider audience, who are able to access these publications through the internet.[1]

Since each MEA Course has a distinct thematic focus, the Reviews address a range of specific environmental issues, in addition to providing more general observations regarding international environmental law-making and diplomacy. The focus of the 2017 course was 'Trade and Environment', and the current Review builds upon the existing body of knowledge in this area.

The material presented in this Review is intended to expose readers to a variety of issues regarding the relationship between trade and environment. This compilation informs negotiators of the different forms that the relation between trade and environmental protection may take. These considerations in turn inform policy choices that can enhance bilateral and multilateral cooperation in addressing this issue.

[1] For an electronic version of this volume, and of the 2004–2016 Reviews, please see the University of Eastern Finland – UN Environment Course on Multilateral Environmental Agreements website, <http://www.uef.fi/en/web/unep/publications-and-materials>.

We are grateful to all the contributors for the successful outcome of the fourteenth Course, including the lecturers and authors who transcribed their presentations to compile the Review. We would also like to thank Tuula Honkonen and Seita Romppanen for their skillful and dedicated editing of the Review, as well as the members of the Editorial Board for providing guidance and oversight throughout this process.

Professor Jukka Mönkkönen
Rector of the University of Eastern Finland

Elizabeth Maruma Mrema
Director, Law Division,
United Nations Environment Programme

Editorial preface

1.1 General introduction

The lectures presented on the fourteenth annual University of Eastern Finland[2] – UN Environment Course on Multilateral Environmental Agreements (MEAs), from which the papers in the present *Review* originate, were delivered by experienced diplomats and MEA professionals, members of government and senior academics.[3] One of the Course's principal objectives is to educate participants by imparting the practical experiences of experts involved in international environmental law-making and diplomacy – both to benefit the participants on each Course and to make a wider contribution to knowledge and research through publication in the *Review* publication. The papers in this *Review* and the different approaches taken by the authors therefore reflect the professional backgrounds and experiences of the lecturers, resource persons and participants (some of whom are already experienced diplomats). The papers in the *Reviews* of different years, although usually having particular thematic focuses, present various aspects of the increasingly complicated field of international environmental law-making and diplomacy.

It is intended that the current *Review* will provide practical guidance, professional perspective and historical background for decision-makers, diplomats, negotiators, practitioners, researchers, students, teachers and different stakeholders who work with international environmental law-making and diplomacy. The *Review* encompasses different approaches, doctrines and theories in this field, including international environmental law and governance, international environmental law-making, environmental empowerment, and the enhancement of sustainable development generally. The special themes of the *Reviews* bring naturally their own approaches and special questions into the publication. The papers in the *Review* are thoroughly edited.

The first and second Courses were hosted by the University of Eastern Finland, in Joensuu, Finland where the landscape is dominated by forests, lakes and rivers. The special themes of the first two Courses were, respectively, 'Water' and 'Forests'. An aim of the organizers of the Course is to move the Course regularly to different

[2] The University of Joensuu merged with the University of Kuopio on 1 January 2010 to constitute the University of Eastern Finland. Consequently, the University of Joensuu – UNEP Course was renamed the University of Eastern Finland – UNEP Course. The Course activities are concentrated on the Joensuu campus of the University.

[3] General information on the University of Eastern Finland – UNEP Course on International Environmental Law-making and Diplomacy is available at <http://www.uef.fi/unep>.

parts of the world. In South Africa, the coastal province of KwaZulu-Natal is an extremely biodiversity-rich area, both in natural and cultural terms, and the chosen special themes for the 2006 and 2008 Courses were therefore 'Biodiversity' and 'Oceans'. These two Courses were hosted by the University of KwaZulu-Natal, on its Pietermaritzburg campus. The fourth Course, held in Finland, had 'Chemicals' as its special theme – Finland having played an important role in the creation of international governance structures for chemicals management. The sixth Course was hosted by UNEP in Kenya in 2009, in Nairobi and at Lake Naivasha, with the special theme being 'Environmental Governance'. The theme for the seventh Course, which returned to Finland in 2010, was 'Climate Change'. The eighth Course was held in Bangkok, Thailand in 2011 with the theme being 'Synergies Among the Biodiversity-Related Conventions'. The ninth Course was held in 2012 on the island of Grenada, near the capital St George's, with the special theme being 'Ocean Governance'. The tenth Course, which in 2013 returned to its original venue in Joensuu, Finland, had 'Natural Resources' as its special theme. The eleventh Course was again held in Joensuu with a special theme of 'Environmental Security'. The twelfth Course was hosted by Fudan University in Shanghai, China, with the recurring special theme 'Climate Change'. The thirteenth Course was again hosted by the UEF in Joensuu, with the special theme 'Effectiveness of Multilateral Environmental Agreements'. The most recent, fourteenth, Course was held at the Château des Comtes de Challes, Chambéry, France and at the International Environment House, Geneva, Switzerland. The special theme of the Course was 'Trade and Environment' – and this is therefore the special theme of the present volume of the *Review*.

The Course organizers, the Editorial Board and the editors of this *Review* believe that the ultimate value of the *Review* lies in the contribution that it can make, and hopefully is making, to knowledge, learning and understanding in the field of international environmental negotiation and diplomacy. Although only limited numbers of diplomats and scholars are able to participate in the Courses themselves, it is hoped that through the *Review* many more are reached. The papers contained in the *Review* are generally based on lectures or presentations given during the Course, but have enhanced value as their authors explore their ideas, and provide further evidence for their conclusions.

All involved with the *Review* have been particularly grateful to receive contributions through the various editions both from new writers in every volume, and by writers who have written multiple papers on an ongoing basis. Many of the people who have contributed papers have been involved in some of the most important environmental negotiations the world has seen. Publication of these contributions means that their experiences, insights and reflections are recorded and disseminated, where they might not otherwise have been committed to print. The value of these contributions cannot be overstated. To complement this, an ongoing feature has been the publication of papers by Course participants who have brought many fresh ideas to the *Review*. Two such papers are included in the present *Review*.

Before publication in the *Review*, all papers undergo a rigorous editorial process. Each paper is read and commented on several times by both editors, is returned to the authors for rewriting and the addressing of queries, and is only included in the *Review* after consideration by, and approval of, the Editorial Board. As is alluded to above, the papers published in the *Review* vary in nature. Some are based on rigorous academic research; others have a more practical focus, presenting valuable reflections from those involved in the real-world functioning of international environmental law and law-making; and still others are a combination of both. Since the 2012 volume, papers have undergone an anonymous peer-review process[4] where this process is requested by their author(s).

1.2 Trade and environment

The special theme of the 2017 Course (and hence of the current volume of the *Review*) was trade and environment. This is a theme that continues to be topical year after year. It is a question about the environmental impacts of trade, or trade impacts of environmental protection provisions and measures.[5] Either way, there continue to be growing interdependencies that need to be addressed. In addition, also the 2030 Sustainable Development Agenda recognizes international trade as key means of implementation for the Sustainable Development Goals (SDGs).[6] Consequently, increasing policy coordination at all levels and directions (economic, social and environmental) is needed. The aim should be to make trade and environment truly mutually supportive, which is more easily said than done.[7]

The issue of trade and environment can be approached from different perspectives.[8] Firstly, we can discuss the relationship between trade and environment on a general level: their interactions, the basic relationship, different channels through which they interact, their different characteristics, potential for conflicts or effective co-ex-

[4] Per generally accepted academic practice, the peer-review process followed involves the sending of the first version of the paper, with the identity of the author/s concealed, to at least two experts (selected for their experience and expertise) to consider and comment on. The editors then relay the comments of the reviewers, whose identities are not disclosed unless with their consent, to the authors. Where a paper is specifically so peer-reviewed, successfully, this is indicated in the first footnote of that paper. A paper may be sent to a third reviewer in appropriate circumstances. As part of the peer-review process, the editors work with the authors to ensure that any concerns raised or suggestions made by the reviewers are addressed.

[5] For a good general account of the issue and its problematics, see, for instance, Kevin P. Gallagher (ed.), *Handbook on Trade and the Environment* (Edward Elgar, 2010); and Brian R. Copeland and M. Scott Taylor, *Trade and the Environment. Theory and Evidence* (Princetown University Press, 2003).

[6] 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015, at 27.

[7] One of the classic textbooks on the theme is Duncan Brack (ed.), *Trade and Environment: Conflict of Compatibility?* (Earthscan, 1998). For a good account on this question in the context of the international climate change regime, see Patrick A. Messerlin, 'Climate Change and Trade Policy: From Mutual Destruction to Mutual Support', World Bank Policy Research Working Papers (2010), available at <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5378#> (visited 5 September 2018).

[8] See also the paper by Mark Halle in the present *Review*.

istence. The basic question here could be formulated as: is trade good or bad for the environment? Of course the issue is not this black and white, but sometimes simplification helps us to see what is essential.

Secondly, we can examine the relationship between trade and environment through the lens of international and national trade law and regulation. There we may study, for instance, the rules of the international trade regime – created under the World Trade Organization (WTO) or regional trade agreements, for instance – and their interactions with national legal provisions on environmental protection.[9] Free trade principles of the international trade regulations form the core of the WTO organization. WTO has traditionally resisted 'green protectionism' and has had a restrictive view on extra-territorial impacts of protection measures.

Thirdly, the issue of trade and environment may be looked at from the perspective of international environmental legal instruments and their trade-related provisions. Some MEAs specifically regulate trade, others may contain certain trade-related provisions or mechanisms. Issues such as ozone depletion, hazardous wastes and climate change all have trade-related aspects. Their potential for conflict with international trade rules has been recognized for a long time. Consequently, the compatibility of MEAs with WTO rules is a much-examined issue[10] although direct conflicts have been largely avoided. Generally, mutual supportiveness, complementary systems and (possibly joint) contribution to sustainable development are sought, although their realization can be challenging within the given settings.

Increasingly also the concept of sustainable development is brought to the debate on trade and environment. This is being done, for instance, by enhancing the (environmental) sustainability of trade agreements, but also more carefully designing and implementing MEA trade-provisions.[11]

It could be concluded that international trade almost unavoidably affects the environment.

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[9] See, for instance, Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn, *The World Trade Organization. Law, Practice, and Policy* (3rd ed., Oxford University Press, 2015), especially ch. 2 and 20.

[10] See, for instance, James K. R. Watson, *The WTO and the Environment. Development of competence beyond trade* (Routledge, 2013), ch. 4 and 5.

[11] Examples of measures by which sustainable development is better integrated into international trade and environmental law include the enhancement of the linkages between human and labor rights to international trade development and environmental law norms and regimes; adjudicating sustainable development conflicts in world trade law; conduct of impact assessments of policies and projects; and designing more comprehensive and cross-cutting trade measures in MEAs. For a seminal work in this area, see Markus W. Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law* (Kluwer Law International, 2005).

1.3 The papers in the 2017 Review

The present *Review* is divided into three Parts. Part I introduces readers to the issue of the nexus of trade and environment. In the first paper, Mark Halle takes an analytical look into the development of the relations between international trade and environmental fields, especially from the perspective of the interactions between the World Trade Organization and multilateral environmental agreements. The paper analyses the steps taken by the WTO in addressing environmental issues and trade provisions contained in MEAs, and then tracks progress made in this regard through negotiation, dispute settlement and 'crystallization'. The author concludes that solutions that work for both trade and sustainable development are the only ones acceptable in the long run. The challenges remain great, but there is a genuine acceptance that solutions must emerge from cooperative rather than adversarial approaches.

The second paper in Part I of the *Review* adds the concept of sustainable development into the trade and environment nexus. The author of the paper, Jodie Keane, argues that the Sustainable Development Goals (SDGs)[12] rightly place the multilateral trading system as a means of implementation. The expansion of global trade in recent decades has led to unprecedented reductions in poverty and therefore historically unparalleled socioeconomic progress – yet also to severe environmental costs. The adoption of SDGs seeks to redress some of the concerns. According to Keane, it provides for a universal framework related to public policy to assist policy-makers in more effectively governing trade as a tool to achieve sustainable development. This includes through addressing gaps within the multilateral framework governing trade, so as to achieve a triumph rather than tragedy of the commons.

Part II of the *Review* introduces selected perspectives on the theme of trade and environment. In the opening paper of Part III, Yvonne Nzelle Ewang-Sanvincenti examines trade measures in the context of specific MEAs of the international chemicals and waste cluster. After providing an overview of the relevant provisions under the Basel,[13] Rotterdam[14] and Stockholm Conventions,[15] the paper considers and highlights commonalities and differences between the Conventions' provisions. The paper concludes by briefly assessing the effectiveness of the three Conventions and their related processes and maps out some possible future developments. The author sees it likely that further activities will be conducted and closer cooperation and co-

[12] Rio +20 Outcome Document 'The Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> (visited 13 September 2018).

[13] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

[14] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.

[15] Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://chm.pops.int>.

ordination encouraged between the Conventions with regard to their trade-related provisions and measures, whilst of course respecting the legal autonomy of each Convention.

The paper by Anjana Varma, a course participant, addresses the role of trade in wildlife in enabling or deterring wildlife conservation. The paper begins by highlighting the magnitude of wildlife trade, both in terms of its monetary value and threat to species survival, and then proceeds to give an overview of the interactions between trade and environment in the international landscape. The main part of the paper provides an analysis on trade as a means of implementation (the convergence argument) of wildlife conservation on one hand, and on the role of trade as a deterrent to environment (the divergence argument), on the other hand. In conclusion, the paper argues that it is crucial to understand the dynamics that can lead to trade either having an enabling or deterring effect on wildlife conservation. In addition, despite the growing interactions taking place between the trade and environment regimes, the analysis indicates that perhaps the interaction remains asymmetrical.

The third paper of Part II, by Elena Koritchenko, a course participant, examines the environmental and social policies in the activities of export credit agencies (ECAs). The starting point for the paper is the observation that the environmental and social effects produced by economic activities shall be borne not only by the immediate owners and operators of harmful facilities but also by those project participants which actually enable project implementation. The author begins by tracking the role of ECAs in the world trade system, and then proceeds to describing and analyzing the evolution of that role with regard to integration of environmental and social considerations (in a word: sustainability) into the activities of ECAs. The OECD export credit agencies are more specifically examined in the paper. In conclusion, the author highlights two main driving forces behind the emergence of specific sustainability policies of ECAs, especially under the OECD context: the global paradigm shift towards sustainable development as an overarching idea and ultimate goal (which determined the necessity of such standards for the ECAs), and, on the other hand, the active position of civil society.

In the fourth and final paper of Part II, Elizabeth Maruma Mrema and Tomkeen Onyambu Mobegi use a Third World perspective on approaches to international law to argue that even though trade and environment issues continue to collide from time to time, they cannot be treated as separate anymore. Instead, there is a need to better define the nexus and strike a balance between the two sets of issues. After providing an account of the general framework on trade and environmental law, the paper focuses on discussing the relationship between trade and environment, the relevant principles and on analyzing trade issues in MEAs. Using a global south approach throughout the paper, the authors map out potential opportunities for future developments and argue that there exist strong platforms for developing countries to proactively negotiate for comprehensive and mutually supportive inter-agency and

multi-disciplinary trade and environment processes, specifically within the three dimensions of sustainable development: economic, social and environmental.

Part III of the *Review* reflects the interactive nature of the Course – and the fact that education and dissemination of knowledge are at the core of the Course and of the publishing of this *Review*. During the Course, negotiation simulation exercises were organized to introduce participants to the real-life challenges facing negotiators of MEAs. Excerpts from, explanation of, and consideration of the pedagogical value of the main exercise are included in a paper in Part IV of the *Review*. The paper describes a negotiation exercise that, based on experiences from exercises run in previous years of the Course, was devised and run by Kati Kulovesi, Sabaa A. Khan and Harro van Asselt, assisted by Tuula Honkonen in preparing the exercise. The scenario for the negotiation simulation focused on substantive, institutional and procedural issues in the context of regulating plastic pollution in global oceans. The simulation was totally hypothetical in the sense that there is not, in real life, a draft international convention on the theme. However, at the same time, the issue of setting controls on marine plastic pollution is highly topical, and individual countries as well as the broader international community have been seeking for ways to address the problem. The scenario was set at 5th session of an imaginary Intergovernmental Negotiation Committee on Ocean Plastics. Negotiations took place within two drafting groups established to negotiate on two themes: PVC control measures and trade-related provisions to control trade among Parties and non-Parties. Participants were given individual instructions and a hypothetical, country-specific, negotiating mandate and were guided by international environmental negotiators. The general objectives of the simulation exercise were to promote among participants, through simulation experience: understanding of the challenges and opportunities related to the inclusion of trade-related provisions in MEAs; understanding of the principles and practices of multilateral environmental negotiations; and familiarity with specific substantive and drafting issues.

It could be said that the negotiation exercises provide, in a sense, the core of each Course. This is because each Course is structured around the practical negotiation exercises which the participants undertake. More generally, the programmes of more recent Courses have included an increasing number of interactive exercises, partly as a response to feedback received from Course participants.

The inclusion of the simulation exercises has been a feature of every *Review* published to date, and the Editorial Board, editors and Course organizers believe that the collection of these exercises has significant value as a teaching tool for the reader or student seeking to understand international environmental negotiation. It needs to be understood, of course, that not all of the material used in each negotiation exercise is distributed in the *Review*. This is indeed a downside, but the material is often so large in volume that it cannot be reproduced in the Course publication.

It is the hope of the editors that the various papers in the present *Review* will not be considered in isolation. Rather, it is suggested that the reader should make use of all of the *Reviews* (currently spanning the years 2004 to 2017), all of which are easily accessible online through a website provided by the University of Eastern Finland,[16] to gain a broad understanding of international environmental law-making and diplomacy.

Tuula Honkonen[17] and Seita Romppanen[18]

[16] See <http://www.uef.fi/en/unep/publications-and-materials>.

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Part I

Introduction to the Nexus of Trade and Environment

Assessing the Trade and Environment Debate after 30 Years: Reflections from the Perspective of International Environmental Negotiations

Mark Halle[1]

1 Introduction

Almost a quarter century after the World Trade Organization (WTO)[2] was established, it is difficult to recall the apprehension its arrival caused in the environmental community. WTO was seen to be powerful, endowed with a dispute settlement system that could impose real sanctions on recalcitrant members, and inclined to regard environmental measures as unwarranted restrictions on trade. The fear was that WTO would challenge and roll back years of achievement in the development of international environmental law. Many developing country WTO members were hostile to the notion that environment could have a say in trade policy, fearing that environmental reasons would be adduced to justify trade restrictions that they considered to be no more than green protectionism.

From today's perspective, this fear now seems largely unwarranted. Nobody would now claim that environment is not a legitimate subject in the trade policy context and, by and large, the issues that have arisen at the trade – policy interface have been addressed with common sense and a respect for the scope of member states – singly or collectively – to adopt and enforce environmental norms and regulations. The decision by the Appellate Body in the Shrimp-Turtle case, set out below, is a case

[1] BA (History and French) Tufts University Dipl. Historical Studies University of Cambridge; Senior Fellow, International Institute for Sustainable Development (IISD); e-mail: mhalle@iisd.org.

[2] See <http://www.wto.org>.

in point, and especially in underlining the relevance of international environmental conventions in determining the case.

How did this unfold, and what were the key steps along the way? Can we say that trade and environmental policy are now largely in harmony?

2 GATT and the environment

During the years of the General Agreement on Tariffs and Trade (GATT),[3] from 1947 to 1995, environment was simply not an issue. Article XX ('General Exceptions') offered exceptions for measures taken to protect the environment or endangered natural resources, and in any event the focus of trade negotiations was largely on lowering tariffs. The fact that trade should not undermine a healthy environment was, with the exception stated below, simply taken for granted.

Indeed, when the United Nations Conference on the Human Environment (UNCHE, Stockholm, 1972) was being prepared, GATT established a forum – the unfortunately-named Environmental Measures and International Trade (EMIT) Working Group. This Working Group would meet in case any member state wished to raise and discuss an environmental issue in the trade context. EMIT met only once, twenty years later, to discuss preparations for the UN Conference on Environment and Development (UNCED, Rio de Janeiro, 1992).

The exception to GATT's indifference to environmental matters came with the Tuna-Dolphin cases[4] brought and heard while the final architecture of WTO was being shaped. The panels (or such was the perception of the environment community) ruled that consumers should not be allowed to distinguish among tuna products on the basis of how these tunas were captured – and specifically on the basis of whether the capture methods led to large-scale death of dolphins.

This ruling had the effect of a bomb-shell. After years of being told to rely on market mechanisms to promote environmental values, environmentalists were effectively being told that their key market-facing tool – playing on consumer preference – ran contrary to trade law. It matters little that the cases were far more complex and the trade law underlying them much more fragile than it seemed at the time. Match this with the emerging design of the proposed WTO dispute settlement system, many times more powerful than that of the GATT, and there appeared to be serious grounds for concern at the ability of the trading system to undermine environmental action.

[3] The General Agreement on Tariffs and Trade (GATT), 1947.
[4] United States - Restrictions on Import of Tuna (No 1), Mexico v United States, GATT Panel Report, DS21/R, BISD/39S/155 (1991).

3 The Marrakech Act and the fledgling WTO

When the creation of WTO was secured with the signature of the Marrakech Act[5] in 1994, there were grounds for the environmental community to take some solace. No doubt due in part to the recent Earth Summit in Rio, the Act contained a number of gestures in the direction of environment and sustainable development.

The Preamble to the Act reproduced the Preamble to GATT 1947 but added that member states should implement the trade rules

> … 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 of doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

In other words, they recognized that trade is a means to an end, and not an end in itself. And, broadly speaking, they define that end as being sustainable development.

Further, the member states established a forum – the Committee for Trade and Environment (CTE)[6] – in which the relationship between trade and environment could be discussed. And of course, GATT Article XX was reproduced in GATT 1994 coupled with a dispute settlement system able to provide detailed and specific interpretations of how it might be applied.

At the same time, other elements of the Marrakech package were a cause for concern. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement)[7] gave no recognition to traditional or community-held knowledge (though this was called for in the Convention on Biological Diversity – CBD[8]), and the TBT agreement[9] offered grounds for member states to challenge even voluntary standards[10] – another market-based tool increasingly used by the environmental community. In the first case, TRIPS not only reinforces intellectual property rights, it recognizes only privately-held rights, thus setting up a potential conflict with a major piece of global environmental legislation – the CBD – adopted less than two years earlier and that calls for recognition not only of private rights but of other

[5] The General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <http://www.wto.org>.

[6] See <https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm> (visited 15 May 2018).

[7] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, 15 April 1994, in force 1 January 1995, <http://www.wto.org>.

[8] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[9] Agreement on Technical Barriers to Trade, Marrakesh, 15 April 1994, in force 1 January 1995, <http://www.wto.org>.

[10] Government-set standards are known as technical regulations, but they are increasingly flanked by voluntary standards – for instance, standards on organic production, or fair trade, set by the market itself.

forms of collective knowledge as well. In the second case, the Agreement to Technical Barriers to Trade (TBT agreement) extended the scope of WTO member states to challenge voluntary standards (as opposed to government-sanctioned standards, or technical regulations. This appeared to allow member states the possibility to challenge other member states for voluntary measures taken in their economies that involved no government action – an apparent extension of authority into the market that awoke serious preoccupations.

4 How to assess progress?

4.1 Introduction

Despite the concessions made, strong scepticism continued within the environmental community. Nobody was quite sure how the dispute settlement system would handle environmental issues. In addition, discussions in the CTE went around in circles, with no discernible progress in addressing any of the items on its agenda. Indeed, the initial mandate of CTE was simply to clarify the issues arising at the interface between trade and environmental policy and not to prepare these for a negotiated outcome.

At this point, it is important to point out that there are at least three ways – negotiation, dispute settlement, and 'crystallization', in which issues might advance in the WTO context. Negotiation is one – and often the only one understood by the public, which is not surprising after long years of negotiations under the Uruguay Round[11] and its apparently triumphant outcome.

But beyond that, dispute settlement was emerging as perhaps the strongest motor of progress. When discussion or negotiation fails to advance agreement, there is often no other recourse than dispute settlement – if only to clarify what was intended by the measure in question or to provide interpretations of legal provisions where these are not clear. More about that later.

Another significant, if less noticed, form of progress may come through what US legal scholar Greg Schaffer calls the process of 'crystallization'.[12] This occurs where

[11] The history of GATT is one of successive rounds of negotiations during which tariffs were lowered and rules governing trade in goods were refined. The Uruguay Round, which occupied almost a decade and ended in the Marrakech Agreement of April 1994, was the most ambitious to date, moving from a focus on what happens to goods at the border to a focus on how standards, legislation and practices 'behind the border' affect trade. Further, prior to the creation of the WTO, the GATT dispute settlement mechanism was weak and ineffective and resolved very few policy issues conclusively. All this adds up to the common perception of the GATT/WTO as essentially a forum for negotiation.

[12] Gregory C. Shaffer, 'The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters', 25 *Harvard Environmental Law Review,* (2001) 1-93.

an issue is not specifically resolved but ceases to be an issue simply because member states understand better the purpose and motivation of other member states in taking a measure. For an issue to go away, or be 'resolved' through shedding light on it, is a genuine form of progress. The day-to-day operations of the WTO committees and working groups resolve issues on a continuous basis through such measures as notifications. A good example is the work of both the Sanitary and Phytosanitary Measures (SPS) and TBT committees who deal with member state concerns arising from notification of measures taken by one or another member state. Many of these measures trigger concerns in relation to their potential impact on that member's trade interests. Yet only a fraction of these lead to further action in the respective committee, much less progress to a dispute. This may be undramatic, but this represents WTO functioning as it is intended to.

4.2 Negotiation

The process of going around in circles at WTO continued from 1996 – when CTE received its mandate – to 2001 and the adoption of the Doha Development Agenda and the launch of a new round of multilateral trade negotiations under the WTO. Some issues (for instance, Domestically-Prohibited Goods) dropped off the agenda, successfully crystallized, but the remaining issues were divided into two categories. One group was 'upgraded' and assigned to a special session of CTE (CTE-SS)[13] on the understanding that these were being prepared for eventual negotiation. These included 'specific trade obligations' or trade-related provisions contained in multilateral environmental agreements (MEAs), and the notion of disciplining subsidies to fishing operations. Despite fifteen years of discussion, none of the issues has been resolved.

The remaining issues remain in the normal sessions of the CTE, where the path around the traditional mulberry bush has been beaten into a deep groove. So, is the process a failure and has environment as a trade policy topic died a slow and agonizing death? If progress depended on negotiations only, strong evidence would exist to support that conclusion.

And yet two points must be underlined to offset the sorry picture painted above. The first relates to the nature of negotiations in multilateral trade rounds. These revolve around a set of key, primary issues such as agriculture and services. Issues such as those on the CTE-SS agenda are very much secondary. Even if agreement were within reach it is likely it would be held off so that they might be used in the end-game, to trade off against concessions in other areas.

Second, the simple fact that environment – an issue regarded as highly marginal in GATT and around which considerable suspicion remained in the early years of the

[13] See WTO, 'Negotiations on trade and the environment', available at <https://www.wto.org/english/tratop_e/envir_e/envir_negotiations_e.htm> (visited 20 May 2018).

WTO is now a permanent feature of international trade policy. Its graduation into an issue worthy of negotiation is politically very significant.

4.3 Dispute settlement

It is in the area of dispute settlement that the most remarkable progress has been made in addressing how environmental matters are handled in the multilateral trade system. Three examples will suffice.

4.3.1 Trade measures under multilateral environmental agreements

Many environmental treaties – whether global, regional, bilateral or indeed topical – use the threat of trade sanctions as an incentive for Parties to comply with their terms. This has generally been regarded with apprehension by the trade community, for whom minimum restriction on trade is a core value. The GATT, indeed, followed the custom of regarding the trade rules as the only relevant body of international law in resolving trade disputes. Not so the WTO.

The very first case heard by the new WTO Appellate Body was the Reformulated Gas case[14] (not per se an environmental case). In its decision, the Appellate Body drew on other relevant laws and stated that trade law must not be interpreted 'in clinical isolation' from other relevant bodies of international law.[15] This signalled a fundamentally different approach consistent with the recognition in the Preamble to the WTO Agreements of trade as a means to an end, not an end in itself.

However, it was the Shrimp-Turtle case[16] that cemented the entirely new outlook taken by the WTO's fledgling dispute settlement body. First, it clarified the scope of Article XX exceptions, and, in particular, the relationship between the 'chapeau'[17] and the relevant provisions in XX b)[18] and g),[19] thus offering a hitherto inexistent methodology for invoking the environmental exceptions under the GATT article.

More important, however, it drew on a range of environmental agreements, deeming them relevant to the case. It even invoked a treaty not yet in force, arguing that it shed light on what states intended in seeking to address the issue.

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[14] WTO Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996.

[15] *Ibid.* at 17.

[16] WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 12 October 1998.

[17] The chapeau read as follows:

> Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

[18] 'necessary to protect human, animal or plant life or health;'

[19] 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;'

A page was turned. Henceforth trade disputes would be examined in light of the range of relevant legal provisions contained in treaties adopted by member states. Clinical isolation was clinically dead.

4.3.2 The precautionary principle

The precautionary principle – a central principle in environmental law – sets out standards for behaviour in a situation of uncertainty, arguing that preventive measures may be taken even if the science is unclear in cases where there is a significant danger to human, plant or animal life or to the environment.[20] In the trade world, however, it is often seen as an excuse to introduce restrictions to trade unwarranted by the state of knowledge – a wedge that could lead to the invalidation or neutralization of many trade liberalization achievements.

The precautionary principle was regarded with something akin to anathema in trade policy circles and even the tiny opening to it in the SPS agreement[21] was regarded as an unwelcome chink in the armour, and all efforts to prevent its common use were deployed. And yet three successive cases essentially settled the matter and ensured that – in certain cases and if due procedure was followed – the precautionary principle could be invoked in resolving trade disputes.

The Appellate Body decision on the EU – Beef Hormone case[22] agreed that the precautionary principle could be invoked in cases where human life and health were in danger. With this precedent established, two further cases took the matter further. The Japan Varietals case[23] set out a methodology for invoking the precautionary principle, akin to the methodology for applying Article XX exceptions arising from the Shrimp-Turtle case. The Australia-Salmon case[24] placed clear limits around the use of the precautionary principle in trade cases.

A principle dear to environmental policy but reviled in the world of trade policy was henceforth part of the trade arsenal. The principle can indeed be used in connection with trade measures; its use must respond to certain criteria and follow a set methodology; and that use is restricted within defined limits.

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[20] The principle was most famously defined in Principle 15 of the Rio Declaration (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876): 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

[21] Article 5(7) of the SPS Agreement allows temporary precautionary measures to be taken, but only in association with a scientific assessment aimed at replacing the temporary measures with a ruling based on the conclusions of the scientific review.

[22] Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

[23] Appellate Body Report, Japan – Measures Affecting Agricultural Products, WT/DS76/AB/R, adopted 19 March 1999.

[24] Appellate Body Report, Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R, adopted 6 November 1998.

An issue that could not have been negotiated in a month of Sundays, and for which crystallization was not an option, was addressed, clarified and effectively resolved by the WTO dispute settlement system without a fuss, representing significant progress for the environment in the multilateral trading system.

4.3.3 Process and production methods

One of the sacred tenets of trade law is that no distinction in trade treatment may be made among 'like' products on the basis of how they are produced. Only the traded product may be considered. To take an extreme example, a soccer ball produced by child labour cannot be given differential treatment at the border when compared to a soccer ball produced by adults or by machines. This is known as a ban on 'process and production methods' (PPM) and throughout the years of GATT and into the early years of the WTO, the ban was regarded as near-absolute.

The Tuna-Dolphin cases rejected differential treatment by the US or tuna products derived from fishing methods that led to massive dolphin deaths. A tuna is a tuna, no matter how it is caught. The massive concern caused by this attitude in the environmental community is noted above. It appeared to signal that environmental progress could not be sought through consumer preference for environmentally-friendly products in the market place. The strong opposition to the WTO evident at its Ministerial meeting in Seattle in late 1999 was in part due to revulsion at this notion.

Once again, the WTO Appellate Body came to the rescue. In the Shrimp-Turtle case mentioned above, aside from invoking environmental agreements relevant to the dispute, it established the principle that member states could make a case for their use of PPM distinctions under Article XX. They helpfully clarified the criteria under which those arguments could be heard, including the requirement to establish 'sufficient nexus' between the environmental challenges on the one hand, and the trade measure on the other. They also insisted that, in addressing the environmental problem (in this case, the death of turtles during shrimping operations) states should enjoy flexibility in how they approached the matter, with a focus on the outcome rather than the method used to achieve it. Finally, the Appellate Body called for good-faith efforts to find a negotiated solution, and a reasonable lapse of time in order to implement the chosen measures.

So, far from pitting trade law against environmental action, the Appellate Body showed both flexibility and common sense in seeking outcomes that work for both sides. And in doing so, it advanced the resolution of issues at the interface between trade and environment significantly while the negotiations stagnated.

5 Environment in regional and bilateral trade agreements

While the WTO embodies the largest collection of multilateral trade obligations, trade policy also advances through regional and bilateral agreements. Over the period since the WTO was established, such trade agreements have multiplied at a significant pace. Here, and beginning with the North American Free Trade Agreement (NAFTA),[25] environment has become a standard part of the trade policy package. Whether through the inclusion of environmental clauses, the addition of environmental side agreements, or even the establishment of institutions for environmental cooperation linked to the agreement, environmental obligations have become the norm rather than the exception in sub-global trade agreements, and especially those involving OECD countries.

There are several ways to assess these developments. Clearly it is positive that the link between trade and environment is so readily acknowledged through these provisions – providing further evidence that environment is here to stay in the trade context. And while most of the environment provisions are non-binding, they provide clear evidence that the parties to the agreements intend trade to develop in ways that support rather than undermine the environment.

A number of agreements contain a commitment by parties to implement either national environmental legislation or international environmental conventions to which the parties adhere. Where these commitments link to binding provisions, it can be argued that they provide an incentive to enforce the relevant domestic and international legal commitments lest trade sanctions be levied.

6 Concluding remarks

6.1 Where has this taken us?

Looking back over the quarter century just elapsed, it is possible to draw some tentative conclusions. Years of research, analysis and debate have led to a much more sophisticated understanding of the trade-environment interface than existed when WTO was founded, and with it the breakdown of the adversarial mind-set that was too common on both sides. Instead, there is now a sense that the issues require a common resolution, as difficult as it may be to encounter these.

Further, it is now established – most recently with the adoption of the 2030 Agenda

[25] North American Free Trade Agreement, Ottawa, 11 and 17 December 1992; Mexico D.F., 14 and 17 December 1992; Washington D.C., 8 and 17 December 1992, into force 1 January 1994, available at <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement> (visited 21 May 2018).

and the Sustainable Development Goals[26] – that a healthy environment is a shared goal of all humanity and cannot be set aside or sacrificed to the imperatives of international trade. Solutions that work for both trade and sustainable development are the only ones acceptable in the long run. This all the more true in that environment is emerging as a clear consumer preference. Successful trade and successful commercial activity increasingly depend on demonstrating environmental responsibility. There is also a growing consciousness on the part of the environmental community that their objectives must, where possible, be pursued in ways that do not restrict trade in an unwarranted way and that do not constitute overt or hidden forms of green protection. The challenges remain great, but there is a genuine acceptance that solutions must emerge from cooperative rather than adversarial approaches.

6.2 Trade in an SDG world

In light of what appears to be long-term stagnation in the WTO and the as-yet-unacknowledged definitive failure of the Doha Round[27] to reach even a modest conclusion, attention has turned from trade towards the wider challenge of implementing the SDGs, the Addis Ababa Action Agenda[28] on Finance for Development, and the Paris climate agreement.[29] The question must be asked as to what these agreements mean for trade rules and trade policy, and how trade might contribute to their implementation.

At one level, the SDGs keep out of the world of the WTO and respect its independent jurisdiction. The SDG targets, in various places, urge the WTO to complete the Doha Round, to reach a conclusion on the fish subsidies question or to recall the promises of favourable trade treatment made to developing countries. The upshot, however, is to leave the WTO and the trade world to get on with its business largely outside the reporting and accountability structures set up to track SDG implementation.

At another level, however, trade is solidly in the picture. The notions of 'means of implementation' included in the 2030 Agenda urge UN members to enable developing countries to reach their goals and targets through trade and investment as well as through domestic resource mobilization. If that is to be a genuine pathway towards sustainable development, however, serious realignment of power will be

[26] 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015.

[27] Officially, the Doha Round is still underway, simply because no specific decision has been made to abandon it or to conclude an agreement that no longer matches the mandate set out in the negotiating agenda Indeed, the Sustainable Development Goals call on the WTO to conclude the Doha Round. However, very few observers of trade policy hold out much hope for significant positive conclusion.

[28] Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015), available at <https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf> (visited 22 May 2018).

[29] Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 'Adoption of the Paris Agreement', UNFCCC Dec. 1/CP.21 (2015).

needed in the trading system. At present, there is no movement whatsoever in that direction, leaving the present trade rules an inadequate tool to correct the imbalances between developed and developing countries. It is hard to imagine a change that would lead to the WTO acting in the spirit of the 2030 Agenda in respect of trade.

6.3 Final considerations

The account offered above is largely a positive one. From a highly adversarial start, the worlds of trade and environmental policy have moved along a convergent path. Major issues that divided or appeared to divide the two have been resolved one way or another, even if through the 'judicial activism' of which the WTO Appellate Body is often accused. Can we therefore lower our vigilance and turn to other priorities?

Unfortunately, not. For all the prosperity and stability that the multilateral trading system has permitted, the fact remains that the rules embodied in the WTO reflect the needs of a global economy that, increasingly, appears incompatible with sustainable development. If trade is genuinely to be the means to the end goal of delivering on sustainability, then we must question the extent to which that is possible under a trade regime that serves an unsustainable form of economic organization.

Nor can we be sanguine about the extent to which the SDGs appear to exempt the WTO and the wider trade regime from shouldering their share of the burden in ensuring that the SDGs are reached. The effective exemption from which they appear benefit allows trade and sustainable development to remain apart at a time when there can only be one agenda – the one that takes us to the goal set out in the 2030 Agenda and that the trading system ostensibly serves.

Effectively Governing Trade within Global Value Chains as a Tool to Achieve Sustainable Development

Jodie Keane[1]

1 Introduction

The nature of global trade has been radically transformed in recent years. The response from policy-makers in the developed world to heightened competitiveness challenges has, in some cases, resulted in a policy shift toward protectionism – the protection of domestic industries through raising taxes on foreign imports. This shift in policy has been driven partly by unresolved issues relating to environmental sustainability and social stresses and tensions, which have become more pressing. The global response to some of these issues, it is fair to say, comes in the form of the Sustainable Development Goals (SDGs)[2] agreed by the Heads of State in 2015. These 17 goals and 169 ambitious targets, it is argued in this paper, seek to address gaps within the multilateral framework of global economic governance.

The need for more effective trade-related governance has become more obvious in recent years in view of the fragmented nature of global trade. Whilst the contradictions related to global economic governance, democracy, and increasing integration have been debated for some time, the SDGs seek to transcend national boundaries in order to achieve sustainable economic integration. The SDGs rightly place the multilateral trading system as a means of implementation. The realization of the 2030 Agenda and the implementation of the SDGs – which incorporate environmental, social as well as economic objectives – recognizes the need for bolstered

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[2] Rio +20 Outcome Document 'The Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> (visited 2 October 2016).

public policy frameworks to better the guide the globalization process. The SDGs seek to mainstream Multilateral Environmental Agreements (MEAs) into national policy making, including at the sectoral level, with recognition that the United Nations Framework Convention on Climate Change[3] is the primary international, intergovernmental forum for negotiating the global response to climate change. MEAs are critical components of effective global economic governance to advance the SDGs, so urgently needed.

The expansion of global trade in recent decades, through the expansion of production networks and integration of newly industrialized economies within global value chains (GVCs), has contributed to unprecedented reductions in poverty and therefore historically unparalleled socioeconomic progress. However, socioeconomic gains have been accompanied by severe environmental costs as well as many losers from trade expansion, within sectors and industries. Recent shifts towards anti-globalization reflect concerns regarding the erosion of public policy frameworks under the most recent phase of financial globalization. The adoption of the 2030 Agenda and of the SDGs seeks to redress some of these concerns. It provides for a universal framework related to public policy to assist policy-makers in more effectively governing trade as a tool to achieve sustainable development. This includes through addressing gaps within the multilateral framework governing trade, so as to achieve a triumph rather than tragedy of the commons.

The challenge which confronts policy-makers in relation to effectively governing global value chains within the present context is that whilst new policy frameworks are being made to maximize the gains from integration and 'whole of supply chain' approaches, a fragmented international policy landscape can complicate such efforts. Major questions remain regarding how collective action and shared responsibilities between the public and private sectors in order to implement the SDGs will influence the upgrading trajectories in GVCs in the future, given that there are no specific enforcement mechanisms. This criticism, of course, also applies to MEAs and their related compliance mechanisms which rely rather more on soft law approaches. However, this perspective negates the norm-setting behaviour which can be set in motion, especially given inertia for formal rule-making at the multilateral level.

Whilst this paper does not pertain to offer answers to all of these pertinent questions, it does offer some reflections on the necessity of the trade-related SDG implementation agenda, and the need for coherence between related governance mechanisms, including MEAs, for Commonwealth Small States. The first test of the implementation of the trade-related SDGs is already amongst us in view of the need to secure an early harvest of the SDGs by 2020, and agreement on the need to address harmful fishing subsidies (target 14.6).

[3] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>.

This paper is organized as follows. In section two, the changing nature of global trade is reviewed in order to substantiate the demand for bolstered public policy frameworks as manifested within the 2030 Agenda and the SDGs. In section three, the need for enhanced governance of GVCs in view of societal as well as environmental upgrading processes is described. In section four, recent Small States trade performance in GVC is reviewed and progress on trade-related SDGs discussed. Finally, this paper concludes in section five.

2 The Changing nature of trade and the Sustainable Development Goals

The universal acceptance of the particular role played by trade-induced growth nowadays stands in a stark contrast to the past. The post-war period of the 1950-80s saw countries divided in terms of trade policy between those that had espoused export orientation (the East Asian Newly Industrialised Countries (NICs)) and those that had pursued import substitution (ISI), such as sub-Saharan Africa. The economic crises of the early 1980s changed all that: fuelled by oil price rises and the recycling of petrol dollars in the newly created Eurodollar market, it led to sharp increases in interest rates in the US and UK and a subsequent sovereign debt crisis in much of sub-Saharan Africa, and witnessed the rise of neo-liberalism in Anglo-Saxon economies.[4]

History tells us that crises typically precede radical shifts in policy. The most recent crises in the developed world which began with the global financial crisis of 2007/8, followed by the Eurozone crises, have indeed heralded changes in policy formulation, some of these being unorthodox.[5] It is impossible to ignore the recent shifts towards nationalism and forms of mercantilism not seen since before the post-war period. The rhetoric and policy negate the radical transformations in global trade patterns as well as in the surrounding architecture created by multilateral frameworks. The current situation is seemingly one in which some parts of the developed world are turning against the liberal economic order, whilst the developing world continues to embrace it.

Economic growth in low and middle-income countries has far surpassed growth in the high-income Organisation for Economic Co-operation and Development

[4] Jodie Keane, 'The Governance of Global Value Chains and the Effects of the Global Financial Crisis Transmitted to Producers in Africa and Asia', 48(6) *Journal of Development Studies* (2012) 783-797 at 783-784.

[5] Rolf Strauch, 'Lessons from the Euro Crisis', BBVA Seminar, Valencia, 23 January 2017, available at <https://www.esm.europa.eu/speeches-and-presentations/lessons-euro-crisis> (visited 15 August 2018).

(OECD)[6] economies since 2000.[7] The rise of the developing and emerging economies within global trade in recent decades has been formidable, with the main driver more recently being China. The shifts towards more outward orientation began during the 1980s as the previous wave of globalization, driven by the expansion of trade, investment and finance networks, began. By pursuing more open trade and investment policies, embodied by what was then termed the 'Washington Consensus', meant developing countries could benefit from external economies of scale through trade. The justification for such policies was based on the historical experience of the East Asian newly industrialized countries, including Japan and South Korea.

Trade and transfers of technology both played pivotal roles in the post-war period as drivers of growth in the East Asian NICs and these transfers occurred within a conducive international environment. This included the 'flying geese' model of recycling comparative advantage through trade and investment links, and movement up the value-added ladder, on the initial basis of an abundance of low-skilled labour and links with, and access to the market of, the initial 'lead goose' – the United States. This integration process of developing economies within the global trading system, based on the recycling of comparative advantages within the expansion of regional and global production networks, and manifested within GVCs, has been subsequently replicated elsewhere, given the inclusion of other emerging developing economies within high-value manufacturing networks.

Whilst some countries and regions have benefited through their inclusion within such networks, both as producers and consumers, our understandings of the process of growth induced through trade and the process of technological change have also been transformed through recent theoretical developments.[8] These developments have transformed old growth and trade theory into more contemporary understandings based on empirical evidence. This means that nowadays, we endogenize the process of technological development, which occurs as a result of knowledge spillovers from the productive actualization of given goods and within country interactions between human capital and capital formulation, which can generate increasing returns.

Part of the process of increasing returns relates to the process of learning by doing. All learning starts at the interpersonal level, before developing into more intrapersonal learning. The process of translating tacit forms of knowledge into codified forms

[6] See <http://www.oecd.org>.

[7] William Easterly, 'The Trouble with the Sustainable Development Goals', 114(775) Current History (2015) 322-324, available at <http://www.currenthistory.com/Easterly_CurrentHistory.pdf> (visited 1 August 2018) at 324.

[8] Jodie Keane,'Rethinking Trade Preferences for Sub-Saharan Africa: How Can Trade in Tasks Be the Potential Lifeline?', 31(4) *Development Policy Review* (2013) 443-462 at 444-445.

invariably brings into the analysis wider societal and institutional factors.[9] As soon as consideration of not only individual interests, but also those of communities or groups of individuals arises, learning materializes in particular rules and procedures within institutions which are structured by formal mechanisms and work at different levels.

The literature on National Innovation Systems (NIS) focuses on flows of knowledge within economies, rather than knowledge investments and stocks.[10] Although the processes are invariably interconnected, the NIS approach essentially encompasses individual, organizational and inter-organizational learning, in order to link from innovation to economic growth. Hence the linkages between formal institutions – such as higher education, and intermediate institutions, including business associations which can support capacity-building and flows of knowledge – (tacit and non-tacit interfaces) – are incorporated into analysis. This recognition entails that elements of organization, mixed with markets, will differ across national and regional innovation systems. Public policy therefore intervenes in relation to the core and the wider setting of the national innovation system. This includes as a conscious effort to stimulate and supplement the spontaneous development of systems of innovation.[11]

The realization of the 2030 Agenda and the implementation of the SDGs – which are rightly ambitious and incorporate environmental, social as well as economic objectives – recognize the need for bolstered public policy frameworks to better guide the globalization process. The role of MEAs is explicit in relation to the mitigation of climate change and role of the UNFCCC within the framework. However, in other instances, the reference made to MEAs is rather more indirect and implicit. Nevertheless, aspects related to the innovation systems approach are inherent within the overarching SDG framework and multiagency approach, which requires new partnerships between the public and private sectors.

The movement towards a universal framework for sustainable development comes with a recognition that whilst major gains have been made from the globalization process thus far, current growth trajectories confront environmental as well social limits. Trade, whilst the only proven route out of extreme poverty, can be accompanied by severe environmental as well as social costs unless appropriately managed and embedded within a form of NIS which stimulates regenerative as opposed to degradative growth trajectories.

Whilst the impossible political trilemma of globalization, which states that democracy, national sovereignty and global economic integration are mutually incompati-

[9] Giovanni Dos, 'Sources, Procedures and Microeconomic Effects of Innovation', 26(3) *Journal of Economic Literature* (1988) 1120-1171 at 1150-1164.

[10] Chris Freeman, 'The National System of Innovation in Historical Perspective', 19 *Cambridge Journal of Economics* (1995) 5–24.

[11] Bengt-Åke Lundvall, Patarapong Intarakumnerd and Jan Vang, *Asia's Innovation Systems in Transition* (Elgar, 2006) 1-2.0

ble (with it impossible to have all three simultaneously) has been a longstanding debate,[12] it is fair to say that the SDGs seek to transcend national boundaries, though not necessarily sovereignty, so as to achieve sustainable economic integration. The 17 goals and 169 targets seek to secure a sustainable development trajectory through collective responsibility, as agreed by all United Nations Heads of State in 2015.

Because there is no enforcement mechanism, the SDGs have been criticized as being akin to a reliance on collective farming and related incentive measures.[13] However, more specifically, in relation to trade, the SDGs rightly place the multilateral trading system as the means of implementation (SDG17, "Strengthen the Means of Implementation and Revitalise the Global Partnership for Sustainable Development"). Securing the framework of multilateral trade governance, given the current backlash against globalization seen in the developed world, has become critical for Small States, which includes small island developing states (SIDS) and least developed countries (LDCs).

There is more general recognition, including by the Secretariat of the World Trade Organisation (WTO),[14] that more appropriate management of technological development as a result of trade-induced growth is required by policy-makers, in line with more recent theoretical developments in trade theory.[15] For example, whilst SDG17 includes reference to the achievement of duty-free-quota-free market access by LDCs, this objective was agreed under the Doha Round of negotiations, nearly two decades ago and before the full entry of China into the WTO. Enhanced market access alone is unlikely to ease the formidable trade and development challenges of LDCs in both entering and upgrading, socially and environmentally, within GVCs.

3 Effectively governing global value chains

Although estimates vary, it is generally acknowledged that since the latest phase of globalization which began in the 1980s, the proportion of trade that takes place on an intra- rather than inter-firm basis has been increasing. This means that increasingly trade takes place within the firm (typically a multinational or transnational corporation) as opposed to between firms. Because of these developments focus has shifted towards the organization of firms, their boundaries, and how this relates to contracts. Other pertinent questions are being raised regarding capital mobility and the role of multinationals. This is because of the combined effects of the erosion of

[12] Dani Rodrik, 'The Inescapable Trilemma of the World Economy', a blog post of 27 June 2017, available at <http://rodrik.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html> (visited 14 August 2018).

[13] Easterly 'The Trouble with', *supra* note 7, at 323.

[14] See <http://www.wto.org>.

[15] This is indicated in the report by the WTO ('WTO Trade Report 2017: Trade, Technology and Jobs' (2017), available at <https://www.wto.org/english/res_e/booksp_e/world_trade_report17_e.pdf> (visited 24 August 2018).

public policy frameworks under neoliberalism coupled with reduced tax liabilities for firms positioning themselves and their operations strategically, whilst operating within and spanning multiple jurisdictions.

Global trade increasingly involves spreading the production process across firms located in separate countries with each one undertaking what is better described as 'a task' in the overall process, rather than the production of a discrete good.[16] These changes have occurred as capital has become increasingly mobile under the accelerated pace of financial globalization and resulted from the internationalization of global production and its fragmentation across countries. The GVC literature which emerged in the 1990s was motivated by the need to better understand how producers engage with the process of globalization and the implications for the development of productive capacity and capabilities.[17]

The GVC approach considers trade to be embedded in, but also to a considerable extent determined by, specific (but changing) institutional structures and organizational aspects of international trade.[18] However, external GVC governance structures usually remain outside of the modelling sphere of 'which GVC takes what shape and why.' For example, the conventional value chain governance structures widely referred to in the literature[19] do not include reference to external structures, including the institutional framework negotiated by governments for private actors, but rather focus on the internal structures between firms and private actors.

This is an important omission. It is therefore recognized that domestic regulation and public sector support needs to be incorporated in a comprehensive framework linking GVC governance, institutional frameworks, and upgrading.[20] In addition, so far, GVC analysis has focused mainly on governance mechanisms internal to the value chain, treating the institutional framework (including state regulation) as 'background'.[21] Research questions remain, including how overall GVC governance is shaped by broader institutional, regulatory and societal processes.

This includes how the collective action and shared responsibilities between the public and private sectors in order to implement the SDGs will influence the upgrading

[16] WTO and Institute of Developing Economies (IDE)-JETRO, 'Trade Patterns and Global Value Chains in East Asia: From trade in goods to trade in tasks' (2011), available at <https://www.wto.org/english/res_e/booksp_e/stat_tradepat_globvalchains_e.pdf> (visited 24 August 2018).

[17] Kahlid Nadvi and John Thoburn, 'Vietnam in the Global Garment and Textile Value Chain: Impacts on Firms and Workers', 16(1) *Journal of International Development* (2004) 111-124 at 111-113.

[18] Phillip Raikes, Michael Friis Jense and Stefano Ponte, 'Global Commodity Chain Analysis and the French Filiere Approach: Comparison and Critique', 38(3) *Economy and Society* (2000) 390-417 at 397-402.

[19] Gary Gereffi, John Humphrey and Timothy Sturgeon 'The Governance of Global Value Chains', 12 *Review of International Political Economy* (2005) 78-104 at 80-88.

[20] Stefano Ponte and Timothy Sturgeon, 'Explaining Governance in Global Value Chains: A Modular Theory-Building Effort', 21(1) *Review of International Political Economy* (2014) 195-223 at 195-200.

[21] *Ibid.*

trajectories in GVCs in the future. Table 1 provides an overview of how value chain governance is situated within a framework defined for firms by governments. This institutional context includes the management of trade and the macroeconomic context, finance and investment policy, human resources and labour market policy, as well as environmental policy.

<table>
<tr><th>External: Defined for firms</th><th>Internal: between firms</th><th>Combined Effects</th></tr>
<tr><td>Institutional Context</td><td>Market</td><td rowspan="3">GVCs meet Innovation Systems: upgradingz processes‘stimulated.</td></tr>
<tr><td rowspan="2">Management’ of’ trade’ &’ macroeconomic’ context;
Finance & investment policy;
Human resources and labour market policy;
Environmental policy.</td><td></td></tr>
<tr><td>Hierarchy</td></tr>
</table>

Table 1: Effective value chain governance and public policy frameworks.[22]

Whilst the share of intra-firm trade has risen dramatically in recent years, and of course, large multinational firms have their own standards and systems of governance, they operate within the framework of rules agreed by governments in view of public policy objectives. This includes trade policy frameworks established between governments, not only specifying tariffs and duties applicable, but also conformity and the mutual recognition of standards, certification and regulatory frameworks. Even if not explicitly recognized, the combined effects of these public and private interactions result, in turn. in a type of innovation system. This can be challenging for policy-makers to grasp and, as a result, means that important opportunities to leverage knowledge and best practices are lost.

Trade statistics alone contain very partial information about the location of the value added, and no information about ownership of productive assets. Whilst the WTO, the governing body for global trade, has tried to redress this situation through the creation of trade in value added statistics – as a proxy for GVC participation – derived from input:output tables, the current situation is one in which there are lots of new data sets but very little information on the lead firms driving these trends, which can only be known through more qualitative analysis.

Given these unknowns, there is a recognition of fundamental asymmetry at play in view of ‘head quarter’ (HQ) economies compared to ‘factory economies’ and how

[22] Source: the author.

this affects trade policy formulation.[23] The analogy of the prisoners' dilemma is used. Whereas in the past the political economy of the General Agreement on Trade and Tariffs (GATT)[24] centred around a prisoners' dilemma tariff setting game: in order to shift from high tariffs towards low tariffs, all parties had to act in concert and be punished for non-compliance. Nowadays, so long as lead firm's investments are protected through strict regulation to secure profit maximization, then supply-chain led industrialization may take place within host countries.[25] This means that the incentives for governments to act in concert are reduced.

This is because unless lead firms find the regulatory environment favourable to their objectives, for example, in relation to levels of taxation or environmental standards and procedures (which may be related to MEAs), they can simply shift production to another more profitable location. This can create a race to the bottom be it in relation to lowest tax returns, labour laws, or environmental restrictions. It is this process which epitomizes the less palatable face of globalization, which since recent financial crises has experienced a severe backlash in the developed world. Whilst the SDGs seek to provide a universal framework for sustainable development, their high-level nature in view of the diverse (and in cases, divergent) interests of all UN members, means that responsibility for their implementation is not always covered in detail. This is because the framework, agreed by Heads of States, provides the mandate for different international agencies to address specific issues.

For example, in relation to issues related to taxation, the OECD has been grappling for a number of years with the specific issues relating to the location of multinational HQs for taxation purposes. In relation to climate change, the apex decision-making body for the international community is the United Nations Framework Convention on Climate Change. Multilateral trade issues remain the purview of the WTO, although the rise of regional trade agreements is an unmistakable feature of the 21st century global trading system. The challenge which confronts policy-makers in relation to effectively governing GVCs within this context is that whilst new policy frameworks are being posited to maximize the gains from integration and 'whole of supply chain' approaches, a fragmented international policy landscape can complicate such efforts.

[23] Richard Baldwin, 'WTO 2.0: Global governance of supply-chain trade', Centre for Economic Policy Research Policy Insight No. 64 (2012), available at <http://www.cepr.org/sites/default/files/policy_insights/PolicyInsight64.pdf> (visited 14 June 2014).

[24] The General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <http://www.wto.org>.

[25] *Ibid.*

4 Small States trade performance in GVCs

As previously mentioned, whilst many developing countries have been able to engage with GVC-led trade, including through attracting efficiency seeking foreign direct investment (FDI), others remain more reliant on resource seeking FDI, including in natural resource sectors, which are unable to derive the broad-based growth opportunities more readily available from the manufacturing sector. For example, out of 52 Commonwealth countries, around 30 countries are commodity-dependent countries. This means that the export of primarily agricultural or other commodities accounts for up to 60 per cent of total merchandise trade. Such specialization brings specific challenges, not least in terms of managing price volatility at the producer level.[26]

There are particular challenges within commodity driven types of GVC in relation to upgrading and increasing shares of value added. There remain major risks of becoming trapped in 'captive' value chains: stuck exporting low value-added items with lower gains accruing over time. Many small developing economies exhibit a polarized export structure with a high dependency on commodity exports and specific services sectors, such as tourism.

The missing middle structure of a viable manufacturing base means that the process of structural economic transformation, as conventionally understood, can become compromized in such cases as it results in deindustrialization. There are no historical parallels to specialization in the services sector as a driver of structural economic transformation. Analysis of trends is compromized by the fact that the services sector remains mired by major trade data constraints across all modes of supply. Despite the challenges limited data presents, in the following sub-sections the best available information is reviewed in relation to Caribbean Small States participation in GVCs. The findings are somewhat sanguine since they suggest that Small States in the Caribbean have experienced a decline, including within archetypal GVCs, typically characterized by efficiency, as opposed to resource seeking FDI, such as light manufacturing.

4.2 Caribbean's participation in global value chains

Figure 1 presents the results of analysis of the Caribbean's contribution of value added to world exports. The largest share is contributed by Trinidad and Tobago, which has an export basket comprised mainly of oil and gas related products. Overall, the region accounts for less than 0.05 per cent of the overall contribution of value added

[26] Machiko Nissanke, 'The Changing Landscape in Commodity Markets and Trade Implications for Development' in Jodie Keane and Roland Baimbill-Johnson (eds), *Future Fragmentation Processes. Effectively Engaging with the Ascendancy of Global Value Chains* (Commonwealth Secretariat, 2017), available at <http://thecommonwealth.org/sites/default/files/news-items/documents/Future%20Fragmentation_LR.pdf> (visited 24 August 2018) at 26-42.

to world exports, which has declined over the period analysed, from 2000 to 2012. These results confirm how the most recent globalization process has not necessarily been advantageous to some regions, which have been unable to capture greater shares of global trade in value added.

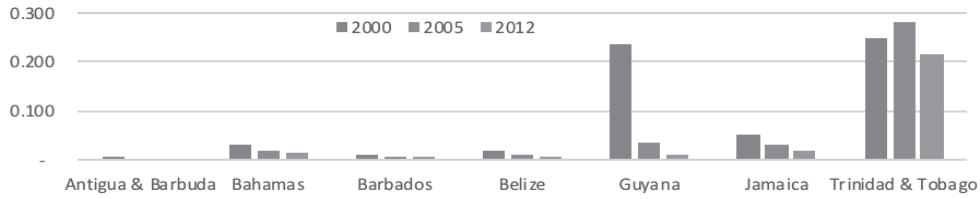

Figure 1: Caribbean countries' contribution of value added to world exports (%).[27]

Contrary to the global picture, there has been an increase in the proportion of foreign value added embedded in exports between 1995 and 2012 (Figure 2). This is because between 2000 and 2012, the sourcing of global value added to exports (through imports) has increased on average for the region by almost 10 percentage points. The contribution of FVA to exports is an often used indicator of participation in GVCs since it relates to the use of imported intermediate goods and services embedded within exports.

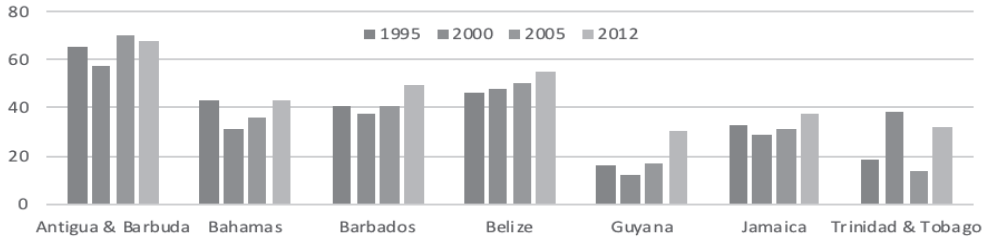

Figure 2: Caribbean's share of foreign value added embedded in global exports (%).[28]

[27] Adapted from Jodie Keane and Roland Baimbill-Johnson, 'Understanding Shifts in Trade in Value Added: The Relative Position of the Commonwealth Caribbean and Pacific Future Fragmentation' in Jodie Keane and Roland Baimbill-Johnson (eds), *Future Fragmentation Processes. Effectively Engaging with the Ascendancy of Global Value Chains* (Commonwealth Secretariat, 2017), available at <http://thecommonwealth.org/sites/default/files/news-items/documents/Future%20Fragmentation_LR.pdf> (visited 24 August 2018) at 159-171.

[28] *Ibid.*

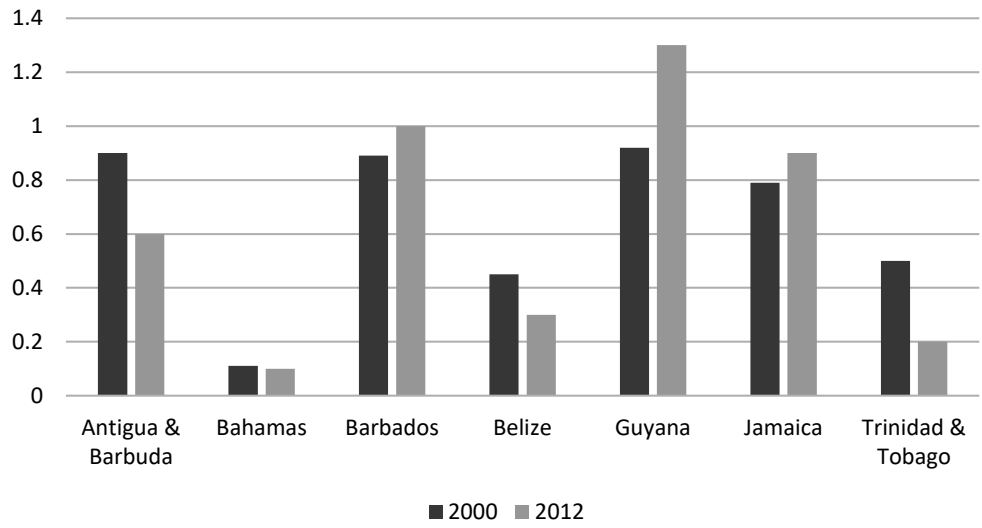

Figure 3: Proportion of regional value added in exports (%) in 2000 and 2012.[29]

Overall, there has been a slight reduction in the regional sourcing of value added in the Caribbean of 0.02 per cent between 2000 and 2012 (Figure 3). This suggests that overall, other extra-regional partners have become slightly more important sources partners. However, what can also be seen from Figure 3 is an increasing sourcing of regional value added by Guyana, Barbados, Guyana and Jamaica – which all increased their sourcing (albeit it, marginally) from Trinidad and Tobago.

Looking more specifically at sectoral performance, it is notable that the Caribbean region has experienced major declines in shares of FVA within specific sectors such as fisheries.[30] A reduction in competitiveness for Caribbean countries is also apparent across specific services sectors. Overall, there is much the region could do in order to more effectively engage with GVC-driven trade including bolstering logistic capabilities and addressing competitiveness challenges within aviation and maritime connectivity.

However, even the best efforts have to confront the somewhat un-level playing field faced by many Small States in relation to multilateral trade. The smallest economies depend the most on trade as a driver for growth, because of small domestic markets. At the same time, because of limited scale and network effects, as well as distance from end-markets, the costs of doing business can also be prohibitively high.

[29] *Ibid.*

[30] Jodie Keane, 'Effectively Influencing Value Chain Governance and Implementing SDG14: Life Below Water' in Teddy Soobramanien and Leah Worrall (eds), 'Emerging Trade Issues for Small Developing Countries: Scrutinsing the Horizon' (Commonwealth Secretariat, 2017), available at <http://unctad.org/meetings/en/Contribution/ditc-ted-oceans-commonwealth-9781848599642-en.pdf> (visited 24 August 2018) 57-77 at 63-67.

5 Progress on the trade-related SDGs and targets

In addition to the specific trade-related needs of the least developed countries, an internationally recognized group of extremely structurally vulnerable economies, there is reference to those of Small Island Developing States (SIDS) within the 169 targets of the SDGs. For example, in relation to SDG14, target 14.7 refers to the specific need to '[b]y 2030 increase the economic benefits to SIDS and LDCs from the sustainable use of marine resources, including through sustainable management of fisheries, aquaculture and tourism.'

The ability of the international community to reach SDG14 target 14.7, and Small States in particular, will be contingent on effective MEAs. This is because 'in failing to consider the environmental and resource management dimension of fisheries, the indicator could easily be interpreted at the national level as simply encouraging more fishing, thus falling short of achieving the target and the Goal.'[31] Whilst in 2002, parties to the Convention on Biological Diversity[32] adopted a focused strategic plan, differential priority setting at the national level has impeded assessment of progress to date. Consideration of the coevolution of national priority setting in view of the commitments made under MEAs will invariably be integral to the advancement of target 14.7.

The first test of the implementation of the trade-related SDGs is already amongst us in view of the need to secure an early harvest of the SDGs by 2020, which includes target 14.6 which seeks to address harmful fishing subsidies. Whilst some subsidies can be beneficial to the environment and indeed are necessary in order to encourage certain beneficial activities, others can contribute to damaging effects which undermine resource sustainability. Not only can anti-competitiveness practices be enhanced because an uneven playing field exists between large fishing fleets and artisanal fishermen and smaller scale fishers, but the natural resource base can itself become compromized.

This unfair competition can mean that many SIDS, because of capability constraints, are unable to make as best use as they can of their Exclusive Economic Zones (EEZ).[33] Whilst the focus on SDG14, related to life under water, has gar-

[31] Balakrishna Pisupati, 'Enhancing cooperation among the seven biodiversity related agreements and conventions at the national level usingnational biodiversity strategies and action plans' (UNEP, 2016), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/9965/Synergies-and-NBSAPs.pdf?sequence=1&isAllowed=y> (visited 20 August 2018) at 1-13.

[32] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[33] Exclusive Economic Zones (EEZ) are areas of the sea, generally extending 200 nautical miles from a country's coastline, that are reserved to the respective country under the United Nations Convention on the Law of the Sea (UNCLOS) (Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261).

nered much attention on the Oceans Economy[34] and led to calls for enhanced market access, including for small scale and artisanal fisheries, the specific policy levers available with the multilateral system are rather more limited. This is because of the inability of the WTO to recognize, to date, the specific trade-related needs of SIDS, compared to LDCs, known as the 'differentiation issue'.

5.1 International support measures

In the past, trade preferences conferred to developing country members of the WTO have enabled successful experiences of trade-led growth. However, at the current time there is unfortunately no appetite to create a specific mechanism at the current time for SIDS. This is despite the challenging trade performance exhibited in recent years, as well as the more general recognition that competition at entry level stages of GVCs is fierce and the available shares of value addition less then compared to the past.

Existing trade preference schemes, such as the European Union's Generalised Scheme of Preferences (GSP)[35] offers additional preferences based on adherence to specific social (human rights related) as well as environmental objectives. However, this instrument is available to all developing countries and so is unable to convey any specific preference, in the form of reduced tariffs to facilitate market entry, for SIDS compared to other groups of countries, although it can contribute to improvements in environmental outcomes. Whilst some specific mechanisms do exist for LDCs within GSP regimes, for instance, the EU through its 'Everything But Arms'[36] regime, this is not yet the case for SIDS.

This emphasis on LDCs is also reflected within SDG17 on Means of Implementation, which refers to the continued need to secure duty-free and quota-free market access for all LDCs. Within the text of this goal, reference is also made to the conclusion of the Doha Development Round (DDR) of trade negotiations. Whilst the market access for developing countries, which could be secured through conclusion of the round, is by no means inconsequential, the fact remains that the round began nearly two decades ago, before the full entry of China into the multilateral trading system. Overall, within this context, it is fair to say that, whilst laudable, the conclusion of the DDR is unlikely to ease the formidable trade and developmental challenges of Small States, which includes the LDCs and SIDS collectively.

[34] The oceans economy (also known as the blue economy) is defined as a subset of, and complement to, the evolving development paradigm emphasizing greener and more sustainable and inclusive economic paths. It seeks to expand the economic frontiers of coastal countries beyond their land territories.

[35] The GSP provides developing countries with preferential market access through reduced tariffs and is permitted under the WTO's framework of rules, known as the Enabling Clause.

[36] This provides for duty-free and quota free market access for LDCs.

5.2 Looking Ahead

Conventional competitiveness challenges are likely to be aggravated in view of the severity of effects to be felt from climate change. These challenges require urgent confrontation. They increase the impetus for traditional export diversification opportunities. This includes capitalizing on new trade opportunities already arising in view of the transition to clean and green renewable energy sources. The interaction between international agreements related to climate change mitigation and domestic policy frameworks are receiving more attention, given the urgency of climate change mitigation. These interactions are likely to become even more significant in forthcoming years, as increasing measures are taken to adapt to the realities of global trade as manifested in GVCs and enhance regulatory structures in view of social as well as environmental objectives.

6 Concluding remarks

This article has situated the advancement of the 2030 Agenda and the trade-related SDGs within the context of effectively governing GVCs so as to achieve sustainable development. The need for enhanced public policy frameworks to transition the global economy towards a more sustainable – both socially, as well as ecologically – growth trajectory has become pressing in view of the recent backlash against globalization. Effective global value chain governance situates the private frameworks of rules agreed between firms within the overarching multilateral framework agreed by member states. Stimulating the transition towards a sustainable growth trajectory requires acknowledgement of how these interactions between public and private sectors form part of an innovation system, and then pulling the necessary levers to achieve specific objectives. In some cases, this may include ensuring MEAs are in place and are effective.

The imperative of the implementation of the trade-related SDGs particularly for Small States has been underscored through the analysis presented in this paper, which demonstrates clearly that whilst the expansion of GVCs has brought tremendous economic benefits to some parts of the world and regions, others have experienced declines. The rise of the Asian economies has meant that competitiveness challenges have been heightened. Components of the early harvest of the SDGs to be achieved by 2020 relate to addressing the unfair playing field confronted by many small economies because of gaps and inconsistencies within the multilateral framework of rules.

Moving away from the tragedy of the commons towards a triumph requires the universal implementation of the SDGs, not all aspects of which are directly trade-related. This is because the effective governance of GVCs nowadays spans multiple jurisdictions and national boundaries. The fragmented policy landscape currently

faced must be redressed in order to create the appropriate public policy frameworks and incentive structures which lead governments to act in concert, as opposed to in competition. The ambition of the SDGs remains high. Effective MEAs are part of the process of building capacity and developing the necessary trust so as to create fit for purpose 21st century global economic governance structures, which leave no one behind.

PART II

SELECTED PERSPECTIVES ON TRADE AND ENVIRONMENT

Trade Measures and Specific MEAs: The Case of the Chemicals and Wastes Conventions

Yvonne Nzelle Ewang-Sanvincenti[1]

1 Introduction

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;[2] the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[3] and the Stockholm Convention on Persistent Organic Pollutants[4] share the common objective of protecting human health and the environment from hazardous chemicals and wastes at all stages of their life cycle, from production to disposal.

All three multilateral environmental agreements (MEAs) provide for the control of the international trade or transboundary movements of the chemicals and wastes covered. Some of the trade control provisions are similar across the Conventions, such as the establishment of prior informed consent procedures under both the Rotterdam and Basel Conventions. There are nonetheless notable differences – on the one hand, both the Rotterdam and Basel Conventions allow trade under certain controlled conditions. On the other hand, the Stockholm Convention imposes

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2 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int> (hereinafter 'the Basel Convention').

3 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int> (hereinafter 'the Rotterdam Convention').

4 Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://chm.pops.int> (hereinafter 'the Stockholm Convention').

strict controls to eliminate or reduce the production and use of the chemicals falling within its scope, thereby eliminating or reducing trade in such chemicals.

This paper provides an overview of the provisions under each Convention aimed at controlling international trade and transboundary movements of the chemicals and wastes within their scope. It considers and highlights commonalities and differences between the Conventions' provisions. The ongoing process to enhance cooperation and coordination between the Conventions (commonly referred to as the 'synergies process'), initiated in 2008, is also explored. Specifically, this paper asks: What effect has the synergies process had on the implementation of trade control measures under the Conventions? The paper also considers the relationship between the Conventions and other international trade regimes. The Minamata Convention on Mercury[5] was adopted in October 2013 and entered into force in August 2017, with overlaps in the scope of this Convention and the Basel, Rotterdam and Stockholm Conventions. This paper will focus, however, on the latter conventions in light of the process that has been ongoing for some years to enhance cooperation and coordination between them.

In conclusion, the paper will consider some of the processes related to evaluating the effectiveness of the Basel, Rotterdam and Stockholm Conventions and possible developments for the future.

2 Overview

2.1 Scope and status of the Conventions

2.1.1 The Basel Convention

With 186 Parties as at May 2018, the Basel Convention provides almost universal coverage under the control procedure established for wastes under the scope of the Convention. The Basel Convention control procedure only applies to transboundary movements of wastes falling within the scope of the Convention, which covers a wide variety of wastes, categorized as 'hazardous wastes' and 'other wastes'. Hazardous wastes belong to any category in Annex I (a list of entries from Y1 to Y45), as further elaborated in Annexes VIII and IX to the Convention. Examples of some of the wastes covered within the scope include: household wastes; waste electrical and electronic assemblies or scrap containing certain hazardous components, for instance accumulators and certain batteries; mercury-switches; glass from cathode-ray tubes and other activated glass and PCB- capacitors; or contaminated with hazardous constituents (for instance, cadmium, mercury, lead).

[5] Minamata Convention on Mercury, Geneva, 19 January 2013, in force 16 August 2017, <http://www.mercuryconvention.org/>.

Parties may also define or consider additional wastes as hazardous by their domestic legislation, and these definitions are published on the Convention website.[6] National definitions of hazardous wastes notified in this manner and subject to transboundary movement are 'hazardous wastes' for the purposes of the Convention subject to the prior informed consent procedure in the same manner as the hazardous wastes listed in the Annexes to the Convention. 'Other wastes' are those listed in Annex II, namely wastes collected from households and residues from the incineration of such household wastes.

The Convention rests on three pillars:

1) minimization of waste generation;

2) environmentally sound management of wastes; and

3) control of transboundary movements of wastes (hereinafter referred to as the 'control procedure'), including preventing and combating illegal traffic.

Although Parties' obligations under the Convention include ensuring environmentally sound management (ESM) of wastes, the text of the Convention does not specify in detail what constitutes ESM.[7] Transboundary movements are, however, defined as any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one state to or through an area under the national jurisdiction of another state or to or through an area not under the national jurisdiction of any state, provided at least two states are involved in the movement.[8] The control of transboundary movements of wastes under the oldest of the three international chemicals and waste conventions involves as many states as are involved in a given transboundary movement and is subject to specific conditions, grounded in a detailed prior informed consent or 'PIC' procedure.

Parties have specific obligations to communicate information to each other through the Secretariat, which supports the effective implementation of the Convention.[9] Parties are to notify if they have adopted a national definition of hazardous wastes,[10] of the entities designated to perform specific functions under the Convention (focal

[6] Basel Convention, 'Overview', available at <http://www.basel.int/Countries/NationalDefinitions/Overview/tabid/5104/Default.aspx> (visited 18 February 2018).

[7] Article 2(8) nonetheless provides a general definition of ESM as follows: 'Environmentally sound management of hazardous wastes or other wastes" means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes'. There are also various guidelines, guidance and examples that are available to Parties through the Convention website at <http://www.basel.int/Implementation/Publications/GuidanceManuals/tabid/2364/Default.aspx> (visited 18 February 2018).

[8] Article 2(3) of the Basel Convention.

[9] The role of the Secretariat is set out in Art. 16 of the Convention.

[10] Article 3.

point and competent authority),[11] and of any prohibitions or restrictions on the import or export of wastes.[12] Transmission of information, including updates of previous notifications, also occurs through transmission of annual reports containing certain specified information. This includes information on domestic legal and institutional aspects as well as on the amounts of wastes exported and imported.[13] As such, Parties need to control and record trade in wastes under the scope of the Convention to fulfil their reporting obligations.

The functioning of the Basel Convention control procedure and transmission of information, including details on national reporting, will be considered in section 3 below.

2.1.2 The Rotterdam Convention

The Rotterdam Convention, adopted in September 1998 and currently (as of May 2018) with 160 Parties, applies to banned or severely restricted chemicals and severely hazardous pesticide formulations.[14] Its scope is dynamic, with decisions adopted by the Conference of the Parties (COP) to amend Annex III to list additional chemicals and severely hazardous pesticide formulations, thereby making them subject to the prior informed consent procedure.[15]

The Convention operates on the basis of shared responsibility, information exchange and national decision making. Its objective is

> …to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.

Like the Basel Convention, Parties to the Rotterdam Convention are required to exchange information on the import and export of the covered chemicals under two distinct procedures:

1) Prior Informed Consent for chemicals listed in Annex III to the Convention; and

[11] Article 5.
[12] Articles 4 and 13(2).
[13] Article 13(3).
[14] Article 3.
[15] Article 9 also contains provision for removal of chemicals from Annex III, although there has never been recourse to this provision to date.

2) Export Notification for banned and severely restricted chemicals not listed in Annex III.[16]

Consequently, this provides tools to prevent unwanted trade of certain hazardous chemicals.

2.1.3 The Stockholm Convention

The Stockholm Convention is the youngest of the three international chemicals and wastes conventions, adopted in May 2001 and with 182 Parties as at May 2018. Its objective is to protect human health and the environment from persistent organic pollutants (POPs). These are chemicals that present certain characteristics: highly persistent; bio-accumulate; potential for long-range environmental transport; and adverse effects on human health and the environment. Examples of some of these chemicals that are covered within the scope of both the Rotterdam and Stockholm Conventions include DDT and lindane (commonly used for disease vector control, for instance against malaria and lice); and the pesticide endosulfan.

The provisions forming the basis of the Convention also have trade implications, to varying extents. The chemicals listed in Annex A are intended for elimination; Annex B covers restriction; and Annex C relates to unintentional production. Although there is no specific procedure under the Stockholm Convention for regulation of the international trade in POPs, there is a general obligation to regulate import and export of intentionally produced chemicals listed in its Annexes A and B. In the event these fall within the scope of the Basel or Rotterdam Conventions, then the control procedures provided by those Conventions would apply to the import, transit and export, as appropriate, of the POPs. [17]

Among the measures to be taken by Parties to reduce or eliminate releases from intentional production and use provided by Article 3 of the Convention, is the obligation to ensure that any import and export of the chemicals listed in Annexes A and B of the Convention complies with strict requirements. These requirements are considered in more detail in section 3 further below.

[16] Full information on the chemicals listed in Annex III is available on the website of the Treaty Section of the United Nations. The Secretariat also reproduces information on the Convention website and in a compilation publication (for the purpose of facilitating access to this information only).

[17] Article 3(2)(b):

> Each Party shall take measures to ensure.[t]hat a chemical listed in Annex A for which any …exemption is in effect or a chemical listed in Annex B for which any production or use specific exemption or acceptable purpose is in effect, taking into account any relevant provisions in existing international prior informed consent instruments, is exported only…

2.2 Life cycle management and the Conventions: overlapping scope and objectives

Working together, the Conventions provide a 'cradle-to-cradle' approach to chemicals and wastes management. This approach aims to ensure the best possible management of chemicals and wastes from the moment they are produced to the time when they are finally disposed of. The framework for the life-cycle management is only possible due to the overlocking scope and objectives of the Conventions. Most of the POPs under the Stockholm Convention fall within the scope of all three Conventions; many pesticides under the Rotterdam Convention are also subject to controls under the other two Conventions; and as wastes all fall under the scope of the Basel Convention.

	Basel	Rotterdam	Stockholm
Evaluating/regulating new and existing chemicals		X	X
Import/export controls	X	X	X
Risk assessment	X	X	X
Waste management	X		X
Risks/hazard communication	X	X	X
Alternatives		X	X
Environmental releases	X		X
Technical assistance	X	X	X

Table 1: Overview of cross-cutting elements between the Basel, Rotterdam and Stockholm Conventions.

Enhanced cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions is based on similar decisions adopted by their respective COPs. The resulting 'synergies process' was intended to strengthen implementation and effectiveness of the three Conventions nationally, regionally and globally. In order to facilitate the implementation of the Conventions, the COPs have over the years adopted a series of decisions aimed at enhancing cooperation and coordination among the Conventions. This process was initiated by the establishment of an ad-hoc working group in 2006, to prepare joint recommendations on enhanced cooperation and coordination among the Rotterdam, Basel and Stockholm Conventions. Subsequently, the COPs adopted a series of decisions on this issue in the following areas: organizational issues in the field; technical issues; information management and public awareness; administrative issues and decision-making. Later decisions then approved a different organization of the Secretariat for the Conventions, as well as organization of cross-cutting and joint activities included in the programmes of work and budgets of the Conventions. Most recently, the decisions by the COPs

have aimed at strengthening cooperation and coordination among the Conventions on:

- international cooperation and coordination;
- enhanced cooperation and coordination between technical bodies of the Conventions;
- a clearing house mechanism for information exchange; and
- from science to action.

The synergies process resulted in more coherent policy guidance to Parties about how to implement control measures under the Conventions; enhanced efficiency in the provision of support; more effective and efficient use of resources, whilst respecting the legal autonomy of each MEA.

In addition to initiating reforms at the international level, to the scientific subsidiary bodies as well as the secretariats, synergies have revolutionized implementation of the Conventions at national and regional levels. Parties and those supporting efforts to implement and enforce the Conventions, such as regional centres, intergovernmental organizations and non-governmental organizations, have noticeably increased efforts towards more coherent and coordinated implementation.[18] This supports strong trade control measures at national borders through, for instance, information-sharing, improved enforcement, coordinated customs training, and prevention of illegal trade and traffic in chemicals and wastes.

2.3 Relationship between the Conventions and other international trade regimes

Significant efforts have been and continue to be made to ensure consistency and avoid duplication within the wider sustainable development context. Previously chemicals and waste management were addressed separately to sustainable development and poverty reduction. In recent years, however, endeavours have been made to change the perception of chemicals and wastes management, including related trade controls, as an integral issue for the sustainable development agenda. As a result, chemicals and waste management has been recognized as aligned with the Sustainable Development Goals,[19] particularly Goal 12, with the target under Goal 12.4: 'By 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment.' The associated indicator

[18] Synergies among the Basel, Rotterdam and Stockholm Conventions, 'About synergies', available at <http://www.brsmeas.org/Decisionmaking/Overview/AboutSynergies/tabid/2614/language/en-US/Default.aspx> (visited 17 February 2018).

[19] 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015

12.4.1 relates to the 'number of parties to international multilateral environmental agreements on hazardous waste, and other chemicals that meet their commitments and obligations in transmitting information as required by each relevant agreement'.

So, how do the Conventions provide for interaction within the wider international context in relation to the implementation of their specific trade control measures?

The preamble to the Basel Convention recognises: '…hazardous wastes and other wastes should be transported in accordance with relevant international conventions and recommendations.'[20] The recognition is further elaborated in Article 4(11): 'Nothing in this Convention shall prevent a Party from imposing additional requirements that are consistent with the provisions of this Convention, and are in accordance with the rules of international law, in order better to protect human health and the environment.' The Rotterdam Convention takes a rather more explicit approach to the relationship with other trade regimes: '…Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development'; and 'Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection…'[21] The Stockholm Convention also explicitly recognizes the symbiotic nature of the wider framework and the Convention: 'Recognizing that this Convention and other international agreements in the field of trade and the environment are mutually supportive'.[22]

So, how do the trade control measures for chemicals and wastes work?

3 Trade control measures

3.1 Use of trade control measures by the Basel, Rotterdam and Stockholm Conventions

MEAs use a variety of trade control measures to achieve their objectives. The following section examines those relied on in the chemicals and wastes conventions, as well as any information on their effectiveness. In general, it has been stated that trade measures in MEAs, such as bans, quotas, notifications and labelling, aim most importantly at either reducing environmental harmful trade flow, where trade is perceived to be the source of the environmental damage; or at encouraging participation and adherence of as many states as possible by putting those states at a trade

[20] Preamble, para. 22.
[21] *Ibid.* paras 8-9.
[22] *Ibid.* para. 9.

disadvantage that may want to stay outside.[23]

The table below sets out a summary of the trade control measures under the Rotterdam and Basel Conventions. The Stockholm Convention is not included in this table as, although it provides international trade be regulated, it does not establish a specific procedure for international trade of persistent organic pollutants in a comparable manner to the procedures established under the other two conventions. As can be seen from the table, the procedures established under each Convention differ on a number of points, whether it be the timing for when information is to be exchanged or the entity designated as the official point of communication.

Summary of the import/export procedures under the Basel and Rotterdam Conventions

	BASEL	ROTTERDAM	ROTTERDAM
Object	All the hazardous and other wastes covered by the Convention	Chemicals listed in annex III of the Convention.	Chemicals outside annex III that are banned or restricted by the Exporting Party
Timing	As a general rule, for each proposed movement	Subsequent to the listing of the substance in Annex III	Prior to the first export following adoption of the corresponding final regulatory action
Trigger	TBM proposed by State of export to State of transit and State of import, using a Notification Document	Decision Guidance Document sent by the Secretariat to all Parties	Export notification sent by State of export to State of import
Decision by the State of import (and State of transit)	Consent/ deny/ request for additional information	Consent/ no consent/ consent with conditions	Acknowledgement
Form for expressing decision	Written decision communicated to the State of export by the import (and transit) State in the Notification Document	Written notification sent to the Secretariat. Notifications (so-called "Import Responses") made available in the PIC circular	Written notification
Contact	Competent Authority	Designated National Authority	Designated National Authority

Table 2: Comparative summary table of import / export procedures.[24]

[23] Strengthening Research and Policy-Making Capacity on Trade and Environment in Developing Countries (Project INT/98/A61). The Compatibility of recent MEAs with the WTO rules, discussion paper, draft of 26 May 2000.

[24] Table 2 does not include the Stockholm Convention as although it provides that international trade is to be regulated, it does not establish a specific procedure for international trade of persistent organic pollutants (see section 3.3 below).

3.2 What specific measures have been put in place under the Basel Convention and how does this relate to non-Parties?

One of the measures relied on by the Basel Convention is its detailed PIC procedure with strict requirements for transboundary movements of hazardous and other wastes. This is based on: notification; consent and issuance of a movement document; transboundary movement; and confirmation of disposal of the wastes subject to the shipment.

Parties have the right to adopt additional trade control measures under their national legislation or other measures, including a right to prohibit import of hazardous wastes or other wastes for disposal.[25] These need to be in accordance with the rules of international law, such as the principle of non-discrimination embodied in the World Trade Organization (WTO) regime, and must not derogate from the provisions of the Convention.[26] Parties exercising the right to prohibit imports need to inform others of their decision through the Secretariat and the notification is made available on the Convention website.[27] Exporting Parties have an obligation to prohibit or not permit the export of hazardous wastes and other wastes to the Parties which have prohibited import of such wastes.[28]

Another control measure available to Parties is the inclusion of additional wastes in their national definitions of hazardous wastes, through Article 3. This provides an avenue to extend the scope of the Convention to wastes that would otherwise fall outside the control procedure but that a Party may feel that it does not have the capacity to manage otherwise or simply that it wishes to control under the PIC procedure. The information database maintained by the Secretariat includes national definitions of hazardous wastes[29] as well as texts of implementing measures adopted by Parties.[30]

Unusually for an environmental treaty, the Basel Convention specifically addresses illegal traffic, which Parties consider criminal.[31] Illegal traffic is defined as any transboundary movement of hazardous wastes or other wastes:

- without notification pursuant to the provisions of the Convention to all states concerned; or
- without the consent pursuant to the provisions of the Convention of a state concerned; or

[25] Article 4(1).
[26] Articles 4(1) and (11).
[27] Basel Convention, 'Decisions to prohibit or restrict import or export of hazardous or other wastes', available at <http://www.basel.int/Countries/ImportExportRestrictions/tabid/4835/Default.aspx> (visited 10 April 2018).
[28] Article 4(2).
[29] Basel Convention, 'Overview', *supra* note 6.
[30] Basel Convention, 'National legislation', available at <http://www.basel.int/Countries/NationalLegislation/tabid/1420/Default.aspx> (visited 10 April 2018).
[31] Article 4(3).

- with consent obtained from states concerned through falsification, misrepresentation or fraud; or
- that does not conform in a material way with the documents; or
- that results in deliberate disposal (for instance, dumping) of hazardous wastes or other wastes in contravention of the Convention and of general principles of international law. [32]

Each Party has an obligation to introduce appropriate national legislation to prevent and punish conduct in contravention to the Convention's provisions, including illegal traffic.[33] As such, the implementation of the Basel Convention provisions depends on measures put in place nationally. This is because the text is formulated in a manner that leaves a certain flexibility to Parties in how they implement it at the national level, for instance whether civil (fines) or criminal (imprisonment) penalties imposed for illegal traffic. Consequently, Parties might encounter difficulties to consider Basel Convention illegal traffic provisions as self-executing due to the need for further legislative or administrative measures to be fully operational and applicable at the national level.

A further feature of the control procedure established under the Convention is that Parties are not to permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.[34] There is an exception in cases where the states concerned by the movement have entered into a bilateral, multilateral or regional agreement or arrangement that does not derogate from the ESM of hazardous wastes and other wastes required by the Convention. The provisions need to be not less environmentally sound than those provided for under the Convention, preventing a loophole whereby wastes could be subject to disposal in lesser conditions in non-Parties.[35]

So, how are these controls on import, export and transit implemented in practice? Firstly, Parties have an obligation to ensure that transboundary movements of wastes within the scope of the Convention only take place if:[36]

- the state of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites to dispose of the wastes in question in an environmentally sound and efficient manner; or

[32] Article 9(1).
[33] Articles 4(4) and 9(5).
[34] Article 4(5).
[35] Parties notify of any such agreements or arrangements. See Basel Convention, 'Text of the Bilateral Agreements or Arrangements in Force as Transmitted to the Secretariat', available at <http://www.basel.int/Countries/Agreements/BilateralAgreements/tabid/1517/Default.aspx>; and Basel Convention, 'Text of the Multilateral / Regional Agreements or Arrangements in Force as Transmitted to the Secretariat', available at <http://www.basel.int/Countries/Agreements/MultilateralAgreements/tabid/1518/Default.aspx> (both visited 10 April 2018).
[36] Article 4(9).

- the wastes in question are required as a raw material for recycling or recovery industries in the state of import; or
- the transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention.

The Convention defines environmentally sound management as 'taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes...'[37] (Article 2(8)). Let us examine a little closer the four key stages of this control procedure, which are principally based on Article 6 of the Convention, setting out the conditions, procedures and rules for transboundary movements with the aim of facilitating the effective implementation of the Convention.

Stage 1: Notification
This stage focuses on information sharing with the state of import to enable it to take an informed decision as appropriate in light of its national circumstances and the movement in question.

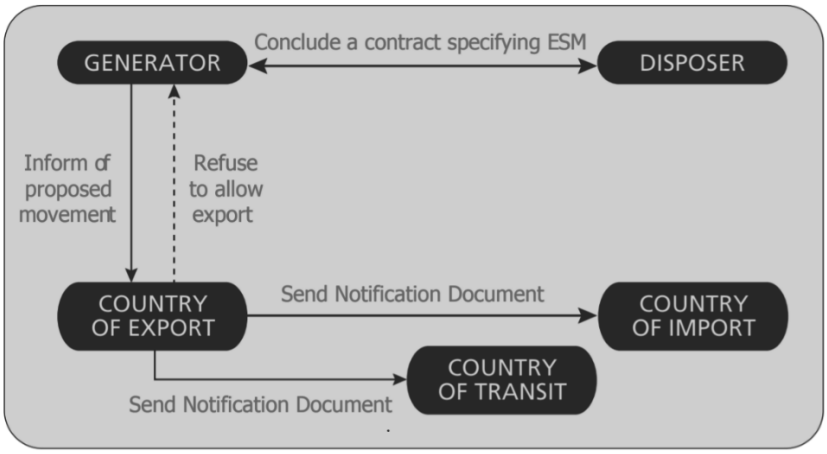

Table 3: Notification of a transboundary movement under the control procedure.

The first step is to inform the competent authority[38] of the state of export of the proposed movement, who decides to refuse or allow the export. Already, the state of export before allowing export should ensure there is a contract for the disposal of the wastes in an environmentally sound manner. If the state of export has no objec-

[37] Article 2(8).
[38] Communications take place involving competent authorities, which are governmental authorities designated by Parties to be responsible within such geographical areas as the Party may think fit for receiving notification of a transboundary movement and any related information and for responding (Article 2(6)).

tion to export, it notifies states of import and transit of the proposed transboundary movement.[39]

Stage 2: Consent and issuance of the Movement document
On receipt of the notification document, the state of import responds in writing, consenting with or without conditions, denying permission or requesting additional information.[40]

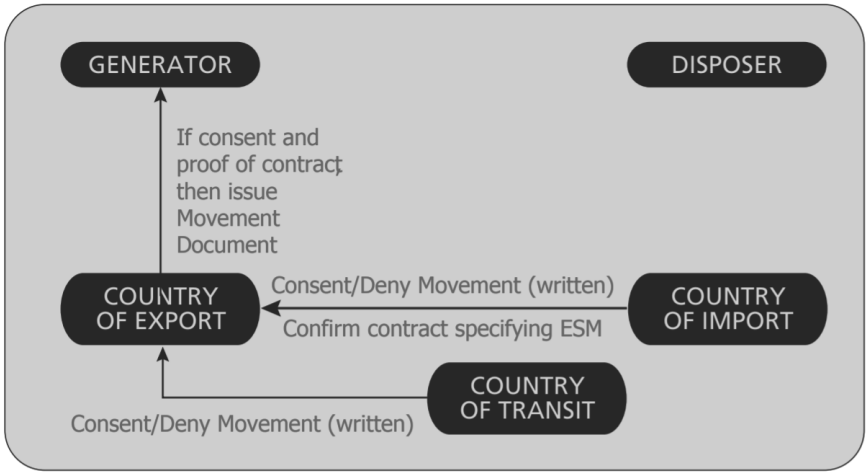

Table 4: Steps towards consent and issuance of movement document.

The state of export has an obligation to not allow the transboundary movement to commence until it has received written confirmation that: (a) the notifier has received the written consent of the state of import; and (b) the notifier has received from the state of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question. At such time, a movement document is issued and the state of export authorizes the shipment to start.[41]

Stage 3: Transboundary movement
Each person who takes charge of a transboundary movement has to sign the movement document, which contains detailed information about the wastes. Annex V B to the Convention sets out information to be provided in the movement document,

[39] There are many different types of certification – national, international, third party certification, self-certification etc. For further information, see the Basel Convention Practical manual on certification schemes, available at <http://www.basel.int/Implementation/CountryLedInitiative/EnvironmentallySoundManagement/ESMToolkit/Practicalmanuals/tabid/5847/Default.aspx> (visited 10 April 2018).

[40] Article 6(2).

[41] For further information on the procedure as well as the notification and movement documents, see Basel Convention, 'Notification and Movement Documents', available at <http://www.basel.int/Procedures/NotificationMovementDocuments/tabid/1327/Default.aspx> (visited 10 April 2018).

with the notes stating that the information required on the movement document where possible needs to be integrated in one document.

Stage 4: Confirmation of disposal

The Convention requires the disposer to confirm that the disposal has taken place as specified in the notification document. If this does not occur, the state of export needs to inform the competent authority of the state of import accordingly. The state of import may then wish to follow up to confirm that the transboundary movement of wastes has been completed as initially stated. From the information transmitted by Parties, it would appear this confirmation is often not received.[42]

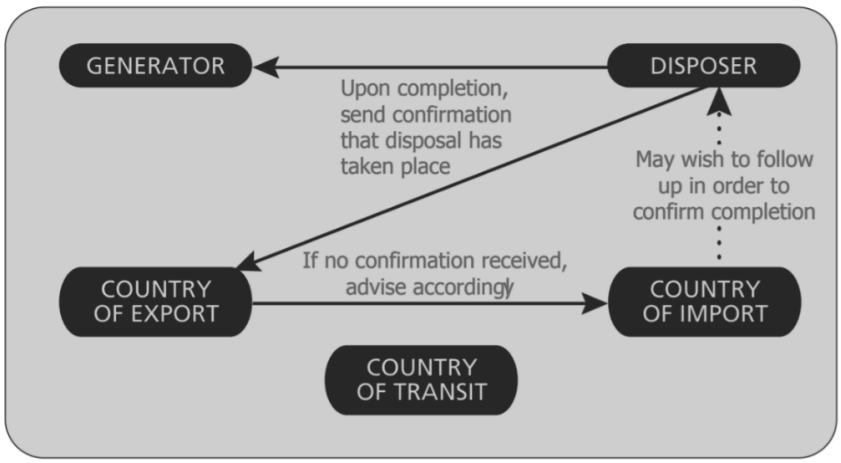

Table 5: Confirmation of disposal following transboundary movement.

3.3 Specific measures in place and information exchange under the Rotterdam Convention

The Rotterdam Convention also regulates import and export although, in contrast to the Basel Convention, transit is expressly excluded from its scope.[43] Requirements are established for the exchange of information on certain chemicals, with all procedures leading to the listing of a chemical beginning and culminating with decisions by Parties. The conditions for international trade established under the Rotterdam Convention revolve around the prior informed consent procedure for those chemicals listed in its Annex III; and the export notification procedure for chemicals not listed within this Annex however banned or severely restricted by an exporting Party.

[42] See responses received from Parties and stakeholders to a questionnaire on electronic data approaches for the notification and movement documents, available at <http://basel.int/Implementation/LegalMatters/Compliance/GeneralIssuesActivities/Activities201617/Controlsystemelectronicapproaches/tabid/4890/Default.aspx> (visited 28 March 2018).

[43] Article 2(f).

The prior informed consent procedure provides a mechanism to obtain and disseminate decisions of importing Parties about chemicals listed in Annex III. This enables Parties to communicate whether they wish to receive future imports of chemicals and to ensure compliance by exporting Parties with these decisions.

Stage 1: Import responses for Annex III chemicals
After a chemical is listed in Annex III, Parties have an obligation to take measures to ensure timely decisions with respect to the import of those chemicals. This includes transmitting final decisions or interim responses concerning the future import of such chemicals as soon as possible and in any event no later than nine months after the date of dispatch of a decision guidance document.[44], [45]

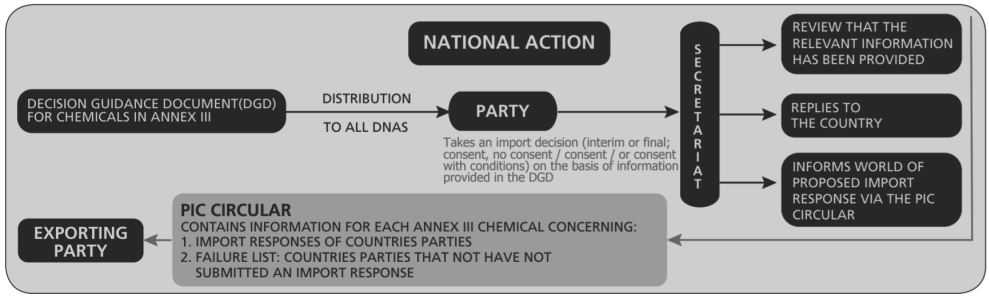

Table 6: Actions after a chemical is listed in Annex III.

Import responses are published every six months through the PIC Circular[46] and on the Convention website, widely disseminating information and giving stakeholders access to information on trade control measures put in place by the Party.

Decisions adopted by Parties in their import responses to not consent to import or to consent to import of a chemical only under specified conditions need to be non-discriminatory, meaning the Party has an obligation to simultaneously prohibit or make subject to the same conditions:

- import of the chemical from any source; and
- domestic production of the chemical for domestic use.[47]

[44] Decision guidance documents (DGD) are developed by the scientific subsidiary body, the Chemical Review Committee, and forwarded to the COP with a recommendation regarding listing of a chemical. Following approval by the COP, DGDs are communicated to all Parties and made available at <http://www.pic.int/TheConvention/Chemicals/DecisionGuidanceDocuments/tabid/2413/language/en-US/Default.aspx> (visited 17 April 2018).

[45] A standard form has been developed to facilitate transmission of information between Parties in this regard. See <http://www.pic.int/Procedures/ImportResponses/tabid/1162/language/en-US/Default.aspx> (visited 17 April 2018).

[46] See <http://www.pic.int/Implementation/PICCircular/tabid/1168/language/en-US/Default.aspx> (visited 18 April 2018).

[47] Article 10(9).

The principle of shared responsibility under the Rotterdam Convention places obligations on the exporting Parties to communicate import responses to those concerned in their jurisdiction; and to take the necessary measures to ensure compliance by exporters within their jurisdiction. Provisions tackling illegal trade are not trade control measures directly under the Rotterdam Convention, but instead depend on measures adopted by a Party. Emphasis is placed on '…the importance of the effective implementation of the Rotterdam Convention…in particular Articles 11 and 12, for preventing and combating illegal trade in hazardous chemicals…'[48]

Stage 2: Export notifications for non-Annex III chemicals
This second procedure also relies on exchange of information – however, between the Parties concerned rather than through the Secretariat. Where a chemical is banned or severely restricted by a Party, then exported from its territory, it needs to provide a notification including the information in Annex V to the Convention to the importing Party. The importing Party has to acknowledge receipt within 30 days. If not received, the exporting Party needs to send a second notification and make reasonable efforts to ensure this is received. The obligations cease when:

1) the chemical has been listed in Annex III;
2) the importing Party has provided an import response; and
3) the Secretariat has published the import response.[49]

Article 13 sets out the information required to accompany exported chemicals including the World Customs Organisation Harmonised Systems codes, labelling requirements and safety data sheets.

3.4 General obligations of Parties and implications of trade control measures under the Stockholm Convention

The Stockholm Convention differs from the other international chemicals and wastes conventions: it provides that international trade is to be regulated but it does not establish a specific procedure for international trade of persistent organic pollutants (POPs).

As at 17 February 2018, 28 chemicals are listed in the three Annexes to the Convention, with export and import of intentionally produced chemicals listed in Annexes A and B regulated. Unintentional releases (Annex C) are also regulated by the Convention; however, they have no direct relation to the regulation of trade and are therefore not considered further in this paper.

[48] 'Synergies in preventing and combating illegal traffic and trade in hazardous chemicals and wastes', Rotterdam Dec. RC-8/14 (2017), para. 2.
[49] Article 12(5).

The Convention aims at elimination and restriction of the covered chemicals, meaning that trade is generally not allowed unless it has been established to meet a strict set of requirements. Article 3, on measures to reduce or eliminate releases from intentional production and use of the regulated chemicals, sets out the obligations and conditions for international trade, including for:

- Imports: They are to only occur for environmentally sound disposal; or for a permitted use or purpose for that Party under Annex A or B, namely Parties that benefit from a specific exemption or acceptable purpose.
- Exports: They are to only occur for environmentally sound disposal; to a Party permitted to use that chemical under Annex A or Annex B, meaning a Party that has available to it specific exemptions; or to a non-Party which has provided an annual certification to the exporting Party specifying the intended use and including a statement of commitment to the three elements set out in Article 3(2)(b)(iii).

The Secretariat maintains a Register of Specific Exemptions and a Register of Acceptable Purposes, which are accessible on the Convention website.[50] It is important to note that specific exemptions under Article 4 are time limited,[51] therefore trade cannot be carried out indefinitely on that basis.

There are nonetheless specific conditions that would apply to what are commonly referred to as 'Opt-in' and 'Opt-out' Parties:

- notification stating that any amendment to Annex A, B or C shall enter into force for it only on deposit of its instrument expressly consenting to be bound by such amendment;
- opt-out Parties notify the depositary[52] within one year from the date of communication of adoption of an amendment that they are unable to accept the amendment.

For these Parties, the obligations and related trade measures under the Convention would apply only in so far as they have consented to be bound by them.

[50] Stockholm Convention, 'Registers of Specific Exemptions for chemicals listed in Annex A', available at <http://chm.pops.int/Implementation/Exemptionsandacceptablepurposes/RegisterofSpecificExemptions/ChemicalslistedinAnnexA/tabid/4643/Default.aspx> and Stockholm Convention, 'Registers of Acceptable Purposes for chemicals listed in Annex B', available at <http://chm.pops.int/Implementation/Exemptions/AcceptablePurposes/ChemicalslistedinAnnexBRoAP/tabid/5051/Default.aspx> (both visited 18 April 2018).

[51] Article 4(4): 'Unless an earlier date is indicated in the Register, or an extension granted pursuant to paragraph 7, all registrations of specific exemptions shall expire five years after the date of entry into force of this Convention with respect to a particular chemical.' For certain chemicals, the COP also regularly evaluates the continued need for specific exemptions and acceptable purposes, for instance PFOS, its salts and PFOSF.

[52] United Nations Office of Legal Affairs, New York, on behalf of the Secretary-General of the United Nations.

3.5 Information exchange under the Conventions on trade in chemicals and wastes

3.5.1 Why exchange and collect information?

Complete, updated and reliable information is essential in any attempt to assess the impact and effectiveness of the measures established by MEAs. This is also relevant to the wider sustainable development agenda. For example, decision BC-13/8 on national reporting under the Basel Convention recognized '…the importance of the information to be submitted by Parties in their national reports on the generation, import, export and disposal of hazardous wastes for indicators 12.4.1,[53] 12.4.2[54] and 12.5.1[55] for measuring progress towards Sustainable Development Goal 12[56]…'[57]

Information is collected from various sources related to the three chemicals and wastes conventions, including:

- decisions of the Conferences of the Parties;
- responses to questionnaires transmitted by Parties to the Secretariat;
- activities undertaken within the context of the Basel Convention Strategic Framework;[58]
- conclusions and recommendations emanating from the Stockholm Convention effectiveness evaluation report;
- communications by Parties to the Secretariat, for instance a letter, face to face request etc.;
- national action plans under the Rotterdam Convention;
- national implementation plans under the Stockholm Convention;
- notifications of import prohibitions and national definitions of hazardous wastes pursuant to the Basel Convention;
- certificates of export to non-Parties transmitted pursuant to the Stockholm Convention; and
- national reports submitted in accordance with the Basel and Stockholm Conventions.

[53] 'Number of Parties to international multilateral environmental agreements on hazardous waste and other chemicals that meet their commitments and obligations in transmitting information as required by each relevant agreement', as adopted by the Statistical Commission of the United Nations at its forty-eighth session and recommended by the Commission for adoption by the Economic and Social Council of the United Nations (see the report of the Statistical Commission on its forty-eighth session, Doc. E/2017/24-E/CN.3/2017/35 (2017), ch. I A).

[54] 'Hazardous waste generated per capita and proportion of hazardous waste treated, by type of treatment', as adopted by the Statistical Commission of the United Nations at its forty-eighth session and recommended by the Commission for adoption by the Economic and Social Council of the United Nations (see *ibid.*).

[55] 'National recycling rate, tons of material recycled', as adopted by the Statistical Commission of the United Nations at its forty-eighth session and recommended by the Commission for adoption by the Economic and Social Council of the United Nations (see *ibid.*).

[56] 'Ensure sustainable consumption and production patterns', as adopted by the Statistical Commission of the United Nations at its forty-eighth session and recommended by the Commission for adoption by the Economic and Social Council of the United Nations (see *ibid.*).

[57] 'National reporting', Basel Dec. BC-13/8 (2017), para. 8.

[58] 'Strategic framework for the implementation of the Basel Convention for 2012–2021', Basel Convention Dec. BC-10/2 (2011), Annex.

Where available, national reports under the Basel and Stockholm Conventions provide the most frequent and comprehensive snapshot of Parties' implementation. Parties to the Rotterdam Convention do not have reporting obligations, although information may be available through other sources such as national action plans or import responses.

3.4.2 Annual national reporting under the Basel Convention

Before the end of each calendar year, Parties to the Basel Convention transmit, through the Secretariat, an annual report on the previous calendar year containing information mentioned in Article 13. This comprehensive report includes information regarding transboundary movements of hazardous wastes or other wastes in which the Party has been involved, including:

- the amount of wastes exported, their category, characteristics, destination, any transit country and disposal method; and
- the amount of wastes imported, their category, characteristics, origin and disposal methods.

This provides a snapshot of implementation of the Convention over the course of the previous year, including trade control measures adopted by Parties and their effectiveness. For example, as of 2016, a revised format was adopted by the COP for such reporting that includes a table where Parties can report information on illegal traffic of hazardous and other wastes.

Reporting or lack thereof can be a concrete indicator of successes or challenges with implementation and / or enforcement of the control procedure under the Basel Convention.[59] Without effective trade control measures being implemented and enforced at all levels, Parties indubitably face difficulties with or are unable to comply with this reporting obligation.

3.4.3 Reporting and certification of trade with non-Parties - Stockholm Convention

Similarly, Parties to the Stockholm Convention report to the COP on the measures taken to implement the Convention's provisions and on their effectiveness in meeting its objectives.[60] The periodicity and format of national reporting are determined by the COP – currently, reports are due on a four-year cycle with the latest national reports to be submitted to the Secretariat by 31 August 2018.

National reports, however, focus on providing information on what has been done by Parties to implement the Conventions. They do not usually involve a direct analysis of the effectiveness of the measures adopted by Parties. They do nonetheless

[59] See, for instance, Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on the work of its thirteenth meeting, UN Doc. UNEP/CHW.13/28 (2017), para. 113.

[60] Article 15(1).

constitute the main source of information for the subsequent analysis or evaluation, such as the Strategic Framework for the implementation of the Basel Convention or the effectiveness evaluation of the Stockholm Convention conducted pursuant to its Article 16.

4 Conclusion

4.1 Effectiveness of the Conventions and related processes

So, what, if any, conclusions can be drawn from these evaluations or other sources and activities related to the strategic direction for the Conventions and their Parties? Have these Conventions specifically addressed the use of trade control measures to protect human health and the environment from hazardous chemicals and wastes, thereby contributing to the achievement of the Conventions' objectives?

Trade control measures form an essential tool for the Conventions. The Strategic Framework for the implementation of the Basel Convention for 2012 – 2021 within its vision acknowledges: 'The aim of the strategic framework is to protect human health and the environment by controlling transboundary movements of hazardous and other wastes….'.[61] The Stockholm Convention effectiveness evaluation further stated: 'The Convention provides an effective, dynamic framework to regulate POPs, addressing the production, use, import, export, releases, and disposal of these chemicals worldwide…inadequate implementation is a key issue that has been identified in this evaluation.'[62]

The effectiveness[63] of measures and procedures established by the Conventions therefore depends on effective implementation by the Parties. Without Parties adopting and enforcing measures at the national and/or regional level, the Conventions cannot establish effective control measures and would not be able to achieve their objectives. This has been recognized in various decisions of the COPs to the Conventions. For example, the guiding principles of the Strategic Framework for the Basel Convention refer to respect for legislation governing waste management, including ensuring every Party has national legislation, regulations and enforcement mechanisms in place, to control transboundary movements of hazardous and other wastes and to prevent and combat illegal traffic. These also refer to respect for each Party's legislation and regulations regarding the control of the transboundary move-

[61] Basel Convention Dec. BC-10/2, Annex, para. 1.

[62] 'Effectiveness evaluation of the Stockholm Convention on Persistent Organic Pollutants pursuant to Article 16: Executive summary of the report of the effectiveness evaluation of the Stockholm Convention on Persistent Organic Pollutants' UN Doc. UNEP/POPS/COP.8/22/Add.1 (2017), para. 20.

[63] In the context of this paper, effectiveness is to be understood to mean the contribution to achieving the objective of the Conventions to protect human health and the environment from the chemicals and wastes under their scope.

ments of hazardous and other wastes.[64] The Stockholm Convention effectiveness evaluation report notes:

> According to the information contained in the [national implementation plans] and in the national reports, a majority of Parties (up to 66% depending on the chemical) provided information on having set up measures, including legal and administrative measures, to control the production, import, export and use of POPs listed in Annexes A and B that meet or exceed the Convention's requirements, either before or upon entry into force of the Convention.'[65]

The COPs to the Basel and Rotterdam Conventions have requested the Secretariat to make texts of these measures available on the Conventions' websites. These databases not only share information on trade control measures adopted by Parties, thereby encouraging greater compliance, but serve as a useful reference for access to examples for those wishing to develop similar measures.

Ultimately, strong national mechanisms are needed to prevent illegal trade and traffic of hazardous chemicals and wastes. As the Global Chemicals Outlook highlighted,

> Illegal trade in banned and severely restricted chemicals will continue as long as markets for them thrive and the prospects of being apprehended are low. Illegal traffic in hazardous chemicals at the national and regional levels can be reduced by strong local enforcement, but international trade requires international agreements and strong national border controls.[66]

This means in order to effectively implement the Conventions, Parties would need to ensure that not only is legal trade controlled in accordance with their obligations but that there are sufficient disincentives to participating in illegal traffic and trade in chemicals and wastes.

4.2 Looking forward – possible future developments for the Conventions

Parties to all three chemicals and wastes Conventions have several times acknowledged that implementation could be improved and stressed the importance of effective trade control measures. Challenges continue to face Parties in this regard. At the thirteenth meeting of the COP to the Basel Convention,[67] Parties highlighted

> …the problems and practices contributing to the continued proliferation of illegal traffic in hazardous wastes in their countries, such as inadequate or

[64] Basel Convention Dec. BC-10/2, Annex, paras 2(c) and 2(d).
[65] UN Doc. UNEP/POPS/COP.8/22/Add.1, para. 26.
[66] Elizabeth Kemf (ed.), Global Chemicals Outlook – Towards Sound Management of Chemicals (UNEP, 2013, available at <https://sustainabledevelopment.un.org/content/documents/1966Global%20Chemical.pdf> (visited 18 April 2018) at 227..
[67] Thirteenth meeting of the Conference of the Parties, 24 April – 5 May 2017, Geneva, Switzerland.

> fraudulent labelling, dumping and the export of e-waste, including equipment exported in the guise of charitable donations and for recycling. Many representatives gave examples of their Governments' efforts to address those problems through, among other things, legislative action and information-sharing and coordination with other stakeholders. Many also expressed the concern that developing and least developed-country Parties in particular lacked the capacity to tackle those problems and called for financial and technical assistance from the international community to enable them to develop and enforce adequate border controls through, inter alia, data collection, monitoring and enforcement training, failing which those countries were unlikely to meet their obligations under the Basel Convention. Several representatives …suggested the creation of a unified information-sharing platform.[68]

It is essential, though, that there continue to be coordination and cooperation between those working on the three Conventions. The COPs adopted similar decisions on synergies in preventing and combating illegal traffic and trade in hazardous chemicals and wastes at their meetings in 2017.[69] These decisions encouraged Parties to two or more of the Conventions to

> … establish, where they do not yet exist, coordinating mechanisms at the national level with a view to facilitating the exchange of information among relevant authorities responsible for the implementation and enforcement of the provisions of the conventions aimed at controlling the export and import of the chemicals and wastes covered under the conventions, other relevant institutions and the private sector.

Consideration of further synergies continues and feeds into ongoing efforts by Parties to improve chemicals and waste management under the Conventions' control procedures.

Consequently, it seems that further activities will be conducted and closer cooperation and coordination encouraged between the Conventions, whilst of course respecting the legal autonomy of each. The Parties to the Minamata Convention are due to meet in September 2018 for their second meeting of the COP, with the agenda due to include further consideration of the organizational arrangements for the permanent secretariat, including its cooperation and coordination with the three Conventions Secretariat. The Basel, Rotterdam and Stockholm Conventions' COPs will also consider this as necessary at their meetings in 2019.

Looking to the future, it is certain that these Conventions are necessary to protect human health and the environment. However, the precise nature of what resources

[68] UN Doc. UNEP/CHW.13/28, para. 151.

[69] 'Synergies in preventing and combating illegal traffic and trade in hazardous chemicals and wastes', Basel Dec. BC-13/21, Rotterdam Dec. RC-8/14, and Stockholm Dec. SC-8/24.

and how much will be available from the international and national stakeholders to support effective efforts towards greater protection from hazardous chemicals and wastes remains to be seen.

Understanding the Trade and Environment Nexus: Legal Interactions and the Case of Wildlife Trade

Anjana Varma[1]

1 Introduction

From a cursory view, trade and environment seem like an unlikely duo – existing and functioning in two distinct domains. And yet, the two are intertwined by a complex history of interactions, most notably in the area of wildlife trade.

Wildlife trade is considered to be the second-biggest direct threat to species survival, after habitat destruction, with population of species on earth having declined by an average of 40 per cent between 1970 and 2000.[2] Moreover, conservative estimates indicate that the global value of illegal trade in all wildlife products, including timber and fisheries resources, could be a minimum of $19 billion per year, which would make it the fourth biggest illicit transnational commodity trafficked worldwide, after drugs, counterfeited goods, and humans.[3] This is alarming.

Reversing wildlife loss and more broadly, biodiversity loss,[4] is necessary not just for

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[2] World Wildlife Fund (WWF), 'Unsustainable and Illegal Wildlife Trade', available at <http://wwf.panda.org/our_work/wildlife/problems/illegal_trade/> (visited 10 May 2018).

[3] Elisabeth McLellan et al, Illicit Wildlife Trafficking: An Environmental, Economic and Social Issue, UNEP Perspectives No. 14 (UNEP, 2014), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/7466/-UNEP_Perspective_Series_%E2%80%93_Illicit_Wildlife_Trafficking_An_Environmental,_Economic_and_Social_Issue-2014ENVIRONMENT_PAPERS_DISCUSSION_14.pdf.pdf?sequence=3&isAllowed=y> (visited 10 June 2018).

[4] The impact of biodiversity loss on humanity has been well-documented. For a reference, see Bradley J. Cardinale et al, 'Biodiversity loss and its impact on humanity', 486 *Nature* (2012) 59-67.

the sake of conservation but because on a fundamental level, it can disturb the entire interplay of nature, and our own ability to survive as species. This paper assesses the extent to which trade in wildlife has played an enabling or deterring role in wildlife conservation, and whether the lack of uptake of illegal wildlife trade as a trade issue rather than an environmental issue – within the trade policy and legal frameworks of the multilateral trade system – has inhibited it from getting its due attention.

After providing an analysis of the interactions between trade and environment in the international legal landscape, the paper considers the extent to which trade can play a regulating role in wildlife conservation (what the author calls 'the convergence argument') or, conversely, a deterrent role ('the divergence argument'). Finally, the paper makes recommendations on how stronger interaction of legal regimes can mutually support and pave the way forward in addressing wildlife trade.

2 Interactions between the legal regimes on trade and environment

This section of the paper will look at environment in the international trade law landscape, namely through the World Trade Organization (WTO)[5] as well as the role of trade in international environmental law, mainly through the CITES treaty.[6]

2.1 Trade in the environment arena

It is estimated that there are over 250 multilateral environmental agreements (MEAs) currently in force, dealing with various environmental issues. However, only about 20 of these include provisions that can affect trade.[7]

This may reinforce the thinking that indeed trade remains at the periphery of environmental issues. But, interestingly, one of the arguably most successful MEAs tackling wildlife conservation is one that is centered on trade. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – as one of the oldest and most widely ratified treaties with 181 Parties – largely came into force in response to concerns over the 'overexploitation of many vulnerable species as a result of unregulated international trade.'[8]

Historically, trade was perceived as 'the driving force for the depletion and even ex-

[5] See <http://www.wto.org>.

[6] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>.

[7] WTO, 'The Doha Mandate on Multilateral Environmental Agreements (MEAs)', available at <https://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm> (visited 1 May 2018).

[8] UN Sustainable Development Knowledge Platform, 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)', available at <https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=650&menu=3170> (visited 2 August 2018).

tinction of wildlife and thus had to be strictly controlled.'[9] It was against this backdrop that the conservation movement of the 1970s era rallied behind the creation of this treaty to bolster efforts in preventing dwindling wildlife.

As a multilateral regulatory instrument that currently has over 35,000 species listed under it,[10] trade-related measures remain at the heart of the implementation of CITES. The core regulatory system of the Convention primarily is based on trade related measures,[11] such as import bans, regulatory quotas, limited trade, and other measures.

It is clear that given the nature of the treaty, trade is the core feature and means of implementation under CITES. In using trade as the medium to address wildlife conservation, CITES is a unique treaty that is placed at the intersection between trade and environmental concerns. Conservationists have hailed it as the 'Magna Carta for Wildlife', both a 'conservation and trade instrument' to protect wild fauna and flora both for humankind ('present and future generations') and as national heritage (of 'peoples and States').[12]

However, could the same be said about how trade law tackles environmental concerns? In the following section, this paper explores how the environment is featured in the international trade policy-making and trade dispute platform, the World Trade Organization (WTO).

2.2 Environment in the trade arena – a look at WTO

As the global body that deals with the rules of trade between nations, the WTO primarily functions to ensure that 'trade flows as smoothly, predictably and freely as possible.'[13] Thus, its prime mandate does not focus on protecting the environment. The organization will be the first to admit that it has no specific agreement dealing with the environment.[14]

And yet, the Marrakesh Agreement – which established the WTO – makes explicit reference to sustainable development and environmental protection in the pursuit

[9] Dale Andrew, 'Trade and SDG 15: Promoting "Life on Land" through Mandatory and Voluntary Approaches', Asian Development Bank Institute (ADBI) Working Paper No. 700 (2017), available at <https://www.adb.org/publications/trade-and-sustainable-development-goal-15> (visited 10 June 2018) at 4.

[10] CITES, 'CITES Trade Database Passes 15 Million Records' (2015), available at <https://www.cites.org/eng/cites_trade_db_passes_15million_records> (visited 9 April 2018).

[11] CITES, 'CITES and Trade Agreements – Partnering to Combat Wildlife Crime and to Achieve Sustainable Development - CITES Secretary-General's Op Ed', available at <https://www.cites.org/eng/news/cites_and_trade_agreements_partnering_to_combat_wildlife_crime_and_to_achieve_sustainable_development_14102015> (visited 20 April 2018).

[12] Sand Peter H, 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment', 8(1) *European Journal of International Law* (1997) 29-58.

[13] See <https://www.wto.org/>.

[14] WTO, 'The environment: a specific concern', available at <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> (visited 22 April 2018).

of trade optimization.[15] This perhaps indicates that the establishment of the WTO in 1994 did not happen in isolation and was in some ways affected by the major developments of that period, most notably, the emerging priorities of the post-Earth Summit and the ensuing Rio Conventions.[16]

Despite there not being a central environmental instrument that caters to environmental issues of trade under the WTO, one cannot deny that there exists a body of relevant decisions, committees, texts, and agreements that are positioned between the interface of trade and environment. This includes:

- the WTO Committee on Trade and Environment, which serves as a key platform for emerging issues and dialogue on this topic;
- the GATT[17] Article XX on exemptions, which enables WTO members to be exempted from GATT rules, in particular relevance to the protection of the environment;[18]
- the specialized agreements such as the Agreement on Technical Barriers to Trade[19] (which deals with product regulations), and the Agreement on Sanitary and Phytosanitary Measures (which concerns food safety and animal and plant health),[20] providing scope for environmental objectives to be secured.

Nevertheless, one could argue that the WTO's interaction with environment has been passive rather than proactive and is limited in scope to when states bring disputes to WTO's dispute mechanism – not on the basis of rectifying an environmental wrong doing but in ensuring that the national environmental measure is not going against the core principle of the WTO i.e. non-discriminatory trade behavior. The emphasis on removing the garb of environmental protectionism as a means of discriminatory trade behavior in a number of cases is indicative of the passive nature in which environment features in WTO as an incidental issue rather than as the main one.

[15] WTO, 'Marrakesh Agreement Establishing the World Trade Organization', available at <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.> (visited 10 April 2018).

[16] In reference to the three legal instruments that emerged directly as a result of the 1992 Earth Summit: United Nations Framework Convention on Climate Change (New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>), the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>) and the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa (Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>).

[17] The General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <http://www.wto.org>.

[18] WTO, 'WTO rules and environmental policies: GATT exceptions', available at <https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm> (visited 3 April 3 2018).

[19] Agreement on Technical Barriers to Trade, Marrakesh, 15 April 1994, in force 1 January 1995, <http://www.wto.org>

[20] Agreement on Sanitary and Phytosanitary Measures, Marrakesh, 15 April 1994, in force 1 January 1995, <http://www.wto.org>.

This is not to deny the impact of historically iconic legal cases such as the turtle-shrimp case that brought forth many questions on the role and impact of national environmental measures in the international trade system. The Shrimp-Turtle case[21] – where the US imposed a ban on the importation of shrimp and shrimp products that were negatively impacting endangered sea turtles in the process – is perhaps the only example so far in the history of GATT and WTO, of how 'a unilateral, exterritorial national measure involving trade restrictions has been upheld on environmental grounds.'[22] The protection of sea turtles was at the heart of the ban. By upholding the law, the Appellate Body confirmed that under WTO rules, countries have the right to take trade action in the interest of the environment, and that the organization does not have to 'allow' nations this right.[23]

Interestingly, RV Anuradha's account follows the evolution of the environment from an 'exception' to a 'trade obligation' as seen in more recent trade agreements.[24] RV Anuradha makes the argument that unlike multilateral environmental agreements, trade agreements can use the tool of trade sanctions for the enforcement of environment-related obligations as set forth in the agreement.[25] However, over-reliance on these environment-related obligations can be problematic as arguably, they exist in the broader context of mercantile interests rather than environmental interests.[26]

Lurie and Kalinina argue that trade's engagement with the environment has been increasing, positively.[27] Reviewing the last two decades of intergovernmental regulation of trade affecting animals, they argue that 'the evolving worldwide consciousness of animal welfare as a matter of ethical concern will lead to greater protection of animals involved in international trade.'[28] Moreover, there is an increasing trend of recognizing the impact on wildlife, animal welfare, and other such elements under recently agreed free trade agreements indicating that these trade negotiations are not happening in a vacuum devoid of environmental concerns. They highlight the Dominican Republic – Central America – United States Free Trade Agreement,[29] the

[21] WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 12 October 1998.

[22] Peter Singer, 'Anti-environmental Ways of Working of the World Trade Organisation and Their Justification' (ecoglobe), available at <http://www.ecoglobe.ch/motivation/e/wto5412.htm> (visited 25 April 2018).

[23] "United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Case Nos. 58 (and 61). Ruling Adopted on 6 November 1998.

[24] R.V. Anuradha, 'WTO to the TPP: Evolution of Environmental Provisions in Trade Agreements' in Julien Chaisse, Henry Gao and Chang fa Lo (eds), *Paradigm Shift in International Economic Law Rule-Making* (Springer, 2017) 241-253.

[25] *Ibid*

[26] *Ibid.*

[27] Andrew Lurie and Maria Kalinina, 'Protecting Animals in International Trade: A Study of Recent Successes at the WTO and in Free Trade Agreements', 30(3) *American University International Law Review* (2015) 431-487.

[28] *Ibid.* at 436.

[29] Free Trade Agreement between the Dominican Republic, Central America and the United States, Washington, 5 August 2004, available at <http://www.wipo.int/edocs/lexdocs/treaties/en/cafta-do/trt_cafta_do.pdf> (visited 25 June 2018).

U.S. – Peru Trade Promotion Agreement,[30] and two global agreements: Trans-Pacific Partnership[31] and the Transatlantic Trade and Investment Partnership,[32] as promising in terms of wildlife protection.[33]

The Trans Pacific Partnership, in particular, has been praised as an agreement which sets a 'higher bar for combatting wildlife trafficking and ensuring legal and sustainable trade,'[34] putting a greater enforceable obligation to deliver on their CITES directives. Though such agreements have emerged outside of the WTO, they may be emblematic of the kinds of priorities, terms, and conditions emerging among states and trade blocs.

2.3 WTO and MEAs: a blurry space

There is no clear hierarchy or framework that defines how international environmental law and international trade law interact with each other in the international system. It is also not clear – that in the event of a conflict between the two domains – what the way forward would be. So far, there has been no evidence of a WTO dispute directly challenging a CITES trade measure, but that is not to say there may not be one in the future.

Cognizant of the growing and complex interactions taking place between these two domains, WTO's Doha Round of negotiations, which commenced in 2001, has been the first time that environmental issues have been explicitly featured in the context of multilateral trade negotiations. This is not only indicative that perhaps environmental issues are moving in from the periphery on trade issues but also an acknowledgement that there can be a mutual supportiveness of trade and environment.

This is evident as one of the agendas on the table is the inter-institutional level support to enhance exchange and cooperation between the WTO and the MEA Secretariats. This issue was first brought to the forefront through the WTO Committee on Trade and Environment (CTE) which has played a key role in the dialogue. So far, efforts for cooperation are limited to ongoing interaction between WTO and climate change bodies. The United Nations Framework Convention on Climate Change routinely participates in meetings of the WTO Committee on Trade and Environment (CTE) and, as an ad hoc observer to the Committee overseeing the

[30] The United States Peru Trade Promotion Agreement, Washington, 12 April 2006, in force 1 February 2009, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> (visited 25 June 2018).

[31] Trans-Pacific Partnership, Auckland, 4 February 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (visited 25 June 2018).

[32] Transatlantic Trade and Investment Partnership, between the European Union and the United State, still under negotiation.

[33] *Ibid.*

[34] CITES, 'CITES and Trade', *supra* note 7.

specific trade and environment negotiations and, conversely, the WTO Secretariat routinely attends the UNFCCC Conference of Parties meetings.[35]

Negotiating an answer as to how the WTO and MEAs fit with each other in the institutional space would have great implications and would essentially, 'affect the ability of nations to impose all manner of trade-related measures, from bans on trade in endangered species and hazardous waste to restrictions on genetically modified products and chemicals implicated in climate change.'[36]

3 Trade as a means of implementation – the convergence argument

To assess the extent to which trade can be a useful means of implementation in wildlife conservation, it is important to understand the dynamics that govern it and whether trade instruments and policies have yielded desired results, and, converged with the pursuit of wildlife conservation.

Dale Andrew makes the argument that trade can potentially contribute to promoting sustainable outcomes for the terrestrial environment through two distinct pathways: 1) where trade plays a regulatory approach – with laws, institutions and the government playing a key role in implementation and enforcement; and 2) where voluntary sustainability standards govern the trade culture and are essentially non-governmental and voluntary in nature.[37]

Sale of wildlife or its products – either directly, as an input or as a manufactured product – can result in economic gains. However, in order to ensure that this leveraging for economic gain does not lead to overexploitation or overharvesting, the regulatory enforcement becomes crucial in the entire trade chain.

Where the effectiveness of the regulatory role of trade diminishes, the distortion of such markets and the laxity or lack of rules can enable excess supply, excess demand, ultimately leading to unsustainable results.

Considering that trade is at the heart of CITES as a legal instrument, it is understandable that states that become parties to it are not opposed to the idea of trade in wildlife conservation. As a mark of political resolve on this issue, Parties have pre-

[35] WTO, 'Activities of the WTO and the Challenge of Climate Change', available at <https://www.wto.org/English/tratop_e/envir_e/climate_challenge_e.htm> (visited 24 August 2018).

[36] See International Institute for Sustainable Development (IISD), 'Business and Sustainable Development: A Global Guide: Trade' (2013), available at <https://www.iisd.org/business/issues/trade.aspx> (visited 10 June 2018).

[37] Matthias Helble and Ben Shepherd (eds), *Win-Win: How International Trade can help meet the Sustainable Development Goals* (ABDI, 2017), available at <https://www.adb.org/sites/default/files/publication/327451/adbi-win-win-how-international-trade-can-help-meet-sdgs.pdf> (visited 10 June 2018).

viously passed a resolution, recognizing that 'commercial trade may be beneficial to the conservation of species and ecosystems, and to the development of local people when carried out at levels that are not detrimental to the survival of the species in question.'[38]

Nevertheless, one can argue that the exact benefit and impact of trade in the wildlife conversation remains contested.

There have been various success stories highlighted by CITES, indicating the regulatory role it has played which has enabled it to control species from getting overexploited. One such well-known case is that of the highly threatened species of vicuña, a small wild mammal of the camelid family found in the Andes. The vicuña hair – which is considered to be the finest of natural wools – is five times more expensive than cashmere. This high economic value of the wool led to rampant poaching which nearly drove the species to near extinction. As a result, the vicuña was previously listed as an endangered species under Appendix I, effectively making the trade of the vicuña hair illegal.

However, recognizing that the local community of the region, which depended on this economic sale for its livelihood, were getting adversely affected by this ban – CITES granted a 'trade ban variance in 1987 for certain herds and later down-listed all of Peru's vicuna population.'[39] Why this worked was because the local community started undertaking stronger management of the herds through regular shearing, making poaching futile. The community-based natural resource management gave a new lease of life to the species: 'a shorn vicuna is a saved vicuna.'[40] Transferring the vicuna from Appendix I to Appendix II at a later stage, to allow international trade in wool from Peru, for example, not only allowed the sustainable management of the species but greatly supported the local livelihoods. Studies have proven that the regulated international trade in vicuna hair and its products had positive influences and enabled the ecological sustainability of vicuña populations.[41]

The case of vicuña speaks in favour of the argument that locals may be more incentivized to protect wildlife when there is a possibility to legally trade them. It also showcases that regulated trade of a species product can indeed lead to a sustainable outcome.

However, in contrast, studies to assess the effectiveness of CITES listings and trade controls on saving species from extinction consider them to be a mixed success. This

[38] 'Recognition of the benefits of trade in wildlife', CITES Res. Conf. 8.3 (Rev. CoP13).
[39] Helble and Shepherd, *Win-Win: How International, supra* note 37, at 218.
[40] *Ibid.*
[41] Marina Rosales Benites de Franco et al, 'International Trade in Vicuna Fiber and Its Influence on the Conservation Status of Populations of Peru', 2(3) *Weber Earth Science & Environmental Engineering* (2016) 676-687.

comes with the caveat that there have been no systematic studies assessing the impact of the listings and the evidence remains restricted to species-specific studies.[42]

Pires and Moreto make the case that though trade bans (listing species under Appendix I) have led to less trade and 'rebounding' populations for African elephant, vicunas, the southern white rhino, and the greater one-horned rhino, this has been possible through the combined conservation efforts on the ground where all stakeholders are involved. In the cases of lacking viable conservation and recovery plans on the ground, rapidly declining populations of tigers or pangolins may not recover simply from imposed trade bans.[43] In addition, it has also been argued that when trade bans or restrictions are imposed by CITES policy-makers, the 'complexity of demand and market dynamics is not always considered.'[44]

This has given fodder to the argument that the regulatory mechanism of trade bans and restrictions is insufficient as a response to a problem that is deeply complex, and that pertains to not just environmental, but socio-political, economic and cultural elements. Pires and Moreto argue that moving beyond trade bans of the CITES mechanism, countries need better incentives and stronger enforcement of national legislation.[45] In the past few years – and acknowledging that a multilateral treaty can only be as effective as how it is enacted at the national level – CITES has strengthened its support for national-level enforcement.

4 Trade as a deterrent to the environment – the divergence argument

This section of the paper will explore how trade has adversely affected wildlife conservation and magnified the negative impact – or put simply, how it diverges from the pursuit of wildlife conservation.

Among the analyses of trade and environment, one of the most interesting is that of grouping trade dynamics into the kind of impacts they could lead to:[46]

Magnifier effect: where trade, without proper pricing and policies, can lead to environmental degradation. In this, 'the damage to the environment [is] caused not by trade itself, but through trade acting as a magnifier of existing inadequacies of environmental policy.'[47]

[42] Stephen F. Pires and William D. Moreto, *The Illegal Wildlife Trade* (Oxford Handbooks Online, 2016) 5.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] IISD, 'Business and Sustainable', *supra* note 36.
[47] *Ibid.*

Competitiveness effect: where trade can either trigger demand for higher environmental standards and performance by foreign purchasers, or it can bring pressure to lower standards, through pollution-intensive processes congregate in regions where the lowest environmental costs exist (the 'pollution haven' effect).

Among these, the magnifier effect can perhaps have the most devastating effect – as it can, put simply, make a bad situation worse. In the absence of proper legislation and policy frameworks that enable the accounting of comprehensive environmental value and costs, the undervaluing or de-valuing of a wildlife specimen, for example, would be magnified.

When the value is under-priced or unaccounted for, again, as a result of inadequate legislation – the exploitation or overuse could be rampant. These conditions are precipitated to a greater scale of inefficiency, the magnifier effect – in international trade than it would be in a closed, domestic context.

This reasoning can shed light on understanding how the dwindling rhino populations are extremely threatened by the onslaught of poaching for their horns. The average rhino horn, approximately 2.5 kilograms, is estimated to be valued between $87,500 and $150,000, making it worth more than elephant ivory or any other animal part in the world.[48]

However, due to the fact that the entire living rhino is not valued, despite it having biological, cultural, historic or other importance, at the same economic worth as its horn, it leaves little incentive for poachers to keep a rhino alive while trying to extract its horn. Making the life of a living rhino almost worthless and that of its horn, highly valued.

The second effect – competitiveness effect – provides an interesting basis for understanding the movement of illegal wildlife trade. Although it is difficult to make a sweeping conclusion on the supply and demand markets as it depends on the different wildlife products, it is generally believed that both the legal and illegal wildlife market flows from emerging to developed countries.[49]

If the producers or suppliers of a wildlife product are aware that there is a competitive advantage in keeping or avoiding environmental costs, 'there will be pressure to keep such costs as low as possible. This can be done through non-enforcement, or even slackening, of existing regulations, or through "regulatory freeze" – the reluctance of environmental regulators to propound new environmental regulations, even where all the evidence shows that they are needed.'[50]

[48] Pires and Moreto, *The Illegal Wildlife*, *supra* note 42, at 8.
[49] *Ibid.*
[50] IISD, 'Business and Sustainable', *supra* note 36.

Though one cannot state that this is true for all illegal wildlife products flowing from developing to the developed, weak enforcement of regulatory frameworks, corruption, demand for illegal products and poverty are enabling. factors that can further magnify these distortions in the international trade dynamic. Thus, with this set of enabling factors, trade can indeed aggravate the delicate dynamics of wildlife trade and conservation.

5 The path forward

The relationship between trade, environment, and more broadly, development, is complex and cannot be boxed as solely a positive or negative one, or a converging or divergent one. The outcomes can be contingent on many other factors such as the sector, the market, the country or geographical scope, and the prevailing laws and policies.

Traditionally, trade had been perceived to be at odds with and even 'intrinsically harmful for natural resources and environmentally-sensitive products.'[51] But upon a closer analysis of the dynamics and the existing legal frameworks that support the two – it is evident that trade can be both an enabling and a deterring aspect that can affect the environment. Fundamentally, the legal framework and the policies that underpin the trade dynamics are the key determinants of how interactions with the environment and environment-related issues take place.

Despite the growing interactions taking place between the trade and environment regimes, the analysis indicates that perhaps the interaction remains asymmetrical. In the trade domain, especially seen through the WTO dispute cases, there are only a handful that bring to the fore the conflict of measures to protect the environment while securing the pursuit of free, non-discriminatory multilateral trade. Whereas, CITES as a multilateral environmental treaty that puts trade at the center of its functioning, reflects a greater interaction with the principle of trade.

It brings to question a number of issues: firstly, whether the limited number of cases dealing with environmental matters in relation to trade is emblematic of not only the lack of interaction between the two domains but also of the subsequent lack of advancement made in this crucial nexus and secondly, whether the WTO is 'enough' as a platform for settling environmental issues in the trade context that fall out of the CITES ambit. And moreover, whether it is legitimate to have that expectation from the WTO considering the underlying principle that governs the treaty is ensuring that trade is free flowing and non-discriminatory (and not achieving environmental sustainability).

[51] Helble and Shepherd, *Win-Win: How International, supra* note 37, at 211.

In the context of wildlife trade, the role of trade can either converge with environmental goals or diverge devastatingly from them. The crucial aspect is understanding the dynamics that can lead to either outcome. As seen with traditional theory on trade impact, trade can have an effect that can have a magnifying effect wherein a lack of controls, perhaps legislative or policy-related, can magnify the distortions of an existing market. At the same time, trade can play a crucial enabling role in increasing wildlife conservation – with the appropriate regulating framework – and sustaining livelihoods.

Environmental and Social Policies in Official Export Support – Export Credit Agencies on Their Way to Sustainability

Elena Koritchenko[1]

1 Introduction

Modern trade, particularly international trade, producing most environmental and social impacts, is no longer an interaction solely between buyer and seller. Nowadays it takes many different forms and involves a variety of actors, including financial intermediaries, lenders, brokers, insurers, associations and regulatory bodies. The financial system has become the lifeblood of the economy and particularly trade worldwide, being omnipresent where a new facility is planned and fueling all kinds of material changes. The financial streams are reaching into ever more areas of economic and social systems at an unprecedented scale, which allows to talk about the global financialization.[2] To see this bigger picture and assess its current level of sustainability, it is therefore relevant to this volume's overall objective to discuss environmental and social standards of institutions which are not executing trading transactions directly but, with their financial services, support large portions of national export flows worldwide.

It is increasingly recognized that responsibility for the environmental and social effects produced by economic activities shall be borne not only by the immediate

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[2] Tony Porter, 'The OECD and Global Finance: The Governance of New Issues, New Actors, and New Financial Frontiers' in Kerstin Martens, Anja P. Jakobi (eds), *Mechanisms of OECD Governance: International Incentives for National Policy-making?* (Oxford University Press, 2010) 98-118.

owners and operators of environmentally harmful facilities, such as large industrial installations or infrastructure objects, but also by those project participants which actually enable project implementation, including financial institutions of different types. Jaeggi and Ziero[3] argue that nowadays integration of environmental and social considerations into the process of investment allocation and project financing is no longer a matter of specific corporate values or a cutting-edge best practice; it has turned into a mainstream approach to risk management and reputation building.

This paper will track this evolution with a particular focus on export credit agencies (ECAs) as a specific type of institution fulfilling the role of an international trade facilitator and being present in most countries throughout the world. ECAs are national institutions mandated by their governments to provide official support to export operations through loans, insurance and other instruments. Surprisingly, they are relatively poorly addressed by different types of studies despite the fact that their history stretches back almost a century[4] and that ECAs currently support a very significant share of global export operations.[5] This paper explains briefly the role of ECAs in world trade and describes the environmental and social standards currently in force for these institutions.

The specific goal of the paper is to shed light on the historical process of policy-making to 'green' the financial component of international trade, including the main driving forces and actors involved, on the challenges and achievements at different stages of policy creation and implementation, and interplay of ECAs' sustainability policies with other institutions. Further, the paper describes the role of the Organisation for Economic Co-operation and Development (OECD)[6] as a node of transnational governance and the centre for best practice initiation and dissemination (on the example of sustainability standards for official export support). Starting from the late 1990s, the OECD has been actively facilitating integration of sustainability considerations into international trade operations linking technology transfer to the cognitive process of environmental and social risks management practices learning. This learning has been targeting both the export recipients and the main co-financing partners on the international trade arena.

[3] Olivier Jaeggi and Gabriel Webber Ziero, 'What New OECD Standards Mean for Investors'. MITSloan management Review (2016), available at <sloanreview.mit.edu/article/investors-required-by-oecd-to-broaden-due-diligence/> (visited 15 February 2018).

[4] Christopher Wright, 'Export Credit Agencies and Global Energy: Promoting National Exports in a Changing World', *2 Global Policy* (2011) 133-143.

[5] Finance and Trade Watch, 'ECAs Go to Market. A critical review of transparency and sustainability at seven export credit agencies in Central and Eastern Europe' (Finance & Trade Watch and CEE Bankwatch Network, 2017), available at <bankwatch.org/publication/ecas-go-to-market> (visited 22 May 2018) and Berne Union, 'The Bulletin on International Trade, Finance and Investment from the Export Credit and Political Risk Insurance Industry. Berne Union Spring Meeting' (Berne Union, 2018), available at <cdn.berneunion.org/assets/Images/81ced745-5488-40d1-8717-ece86bc8f60f.pdf> (visited 22 May 2018).

[6] See <http://www.oecd.org>.

2 Export credit agencies in the world trade system

ECAs are specially designated bodies appointed by their respective national governments to support national exporters through the provision of financing and insurance or guarantees for export operations. Most ECAs are either state owned or operate based on governmental mandate. In most cases, ECAs mainly deal with the so-called non-marketable risks which are beyond the risk appetites of commercial companies. This makes them essential actors in the international trade system, facilitating streams which would not develop otherwise. When it comes to insurance, ECAs deal with both the financial risks of counterparty non-payment and the political risks associated with such events as legislation change, nationalization etc. In many cases these institutions are not falling under national general banking or insurance laws and function under the regulations or governmental decrees issued specifically to provide them with this mandate and allocate responsibilities on official export support.

As Gianturco notes, export credit agencies are the modern 'unsung giants' of the world trade system, having appeared as early as 1906 acting worldwide and influencing a significant share of international trade and investment flows.[7] There is no precise figure of their share in international trade due to the absence of a common coordinating or governing centre. However, the members of the Berne Union[8] alone supported 14 per cent of the world's export transactions in 2017.[9] It is more than the total share of multilateral development banks (MDBs), including the regional ones.[10] Further, it is clearly recognized that the role of ECAs was becoming particularly important in the years of economic and financial crises, when other sources of financing and support are reduced.[11] In numerous cases, this anti-crisis activity intensification resulted in higher risks appetites and provision of official support to environmentally and socially questionable and even financially unsustainable projects.[12]

A distinctive feature of export credit agencies is the international nature of the transactions they support, with goods and financing originating from one jurisdiction and consumption taking place and causing associated effects in a different one. In the case of project financing or insurance, consumption takes the form of the construction or modernization of facilities able to produce major environmental and

[7] Delio E. Gianturco, *Export Credit Agencies: the Unsung Giants of International Trade and Finance* (Greenwood Publishing Group, 2001).

[8] Berne Union is an association of export credit and investment insurance companies. For details, see <https://www.berneunion.org/>.

[9] Berne Union, *The Bulletin on International, supra* note 5, at 2.

[10] Finance and Trade Watch, 'ECAs Go to Market', *supra* note 5.

[11] See Wright, 'Export Credit Agencies', *supra* note 4, at 135; Finance and Trade Watch, 'ECAs Go', *supra* note 5; and Bruce Rich, 'Coal, Climate and Public International Finance' (Environmental Defense Fund, 2009), available at <http://www.edf.org/sites/default/files/9593_coal-plants-report.pdf> (visited 12 March 2018).

[12] Finance and Trade Watch, 'ECAs Go', *supra* note 5.

social impacts. At the same time, the ECAs themselves are national entities managed or mandated for their function by their respective governments and often having no legislative power at the place of export destination. Therefore, they form a very diverse group of institutions subject to different jurisdictions and with only limited or indirect leverage over the process of the exported goods and services utilization. Though the global role of ECAs is often compared to the role of multilateral development banks, primarily the World Bank Group,[13] this comparison is only partially legitimate. This issue will be addressed in more detail in the following section of this paper.

Due to the factors mentioned above, ECAs worldwide possess significant potential to address the environmental and social effects of the world trade, particularly with a view to preventing negative future sustainability impacts of the planned activities and to mitigating relevant risks. Being in certain cases the critical element of trade transactions, ECAs, in other words, wield a noticeable structural power over their clients, which allows them to introduce additional requirements to the projects supported,[14] including environmental and social ones.

Despite their long history and deep involvement in international trade, ECAs were relatively late to join the global wave of integration of environmental and social risk considerations into policies and procedures of financial institutions. While the European Bank for Reconstruction and Development (EBRD)[15] issued the first 'Environmental Policy' (further transformed into the 'Environmental and Social Policy') in 1992, the International Finance Corporation (IFC)[16] adopted an extensive package of environmental and social guiding documents in 1998 (Disclosure policy; the Environmental and Social Review Procedure; and the Guidance Notes to it as well as new Safeguard Policies) with some documents dating back to even earlier years (1996 Safety of Dams Safeguard policy; 1991 Indigenous Peoples Safeguard policy; 1990 Involuntary Resettlement Safeguard policy; and 1986 Cultural Property Safeguard policy), ECAs still stayed away from this global trend in the beginning of the 2000s. This fact, together with the growing recognition of the role these institutions played in global trade, resulted in a series of critical statements by non-governmental organizations (NGOs) and individual researchers blaming ECAs for lack of transparency, unwillingness to make any commitments on human rights or onsocial and environmental impacts mitigation or to engage in constructive dialogue with stakeholders.[17] Those claims were made with particular reference to the multilateral development banks listed above which managed to incorporate sustainability considerations into their routine procedures by that time.

[13] See <http://www.worldbank.org>.
[14] Marcus Schaper, 'Leveraging Green Power: Environmental Rules for Project Finance', 9(3) *Business and Politics* (2007) 1-27.
[15] See <http://www.ebrd.com>.
[16] See <http://www.ifc.org>.
[17] Aaron Goldzimer, 'Worse than the World Bank? Export Credit Agencies – the Secret Engine of Globalization', 9(1) *Backgrounder* (Institute for Food and Development Policy, 2003).

Before discussing the history of ECAs' 'greening' in the next section, it is worth focusing on the specific features of these institutions in order to understand if references to the practices of multilateral development banks are legitimate to make ECAs follow the same track and bring their policies in line with other financial institutions. In terms of the nature and scale of the projects supported, the two types of institutions might be similar (though ECAs in general have a more diverse portfolio, with large projects not being the majority). However, there are important differences influencing the opportunities for the introduction and effective implementation of new policies.

The first and the most important difference has its roots in the mandates assigned to the different types of financial institutions. While development banks and agencies are designed to support development activities and contribute to sustainability in less developed countries, ECAs are oriented towards support of domestic producers (exporters) acting in compliance with national legislation and standards and accepting non-marketable risks connected with export transactions. Therefore, the idea of development and assistance to the countries of the export destination is not part of their mission; the focus of the ECAs' attention is placed within the country (on exporters) with the outer world being mainly a source of risks to be covered.

Further, though the missions and operations of various ECAs might be analogous, they are still independent legal entities registered in different countries and subject to their respective jurisdictions and subordinated to the national government. As a result, the ECAs' governance is highly dispersed in terms of not only location of the governing center but also of the applicable legislation, relevant international obligations etc. All ECAs are subject to national laws which are in many cases developed specifically for these institutions and reflect perceptions and objective of the particular state on their export promotion. The only global[18] requirement to official export support can be found in the Annex I to the WTO Agreement on Subsidies and Countervailing Measures[19] regarding official export support provided at inadequately low rates as a subsidy, which shall be prohibited. Moreover, even though the dialogue between the largest ECAs was established as early as the mid-1970, for a long time it was maintained exclusively within closed forums such as the G7/G8 and the OECD.[20] These fundamental differences make streamlining new requirements into ECAs' operations a much more challenging and presumably longer-term task than integration of environmental and social policies into single institution processes.

What is similar, though, is that the level of development and national environmental and social legislation and technological advancement in the countries of export origin and destination can vary significantly. Therefore, there is a significant window

[18] Applicable only to the WTO member states.
[19] Agreement on Subsidies and Countervailing Measures, Marrakesh, 15 April 1994, in force 1 January 1995.
[20] Wright, 'Export Credit Agencies', *supra* note 4, at 136.

of opportunity for technology and best practice transfer connected with these activities, but also some space for irresponsible exporters to profit financially from lower social and environmental standards in the destination country.

As can be seen from the results of the comparison between the major MDBs and ECAs, the main challenge on the way to realize this potential is the relatively low leverage of every single ECA on the global sustainability. However, the aggregated amount of official support provided by different ECAs is significant and can be used as a key to address environmental and social impacts of the world trade. Obviously, to achieve this, it was essential to find ways to align the individual ECAs' policies and efforts and encourage them to act in a concerted manner in order to avoid 'race to the bottom' among the exporters and official export support providers.

3 ECAs and their way to sustainability: actors and driving forces

In view of the growing recognition of the close interconnectedness between international trade and environmental and social issues worldwide, those 'giants' could not stay long out of the radar of sustainable trade and responsible investment proponents. In the mid-1990s, not only did individual experts recognize the potential of and expressed concerns on negative social and environmental consequences of officially supported projects, but also civil society voices on this issue started getting ever more urging. This chapter describes views, roles and motivations of main actors in the process of introduction of sustainability standards for ECAs.

3.1 The role of civil society

From the end of 1990s, ECAs, particularly in the OECD countries, experienced significant organized pressure from national and international NGOs.[21] Some authors go further in the analysis of the civil society role in the introduction of environmental and social standards into international trade and investments practices and tend to see the whole history of the financial sector's 'greening' being a result of consistent work of the NGOs community,[22] supported by influential national lobbies at some stages.[23] The main discourse in the NGO critique of ECAs' activities worldwide was the lack of transparency and public dialogue and occasional engagement in activities contradicting the recognized sustainability goals.

In 1996, NGOs taking an active position on the issue, created a network called ECA Watch,[24] which is still functioning and highlighting the officially supported

[21] *Ibid.*
[22] Schaper, 'Leveraging Green Power' *supra* note 14.
[23] Wright, 'Export Credit Agencies', *supra* note 4, at 137.
[24] See <http://www.eca-watch.org>.

transactions involving potential environmental and social dangers not sufficiently mitigated or disclosed or which are contradicting to the official commitments of the parties. In April 1998, 163 NGOs from 46 countries compiled a joint 'Call of National and International Non-Governmental Agencies for the Reform of Export Credit and Investment Insurance Agencies.' It was addressed to the governments of the OECD countries and contained, besides a description of the current concerns, four practical calls to be added to ECAs' regulations by their governments, including a call for greater transparency and public participation, a call for environmental screening and assessment, a call for social responsibility and a call for agreement on common environmental and social standards.[25]

This Call did not stay unnoticed. However, it did not result in the immediate implementation of clear binding commitments for all the OECD export credit agencies. In 1998, ECAs from the OECD countries made a joint statement on their intention to consider the concerns raised and develop guidelines and procedures which would adequately address them. This process, however, was neither prompt nor easy. The first significant achievement of the trilateral dialogue between the NGO group, the ECA group and the OECD at the very end of the 20th century was the commitment of the OECD ECAs to share information on large projects with high potential impacts.[26] However, no official procedural document was issued before 2003.

It should be mentioned that ECAs were not the only type of financial institutions in the focus of NGOs' attention. From the late 1980s, the latter were implementing consistent step-by-step efforts aimed at improving transparency and accountability of the financial institutions engaged in large projects with high potential environmental and social impacts, particularly including those situated in developing countries.[27] Though the most active phase of this struggle took about 20 years, the efforts of civil society brought significant changes in the financial sector due to the increasing discursive power[28] that international NGOs and their associations were gaining.[29] Before turning their attention and the 'name-and-shame' tactics to the ECAs, they triggered the introduction of a whole set of general and technical sector-specific environmental and social standards and guidelines in the World Bank Group. With time it has even redefined its mission to include 'sustainable development'.[30] This could be considered as a game changer for the future of the interplay between sustainability and international trade.

[25] World Economy, Ecology and Development (WEED), 'Call of National and International Non-Governmental Agencies for the Reform of Export Credit and Investment Insurance Agencies' (1998), available at <http://www.weed-online.org/themen/english/17921.html> (visited 27 January 2018).

[26] ECA Watch, *Common Approaches* (ECA Watch, 2018), available at <http://www.eca-watch.org/issues/common-approaches> (visited 11 March 2018).

[27] Schaper, 'Leveraging Green Power' *supra* note 14.

[28] As defined by Robert A. Dahl, 'The Concept of Power', 2(3) *Behavioral Science* (1957) 201-215.

[29] Schaper, 'Leveraging Green Power', *supra* note 14.

[30] *Ibid.*

However, as noted by some authors looking at this process from the angle of institutional dynamics, despite similar results (the introduction of environmental and social responsibility considerations into their decision-making processes), the main powers creating pressure on the different types of financial institutions and transition mechanisms differed significantly. In case of the World Bank, this was mainly the discursive power of civil society (expressed mainly by NGOs and other activists as well as lobbyists) conveyed through the national governments of the partner and client countries of the World Bank having instrumental power over this institution. Further, the Equator Principles financial institutions[31], which are mostly private, were mainly influenced through their clients requiring a higher level of responsibility and transparency from the banks.[32] In the case of ECAs the change was induced through their respective governments and the high-level governmental forums.

Those step-by-step changes in the dominant views of the main stakeholders on the accountability of the financial sector on social and environmental impact have finally resulted in a significant shift in the overall trade and environment discourse, at least in the developed countries. By the end of the 1990s, the dialogue on sustainability and international trade (including investments) had gradually transformed from conceptual debates on the relevance of these considerations to project supporting institutions into a discussion on the methods most appropriate in different cases, with the overall acceptance that financial institutions shall share responsibilities for adverse effects of international trade. This new reality could not be much longer ignored by the national governments which have immediate power over their ECAs. Moreover, the process was strongly influenced by the US lobby, where the principle of extraterritoriality for environmental assessment was enforced by several law suits raised by NGOs against national agencies providing support for projects overseas, including Ex-Im,[33] the national ECA.[34] However, debates on the form and content of this policy postponed the actual policy change for another few years.

3.2 The role of high-level inter-governmental forums

The consequent steps of this paradigm shift were marked by several official statements made by the world-leading polities. In 1997, the G8 countries encouraged ECAs to introduce 'sustainable practices by taking environmental factors into account when providing financing support for investment in infrastructure and equip-

[31] The Equator Principles is a set of voluntary environmental and social standards for financial institutions providing project financing. For details, see <http://equator-principles.com/>.
[32] *Ibid.*
[33] See <https://www.exim.gov/>.
[34] Schaper, 'Leveraging Green Power', *supra* note 14.

ment' in their official Communiqué.[35] In 1999, the same group of countries published a joint statement acknowledging the general approach that ECAs' activities are able to produce environmental and social effects of a scale similar to those of multilateral development banks and agreeing that their policies shall be, therefore, adjusted to take it into account and create instruments for those impacts assessment and mitigation.[36]

In May 2000, NGOs interested in improving the responsibility, accountability and transparency of export credit agencies' operations convened again in Indonesia to discuss the current status of the issue and to produce another common statement. This discussion covered a broader range of topics, than the 1998 statement, including the impacts of national debt on the populations of developing countries. The resulting document is known as the Jakarta Declaration and contains a description of civil society concerns regarding ECAs' activities worldwide as well as a call for a reform addressed once again to the OECD governments. The Declaration contained a list of six actions able, in their view, to significantly improve the situation, if implemented collectively by the ECAs from developed countries. The actions proposed were aimed at increasing transparency, including public consultations, as well as the application of best international environmental and social practice and standards to projects in both developed and developing countries through the development of corresponding guidelines with a particular emphasis on human rights and the introduction of binding anti-bribery requirements. Besides that, NGOs urged developed countries to cease support for non-productive investments (with the reference to military goods exports and nuclear power plants construction) and cancel the debts of the poorest countries placing excessive burden on the people of those nations.[37]

The choice of the OECD as an addressee of the concerns and recommendations represented an important strategic move. Though functioning mainly as a forum for coordinated consensus-based decision-making,[38] at that time the OECD was one of the very few institutions bringing certain ECAs together and able to align their activities to a certain extent. Addressing individual ECAs (through national governments or directly) would not allow to create a common policy covering the meaningful amount of international trade. Moreover, exactly this group of countries

[35] Berne Declaration, Bioforum, Center for International Environmental Law, Environmental Defense Fund, Eurodad, Friends of the Earth, Pacific Environment & Resources Center, Urgewald, *A Race to the Bottom: Creating Risk, Generating Debt, and Guaranteeing Environmental Destruction. A Compilation of Export Credit & Investment Insurance Agency Case Studies* (March 1999), available at <slidex.tips/download/a-race-to-the-bottom-creating-risk-generating-debt-and-guaranteeing-environmenta> (visited 14 February 2018).

[36] Wright, 'Export Credit Agencies', *supra* note 4.

[37] Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies (May 2000), available at <http://www.eca-watch.org/sites/eca-watch.org/files/Jakarta_Declaration.pdf> (visited 15 December 2017).

[38] Morten Ougaard, 'The OECD's Global Role: Agenda-setting and Policy Diffusion' in Kerstin Martens, Anja P. Jakobi (eds), *Mechanisms of OECD Governance: International Incentives for National Policy-making?* (Oxford University Press, 2010) 26-50.

at the turn of the century was both supporting the ideas of sustainable development, including the non-industrial sector,[39] and also having some experience on implementation of similar standards. Another ECA forum, the Berne Union, stayed aside from this debate partially due to the lack of instruments and mandate for norm-setting and partially because of their much more diverse membership.

At the same time, it became clear that developing countries increasingly favoured the shared responsibilities approach, including in the international trade sphere, allowing them to restrain from additional commitments. The WTO high-level symposium on trade and environment, held in March 1999, clearly showed that the developing countries were not ready to move in the direction of the introduction of environmental and social requirements together with the developed countries and, moreover, treated this approach with significant suspicion of creating possible disadvantages for their position on the international trade arena.[40] Therefore, it was probably impossible at that period to induce environmental and social standards for each and every ECA in the world, but it was important to launch the process, and the OECD obviously represented the best entry point for a number of reasons described above.

4 The Common Approaches: policy emergence, development and interplay

This chapter is dedicated to description and discussion of the main environmental and social standard used by ECAs from the OECD countries, the so-called Common Approaches. This document has wide reference to other existing sustainability standards and policies in the international finance sphere. Therefore, the second part of this chapter is dedicated to discussion of how these standards reflect current and intended positions of ECAs in the global sustainable finance picture. The concept of policy interplay[41], widely used to explain processes in international environmental governance, is employed here to demonstrate interconnectedness between actors and practices within the global system of goods and capital flows.

4.1 The Common Approaches: emergence

In 1998, the OECD countries committed to introduce sustainability management procedures into their official trade support processes. In terms of policy develop-

[39] As Neumayer notices, though, drivers for the sustainability commitments were not the same for different polities – for some cases, they stemmed directly from their nation's core values; for the others, it was more a result of the civil society pressure. Eric Neumayer, *Greening Trade and Investment: Environmental Protection without Protectionism* (Earthscan, 2001).

[40] International Centre for Trade and Sustainable Development (ICTSD), 'Press Coverage of Symposia Affirm North-South Divisions', 3(11) *Bridges. Weekly Trade News Digest* (1999) 3-4.

[41] As defined in Sebastian Oberthür and Thomas Gehring, *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press, 2006).

ment, this task incurred numerous challenges including the necessity to reach a consensus between then 29 countries with significantly varying export profiles and strategies, and organically build this new policy into the existing international trade regime, including compliance with the WTO rules.

Further challenges to policy development and implementation stemmed from the specific technical features of the official support provision. ECAs deal with most types of exports including goods and services, investments and international project financing. At the same time, it is absolutely clear that only certain types of international trade flows may raise environmental concerns, therefore one of the essential policy-making tasks was to establish rules and procedures which would allow the addressing of the environmental and social effects of trade operations where they actually occur without creating an unnecessary bureaucratic burden in cases where those impacts are negligible.

Finally, after prolonged work and settling certain disagreements within the OECD group itself, the official OECD document regarding environmental and social risks assessment and management in the process of official support provision appeared. The OECD countries clearly state, however, that the measures aimed at environmental and social protection can potentially result in certain level playing field distortions in the international trade area. Therefore, the ultimate stated goal of the issued document is to avoid those distortions by the introduction of uniform rules and policies of sustainable financing.

The official document entitled the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (and more widely known and referred to as the 'Common Approaches', or 'The Recommendations') was issued in 2003. The current version of the Common Approaches was issued in 2016 after an extended review process of the previous 2007 version.

4.2 The Common Approaches: design and requirements

The Common Approaches in its essence is a voluntary consensus-based standard applied by the OECD member countries and their respective ECAs. Despite NGO calls and recommendations to introduce a binding sustainability regulation, the document represents a 'gentlemen's agreement' followed, however, by all member countries with the OECD Export Credit Group (ECG) as an enforcement agency.

In order to duly fulfill the above stated objectives and to deal with the challenges identified, the document design has the following features:

- thought through application area allowing to single out only those export flows which have potential social and/or environmental effects by introduc-

ing the categories of repayment term, single defined export destination and amount of financing into its application scope;
- alignment with the other sustainability standards used in the financial sector (such as the World Bank guidelines and international conventions) through direct links and application areas delimitation;
- universal applicability to most national contexts and export types through a universal wording and reference to national legislation;
- compliance with the existing trade rules, including technical barriers to trade and subsidy avoidance considerations; and
- reproducibility of the policy and the relevant standards within different national and project contexts to be implemented at the national levels by the member countries – and, potentially, by external actors which might be interested in following the same recommendations as the best practice in the trade finance sector or pursuing the improved image on the international arena.

The last consideration's incorporation into the Common Approaches from the outset indicates the clear intention of possibly wider policy transfer, including among the non-member states for the success of the task of the extension of the level playing field in international trade beyond the OECD group, particularly in project financing.

According to the Common Approaches, ECAs shall screen the projects in their pipeline (considering the application scope) for potential adverse environmental and social effects with further categorization into risk groups. The projects with irreversible and unprecedented effects (Category A, according to the Common Approaches) shall be subject to the environmental and social impact assessment (ESIA) procedure and a confirmation of compliance with the international environmental and social standards, such as the IFC Performance standards,[42] IFC Environmental, Health and Safety (EHS) Guidelines[43] and /or Safeguard policies.[44] Public disclosure of information on high-risk projects before making the final support commitment is an important part of the procedure, as well as yearly reporting to the ECG on projects with significant environmental and social risks supported and their compliance status. At the same time, the Common Approaches provides significant flexibility in terms of implementation as well as interpretation[45]. Each ECA has to internalize those standards in their own management system and business processes, deciding independently on practicalities such as, for instance, the necessity of field visits, scope-widening or additional standards to be applied.

[42] See <https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards> (visited 26 August 2018).
[43] See <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/ehs-guidelines> (visited 26 August 2018).
[44] See <https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Sustainability-Policy/> (visited 26 August 2018).
[45] Finance and Trade Watch, 'ECAs Go', *supra* note 5.

4.3 The Common Approaches: shortcomings and critique

It is important to note that the final document to a significant extent answers the calls uttered by NGOs in their joint statements in 1998-2000 (see above), including public consultation procedures and possibly wide alignment with the recognized environmental and social standards. However, the document only focuses on environmental and social aspects, avoiding such controversial topics as external debt elimination or investment sustainability and 'fairness' assessment. The recommendations also do not apply to the export of military equipment and agricultural commodities and to short-term transactions. These limitations constitute a fertile ground for continued critique of the measures taken by the OECD countries to ensure the sustainability of the official support provided by their ECAs, referring to such international financial institutions as the World Bank and European Bank for Reconstruction and Development (EBRD) which adopted 'exclusion lists'[46] explicitly stating that those institutions do not provide support for such socially and environmentally damaging goods as weapons, alcohol (with some exclusions for wine and beer), nuclear materials and some unsustainable practices such as large driftnet fishing.

It is important to note that the main operational burden for the implementation of the requirements stipulated by the Common Approaches rests with the export recipient party which has to make efforts to prove that their project is compliant with the above-mentioned rules. Therefore, some skepticism is expressed among the recipient countries in respect to the environmental and social requirements to export operations posed by the OECD countries, which are often perceived as additional burdens and barriers for project implementation in the developing world.[47] However, most export recipients prefer to follow the existing rules and procedures imposed by the OECD. This fact gives credence to the significant structural power the OECD financial institutions have over their counterparties being the source of aid, investments and technology transfer. Developing countries tend to place emphasis to and pin high hopes on this type of projects and the associated technology transfer process between the developed and developing countries. This aspiration is systematically addressed at the negotiations of multilateral environmental agreements (MEAs) and corresponding requirements are included into environmental and trade agreements.[48]

International trade thus provides a powerful means for best practice transfer, start-

[46] EBRD, *Environmental and Social Policy* (2014), available at <http://www.ebrd.com/documents/comms-and-bis/pdf-environmental-and-social-policy.pdf>; and the International Finance Corporation (IFC), *Environmental and Social Review Procedures Manual. Environment, Social and Governance Department* (2016), available at <http://www.ifc.org/wps/wcm/connect/d0db8c41-cfb0-45e9-b66a-522c88f270a5/ESRP_Oct2016.pdf?MOD=AJPERES> (both visited 20 January 2018).

[47] ICTSD, 'Press Coverage of Symposia', *supra* note 40.

[48] Padmashree Gehl Sampath and Pedro Roffe, *Unpacking the International Technology Transfer Debate* (International Centre for Trade and Sustainable Development (ICTSD), 2012), available at <http://www.ictsd.org/downloads/2012/07/unpacking-the-international-technology-transfer-debate-fifty-years-and-beyond.pdf> (visited 7 January 2018).

ing from material transfer of advanced equipment and technologies and ending to policies and management approaches. This knowledge can include technology utilization and operation skills, project management (including international financing arrangements, planning and reporting in accordance with the international standards), corporate responsibility and human rights issues and other related processes executed onsite in the developing countries with the involvement of local employees and stakeholders. It is increasingly accepted that those two types of transfers come now as a 'package deal' and eventually enforce each other and allow the achievement of best results contributing to the overall sustainability goals. In many cases, the interest in gaining access to high-end technologies and favorable and reliable financial support tools outweighs other considerations.

5 Other OECD trade and environment instruments for ECAs

Besides the Common Approaches, environmental concerns are reflected in two Sector Understandings employed by the OECD countries to regulate official export support. The Sector Understandings are annexes to the main OECD export credits document setting financial parameters for the official export support from the OECD countries, known as the Arrangement.[49] In fact, these policies represent a different viewpoint to the problem of financial and sustainability issues interplay. While the Common Approaches acknowledge that the official export support institutions generate environmental and social effects as a result of their activities and shall be held accountable for them, the Sector Understandings are developed to highlight those export sectors (including certain environmental goods) which require special treatment and tailor-made financial conditions different from the general ones.

Sector Understandings currently exist for six economy sectors or groups of exported goods which might need a specific approach due to their nature. Out of this number, two Understandings deal with goods and projects which can be considered particularly relevant to environmental considerations and are mandatory for the OECD member countries, including the Sector Understanding on Export Credits for Renewable Energy, Climate Change Mitigation and Adaptation, and Water Projects (introduced in 2009) and the Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects introduced in 2015. If the first document is supportive in its nature, setting more favorable terms for projects listed in the title and acknowledging that those projects might need longer payback periods, the latter contains prohibitive clauses for the financing of certain types of power plants based on the technology utilized. It is designed to phase out official support to large power plants using coal as the main fuel and not meeting the best available technology requirements.

[49] OECD, *Arrangement of Officially Supported Export Credits* (2018), available at <http://www.oecd.org/officialdocuments/displaydocument/?doclanguage=en&cote=tad/pg(2018)1> (visited 28 March 2018).

Power plants with a total installed capacity of over 500 MW, using technologies other than ultra-supercritical and not equipped with operational carbon capture and storage or carbon capture and utilization technology, are no longer eligible for OECD official export support in any form, while smaller units with supercritical and subcritical conditions can only receive it when located in IDA[50]-eligible countries. The Understanding applies both to new projects and to existing facilities, which is meant to facilitate energy balance shift. Though the Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects was a huge step towards the phase-out of carbon-intensive energy generation globally, it is still relatively narrow and technology-based, not allowing to differentiate projects based on their impacts or environmental performance indicators such as, for example, the carbon intensity of the production process. Voices concerned about the scale of the actual environmental effects were arguing for impact-based solutions, such as placing bans or restrictions on thermal power plants with an emissions intensity exceeding a certain threshold. This would allow to address the climate change issue more broadly and, for example, cover low-efficiency power plants fueled by oil and other liquid fuel.[51]

The approach taken by the OECD to shift to less carbon intensive power production technologies is still significantly softer than the alternative of stopping all support for coal-fired power plants disregarding the technology used, which was proposed in NGO recommendations and which is implemented unilaterally in the Nordic countries and in the US[52] as well as by the World Bank Group which stopped financing of coal fired power plants (though in the latter case some exceptions were still foreseen).[53]

It is also interesting to note that the Sector Understanding on Export Credits for Renewable Energy, Climate Change Mitigation and Adaptation, and Water Projects, in its preamble, clearly states that the document is targeting projects with a significant potential contribution to the climate change mitigation objective, while the Sector Understanding on Export Credits for Coal-Fired Electricity Generation

[50] The International Development Association, part of the World Bank Group, aims its activities at the world's poorest countries. For details, see <http://ida.worldbank.org/>.

[51] 'Ending fossil fuel support: the way forward. NGO recommendations for OECD countries on their Export Credit Agencies', press release by a group of NGOs, May 2014, available at <bankwatch.org/sites/default/files/Briefing-OECD-ECAs-coal-27May2014.pdf> (visited 1 April 2018) and WWF, 'Debunking the myths of OECD export credits for coal', press release, October 2014, available at <d2ouvy59p0dg6k.cloudfront.net/downloads/wwf_debunking_the_myths_of_eca_support_for_coal_oct14.pdf> (visited 26 March 2018).

[52] The White House, 'Joint Statement by Kingdom of Denmark, Republic of Finland, Republic of Iceland, Kingdom of Norway, Kingdom of Sweden, and the United States of America', press release, 4 September 2013, available at <obamawhitehouse.archives.gov/the-press-office/2013/09/04/joint-statement-kingdom-denmark-republic-finland-republic-iceland-kingdo> (visited 23 March 2018).

[53] World Bank, *Toward a Sustainable Energy Future for All: Directions for the World Bank Group's Energy Sector* (2013), available at <documents.worldbank.org/curated/en/745601468160524040/Toward-a-sustainable-energy-future-for-all-directions-for-the-World-Bank-Group-8217-s-energy-sector> (visited 3 March 2018).

Projects has no reference to any ultimate objectives to be achieved by its implementation and does not mention any greenhouse gases (GHGs)-related measures, controls or specific monitoring arrangements. This design might be explained by intentional omission of any reference to carbon intensity to avoid comparison with other types of power plants – for instance, oil-fired – or to prevent establishing links to other international commitments, such as the Paris Agreement.[54]

Despite these discussions, the introduction of the Sector Understanding Export Credits for Coal-Fired Electricity Generation Projects has been among the major achievements in the further advancement of the OECD ECAs' sustainability policy development and an important phase in the elimination of carbon intensive energy generation practices at the global level. This Sector Understanding is also unique because it actually bans support to certain facility types, unlike other Understandings. Its design, however, indicates once again that ECAs are still rather reactive in their sustainability policies, with a lack of consensus on their implementation.

6 Recent developments

The Common Approaches is a living document which has undergone several modifications in the course of its implementation period. Those modifications reflect the state of the dialogue between the OECD, individual ECAs, their respective governments and other stakeholders, particularly the NGOs. This dialogue did not stop with the introduction of the Common Approaches but changed its intensity and focus from straightforward naming-and-shaming to a more focused monitoring of individual project cases and the identification of policy implementation gaps.

In 2016, the Common Approaches[55] underwent certain updates to address the latest trends and aspirations of the interested parties. One of the main innovations was the introduction of a new approach to the application scope. The previous 2012 version of the document stated clearly that the recommendations are to be applied by the member states (considering OECD members). The new version introduced the status of an 'Adherent' instead, defining those as 'Members and non-Members adhering to this Agreement'. It means that since 2016 the Common Approaches became open for non-member states to join, or adhere, though the process of 'adhesion' is not described. It is also not very clear if this change may open up the way for the member states to refrain from following the recommendations declaring termination of their adherence.

[54] Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 'Adoption of the Paris Agreement', UNFCCC Dec. 1/CP.21 (2015).

[55] OECD, 'Revised text for the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches"), Doc. TAD/ECG(2016)3, available at <http://www.oecd.org/officialdocuments/displaydocument/?cote=TAD/ECG%282016%293&doclanguage=en> (visited 3 April 2018).

Other updates to the Common Approaches reflect recent general developments and highlights in sustainability and responsible financing debates worldwide. Greater attention in the document is given to human rights issues, which now stand alone as a separate area for analysis and follow-up action. General mention of social impacts as part of the due diligence process in the preceding versions was subject to critique and seen as insufficient to duly ensure proper human rights consideration and protection. After introduction of this new clause export receivers shall specifically screen ECAs' supported projects for presence of human rights risks; and in case those are revealed – conduct the human rights due diligence for the purpose of disclosure and mitigation.

To summarize, the recent changes in the OECD sustainability considerations regarding official export support reflect, on the one hand, the highlights and priorities revealed by the ongoing global and sectoral debates on environmental and social concerns and, on the other hand, the aspiration of the OECD countries to spread their policies over a wider group of countries to both level the playing field in official export support provision and to promote enhanced policies and values beyond the group.

7 Ongoing debates

Those changes were to a large extent initiated by the ongoing dialogue with civil society, mostly represented by the NGOs, which continue monitoring ECA activities worldwide, engage in technical discussions and facilitate transparency and open talks on questionable issues and projects. One of the most recent NGO reports on ECA activities and analysis on the Common Approaches implementation was issued by the CEE BankWatch network in December 2017.[56] Among the main highlights of the report, as well as of earlier similar reports and studies,[57] is the still uneven implementation of the existing commitments, including continued lack of transparency and community engagement in the environmental and social assessment and monitoring processes. It is particularly focused on the relatively new OECD members from the Central and Eastern Europe to ensure even implementation of the social and environmental commitments among all OECD members.

Another gap still existing in the wording and the practice of the Common Approaches and environmental Sector Understandings implementation is their insufficient alignment with global environmental commitments. As was mentioned above, some elements of harmonization with existing norms are built into the Common

[56] Finance and Trade Watch, 'ECAs Go', *supra* note 5.

[57] For instance, Benjamin Görlach, Markus Knigge and Marcus Schaper, 'Transparency, Information Disclosure and Participation in Export Credit Agencies' Cover Decisions' in Sophie Thoyer and Benoit Martimort-Asso (eds), *Participation for Sustainability in Trade. Global Environmental Governance* (Ashgate, 2007) 241-258, and Rich, 'Coal, Climate and Public', *supra* note 11.

Approaches design from the outset. However, this mainly concerns other project assessment frameworks to avoid doubling of functions and excessive burdens on the ECAs clients. At the same time, they do not sufficiently account for such target-oriented commitments as the Paris Agreement. Numerous studies indicate that the Agreement goals cannot be achieved if new carbon intensive energy generation facilities are established, even if they employ advanced technologies.[58] Though the OECD export support policies include certain limitations and considerations on greenhouse gas emissions accounting and reduction, those measures are lacking specific targets and are seen as too soft to duly harness the future GHG emissions and associated climate effects.[59] This is particularly disturbing because the scale of ECA activities places them in the position to influence ongoing and future development of the world energy sector. Another, though vaguer, discrepancy between the strategic multilateral commitments of the states and the actual behavior of their ECAs was discovered in regard to the EU Treaty and its Article 21 stipulating the member countries' aim to eradicate poverty, help other countries to preserve and improve their environment and natural resources management and foster sustainable development. At the same time, most European ECAs still frame their missions around national export promotion and other purely economic objectives. Obviously, such approach does not also take due account of the Sustainable Development Goals.[60]

It is symptomatic that in the above-mentioned report, NGOs have changed the addressee of their concerns and recommendations. They are now addressing the EU and particularly the European Parliament with the recommendation to introduce legislation that would set requirements to the disclosure and reporting performed by ECAs on the high and medium environmental and social risk projects (categories A and B). This turn is arguably dictated by a certain skepticism on the effectiveness of voluntary commitments and the perception that only clear binding obligations and strong enforcement are able to bring further improvements at this stage.

8 The role of OECD in transnational sustainability and trade governance

This section is dedicated to the questions: why exactly the OECD became subject to NGO appellations on the lack of sustainability considerations in official export support activities and, consequently, the starting point for 'greening' the ECAs? And what is its role and potential in setting the trade and environment agenda on regional and global scales?

As Mahon and McBride[61] notice, states are still the main policy-makers in most ar-

[58] 'Ending fossil fuel', *supra* note 33, and WWF, 'Debunking the myths', *supra* note 49.
[59] Finance and Trade Watch, *'ECAs Go', supra* note 5.
[60] *Ibid.*
[61] Rianne Mahon and Stephen McBride, *The OECD and Transnational Governance* (UBC Press, 2008).

eas, including the international trade regime. However, they function and make decisions in the context of the increasing influence of regional and global institutions. In order to better position themselves in this changing world, and to have a more stable standing in international trade-related negotiations, countries tend to create blocks and alliances mainly based on territorial proximity, common interests and the intensity of trade flows forming the supranational level of governance. Though the OECD can be regarded as a representative of this intermediate level (situated between the national and the global ones in the system of multi-level governance), it features one significant difference from the regional or macroregional[62] regimes. Unlike NAFTA, ASEAN, Mercosur etc., the main common basis, bringing together the OECD countries is not territory, but the level of development and, to a large extent, common values with the common interests in international trade to follow.

Though ironically addressed sometimes as a 'rich men's club',[63] the OECD mission and objectives go beyond the utilitarian. It increasingly positions itself as a think tank active in different areas of transnational governance – particularly related to various economic issues which are at the core of the organization's operations. There is also a clear tendency to broaden the scope of its interests and influence to a number of related areas as well as non-member countries to establish common understanding of the appropriate and desirable behavior in relevant spheres of economic activity.[64] Per se, the OECD has relatively low power to enforce its requirements and standards, especially beyond the borders of its immediate member countries, but it gradually gains cognitive power as a center for policy dissemination, gaining legitimacy through efforts for relevant data collection and analysis and systematic experience accumulation. Already in 2008, Mahon and McBride[65] summarized these functions, calling the OECD the 'purveyor of ideas', particularly the high-level ideas of how the modern state should function, highlighting the overall role of transnational ideas transfer in the global order transformation.

Obviously, sustainable development, as one of the major paradigms of the modern world, could not stay outside of the OECD's attention. It is not surprising that the pioneering and leading role in the development, implementation and dissemination of the best practices, allowing the connection of ECA core activities with the potential impact of the trade flows thus supported, was first taken by the OECD. What is interesting and important though, is that the impact of the Common Approaches implementation stretches beyond the immediate trade flows originating from the OECD countries.

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62 For instance, as defined in John H. Dunning, *Regions, Globalization, and the Knowledge-based Economy* (Oxford University Press, 2002) 41.

63 James Salzman and Julio Bacio Terracino, 'Labor Rights, Globalization and Institutions: The Role and Influence of the Organisation for Economic Cooperation and Development' in Virginia A. Leary and Daniel Warner (eds), *Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers, 2006).

64 Porter, 'The OECD and', *supra* note 2.

65 Mahon and McBride, *The OECD and, supra* note 61.

There are several mechanisms facilitating spread of the Common Approaches influence in the non-member countries. The first mechanism has a mixed operational-cognitive nature and works in large projects which often require joint support from more than one ECA. Presence of at least one OECD ECA automatically means applicability of the Common Approaches which to a large extent influences the structure of actors involved, the approval process as well as technical parameters of the project. Such setting requires extensive cooperation, procedures alignment and a deep understanding of the partner ECA's approaches and requirements. This does not automatically mean that the non-member countries' ECAs participating in joint projects with the OECD export credit agencies are keen on committing to the same standards, but raises the overall awareness of the OECD approaches to responsible financing.

Another widely used mechanism for policy dissemination is situated at the policy level. To achieve wider understanding and as an ultimate objective – a future consensus on responsible export operations support – the OECD systematically invites the major external players, such as Brazil, South Africa, China, India and Indonesia for participation in a dialogue on the Common Approaches maintained by practitioners.[66] Russia also joins this process from time to time. In 2016, Common Approaches, as was mentioned before, became officially open to non-members through a change of the terminology used and by an introduction of the 'Adherents' category instead of 'Members' throughout the document. The main challenge for successful implementation of this approach may be, however, rooted in the restricted leverage of the non-member adherents in the decision-making process, which still rests with such OECD internal structures as the ECG. The fact that adherents have access to consultations on the implementation of the Common Approaches and possible upgrades, but have very limited options to influence the final decisions, can be regarded as a significant barrier for official commitments.

As Wright[67] notices, the role of informal professional networks and forums is important in the process of policy transfer within the OECD, especially in highly technical areas of policy formulation and implementation. Currently, the emergence of similar channels can be also observed at the supranational level, connecting the OECD and similar associations of countries. For example, another rapidly developing center of policy coordination and idea generation is emerging in the framework of the BRICS cooperation[68]. Similar to the OECD, it brings together the like-minded countries connected by the common vision and development stage and situated though on different continents. Further similarities regard the role of the bloc in the international arena, including international trade. This role is grounded on an already significant and growing share in international goods and capital flows; for

[66] Wright, 'Export Credit Agencies', *supra* note 4, at 139.
[67] *Ibid.*
[68] BRICS is an informal group of the five states (including Brazil, Russia, India, China and South Africa) with the largest emerging economies. For further details, see <http://infobrics.org>.

instance, China alone has turned into the largest source of financing for infrastructure developments in Africa already a decade ago.[69] Therefore, involvement of the BRICS countries into the global raise of sustainable financing is particularly important, considering, besides the abovementioned, that the institution is still relatively young with many policies in the process of construction or testing, which provides a good opportunity for their 'greening' at the setup.

The 2015 Joint Statement of BRICS environment ministers clearly indicates the readiness of these countries to join the sustainable financing community through the introduction of environmental considerations into the procedures of the newly established BRICS Development Bank.[70] Though it is likely to be a separate independent standard, it can be hypothesized that it will to a significant extent consider the knowledge and experience obtained from the process of practical and cognitive interaction with existing regimes (mainly the OECD-led) in order to balance the newly established requirements with those of similar institutions. For example, the Russian export credit agency (The Russian Export Center) on its official webpage confirms that the Common Approaches as well as the OECD anti-bribery procedures are used as guiding documents in its routine activities.[71]

9 Conclusion

Being a large and diverse group of financial institutions, ECAs collectively play a very important role in international trade, providing, in total, more support than multilateral development banks. Though their activities in different countries follow the same logic, ECAs are subject to their respective jurisdictions, which causes significant challenges to attempts to introduce aligned sustainability policies. The most coordinated and advanced group of ECAs is represented by the OECD member agencies sharing the same values (including human rights, transparency, equality and sustainability) and having the OECD Export Credit Group as a coordinating body. Presence of such a group allowed to establish a meaningful dialogue with civil society, institutionalized through the NGO movement in the late 1990s and, as a result, to introduce a consensus-based standard for environmental and social assessment and management of potentially harmful projects, known as the Common Approaches.

The two main driving forces behind the emergence of this set of recommendations are, on the one hand, the global paradigm shift towards sustainable development as

[69] Peter Bosshard, *China's Role in Financing African Infrastructure* (International Rivers Network, 2007), available at <https://www.internationalrivers.org/sites/default/files/attached-files/chinaeximbankafrica.pdf> (visited 16 January 2018).

[70] 'Statement: First Official Meeting of BRICS Environment Ministers', 22 April 2015, available at <http://www.brics.utoronto.ca/docs/150422-environment.html> (visited 7 April 2018).

[71] The Russian Export Center (REC), 'International Practices and Standards', available at <https://www.exportcenter.ru/en/company/standards/> (visited 8 April 2018).

an overarching idea and ultimate goal, and, on the other hand, the active position of civil society. As can be seen from the mere wording of the Common Approaches, civil society concerns shaped the form and spirit of the final document to a large extent. Even the collocation 'the common approaches', which became an operational name for the document, appears in the above mentioned Jakarta Declaration twice. The calls to align the new policy for ECAs with the existing sustainability standards, create a mechanism for multi-level review and consultation[72] and introduce environmental screening and assessment procedures,[73] are also clearly reflected in the document from the outset.

With the introduction of the Common Approaches, the OECD countries started transferring good policy practices in social and environmental responsibility, together with technology transfer, to developing countries in a systematic and transparent manner. The IFC project standards are chosen as reference standards. They represent a set of environmental project management standards of universal nature, applicable to different project types within various contexts. Due to both the increased level of communication and the willingness to coordinate and align policies, countries and their associations engage in the cognitive process[74] of policy learning, including integration of sustainability considerations into official export support procedures which are a significant part of the overall international trade process. The OECD here acts as a generator, facilitator and disseminator of relevant ideas and practices, pursuing both the pragmatic objective of creating a level playing field in international trade, and the mission of spreading the common values of responsibility and sustainability across non-member countries. With the implementation of the Common Approaches, most projects involving goods and capital transfer from developed to developing countries (supported by the OECD ECAs, the World Bank Group, EBRD and other multilateral development banks as well as the Equator Principles Financial Institutions) are subject to the same (or similar) environmental and social standards in terms of both technical parameters and the environmental and social risk management procedures.

As can be seen from the recent changes in the Common Approaches, the community of developed countries views the enhancement of human rights, animal rights and climate change as areas that have not received enough attention in the previous versions of the Common Approaches and therefore require deeper understanding and incorporation in the trade support procedures. This tendency is very much in line with the global trends in sustainability research and action and indicates that the voices of civil society and the international community are well heard and accounted for in the described area of decision-making.

The active dialogue with civil society continues. However, at the present stage it is

[72] In line with the Jakarta Declaration, *supra* note 35.
[73] In line with WEED, 'Call of National', *supra* note 25.
[74] Oberthür and Gehring, *Institutional Interaction, supra* note 41.

rather focused on highlighting the existing implementation gaps, such as lack of transparency on certain questionable projects and uneven implementation by different OECD members. The new Sector Understanding on coal fired power plants, though regarded as a large step forward to reduce global GHG emissions, only partially address the long-lasting dialogue with NGOs on the role ECAs play in global energy sector performance and the need to eliminate the most carbon-intensive parts thereof. Further, the measures taken within the OECD still do not reflect civil society concerns enunciated by the international NGO community on other socially questionable areas such as weapons export support, which were excluded from the operations of such institutions as the World Bank and EBRD but are still eligible for official support from ECAs.

One of the most remarkable tendencies in the implementation of environmental and social standards, including the Common Approaches by the OECD countries in recent years, was the increased openness and active involvement of non-member countries. Already in the 2007 version of the document, the objective to share experience and communicate the benefits of the Common Approaches implementation was explicitly stated.[75] In 2016, the Common Approaches were officially opened to the participation of non-OECD countries. This tendency indicates not only the overall aspiration of the OECD to serve as a global think tank and the best practice resource, but also the level of maturity of the policy in question itself, allowing it not only to be consistently implemented within its current scope but also to be transferred to the new adherents.

Policy transfer happens at various levels, including the level of informal individual expert networks, organization-to-organization learning in the case of joint projects, at international forums, such as the OECD, and the supranational level between the macro-regional and economic blocks. In recent years, the BRICS countries have shown persistent interest to the rules of sustainable financing. Introduction of the environmental and social standards by those countries for their official export support can become the critical game changer in the trade and environment debate of the early 21st century.

[75] OECD, 'Revised Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits', Doc. TAD/ECG(2007)9, available at <http://www.oecd.org/officialdocuments/displaydocument/?cote=TAD/ECG%282016%293&doclanguage=en> (visited 5 April 2018).

Third World Approaches to International Law: Opportunities for a Shift in Perspective on the Global South Approaches to Multilateral Trade Agreements and Multilateral Environmental Agreements

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1 Background

The purpose of this paper is to argue trade and environment matters, from a Third World perspective on approaches to international law. The aim of the paper is to create justification for an integrated approach to issues to issues developing countries have to address, specifically in the global south, when dealing with questions related to trade and environment.

This paper will hence examine the attitude of the global south in dealing with the conflictive nature of trade and environment concens. To achieve this, it begins by focusing on the general framework, elements and interlinkages between international trade law and environmental law, including historical developments. It then goes on to interrogate the notion of supremacy between trade law and environmental law, before examining the various principles of international law and development, and

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further analyzing trade related measures under multilateral environmental agreements (MEAs). All through, this paper will serve as an assessment, from a global south perspective, of the trade and environment concerns of the global south countries, potential opportunities for future development and possible consequences emanating from legal and policy developments. In a nutshell, this paper will be premised on the arguement that while trade and environment issues continue to collide from time to time, the world cannot afford to treat them as separate anymore. Further, that trade has been happening and will continue to be transacted within the environment, thus the need to define the nexus and strike an appropriate balance between these two subjects.[3] Building on this premise, the paper is deliberately pointed towards the conclusion that there is no major deterrence for global south countries to design and embrace their own perspectives, including integrated approaches towards dealing with their trade and environment apprehensions.

Recent decades have witnessed fundamental changes in the global economic structures, with underlying factors such as poverty, inequalities and exclusion continuing to perpetuate gross imbalances. There have also emerged enormous negative changes in the global environment which have become a major threat to human development and health.[4] From the Uruguay Round of Multilateral Trade Negotiations (1986-1994) to the 1972 United Nations (UN) Conference on the Human Environment (UNCHE), and from the 1992 UN Conference on Environment and Development (UNCED)[5] to the 2015 UN Sustainable Development Summit,[6] it is well documented that while the links between trade and environment are still multifaceted,[7] they are fundamentally more related than they are isolated.[8] Franz Xaver Perrez has agreeably argued that 'the states, when developing the trade and environment regimes, did not want to create conflicting, but mutually supportive rules

[3] United Nations Environment Programme (UNEP) and International Institute for Sustainable Development (IISD), *Environment and Trade: A Handbook* (2nd ed., 2005) 2.

[4] *Ibid.* at 1.

[5] The UNCED adopted major agreements and declarations aimed at enhancing the relationship between environment and human development. They include Agenda 21 on various developmental and environmental objectives (Agenda 21, UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992), available at <https://sustainabledevelopment.un.org/outcomedocuments/agenda21/>); The Rio Declaration on Environment and Development (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876); the Statement of Forest Principles (Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. III)); and the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>); and the United Nations Framework Convention on Climate Change (New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>).

[6] The United Nations summit for the adoption of the post-2015 Sustainable Development agenda, 25 – 27 September 2015, New York.

[7] Adil Najam, 'Trade and Environment After Seattle: A Negotiation Agenda for the South', 9(4) *Journal of Environment & Development* (2000) 405-425 at 405.

[8] UNEP and IISD, *Environment and Trade, supra* note 3, at 2.

that complement each other'.[9] Sooner or later, the world must seek to reconcile the intersections between trade and environment and strengthen linkages and synergies between the two subjects, and ultimately accelerate delivery of the related limbs of the 2030 Agenda and the sustainable development goals (SDGs).[10]

On one hand, conflicts between trade and environment are still raging, and debates on the relations and nexus between the two continue to grow intensely.[11] In this regard, the global south can no longer afford to sit out of the discussions especially because the world has constantly shown a disposition to finding ways of balancing trade and environment interests. For instance, MEAs and other environmental governance bodies are now grappling with trade issues touching on their objectives. Multilateral trade agreements and trade-controlling bodies are recognizing MEA trade measures and shifting focus to integrating environmental issues related to trade into their agenda.

On the other hand, environmental challenges related to trade are continually emerging, and opportunities related to the trade and environment are dramatically shifting based on trends in trade and environment litigation and dispute resolution; strategic interests and divides in the politics of developed and developing countries; and in sociopolitical and socioeconomic dynamics within and between the global and regional political alliances.[12] This is giving rise to a set of arguments on the impact of trade on the environment and the need to regulate trade. M.B.K. Darkoh, for instance, observes that 'the issue of trade and development is of special concern today because it has direct implications on the rate of development and state of environment within countries and region'.[13] Francesco Sindico adds that

> trade may continue to affect the environment in two ways. On the one hand, specific substances may be very dangerous for the environment (such as hazardous wastes, chemicals, pesticides, etc.), in which case international trade of such products must be strictly regulated. On the other hand, the environment can also be damaged if international trade of specific non-renewable natural resources (such as

[9] Franz Xaver Perrez, 'The Mutual Supportiveness of Trade and Environment', 100 *Proceedings of the Annual Meeting* (American Society of International Law) (2006) 26-29 at 27.

[10] 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015.

[11] Robert Falkner and Nico Jaspers, 'Environmental Protection, International Trade and the WTO' in Ken Heydon and Steven Woolcock (eds), *The Ashgate Research Companion to International Trade Policy* (Ashgate, 2012) at 245-260, available at <http://static1.squarespace.com/static/538a0f32e4b0e9ab915750a1/t/538db556e4b038f0a6eff7c4/1401795926548/Falkner_Jaspers_2012_Environment_Trade_WTO_final_ms.pdf> (visited 13 August 2018).

[12] Mark Wu and James Salzman, 'The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy', 108 *North-Western University Law Review* (2014) 401-474, available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=nulr> (visited 13 August 2018) at 401.

[13] Michael Bernard Kwesi Darkoh, 'Trade, Environment and Sustainable Development', 26 *Journal of Eastern African Research & Development* (1996) 115-140 at 115.

> particular animal species, biodiversity elements, etc...) is not regulated.[14]

Mark Wu and James Salzman, on the other hand, have added that the geopolitical dynamics of trade and environment conflicts are becoming more complex, with developed and developing countries embracing different approaches or similar policies that run up against and, in some cases, evidently conflict with trade and environmental issues within the North–South divide.[15] Mehmet Arda concludes that

> way forward might be to find ways to facilitate solutions to those environmental problems that are seen as a priority by developing countries[16].….For a more constructive treatment of environmental concerns in trade negotiations, it seems important to give priority to the environmental concerns of developing countries, allow them to take the initiative by expanding their appreciation of the stakes involved, and offering them positive trade-related incentives.[17]

A prominent question therefore emerges: how can the global south profit from trade while at the same time minimizing its side effects and tackling the crippling trade-related environmental problems?

Many global south countries have significant concerns, interests and opportunities in the nature and scope of the rules governing trade and environment. Adil Najam has, for example, pointed out that 'developing countries have legitimate and significant apprehensions towards the general directions of global debates on trade and environment'.[18] Understandably, the world has, since the end of World War II, unlocked enormous economic development opportunities. Much of the credit in this regard goes to developments in international multilateralism, globalization, regionalism, nationalism and politics. It can, however, not be ignored that most of the global economic opportunities came with a myriad of environmental problems that the international community, decades later, is still struggling to comprehend with. While trade continues to serve its purpose in global development and human well-being, evidence indicates that unprecedented environmental problems – such as climate change, ozone depletion, hazardous wastes/chemicals, and biodiversity loss and degradation – have strong linkages to trade.[19] Developing countries, particularly

[14] Francesco Sindico, 'Unravelling the Trade and Environment Debate through Sustainable Development Law', ESIL Inaugural Conference Agora Paper (2005), available at <http://www.esil-sedi.eu/sites/default/files/Sindico_0.PDF> (visited 13 August 2018).

[15] Wu and Salzman, 'The Next Generation', *supra* note 12, at 404-405.

[16] Mehmet Arda, 'Being the environmental stick' – an improper role for international trade', 5(4) Environment and Development Economics (2000) 497-500 at 498.

[17] *Ibid.* at 500.

[18] Najam, 'Trade and Environment', *supra* note 7, at 405.

[19] Jonathan M. Harris, 'Trade and the Environment', Global Development And Environment Institute Teaching Module on Social and Environmental Issues in Economics (2004), available at <http://www.ase.tufts.edu/gdae/education_materials/modules/Trade_and_the_Environment.pdf> (visited 13 Augsut 2018) at 1, 2 and 16.

those in the global south, are most impacted by the said environmental problems.[20] The impact is further worsened by disconnects between the articulated economic objectives of the global south countries and the ever scorching environmental objectives. There is a need for these countries, in pursuit of their development interests, to set and bear in mind their environmental priorities and the need to defend and improve their environment for the benefit of present and future generations.[21]

As an insight into the perspectives and concerns of the global south countries about their trade needs and environmental concerns, any apprehensions they hold could be instructive for this paper, taking into consideration the unique trade and environmental needs and circumstances of developing countries. Studies have shown that there exist strong interlinkages between trade and the need for environmental conservation.[22] If properly enhanced, the interlinkages can be a starting point towards the realization of environmental sustainability and strong international trade processes. Trade policies and regulations can be tools for delivering a healthy and sustainable environment for developing countries in the global south. The countries should already begin taking into consideration the uniqueness of their environment and environmental needs when articulating their agenda for internal, bilateral and multilateral trade pacts, policies and regulations. In fact, given the global proliferation of environmental agreements and treaties on one hand, and multilateral and bilateral trade regimes, on the other hand, there exist strong platforms for developing countries to proactively negotiate for comprehensive and mutually supportive inter-agency and multi-disciplinary trade and environment processes, specifically within the three dimensions of sustainable development; economic, social and environmental.

2 The framework of international trade and environmental law

This part of the paper examines the development of the frameworks and elements of international trade law and international environmental law and the linkages and differences between the two bodies of international law.

[20] Report of the United Nations Conference on Human Environment, Stockholm, 5-16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1972), Annex II: Report of the Working Group on the Declaration on the Human Environment, available at <http://www.un-documents.net/aconf48-14r1.pdf> (visited 13 August 2018) at 70.

[21] *Ibid.*

[22] Harris, *supra* note 19 at 1, 2 and 16; UNEP and IISD, *Environment and Trade, supra* note 3 at 1; Konrad von Moltke, 'Trade and the environment. The linkages and the politics', a Paper for the Roundtable on Canberra, 25 August 1999, available at <https://www.iisd.org/pdf/canberra.pdf> (visited 30 August 2018); WTO, 'Trade and Environment at the WTO' (2004), available at <https://www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf> (visited 28 August 2018); Arun Jacob, Trade and Environment (United Nations Economic and Social Commission for Asia and the Pacific, n.d.), available at <https://www.unescap.org/sites/default/files/2.%20Trade%20and%20Evironment_Arun.pdf> (visited 28 August 2018).

International trade law is a set of rules and customs governing trade between countries.[23] International Environmental Law is the body of law that contains elements to control the impact of human activities on the Earth and on human health.[24] They are both distinct subsets of international law, as defined by the UN as the body of laws – conventions, treaties, standards and customs – defining legal responsibilities of states in their conduct with each other, and their treatment of individuals within state boundaries,[25] with the aim of promoting economic and social development, as well as to advancing international peace and security.[26]

The core legal body of the UN system in the field of international trade law is the UN Commission on International Trade Law.[27] Trade law, including case law, has further been immensely and systematically embodied and developed by the World Trade Organization (WTO), its Dispute Settlement Body (DSB), panels and the Appellate Body and the related regional and multilateral trade agreements.[28]

The United Nations Environment Programme (UN Environment) is the leading environmental authority in the UN system mandated to set the global environmental agenda, promote the coherent implementation of the environmental dimension of sustainable development, and serve as an authoritative advocate for the global environment by leading the international community in the progressive development of environmental law.[29] The role of UN Environment in the field of environmental law is further strengthened and complemented by the existence of numerous multilateral and bilateral environmental governance processes at the global and regional levels through which a diverse range of environmental problems are negotiated and potential legal, political and economic remedies adopted.

[23] Georgetown Law, 'International Trade Law', available at <https://www.law.georgetown.edu/your-life-career/career-exploration-professional-development/for-jd-students/explore-legal-careers/practice-areas/international-trade-law/> (visited 13 September 2018).

[24] Nicholas A. Robinson, *Training Manual on International Environmental Law* (Pace University School of Law, 2006), available at <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1789&context=lawfaculty> (visited 13 August 2018) at 15.

[25] United Nations, 'Uphold International Law', available at <http://www.un.org/en/sections/what-we-do/uphold-international-law/> (visited 13 August 2018).

[26] Charter of the United Nations, 24 October 1945, available at <http://www.un.org/en/documents/charter/index.shtml>, Article 1.

[27] The United Nations Commission on International Trade Law (UNCITRAL), see <http://www.uncitral.org/uncitral/en/about_us.html> (visited 13 August 2018).

[28] Chad P. Brown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press, 2009), available at <https://www.brookings.edu/wp-content/uploads/2016/07/selfenforcingtrade_chapter.pdf> (visited 13 August 2018) at 16.

[29] UN Environment, see <https://www.unenvironment.org/about-un-environment>.

3 Development of international trade law and environmental law

Soon after World War II, the General Agreement on Tariffs and Trade (GATT)[30] was negotiated, under the Bretton Woods System, as part of the Havana Charter for an International Trade Organization[31] to ensure stable trade and international economic cooperation.[32] The aim of the GATT and the Havana Charter in general was to increase opportunities for trade and economic development, enable countries abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress, and promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce.[33] The Havana Charter, as formulated, never came into force but the GATT remained provisionally in force without any legal backing, subsequently contributing to the progressive development of international trade law.[34]

Other scholars have argued that the development of the GATT was highly motivated by the desire to move away from the nationalistic economic protectionism that was dominant after the World War II era; that the GATT was hence very keen on minimizing barriers by leaning towards trade liberization; that although GATT succeeded in converting trade barriers to tariffs and then eventually reducing them significantly, it blatantly neglected sustainable economic growth and environmental implications of trade by despising them as 'unacceptable non trade barriers'.[35] While such ignored approach may be motivated by the desire to promote trade liberalization, the flip side of the argument suggests that the complex relationship between trade and environment then was not evident and neither trade nor international trade law regimes were mature enough to make the problematic relationship and conflicts inescapable.[36] The first recognition of such a relationship was then first perceived by the Group on Environmental Measures and International Trade (EMIT) formed in 1971 under GATT.[37] Even though participation was open to all, EMIT

[30] General Agreement on Tariffs and Trade, Geneva, 30 =ct0ber 1947, in force 1 January 1948, available at <https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> (visited 23 August 2018).

[31] Havana Charter for an International Trade Organization, Havana, 24 March 1948, not in force, available at <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf> (visited 23 August 2018).

[32] WTO, 'The GATT years: from Havana to Marrakesh', available at <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm>.

[33] Article 1(4) of the Final Act of the United Nations Conference on Trade and Employment and the Havana Charter for an International Trade Organization (Lake Success, New York, 1948), available at <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf> (visited 13 August 2018).

[34] WTO, 'GATT 1947 and GATT 1994: what's the difference?', available at <https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm> (visited 13 August 2018).

[35] Alan Oxley, 'The Achievements of the GATT Uruguay Round' 1(1) *Journal of Policy Analysis and Reform* (1994) 45-53 at 45-47.

[36] Oran Young, *Global Governance: Drawing Insights from the Environmental Experience* (Cambridge: MIT Press 1997) 250-251

[37] GATT, 'Report by Ambassador H.Ukawa (Japan), Chairman of the Group Environmental Measures and International Trade, to the 49th session of the Contracting Parties', GATT Doc. L/7402 (1994).

could only convene at the request of the Contracting Parties and it was not before 1991 that it was first convened.[38]

Following several rounds of multilateral trade negotiations, specifically the Uruguay Round of negotiations, the General Agreement on Tariffs and Trade of 1994 was adopted as one of the Annex I Multilateral Agreements on Trade, within the Marrakesh Agreement establishing the World Trade Organization.[39] Numerous bilateral, regional and multilateral agreements on trade in goods have been further developed as legal frameworks and institutions governing trade, with the WTO as the main global institution on trade.[40]

In contrast, the history of environmental law and other rules on protection of the environment has its roots stretching back to 1902 when the Convention for the Protection of Birds Useful to Agriculture was adopted.[41] Several other multilateral environmental conventions were negotiated, in the years building up to 1972, in relation to protection of useful species of fauna and flora, including by calling for national quotas and regulating their trade.[42] Further developments in environmental law were evidenced in the Trail Smelter Case (United States v. Canada)[43] – focusing

[38] Duncan French, *International Law and Policy of Sustainable Development* (Manchester University Press, 2005) 203.

[39] The General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <http://www.wto.org>.

[40] Perrez, *'The Mutual Supportiveness of, supra* note 9, at 26. See also UNEP and IISD, Environment and Trade, *supra* note 3, at 1-3.

[41] Convention to Protect Birds Useful to Agriculture, Paris, 19 March 1902, into force 6 December 1905, available at <http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE-000067.txt> (visited 13 August 2018).

[42] Convention between Great Britain, Japan, Russia and the United States Respecting for the Preservation and Protection of Fur Seals in the North Pacific Ocean, Washington, D.C., 7 July 1911, 214 *Consolidated Treaty Series* 80; Convention Relative to the Preservation of Fauna and Flora in Their Natural State, London, 8 November 1933, into force 14 January 1936, available at <http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-000069.txt> (visited 13 August 2018); Agreement for the Establishment of General Fisheries Council for the Mediterranean, Rome, 24 September 1949, in force 20 February 1959, available at <http://sedac.ciesin.columbia.edu/entri/texts/fisheries.council.mediterranean.1949.html> (visited 13 August 2018); International Convention for the Protection of Birds, Paris, 18 October 1950, into force 17 January 1963, 638 *United Nations Treaty Series* 185; Agreement Concerning Co-Operation in the Quarantine of Plants and Their Protection Against Pests and Diseases, Sofia, 14 December 1959, into force 19 October 1960, available at <https://iea.uoregon.edu/treaty-text/1959-plantquarantineentxt> (visited 13 August 2018); Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Washington D.C., 12 October 1940, into force 1 May 1942, available at <http://www.oas.org/juridico/english/treaties/c-8.html> (visited 13 August 2018); International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72; Antarctic Treaty, Washington, 1 December 1959, in force 23 June 1961, 19 *International Legal Materials* (1980) 860.

[43] Trail Smelter Case (United States v. Canada), Ad Hoc International Arbitral Tribunal, 11 March 1941, 3 *United Nations Reports of International Arbitral Awards* (1949) 1938. See also Edith Brown Weiss, 'The Evolution of International Environmental Law', 54 *Japanese Yearbook of International Law* (2011) 1-27, available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2684&context=-facpub> (visited 13 August 2018) at 4.

on transboundary harm – and the Lake Lanoux Case (France v. Spain)[44] – focusing on prior informed consent and negotiations. Likewise, the adoption of national environmental legislation in the United States of America and other countries across the globe were also witnessed within the said period. However, the pillars for modern international environmental law were convoked at the 1972 UNCHE (Stockholm Conference) when countries came together to identify ways of preserving the human environment by addressing persistent environmental problems.[45] The Stockholm Conference culminated into the establishment of the UN Environment Programme as the leading global environmental authority; the adoption of the Declaration of the United Nations on the Human Environment;[46] and 26 common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.[47]

Since Stockholm, countries have rapidly re-joined hands in tackling the emerging environmental challenges, and, as a result, a significant portion of international environmental law has chiefly developed in the form of multilateral environmental agreements (MEAs).[48] MEAs are critical components of the overall framework of international environmental laws and conventions. They complement national environmental legal and governance regimes, and serve as overarching catalysts for global efforts to address particular environmental issues through multilateral processes.[49] MEAs are also refered to 'as "soft laws" to indicate the nature of the instruments and compliance issues related to them'.[50] To date, a range of MEAs have been adopted to address a wide range of transboundary environmental issues such as international movement of and trade in endangered species,[51] loss of biological diversity,[52] deser-

[44] Lake Lanoux Case (France v. Spain), Ad Hoc International Arbitral Tribunal, 16 November 1957, 12 *United Nations Reports of International Arbitral Awards* (1963) 281. See also Edith Brown Weiss, 'The Evolution of', *supra* note 43, at 4.

[45] *Ibid.*

[46] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416. See also Report of the United Nations Conference on Human Environment.

[47] Declaration of the UNCHE.

[48] Elizabeth Maruma Mrema and Tomkeen Onyambu Mobegi, 'Comparative Review of Compliance Regimes in Multilateral Environmental Agreements' in Melissa Lewis, Tuula Honkonen and Seita Romppanen (eds), 2016 'International Environmental Law-making and Diplomacy Review' (University of Eastern Finland, 2017) 57-117 at 57-58.

[49] Balakrishna Pisupati, 'Role of Multilateral Environmental Agreements (MEAs) in achieving the Sustainable Development Goals (SDGs)' (UNEP, 2016), available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/9966/role-mea-synergies-sdgs.pdf?sequence=1&isAllowed=y> (visited 13 August 2018) at 5.

[50] *Ibid* at 5.

[51] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[52] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org> ; Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027, <http://www.cbd.int/biosafety>; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force 16 October 2014, <http://www.cbd.int/abs/>.

tification,[53] the negative effects of hazardous chemicals and waste,[54] deterioration of the ozone layer and of atmospheric quality,[55] as well as marine environmental quality,[56] and climate change.[57] UN Environment is credited for taking the lead in the negotiation and adoption of most of the MEAs. UN Environment also provides secretariat support and services to some of the MEAs; and/ or considers as priority the objectives of the agreements thus contributing to and promoting tangible and sustainable trade and environment-related activities as well as projects for their successful and effective implementation.[58]

[53] UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>.

[54] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>; Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>; Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://chm.pops.int>; Minamata Convention on Mercury, Geneva, 19 January 2013, in force 16 August 2017, <http://www.mercuryconvention.org/>; The Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Bamako, 30 January 1991, in force 22 April 1998, 30 *International Legal Materials* (1991) 773.

[55] Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1985) 1529; Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <http://ozone.unep.org/>.

[56] Regional Seas Convention and associated Protocols: Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985, in force 30 May 1996, <http://www.unep.org/nairobiconvention/about-us/structure/protocols>; Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena, 24 March 1983, in force 11 October 1986, 22 *International Legal Materials* (1983) 227, <http://www.cep.unep.org/cartagena-convention/text-of-the-cartagena-convention>; Convention for the Protection of the Mediterranean Sea against Pollution, Barcelona, 16 February 1976, in force 12 February 1978, 15 *International Legal Materials* (1976) 290, amended to be the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995, in force 9 July 2007, <http://web.unep.org/unepmap/> (all visited 13 August 2018) and its seven Protocols; Framework Convention for the Protection of the Marine Environment of the Caspian Sea, Tehran, 4 November 2003, in force 12 August 2006, 44 *International Legal Materials* (2005) 1; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 23 March 1981, in force 5 August 1984, 20 *International Legal Materials* (1981) 746.

[57] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22.; Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 'Adoption of the Paris Agreement', UNFCCC Dec. 1/CP.21 (2015).

[58] Mrema and Mobegi, 'Comparative Review of', *supra* note 48, at 60.

4 The notion of trade law primacy over environmental law

How have trade issues related to environmental issues? Is one of these dimensions of international law supreme over the other?

The Stockholm Conference is hailed as the pillar of modern global environmental protection and governance processes. The Report of the Stockholm Conference outlines in Chapter II an 'Action Plan for the Human Environment' together with 109 recommendations for global environmental action. From the proceedings of the Stockholm Conference, trade and environment emerged as competing concerns given the numerous apprehensions, equally underlined by both developed and developing countries.[59] It is advanced that the Conference offered participating countries little to zero economic incentives to help them undertake to establish and support a balanced and mutually beneficial focus on environmental protection from an economic development perspective.[60] This was probably the beginning of what would become a battle for primacy between trade systems and environmental protection measures.

Recommendation 103 of the Stockholm Conference recommended that governments take the necessary steps to ensure:

a) That all States participating in the Conference agree not to invoke environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets and recognize further that the burdens of the environmental policies of the industrialized countries should not be transferred, either directly or indirectly, to the developing countries. As a general rule, no country should solve or disregard its environmental problems at the expense of other countries;

b) That where environmental concerns lead to restrictions on trade, or to stricter environmental standards with negative effects on exports, particularly from developing countries, appropriate measures for compensation should be worked out within the framework of existing contractual and institutional arrangements and any new such arrangements that can be worked out in the future;

c) That all countries agree that uniform environmental standards should not be expected to be applied universally by all countries with respect to given industrial processes or products except in those cases where environmental disruption may constitute a concern to other countries.

[59] Shawkat Alam, 'The United Nations' Approach to Trade, The Environment and Sustainable Development', 12 ILSA Journal of International & Comparative Law (2006) 607-639, available at <https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1535&context=ilsajournal> (visited 13 August 2018) at 610.

[60] Edith Brown Weiss, 'The Evolution of', *supra* note 43, at 4.

It is conventional that respect for freedom of choice and sovereignty remained of high value at the Stockholm Conference. However, it cannot be conflicted that the Conference largely focused on dealing with environmental degradation without giving a deeper focus to reconciling the concerns of developed and developing countries about the impact of the same on their economic aspirations.[61] This, therefore, opened flood-gates for reservations on the agreed outcomes, and problem of non-compliance with the global environmental commitments.[62] This paper maintains that reservations on trade issues related to the environment and environment issues related to trade are not a new subject to the trade and environment debate in the face of national sovereignty. The same goes for the various aspects of non-compliance with the set environmental objectives. The paper does not, however, fail to see and appreciate the need for respect for sovereignty in the pursuit of global sustainability, and the need to convince rather than coerce when it comes to dealing with international law. It is specifically established in Principle 21 of the Stockholm Declaration, that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Other more visible instances where the economic pillar of development appears to have played a dominant role over environmental protection are laid out in the proceedings and outcomes of the 1992 Rio World Summit on Sustainable Development and the 2002 Johannesburg Declaration on Sustainable Development.[63] In both instances, trade law and the rules of the WTO are given a high political status and environmental law is relegated to second place on matters relating to sustainable development, poverty eradication, sustainable production and consumption, increasing eco-efficiency, reduction of emissions, and strengthening of partnerships between major global economic actors.[64]

A UNEP study on environmental law partly concluded that while the world only became more aware of the nature and extent of global environmental concerns after the Stockholm Conference, and more prominently in the decades after the Rio Summit, environmental concerns have continued to face stiff competition from international economic globalization, emphasis on free trade, and the general development concerns of poor and developing countries.[65] For instance, the study argued

[61] UNEP and IISD, *Environment and Trade, supra* note 3, at 9.
[62] *Ibid.*
[63] Johannesburg Declaration on Sustainable Development 'From our origins to the future', Johannesburg, South Africa, 4 September 2002, UN Doc. A/CONF.199/20 (2002).
[64] Alexandre Kiss and Dinah Shelton, *International Environmental Law* (3rd ed., UNEP and Transnational Publishers, 2004) 39.
[65] *Ibid.* at 38.

that the 2001 Doha Round of trade negotiations appears to give priority to the WTO trade norms when it comes to the relationship between the WTO trade rules and the trade-related environmental obligations set out in MEAs.[66]

On the issue of competition for primacy between trade and environment issues, Daniel Esty further writes that the decision made by the GATT Panel in the Mexico and others v. US Tuna-Dolphin (Restrictions on Imports of Tuna) case[67] was a smoking gun that ultimately demonstrated the environmental insensitivity and anti-posture of the WTO panel.[68]

In addition, Perrez argues that the environment is generally regarded as a public good whereas trade is perceived as an issue of exclusive government competence.[69] An online dictionary defines a public good as a product that one individual can consume without reducing its availability to another individual, and from which no one is excluded to benefit.[70] Perhaps a 'public good' is what Aristotle had in mind when arguing for his economics and politics theory – that the primary meaning of economics is the action of using things required for the Good Life….by properly obtaining and using those things that are necessary for living well.[71] If viewed from this perspective, it then becomes clear why countries have, decades since the Stockholm Conference, not fully succeeded in reconciling their divergent and competing economic development concerns vis-a-vis environment protection despite the existence of evidence that human alteration of global ecosystems and natural resources for the purposes of enhancing economic competitiveness has resulted in severe environmental problems and degradation, such as depletion of the ozone layer and climate change, that are proving too costly for the global economy.[72]

All is, however, not doom and gloom, and steps have been taken to address the indifferences between trade and environment. Environmental law has developed rapidly in the last few decades, and major environmental law principles have found their way into various international trade systems and platforms. The WTO has, for instance, sought to support and enhance the mutual supportiveness of trade

[66] *Ibid.*

[67] United States - Restrictions on Import of Tuna (No 1), Mexico v. United States, GATT Panel Report, DS21/R, BISD/39S/155 (1991).

[68] Daniel C. Esty, 'Beyond Rio: Trade and the Environment', 23(2) *Environmental Law* (1993) 387-396 at 394.

[69] Perrez, *'The Mutual Supportiveness, supra* note 9. at 26.

[70] Available at <https://www.investopedia.com/terms/p/public-good.asp> (visited 13 August 2018).

[71] Edward W. Younkins, 'Aristotle, Human Flourishing, and the Limited State', 133 Québécois Libre (2003), available at <http://www.quebecoislibre.org/031122-11.htm> (visited 13 August 2018).

[72] UN Environment, Global Environment Outlook (GEO) 5: Environment for the future we want (2012), available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/8021/GEO5_report_full_en.pdf?sequence=5&isAllowed=y> (visited 30 August 2018). See also UN Environment, Frontiers 2017: Emerging Issues of Environmental Concern (2017), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/22255/Frontiers_2017_EN.pdf?sequence=1&isAllowed=y> (visited 13 August 2018).

and environment for sustainable development.[73] UN Environment, the WTO and other inter-governmental environmental organizations as well as environmental treaty bodies have continued cooperation to identify ways of ensuring that trade and environment policies are mutually supportive of each other.[74] For example, UN Environment, a number of trade-related MEA Secretariats and the International Criminal Police Organization (INTERPOL)[75] have signed a memorandum of understanding (MOU) with the World Customs Organization (WCO)[76] Secretariat on cooperation, consultation and exchange of information in environment and customs matters.[77] Through the Green Customs Initiative, the organizations are working to enhance cooperation on trade and environmental issues through mutual cooperation including by strengthening the capacities of countries' enforcement agencies, customs officers and other border-control officials involved in facilitating and monitoring trade.[78] Furthermore, many countries that are parties to the WTO and more than one MEA are in the process of or have already developed, adopted, reviewed and or amended their national environmental laws and policies, established and strengthened their environmental law enforcement bodies and procedures, and conducted voluntary national environmental assessments of trade policies.[79]

In addition, while MEAs and multilateral or bilateral trade agreements are negotiated separately with different objectives and provisions, the implementing bodies may seek to develop linkages and relationships between the agreements while respecting the independence, autonomous personality, individual mandates and distinct legal status of each agreement.[80] The TRade & ENvironment Database (TREND) has identified over 300 different types of environmental provisions in more than 680 trade agreements, ranging from linkages in principles, levels of environmental protection in trade measures, legal and policy developments, and dispute settlement

[73] The Ministerial Decision on Trade and Environment adopted in Marrakesh on 15 April 1994 called for the establishment of a Committee on Trade and Environment with the aim to make international trade and environmental policies mutually supportive. The Committee has contributed to identifying and understanding the relationship between trade and the environment in order to promote sustainable development. See WTO, 'The Committee on Trade and Environment ('regular' CTE)', available at <https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm> (visited 13 August 2018).

[74] WTO, 'WTO, UN Environment and WTO launch dialogue on healthier environments through trade' (25 January 2018), available at <https://www.wto.org/english/news_e/news18_e/igo_25jan18_e.htm> (visited 13 August 2018).

[75] See <http://www.interpol.int>.

[76] See <http://www.wcoomd.org/>.

[77] The Green Customs Initiative, see <http://www.greencustoms.org/>.

[78] Nancy Isarin and Yannis Derbali (eds), *The Green Customs Guide to Multilateral Environmental Agreements* (UN Environment, 2018), available at <http://www.greencustoms.org/sites/default/files/resources/Green%20Guide%20Customs%20to%20MEAs%202018%20%20Low_0.pdf> (visited 13 August 2018).

[79] WTO, 'Environmental reviews', available at <https://www.wto.org/english/tratop_e/envir_e/reviews_e.htm> (visited 13 August 2018).

[80] Duncan Brack and Kevin Gray, 'Multilateral Environmental Agreements and the WTO' (IISD, 2003), available at <https://www.iisd.org/pdf/2003/trade_meas_wto.pdf> (visited 13 August 2018).

mechanisms to relations among international institutions.[81] Duncan Brack and Kevin Gray have also observed that 'recent dispute cases suggest that the Appellate Body is developing a greater understanding of the complexities of the trade-environment relationship; this may lead to further decisions upholding trade related environmental measures'.[82]

The interface between trade and environment is quickly shifting. The Director of the Trade and Environment Division of the WTO noted, during the 14th UEF – UN Environment Course on Multilateral Environmental Agreements, that out of over 3,408 notifications and the 20 Trade and Policy Reviews circulated in 2015: 498 environment-related notifications were submitted by 73 WTO members; all 20 Trade and Policy Reviews contained environment-related entries (951 entries); and 1,349 environment-related measures were contained in the notifications. Aaron Cosbey, while discussing 'Regional Trade Agreements (RTAs) and Environmental Protection' observed that in the evolution of RTAs between 1948 and 2017, RTAs have positively sought to

> clarify relationship between MEA and RTA law (MEA obligations not affected by RTA provisions (Chile-China MoU - Article 7, USA-Peru - Annex 18.3.4 paragraph 15); MEA obligations covered by exceptions (Republic of Korea-Peru - Environment Chapter Article 19.3, EU-Colombia-Peru - Sustainable Development Chapter Article 9.1); prevalence of MEA in case of inconsistency (NAFTA - Chapter on Objectives Article 104 (1)); confirm existing MEA commitments (CETA Article 24.4(2)); commit to meeting existing commitments (TPP article 20.17(2)); commit to signing and/or ratifying an MEA (COMESA, Article 124 (1)(c)); commit to legislation in support of MEA objectives, and in some instances going further than the MEA obligations (TPP, Article 20.17(5)).[83]

There is also increased transparency and public participation in both trade and environment processes at the international, regional and national levels, therefore leading to increased focus on issues of capacity-building, coherence, coordination, compliance and synergies rather than supremacy and competition. This has given effect to Principle 12 of the UN Declaration on Environment and Development which provides that states should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.[84]

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[81] TRade & ENvironment Database, see <http://www.chaire-epi.ulaval.ca/en/trend>. See also Jean-Frédéric Morin, TRade and Environment Database (TREND) Codebook (2017), available at <http://www.chaire-epi.ulaval.ca/sites/chaire-epi.ulaval.ca/files/codebook.pdf> (visited 13 August 2018).

[82] Brack and Gray, 'Multilateral Environmental Agreements', *supra* note 80, at 28.

[83] On file with the authors.

[84] UN Declaration on Environment and Development, Principle 12.

5 A two-fold perspective on the settled principles of international development

This part of the paper considers principles and soft law codes that have developed and gained acceptance overtime in a manner that they can presently and in the future define and strengthen linkages between trade and environment, and potentially help the global south approach trade in a manner that would contribute to environmental protection and sustainability.

5.1 Sustainable development

The 1992 UNCED (Earth Summit) marked a departure from the post-Stockholm era to the sustainable development agenda. The post-Stockholm era was calculated to deal with the impact of human activities on the global environment, whereas the sustainable development agenda sought to strike a balance between exploitation of natural resources for progressive economic development and the need to protect and hold the resource base and the environment for the benefit of future generations.[85] Of all international development and law concepts, principles and objectives related to trade and environment, sustainable development is the most prominent at the moment, having found its way to the decisions of the International Court of Justice (Gabcikovo-Nagymaros Project)[86] and the Appellate Body of the WTO (WTO Appellate Body Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products).[87] Furthermore, the universal and integrated 2030 Agenda for Sustainable Development and the Sustainable Development Goals, as premised on the notion of leaving no one behind, exhibit the need to strike a balance between the pillars and dimensions of development with the aim of protecting the planet and ensuring prosperity. The key pillars of sustainability are the economic pillar, the environmental pillar and social pillar. These pillars are interdependent and their integration for development is therefore key.[88]There is, however, no clear cut method of reconciling the three pillars and the determination is often left to bodies such as the dispute resolution tribunals, such as the WTO Dispute Settlement Body (DSB), the WTO Appellate Body, the International Arbitration arrangements such as the ICSID model, which have neither clarified the mode nor importance of integrating the pillars, specifically in relation to trade and environment.[89]

[85] Agenda 21, Chapter 8 ('Integrating Environment and Development in Decision-making'), para. 8.7.

[86] Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia), judgment of 25 September 1997, 7 *ICJ Reports* (1998).

[87] WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 12 October 1998.

[88] Mayank Vats and Leepakshi Rajpal, 'Legal View to Sustainable Development', 2(12) *Imperial Journal of Interdisciplinary Research* (2016) 2121-2130 at 2122.

[89] Duncan French, 'Supporting the Principle of Integration in the Furtherance of Sustainable Development: a Sideways Glance', 18(3) *Environmental Law and Management* (2006) 103-117.

On the face of the foregoing developments and aspects of sustainable development, all trade processes and activities should seek to contribute to and reinforce the three dimensions of sustainable development, including environmental protection and sustainability in addition to the social and economic dimensions. Practitioners, policy and decision-makers should seek to mainstream and integrate trade into MEAs and MEA provisions into multilateral trade provisions in a consistent and mutually beneficial manner.[90]

5.2 Equality and non-discrimination

The principle of non-discrimination is one of the cornerstones of the multilateral trade order under GATT, upon which the GATT Article I - unconditional most-favoured-nation clause - is founded.[91] The Preamble of the WTO Agreement further expresses the desire of WTO members to substantially eliminate 'discriminatory treatment in international trade relations'. In this regard, all members are guaranteed to receive the best possible treatment from all other members of the WTO. Given that this can be extended to customs duties and other trade charges, developing countries can potentially and functionally enhance synergies and interlinkages between their customs laws and environmental laws and functions in an equally and non-discriminatory manner, without disrupting trade and /or creating unjustified restrictions on trade. They can also extend favors through RTAs in relation to green customs to encourage trade in green goods for the benefit of their environment.[92] The nature of RTAs commitments can also be structured to ensure that trade and environmental measures are applied in a mutually benefiting and reinforcing manner as opposed to a discriminatory and arbitrary manner that would constitute an unjustifiable barrier to trade.

5.3 Openness, predictability and transparency

Transparency is the hinge of trust, understanding and cooperation in all international multilateral systems and relations. In this regard, and to ensure that trade works for the benefit of the people and the environment, all trade and investment agreements should be transparently and democratically mandated, negotiated, agreed upon, implemented, reviewed and reported upon.[93] To help countries establish high degrees of precaution in relation to environmental impacts, all trade measures and practices should have high degrees of transparency and predictability on their impact on the

[90] Principle 4 of the Rio Declaration provides that, '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'

[91] Wolfgang Benedek, 'The Participation of Africa in the General Agreement on Tariffs and Trade (GATT)', 20(1) Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America (1987) 45-58 at 55.

[92] Isarin and Derbali, *The Green Customs Guide, supra* note 78.

[93] Greenpeace, '10 Principles for Trade' (2017), available at <https://trade-leaks.org/wp-content/uploads/2018/03/201705_Greenpeace_10_Principles_for_Trade.pdf> (visited 14 August 2018).

environment. To the largest extent possible, non-governmental organizations and other stakeholders should be allowed some level of participation and engagement.

In both trade and environmental matters, there should be a clear view of potential future opportunities and challenges. Where there is predictability, both trade and environmental governing bodies will be able to make mutually beneficial decisions, enhance investments, encourage cooperation, and sustainably deliver on mutually beneficial objectives for human wellbeing. The multilateral environmental and multilateral trading agreements are potential platforms for the countries to make interlinkages between trade and environment stable and predictable.

5.4 Common but differentiated responsibility and treatment

The common but differentiated responsibility principle is established in Principle 7 of the Rio Declaration on Environment and Development.[94] The principle 'reflects the common partnership among States in pursuing agreed norms, the differences among States in their ability to implement them, and the historical differences in states' contribution to specific problems'.[95] The principle further acknowledges the ecological and economic interdependence of nations and the need for cooperation in transitioning towards sustainable development.[96] In the environmental sector, almost all MEAs require the participation of the developed and the developing countries. The multilateral trade systems, including the Uruguay Round Agreements and the subsequent WTO Declarations, have specifically included almost 150 provisions on special and differential treatment (provisions to increase trade opportunities of developing countries; provisions for safeguarding the interests of developing countries; flexibility in commitments, actions, and use of policy instruments; transitional time periods; technical assistance; and provisions relating to least-developed countries) with the aim of raising important issues of intergenerational and intragenerational fairness and equity.[97] If interpreted from both perspectives, the common but differentiated treatment principle would then mean that in both trade and environmental processes, countries should continuously assign and carry different responsibilities for historical damages to the environment and reductions in environmental

[94] Principle 7 of the Rio Declaration provides:

> States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

[95] Edith Brown Weiss, 'Common but Differentiated Responsibilities in Perspective', 96 *Proceedings of the Annual Meeting* (American Society of International Law) (2002) 366-368 at 366.

[96] Lavanya Rajamani, 'The Nature, Promise, and Limits of Differential Treatment in the Climate Regime' in Ole Kristian Frauchald and Jacob Werksman (eds), *Yearbook of International Environmental Law* (Oxford University Press, 2005) at 82.

[97] Edith Brown Weiss *supra* note 95, at 367-368.

standards as well as different desires for economic development.[98] Modeling on this interpretation, states and international organizations have developed differentiated approaches to addressing environmental problems, while exercising flexibility and considering the economic and trade needs and interests of developing countries.[99]

5.5 The Precautionary principle

Both multilateral trade systems and multilateral environmental agreements have adopted and developed the precautionary principle. Principle 15 of the Rio Declaration states that: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' The WTO provides that

> Member countries are encouraged to use international standards, guidelines and recommendations where they exist, including measures which result in higher standards if there is scientific justification. They can also set higher standards based on appropriate assessment of risks so long as the approach is consistent, not arbitrary. And they can to some extent apply the "precautionary principle", a kind of "safety first" approach to deal with scientific uncertainty.[100]

Further, even though the GATT has not explicitly mentioned the precautionary principle, the Agreement on the Application of Sanitary and Phytosanitary Measures[101] allows WTO Members to adopt measures that are necessary to achieve the level of health and phytosanitary protection they deem appropriate.[102] However, such measures are to be determined after a risk assessment[103] which should involve evaluating the available scientific evidence; relevant processes and production methods; necessary inspection, sampling and testing; prevalence of specific diseases or pests; ecological and environmental conditions; and quarantine.'[104] The necessity and importance attached to the risk assessment was emphasized in the *European Communities (EC) - United States (US) Beef-Hormones Case*[105] following the ban imposed by EC on beef products containing growth hormones administered in the US. The WTO Panel and the Appellate Body concluded that the scientific evidence

[98] *Ibid.*

[99] Christopher D. Stone, 'Common but Differentiated Responsibilities in International Law', 98(2) *American Journal of International Law* (2004) 276-301 at 276-277.

[100] WTO, 'The Precautionary Principle', available at <https://www.wto.org/english/thewto_e/glossary_e/precautionary_principle_e.htm> (visited 14 August 2018).

[101] Agreement on Sanitary and Phytosanitary Measures, Marrakesh, 15 April 1994, in force 1 January 1995, <http://www.wto.org>.

[102] *Ibid.* Preamble and Art. 2(1).

[103] *Ibid.* Art. 5(1).

[104] *Ibid.* Art. 5(2).

[105] Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

cited by the EC as the basis for its regulatory decision was not conclusive as the studies carried out by EU posed no negative scientific effects on the consumption of the beef and several scientific assumptions were included in the assessment.[106] It is the view of this paper that the need for a 'rational relationship' between the measure and the risk assessment does not only restrict the scope of precautionary principles, but it further raises two significant concerns. Firstly, whether a provision contained in an MEA can be employed to foreshadow a customary international law principle; and secondly, whether countries from the global south possess the required technical and financial capacity to carry out precise scientific risk assessments.

From any of the foregoing perspectives, it cannot be disputed that, unless legally reasoned to the contrary, the precautionary principle creates a direct a legal obligation calculated to protect public health and the environment, whether or not there is scientific uncertainity, and it should be embraced and applied countries when implementing both trade and environmental agreements.[107] However, a more contextual, integrated and personalized approach to the precautionary principle is needed for developing countries to enable them to meet their common but differentiated responsibilities in both multilateral trade and environmental agreements.

5.6 Polluter pays principle

Principle 16 of the Rio Declaration provides that 'national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.[108] According to the Organization for Economic Co-operation and Development (OECD),[109] this is the guiding precept for balancing environmental and trade considerations.[110] In this regard, costs of environmental protection should be reflected in all trade activities, including all costs and taxes on goods and services. Owen Saunders has observed that, 'with respect to international trade, the principle suggests that goods entering the international marketplace should carry with them the full costs of production,

[106] Carter Michele, 'Selling Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormones Controversy', 6(2) *Minnesota Journal of Global Trade* (1997) 640-641; Veena Jha, *Environmental Regulation and Food Safety: Studies of Protection and Protectionism* (Edward Elgar, 2005) 19.

[107] Green Peace, '10 Principles for Trade', *supra* note 93.

[108] Principle 16 of the Rio Declaration.

[109] See <http://www.oecd.org/>.

[110] OECD Environment Directorate, 'The Polluter-pays Principle: OECD Analyses and Recommendations', Doc. OCDE/GD(92)81 (1992):

> Generally speaking, a polluter has to bear all the costs of preventing and controlling any pollution that he originates. Aside from exceptions listed by OECD(1)(2), a polluter should not receive assistance of any kind to control pollution (grants, subsidies or tax allowances for pollution control equipment, below-cost charges for public services, etc.

See also J. Owen Saunders, 'Trade and Environment: The Fine Line between Environmental Protection and Environmental Protectionism', 47(4) *International Journal* (1992) 723-750 at 727.

including their environmental costs'.[111] Developing countries should begin to adopt environmental and trade standards and measures that reflect pollution costs based on environmental impact and taking into consideration the relevant provisions of domestic and international trade and environment and trade legal and governance regimes.

5.7 Access to justice and legal protection

Access refers to identification and removal of social, economic, political, demographic and psychological barriers and inequalities that contribute to exclusion of certain persons or groups from the fair determination of rights.[112] Persons and/or groups affected by trade and environment matters should be able to have their grievances determined through mechanisms fundamental to the rule of law and promotion of social fairness and inclusion, including judicial and alternative dispute resolution mechanisms. Global south countries should seek to enhance fair and equal access to justice and legal protection, where rights of their communities and the environment have been violated. This can include by participating more in the WTO and MEAs dispute resolution mechanisms and systems by requesting to have at least one panelist from a developing country, requesting for sufficient time to prepare their submissions, mobilizing domestic and regional support for policy and legal changes, and clearly articulating the issues affecting the interest of the developing countries to help formulate solutions that would work in the best interest of their trade and environment agenda and requesting for additional legal advice and assistance of qualified legal experts from the WTO and MEA Secretariats.[113] While encouraging the global south participation in trade and environment dispute resolution for enhanced access to justice and legal protection, this paper does not fail to note the considerable challenges and burdens, including lack of human expertise, low capacity, lack of strong institutional structures and risk for economic harm through retaliation, that developing countries would face when prosecuting disputes under the WTO and MEAs processes. It is, however, not within the objective of this paper to further examine the challenges.[114]

[111] *Ibid.*

[112] Estelle Hurter, 'Access to Justice: to Dream the Impossible Dream?', 44(3) *Comparative and International Law Journal of Southern Africa* (2011), 408-427 at 414-415.

[113] Law Teacher, 'Dispute settlement mechanism wto developing countries', available at <https://www.lawteacher.net/free-law-essays/international-law/dispute-settlement-mechanism-wto-developing-countries-international-law-essay.php> (28 August 2018).

[114] Chad P. Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law', the World Bank Development Research Group Trade and Integration Team Policy Research Working Paper 5168 (2010), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/19938/WPS5168.pdf?sequence=1&isAllowed=y> (visted 30 August 2018).

5.8 The principle of intergenerational equity

Rio Principle 3 states that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'. The present generation may violate the interests of the future generation in three substantial ways; firstly when unsustainable consumption of high quality resources would increase future prices of the resources due to scarcity; secondly, when resources are depleted prior to discovery of their best use and lastly when environmental degradation is not corrected and reversed.[115] The principle calls for all countries and stakeholders to consider, and minimize, the impact of their development activities on future generations through sustainable use of resources and mitigation of irreversible environmental damage. There is need to reconcile the North-South discourse in the context of unsustainable consumption patterns, wherein, on one hand, the North holds strong ground that their operations, especially in the extractive sector, are more ecocentric and the pressure on resources is magnified by the ever increasing population and urbanization in the South.[116] On the other hand, the South strongly asserts that mining is one of the examples that would go to show the North's insatiable appetite for consumer goods to the detriment of the needs of the South.[117] Such acrimonious contentions may affect the attitude towards environmental responsibility and accountability, therefore creating a sense the unfairness on future generations, which countries should step in to remedy by ensuring appropriate distribution of responsibility and liability.[118]

5.9 Notification, consultation, cooperation and environmental impact assessment

Prior notification of any potential harm and the duty to cooperate and consult in good faith are some of the well-settled obligations under international law. Trade issues and practices should be subjected to independent, judicious and comprehensive environmental impact assessment, involving all stakeholders in the trade and environment sectors. Environmental impact assessment is a tool used to identify the environmental, social and economic impacts of a project prior to decision-making, and/or a tool for conceptualizing the due place of an environment in decision-making processes through appropriate evaluation of likely environmental consequences of a proposed activity before action is taken.[119] Developing countries should already seek to bring environmental impact assessment issues and concerns to the center

[115] Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', 8(1) *American University International Law Review* (1992) 19-26.

[116] Richard Westin, 'Intergenerational Equity and Third World Mining', 13(2) *University of Pennsylvania Journal of International Business Law* (1992) 181-225 at 204, available at <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1545&context=jil> (visited 30 August 2018).

[117] *Ibid.*

[118] *Ibid.* at 197 and 204.

[119] Divine Odame Appiah and Balikisu Osman, 'Environmental Impact Assessment: Insights from Mining Communities in Ghana', 16(4) *Journal of Environmental Assessment Policy and Management* (2014) 1-20 at 2.

stage of all trade and environmental negotiations. All outcomes of impact assessments should be taken into consideration in all negotiations and/or be used to initiate review of existing trade agreements and practices.

5.10 Product and process standards

Akin to the Montreal Protocol, more MEAs may begin to establish standards and prescriptive norms on products and processes that impact the environment.[120] The Montreal Protocol establishes firm targets for reducing and eventually eliminating consumption and production of a range of ozone depleting substances. These substances are enumerated in Annexes A-E to the Protocol and are to be phased out within the schedules given in Articles 2A-2I. The Protocol imposes restrictions on trade through bans on the imports[121] and export[122] of controlled substances between Parties and non-Parties. Trade with non-Parties is forbidden unless they have complied with the Protocol's control measures.[123] Building on this trend, global south countries have in the relevant MEAs a platform on which they can domesticate and enforce compliance and implementation measures for the benefit of their environment without creating unnecessary obstacles to international trade.

5.11 Prior informed consent, licensing and permits

Building on the practice under the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[124] all trade-related MEAs may oblige parties to establish permit and license systems for import and export activities or establishments that are potentially harmful to the environment or that use natural resources.[125] Trade on species and/or natural resources will specifically be forbidden in the

[120] Ministry of Natural Resources and Environment of Vietnam, 'International Environmental Law. Multilateral Environmental Agreements' (2017), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/21491/MEA-handbook-Vietnam.pdf?sequence=1&isAllowed=y> (visited 14 August 2018) at 23.

[121] Article 4(1).

[122] Article 4(2).

[123] Article 2.

[124] Article VI of the CITES ('Permits and certificates'):

> 1. Permits and certificates granted under the provisions of Articles III, IV, and V shall be in accordance with the provisions of this Article. Text of the Convention – 5 2. An export permit shall contain the information specified in the model set forth in Appendix IV, and may only be used for export within a period of six months from the date on which it was granted. 3. Each permit or certificate shall contain the title of the present Convention, the name and any identifying stamp of the Management Authority granting it and a control number assigned by the Management Authority. 4. Any copies of a permit or certificate issued by a Management Authority shall be clearly marked as copies only and no such copy may be used in place of the original, except to the extent endorsed thereon. 5. A separate permit or certificate shall be required for each consignment of specimens. 6. A Management Authority of the State of import of any specimen shall cancel and retain the export permit or re-export certificate and any corresponding import permit presented in respect of the import of that specimen. 7. Where appropriate and feasible a Management Authority may affix a mark upon any specimen to assist in identifying the specimen. For these purposes "mark" means any indelible imprint, lead seal or other suitable means of identifying a specimen, designed in such a way as to render its imitation by unauthorized persons as difficult as possible.

[125] Ministry of Natural Resources and Environment of Vietnam, 'International Environmental Law', *supra* note 120, at 23.

absence of properly issued permits and/or licenses.[126] Similarly, under the Basel and Rotterdam Conventions, the use of prior notification and consent procedure obliges states to ensure that they give and obtain prior informed consent before shipment, import, export and transit of hazardous wastes and chemicals.[127] Under the Cartagena Protocol,[128] exporters of living modified organisms (LMOs) must notify the importing country in advance.[129]

6 Time for a Third World Approaches to International Law (TWAIL) perspective?

It cannot be disputed that economic growth is a critical driver for eradicating poverty that is crippling the global south.[130] However, if economic growth is not socially inclusive, balanced and environmentally sound, in the long run, the involved parties and/or countries are bound to differ in vision and objectives. Many developing countries continue to believe that it would be too costly to address environmental pollution and degradation in the manner advanced and underlined by developed countries without fully sacrificing short-term economic development objectives that the developed world is itself not willing to sacrifice.[131] In addition, developing countries have often expressed strong resistance to codification of MEA inter-relationship with WTO agreements by fronting argument that trade-related measures, even if carried out pursuant to environmental agreements, will have a negative economic impact through restricting market access, and that the costs of compliance can be significantly outweighed by any perceived environmental and developmental benefits.[132] In this regard, new approaches to international law have emerged and are informed by the desire of legal scholars and other international actors, especially those from the global south, to make international law responsive to the challenges plaguing the global south and relevant to the needs and circumstances of the developing world.

Since the turn of the 20th century, the critical Third World Approach to International Law (TWAIL) scholarship of international law has developed with the aim of establishing and enhancing debate and understanding of the relationship between international law and the shortcomings and challenges fronting the developing

[126] Brack and Gray, 'Multilateral Environmental Agreements', *supra* note 80, at 8.
[127] *Ibid.*
[128] Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027, <http://www.cbd.int/biosafety>.
[129] *Ibid.*
[130] African Development Bank (AfDB) Group, 'Inclusive Growth: An Imperative for African Agriculture' (2014), available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Inclusive_Growth_-_An_imperative_for_African_Agriculture.pdf> (visited 13 August 2018) at 6.
[131] Kenneth Berlin and Jeffrey M. Lang, 'Trade and the environment', 62(370/371/372) *Ekistics* (1995) 132-137 at 132.
[132] Brack and Gray, 'Multilateral Environmental Agreements', *supra* note 80, at 40.

world.[133] TWAIL also 'seeks to construct and present an alternative normative legal edifice for international governance that is more responsive to challenges facing the Third World,[134] and "through scholarship, policy and politics, contribute to eradicating the conditions of under-development in the Third World'.[135] In this paper, the interrelated objectives of TWAIL are considered to demonstrate why the traditional and contemporary structures and elements of global trade and environmental matters are not fully responsive to the trade and environmental concerns of the global south. Consequently, this part of the paper will examine how TWAIL, specifically in relation to international trade law and environmental law, could reasonably and most effectively contribute to and promote conservation of the environment for the wellbeing of the global south and its people, including by ensuring that the elements of trade and environment are in harmony with each other.

The trade and environmental opportunities and challenges hounding the global south are unique to the scope, needs and circumstances of developing countries and their people. The multi-faceted relationships concerning trade, environment, development and the global economic structures have been a major cause of the standoff between developed and developing countries when it comes to reconciling issues between trade and environment.[136] This is partly attributed to the strong feelings and beliefs held by peoples of the developing world in relation to environmental resources, livelihoods, cultures and aspirations for economic growth. Kenneth Berlin and Jeffrey Lang have, for example, pointed out that the

> developed world is concerned about environmental degradation because of deeply held beliefs that transcend economic concerns. For some, the choice is a conservative one; they believe that society should tolerate very little risk of degradation of the environment because of what they perceive to be the overwhelming seriousness of the consequences. For others, the concern is a moral one, based on deeply held values about the right of species to survive, ….and those who hold these views will not easily be reconciled to a trading system that does not seek to prevent or at least ameliorate the impact of increased trade upon the environment.[137]

At the 1972 Stockholm Conference, many delegates endorsed the statement of the Secretary-General of the Conference that 'there need be no clash between the concern for development and the concern for the environment….that support for envi-

[133] Vikrant Dayanand Shetty, 'Why TWAIL must not Fail: Origins & Applications of Third World Approaches to International Law' (Virtual Centre of International Law, 2011), available at <http://www.publicinternationallaw.in/node/32> (visited 13 August 2018).

[134] Makau Mutua, 'What is TWAIL?', 94 *ASIL Proceedings* (2000) 31-38, available at <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1559&context=articles> (visited 13 August 2018).

[135] *Ibid.* at 31.

[136] Darkoh, Trade, *Environment and, supra* note 13, at 115.

[137] Berlin and Lang, 'Trade and the environment', *supra* note 131, at 132.

ronmental action must not be an excuse for reducing development….and that there must be a substantial increase in development assistance with due consideration for environmental factors'.[138] Many developing countries blamed the exploitation of their natural resources by developed countries for their own purposes; while some protested against the activities of certain multinational corporations which had a direct effect upon developing countries.[139] Notable from the Conference is the fact that the need for more effective and less wasteful utilization of natural resources was underlined by several delegates.[140]

Agenda 21, as adopted twenty years later at the 1992 Rio Conference, states that 'world trade has continued to grow faster than world output in recent years. However, the expansion of world trade has been unevenly spread, and only a limited number of developing countries have been capable of achieving appreciable growth'.[141] Despite the enormous developments in the global multilateral trade system, developing countries have largely not profited from it, thus the global south's continued inclination to the principle of common but differentiated responsibilities on the basis of the global north's greater contribution to environmental degradation.[142]

Para 2.9 of Agenda 21 seeks to enhance sustainable development through trade by, inter alia, noting that

> in the years ahead, and taking into account the results of the Uruguay Round of multilateral trade negotiations, Governments should continue to strive to meet the following objectives:
>
> a) to promote an open, non-discriminatory and equitable multilateral trading system that will enable all countries – in particular, the developing countries – to improve their economic structures and improve the standard of living of their populations through sustained economic development;
>
> b) to improve the functioning of commodity markets and achieve sound, compatible and consistent commodity policies at national and international levels with a view to optimizing the contribution of the commodity sector to sustainable development, taking into account environmental considerations;
>
> c) to promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive.[143]

[138] Report of the United Nations Conference on Human Environment, Chapter VIII, para 44.
[139] *Ibid.* at para 45.
[140] *Ibid.* at para 46.
[141] Agenda 21, para 2.8.
[142] Edwin Kessie, 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in George A. Bermann and Petros C. Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press, 2007), available at <http://www.trungtamwto.vn/sites/default/files/wto/WTO%20Law%20and%20Developing%20Countries.pdf> (visited 13 August 2018) at 12.
[143] Agenda 21, Chapter 2, para. 2.9.

If, as it is shown to us above, that Agenda 21 was the creator of a perfect picture of how trade and environment negotiations should be structured to be mutually supportive for the benefit of sustainable development, specifically in developing countries, and particularly in relation to their economic and environmental objectives, how can the global South position itself in the face of the emerging environmental needs and prevailing economic circumstances?

Over 50 per cent of Africa's total wealth is tied to natural environment resources.[144] More than 70 per cent of the African population depends on the natural environment for economic development and livelihoods.[145] Yet still, Africa continues to suffer from considerable land degradation, with severe consequences for agricultural production, nutrition and human health.[146] Furthermore, majority of Africa's civil strife and ethnic clashes are in part caused or associated to poor governance of natural resources, soil degradation, deforestation, depletion of fish stocks as a result of overfishing and water pollution, economic decline and illegal trade in natural resources.[147] On top of that, Africa loses more than 195 billion dollars of its natural capital annually through, inter alia, resource plunder, illegal logging, illegal trade in wildlife, unregulated fishing, illegal mining practices, high food imports and degraded ecosystems.[148] The degradation can, for instance, be largely attributed to administrative, institutional and financial problems, poor distribution of wealth among people, disconnects between legal and policy frameworks on trade and environmental issues, illegal exploitation of natural resources for trade, and lack of quality and accurate information or guidance on how to account for and deal with the negative impacts of trade on the environment, to mention but a few.

[144] UN Environment, 'Our work in Africa', available at <https://www.unenvironment.org/regions/africa/our-work-africa> (visited 14 August 2018).

[145] Mamadou Biteye, '70% of Africans make a living through agriculture, and technology could transform their world', World Economic Forum (6 May 2016), available at <https://www.weforum.org/agenda/2016/05/70-of-africans-make-a-living-through-agriculture-and-technology-could-transform-their-world/> (visited 14 August 2018).

[146] UNEP, *Africa Environment Outlook 3: Summary for Policy Makers* (2013), available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/8653/aeo3.pdf?sequence=3&isAllowed=y> (visited 14 August 2018) at 23.

[147] UNEP, 'New UNEP report provides an overview of environmental conditions, resources, and conflict, UNEP Information Note 99-16 (1999), available at <https://na.unep.net/siouxfalls/publications/Conflicts.pdf>. See also Christian Nellemann et al (eds), 'The Rise of Environmental Crime. A Growing Threat To Natural Resources, Peace, Development and Security. A UNEP-INTERPOL Rapid Response Assessment (UNEP and INTERPOL, 2016), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/7662/-The_rise_of_environmental_crime_A_growing_threat_to_natural_resources_peace,_development_and_security-2016environmental_crimes.pdf.pdf?sequence=3&isAllowed=y>; Stewart M. Patrick, 'Why Natural Resources Are a Curse on Developing Countries and How to Fix It', The Atlantic, 30 April 2012, available at <https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508> (all visited 14 August 2018).

[148] UN Environment, 'Harnessing Africa's Rich Natural Capital Tops Agenda at High-level African Conference on the Environment' (16 April 2016), available at <https://www.unenvironment.org/news-and-stories/story/harnessing-africas-rich-natural-capital-tops-agenda-high-level-african> (visited 30 August 2018).

The 1997 Global Environment Outlook-1 (GEO-1) Report established that, Africa has experienced persistent and severe economic and environmental problems since 1960s.[149] Twenty years later, the 2016 Global Environment Outlook-6 (GEO-6) Regional Assessment for Africa established that while Africa continues to experience steady economic growth, with the gross domestic product (GDP) rising at an average of 4.5 per cent per year between 2013 and 2014, the growth in GDP is having very little impact in alleviating poverty or improving the health of the people and Africa's economic status in the world.[150]

Africa's population is expected to double to approximately 2.5 billion by 2050.[151] Without proper vision on how to deal with the rapid population growth, Africa's desire for short-term economic growth will result in continued environmental degradation and depletion of ecosystems and natural resources. Usha Natarajan writes that given the current manner of engagement with natural resource and sustainability issues in the global south, TWAIL scholars have an opportunity for self-reflection and re-engagement in environmental issues by contributing and shaping conversations.[152] She adds that all developing states also have an increasing role in environmental conservation, thus should stop being hesitant participants in multilateral negotiations on the global environment; and 'there is also increased potential for alternative cultures, understandings, and voices to emerge to help creatively articulate what sustainable development is, and provide choices other than harmful development trajectories of the past'.[153]

To reduce conflicts between trade and environment, and to bring about a transparent, just and fair-trade system, international trade rules affecting developing countries should already be geared towards harmonization and mainstreaming, with the aim of enhancing sustainable development and implementing the existing multilateral environmental agreements. Furthermore, within the regional trade agreements, if something is good for the environment, the global south should aggressively pursue it with the aim of proactively converting the trade and environment debate into a trade and sustainable development agenda for the benefit of the South.[154]

To protect the environment, human, animal and plant life or health and their natural resources, the global south will need to develop integrated and inter-agency processes for bridging the gap between their environmental and economic concerns,

[149] UNEP, *Global Environment Outlook-1* (1997), available at <http://www.grid.unep.ch/geo1/ch/ch2_3.htm> (visited 14 August 2018) at Chapter 2: Regional Perspectives – Africa.

[150] UNEP, *GEO-6 Regional Assessment for Africa* (2016), available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/7595/GEO_Africa_201611.pdf?sequence=1&isAllowed=y> (visited 14 August 2018) at 13.

[151] *Ibid.* at 6.

[152] Usha Natarajan, 'TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring', 14(1) *Oregon Review of International Law* (2012) 177-201 at 190.

[153] *Ibid.*

[154] Najam, 'Trade and Environment', *supra* note 7, at 418.

frameworks, standards, regulations and policies. For instance, they will specifically have to come into terms with the scope of their economy and why the prominent environment problems will most impact their economies. That the trade and environmental concerns of the South are more compatible than they are in conflict. That economic processes that harm the environment in the global south should not be an inextricable route to economic prosperity. That developing countries can enhance their economic development processes while at the same time raising and sustaining their environmental standards. That green production and consumption can enhance the capacity of developing countries to deal with environmental concerns. That there are models and systems in the global bilateral and multilateral systems to help developing countries achieve sustainability and balance between trade and environment. That given African membership in MEAs, anti-environmentalism is no longer an option, and the environmental agreements can be compatible with trade agreements and policies. That technical assistance, capacity-building, awareness raising and compliance processes of MEAs be used to enhance the scope of trade sustainability in Africa. That the existing environment dispute resolution mechanisms under multilateral environmental agreements and trade dispute resolution mechanisms under the WTO can help establish beneficial jurisprudence on trade and environment issues for the benefit of the global south.[155]

7 Navigating Article XX of the General Agreement on Tariffs and Trade

Article XX of GATT establishes general exceptions to allow WTO members to adopt and maintain measures that aim to promote or protect important societal values and interests, even when the measures would otherwise be inconsistent with other rules of the GATT; and, under specific conditions, give priority to certain societal values and interests over trade liberalization, market access and / or discrimination rules.[156] However, even though the Article provides for exceptions against trade liberalization, the word 'environment' is not explicitly mentioned and this is considered as a weakness of GATT.[157] Despite so, Article XX (b) and (g) have been used by states to justify actions aimed at protecting potentially discriminatory environmental measures.[158]

[155] WTO Committee on Trade and Environment, 'Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements: Note by the WTO and UNEP Secretariats', WTO Doc. WT/CTE/W/191 (2001). See also Brack and Gray, 'Multilateral Environmental Agreements', *supra* note 80, at 38.

[156] University of Oslo, 'GATT Article XX Exceptions' (2016), available at <http://www.uio.no/studier/emner/jus/jus/JUS5850/h16/tekster/general-exceptions.pdf> (visited 14 August 2018).

[157] James Cameron, Dispute Settlement and Conflicting Trade and Environment Regimes. in Gary P. Sampson and John Whalley (eds), *WTO, Trade and the Environment* (Edward Elgar, 2005) 455-468 at 464.

[158] Oren Perez, *Ecological Sensitivity and Global Legal Pluralism, Rethinking the Trade and Environment Conflict* (Hart Publishing, 2004) 60-61.

Article XX provides:

> Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (b) necessary to protect human, animal or plant life or health; …
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

For many years, the construction and interpretation of Article XX has been the cause of discomfort for environmentalists. To a large extent, it would seem that, the exceptions can only be invoked in the protection of the environment when the invoking party is totally sure that the action will not be inconsistent with the other provisions of the Agreement. Specifically, the country using Article XX as an environmental exception must establish the provisional requirements that the measure is taken to protect human, animal or plant life or health (proportionality test) and that the measure is necessary (necessity test), as well as establish the final justification that the measures will not contravene the Agreement in general and the Chapeau to Article XX.[159] Under the 'necessary test' a member is not permitted to take measures that are inconsistent with the GATT if an 'alternative measure that it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is also available to it.'[160] In United States - Restrictions on Imports of Tuna, the WTO Panel argued that:

> previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself. Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.[161]

[159] UNEP and IISD, *Environment and Trade, supra* note 3, at 37.

[160] Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, DS1O/R (Nov. 7, 1990), Philip Bentley, 'A Re-Assessment of Article XX, Paragraphs (b) and (g), of GATT 1994 in the Light of Growing Consumer and Environmental Concern about Biotechnology', 24(1) *Fordham International Law Journal* (2000) 107-131 at 112.

[161] WTO, 'Article XX general exceptions', available at <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf> (visited 14 August 2018).

Naomi Roht-Arriaza in her paper, 'Trade and Environment: An Environmentalist View', argues that:

> by putting the burden of proof on the party defending its regulations rather than on the challenger, trade is given an ill-deserved primacy over the preservation of the world's environment. And the burden of proof is an impossibly heavy one". Under Article XX(b) measures necessary to protect human, animal or plant life or health "necessary" has been defined as having no reasonable alternatives. Article XX(g), which permits measures to conserve exhaustible natural resources, has, as interpreted, similarly strict requirements. A measure must be "primarily aimed at conservation," an apparently unobjectionable requirement that has been narrowly interpreted to mean both that no alternatives exist, and that the measure was adopted only for conservation purposes. Such requirements impose an impossible burden on a regulating state".[162]

Given the heavy litigation burden that emerges within Article XX, it is justifiable to say that even though good environmental intentions can be founded in the Article, most developing countries stand to face difficulties in navigating through the burden of proof allocated to them if they adopted environmental measures pursuant to the Article. In this regard, unless developing countries enhance their capacity and technologies to deal with the ever-growing WTO jurisprudence on Article XX, their trade and environmental needs may continue being neglected. The situation can be remedied by increased participation of developing countries in trade and environmental dispute resolution processes at the international level. There is a need to explore options to enhance transparency and the ability of developing countries to participate in international dispute settlement with the aim of advancing their trade interests and sustainable development objectives.[163]

8 Trade measures in MEAs

This part will consider trade measures in MEAs. The MEAs considered were either:

1) negotiated and adopted before the Uruguay Round of trade negotiations;
2) negotiated and adopted during the period when trade-policy negotiations were ongoing under the Uruguay Round; or
3) negotiated and adopted after the adoption of the Marrakesh Agreement and the establishment of the World Trade Organization.

[162] Naomi Roht-Arriaza, 'Trade and Environment: An Environmentalist View', 86 *Proceedings of the Annual Meeting* (American Society of International Law) (1992) 241-246 at 243-244.

[163] James Headen Pfitzer and Sheila Sabune, 'Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence' (International Centre for Trade and Sustainable Development (ICTSD), 2009), available at <https://www.ictsd.org/sites/default/files/downloads/2012/02/burden-of-proof-in-wto-dispute-settlement.pdf> (visited 14 August 2018) at 44.

There are, currently in force, more than 700 international environmental agreements governing various aspects of the environment; and several more are being negotiated at the bilateral, regional, and global levels.[164] The International Environmental Agreements (IEA) Database Project estimates that as of 2017, there are currently over 1,300 MEAs and over 250 other bilateral and multilateral environmental agreements between governments and international organizations or non-state actors.[165] About 18 of these MEAs include provisions to control trade in order to prevent damage to the environment:

1) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973);
2) Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (1982);[166]
3) International Convention for the Conservation of Atlantic Tunas (ICCAT) (1966);[167]
4) United Nations Fish Stocks Agreement (UNFSA) (1995);[168]
5) FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) (2009);[169]
6) International Tropical Timber Agreement (ITTA) (2006);[170]
7) International Plant Protection Convention (IPPC) (1951);[171]
8) Convention on Biological Diversity (CBD) (1992);
9) Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010);
10) Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000);

[164] Mrema and Mobegi, 'Comparative Review of', *supra* note 48, at 58.

[165] The International Environmental Agreements (IEA) Database Project., available at <https://iea.uoregon.edu/> (visited 30 August 2018).

[166] Convention on Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, in force 7 April 1982, 19 *International Legal Materials* (1980) 841, <http://www.ccamlr.org>.

[167] International Convention for the Conservation of Atlantic Tunas, Rio de Janeiro, 14 May 1966, in force 21 March 1969; <http://www.iccat.int/en/>.

[168] Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 34 *International Legal Materials* (1995) 1542, <http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm> (visited 24 August 2018).

[169] FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 22 November 2009, not yet in force; available at <http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf> (visited 24 August 2018).

[170] International Tropical Timber Agreement, Geneva, 27 January 2006, in force 7 December 2011, available at <http://www.itto.int/direct/topics/topics_pdf_download/topics_id=3363&no=1&disp=inline> (visited 24 August 2018).

[171] International Plant Protection Convention, Rome, 6 December 1951, into force 3 April 1952, 150 *United Nations Treaty Series* 67.

11) Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (2010);[172]
12) Vienna Convention on Substances that Deplete the Ozone Layer (1985) and the Montreal Protocol (1987);
13) United Nations Framework Convention on Climate Change (UNFCCC) (1992), the Kyoto Protocol (1992) and the Paris Agreement (2015);
14) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989);
15) Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991)
16) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998);
17) Stockholm Convention on Persistent Organic Pollutants (2001); and
18) Minamata Convention on Mercury (2013).

Duncan Brack and Kevin Gray have presented three broad sets of reasons why trade restrictions have been incorporated in MEAs:

1) To provide a means of monitoring and controlling trade in products where the uncontrolled trade would lead or contribute to environmental damage. This may extend to a complete exclusion of particular products from international trade (CITES, Basel Convention, Rotterdam Convention, Cartagena Protocol, Montreal Protocol, and the CCAMLR);
2) To provide a means of complying with the MEA's requirements (Montreal Protocol, Kyoto Protocol);
3) To provide a means of enforcing the MEA, by forbidding trade with non-parties or non-complying parties (CITES, International Commission for the Conservation of Atlantic Tunas (ICCAT), CCAMLR, Montreal Protocol, Basel Convention, Kyoto Protocol.[173]

In addition, the United Nations Conference on Trade and Development (UNCTAD) Trade and Environment Review has outlines four clusters of trade obligations under MEAs:

1) Trade measures explicitly provided for and mandatory under MEAs.
2) Trade measures neither explicitly provided for nor mandatory under the MEA itself, but consequential to the 'obligation de résultat' of the MEA. This category covers cases where an MEA identifies a list of potential policies and measures that Parties could implement to meet their obligations.

[172] Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Nagoya, 15 October 2010, <http://bch.cbd.int/protocol/supplementary/>.
[173] Brack and Gray, 'Multilateral Environmental Agreements', *supra* note 80, at 7-11.

3) Trade measures not identified in the MEA, which has only an 'obligation de résultat', but that Parties could decide to implement in order to comply with their obligations. In contrast to the previous category, the MEA does not list potential policies and measures, so countries have greater scope regarding the exact nature of the measures they might decide to deploy to reach the objectives of the MEA.
4) Trade measures not required in the MEA, but which Parties can decide to implement if the MEA contains general provisions stating that Parties can adopt stringent measures in accordance with international law. In some cases, the MEA may explicitly recognize the right of Members to apply specific trade measures.[174]

Most of the global south countries are parties to more than one of the major global environmental agreements hereinabove. While it is not fully settled that the foregoing reasons for having trade restrictions in MEAs and/or the clusters of trade obligations will completely benefit the environment from a general MEA perspective, it cannot be disputed that if the objective and other benefits of an MEA are accepted as valid, then the control of trade of the production and consumption of certain items and/or environmental resources, should be uncontroversial.[175]

Duncan Brack and Kevin Gray have concluded that

> in general, trade measures can be an appropriate policy measure to use….inter alia: (a) when the international community agrees to collectively tackle and manage international trade as a part of the environmental problem; (b) when trade controls are required to make regulatory systems comprehensive in their coverage; (c) to discourage free-riding, which can often be a barrier to effective international co-operation; and (d) to ensure compliance with the MEA.

And that:

1) Trade measures in MEAs have become more common, and seem likely to continue to be so, as a logical reaction to the transboundary nature of environmental issues and patterns of economic activity. The increasing attention being paid to the problem of illegal trade provides another reason for employing trade measures; and
2) In many instances, trade measures are the only realistic enforcement measure available to MEAs. They can bear a real cost (particularly where trade bans are used against non-parties or noncomplying parties), and should not in general be adopted in isolation from other compliance instruments, such as financial and capacity-building assistance. Nevertheless, trade measures in MEAs can be an effective tool and should always be considered when the MEA is designed.[176]

[174] UNCTAD, 'Trade and Environment Review' (2003), available at <http://unctad.org/en/Docs/ditcted20034_en.pdf> (visited 14 August 2018) at 7
[175] Brack and Gray, 'Multilateral Environmental Agreements', *supra* note 80, at 8-18.
[176] *Ibid.* at 17-18.

9 Constraints facing trade and environmental issues in the global south

9.1 Weaknesses and deficiencies in legal frameworks and systems

In some countries from the global south, their laws relating to trade and environment may exist only on paper and/or not exit at all. Where the laws exist on paper, they are sometimes outdated and obsolete. In these cases, there is also minimal to zero enforcement from the state in addition to general non-compliance from the public and other relevant stakeholder because of the associated historical, political, cultural, and economic challenges and dynamics. Relevant judicial institutions are usually very slow and unpredictable in interpreting laws on issues related to trade and environment. There is need for countries to reconcile their domestic policies, laws and regulations related to trade and environment with the internationally agreed treaties, goals and objectives. Adequate institutions should be put in place to ensure enforcement and compliance with the laws. Legal and institutional reforms should be undertaken to ensure designation of laws and systems that respond to the contemporary needs of each society when it comes to dealing with and reconciling gaps in trade and environment issues.

9.2 Low knowledge and institutional capacity

The achievement of the 2030 Agenda for Sustainable Development will require the cooperation of many decision-makers and stakeholders across different institutions at diverse levels. In developing countries, strong knowledge and understanding of linkages between issues related to trade and environment would be the first step towards creating a well-functioning human resource base and institutional capacity. This will require strong and coherent usage of the knowledge and capacity transfer mechanisms and processes that already exist under the multilateral environmental systems.

9.3 Poor understanding of linkages in international law

A state will always struggle to deliver on its obligations under international law if the internal understanding of the relevant international laws and obligations is shallow. In this regard, it is often difficult for the majority of the population to understand their rights and claim them. Where the rights are claimed, the national institutions may lack the capacity to enforce certain rights because of the complex nature of the issues involved. It cannot be disputed that issues related to trade and environment are some of the most complex issues to deal with and reconcile at the national level. Furthermore, some of the linkages in trade and environment issues may be unilateral and limited to a specific situation whereas other linkages can be dynamic and cross-cutting. The environment can be best protected and trade enhanced if govern-

ments and citizens are able to internalize the externalities of all laws related to trade and environment.

10 Conclusion and recommendations

While most developing countries are aware of what their obligations under multilateral environmental agreements are, it is not fully settled that they have reconciled and enhanced their understanding of the inter-relationship and linkages between environmental and trade agreements. It is about time relevant stakeholders mobilized political support and sought to prepare and disseminate basic information and knowledge related to trade and environment in developing countries.

Integrated approaches to development are indispensable in ensuring that the global south benefits the most from the existing environmental and economic opportunities with the sustainable development frameworks. Global south countries should already seek to understand the links between the subjects and device their own unique and integrated approaches to ensuring that their trade and environmental obligations are reconciled for the benefit of the environment, economies and people.

There is a need to draw attention to and linkages between economic and environmental interests of developing countries within the wider global development processes, and establish mechanisms to ensure that during international negotiations, the interests are given a deserving focus.

Finally, this paper has presented an argument on how localized and regional approaches to trade and environment may be a more appropriate response to the trade and environment challenges facing the global south. While the existing international trade processes may be more favorable at the global level, evidence indicates that the global south economies are not great beneficieries of the same. The global south environment continues to degrade, and lives are being threatened. The current global trade system has been more beneficial to the global north through its originally intended mandates. The fledgling and often small economies in the global south may be better placed to grow their economies and protect their natural environment through integrated and green approaches to economic processes. Such approaches would ultimately reduce reliance on the far-flung, mammoth obligations, often funded by loans borrowed from the global north. Integrated and green approaches to trade and environment issues will also reduce deals that plunge the global south countries into more social and political problems and contribute to the depletion of the global south environment.

Part III

Interactive Negotiation Skills in the Area of Trade and Environment

International Negotiation Committee on Ocean Plastics: A Multilateral Negotiation Simulation[1]

Tuula Honkonen,[2] Sabaa A. Khan,[3] Kati Kulovesi[4] and Harro van Asselt[5]

1 Overview

1.1 Introduction

These materials set out the elements and structure of a negotiation simulation exercise for the University of Eastern Finland – UN Environment Course on Multilateral Environmental Agreements (MEAs), held in Chambéry, France, 20–30 October 2017.

The scenario for the negotiation simulation focused on substantive, institutional and procedural issues in the context of regulating plastic pollution in global oceans. The simulation was entirely hypothetical in the sense that there is not, in real life, a draft international convention on the theme.[6] At the same time, the issue of setting

[1] This paper is partly drawn from the description of negotiation exercises on the previous UEF – UN Environment MEA Courses, conducted by Cam Carruthers.

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[6] Although there have been proposals for such an instrument in the literature. See, for instance, Stephanie B. Borrelle et al, 'Opinion: why we need an international agreement on marine plastic pollution', 114(38) *Proceedings of the National Academy of Sciences of the United States of America* (2017) 9994–9997.

controls on marine plastic pollution is highly topical, and individual countries as well as the broader international community have been seeking for ways to address the problem.[7] Plastics pollution resulting from both land-based and marine activities has become a major environmental concern. This is because common plastic wastes disposed in oceans can endure for several hundreds to thousands of years. It threatens ocean health by poisoning marine life, curtailing biodiversity and spreading invasively in various species along the food chain.

The exercise began with a plenary of the 5th session of an Intergovernmental Negotiation Committee on Ocean Plastics (INC5). This imaginary body had been established by the UN General Assembly with a mandate to elaborate an international agreement to regulate and reduce plastic pollution in the oceans. According to the INC's mandate, the agreement could include both binding and voluntary approaches, together with interim activities, to reduce risks to human health and the environment.

INC 5 constituted the penultimate scheduled negotiating session of the body tasked with producing a legally binding instrument on ocean plastics. For the purposes of the exercise, the key outstanding issues included control measures for polyvinylchloride (PVC) plastics and trade-related provisions to control trade among Parties and non-Parties. According to the scenario, two drafting groups had been established at previous sessions to negotiate on these two themes.

This paper contains key elements of the primary materials for the simulation exercise, including general instructions and supporting material. Individual instructions were provided separately to each negotiation simulation participant.

1.2 Importance of procedures and rules of procedure in MEA negotiations

To guide MEA negotiations, Rules of Procedure are set up to govern activities of the negotiating and decision-making bodies. For MEAs still under negotiation, Rules of Procedures are typically adopted by the INC. For existing MEAs, they are usually adopted by the Conference of the Parties (COP) at its first session. Such rules also apply to negotiations for a new protocol or other binding instrument under the MEA in question.

Rules of Procedure play an important role in defining the structure and conduct of multilateral negotiations. The most important one are those concerning decision-making (including possible voting rules), authority of the Chair(s), points of order and motions, as well as amendments to the Rules of Procedule. A good understanding of the rules of procedure is invaluable for MEAs negotiators. Knowing

[7] See, for an overview, UNEP, 'Combating Marine Plastic Litter and Microplastics: An Assessment of the Effectiveness of Relevant International, Regional and Subregional Governance Strategies and Approaches', UN Doc. UNEP/AHEG/2018/1/INF/3 (2018).

the rules means knowing what one can do to advance or protect one's position, and how to do it.[8]

Rules of Procedure and related issues may seem either mundane or arcane, and only incidental to the more compelling questions of substance. Indeed, negotiators are often more concerned with strategy or technical priorities. Some may not even be aware of the influence that Rules of Procedure have on the process, which can be subtle. However, even when no reference is made to the rules, they have a profound influence on outcomes. A key example is decision-making: there is a tendency to avoid voting in MEA negotiations, but whether and how consensus is obtained on a given issue may depend to some degree on the understanding of how Parties would vote if they did so. Negotiators who fail to understand the underlying dynamics on such issues can make serious strategic errors.

Indeed, ignorance of the Rules of Procedure can lead to major failures and frustrations with the process, especially since problems may only be discovered after key decisions have been taken. It is difficult if not practically impossible to undo multilateral process decisions, once taken. Hence, it is important to consider strategic issues about decision-making processes and relevant rules early in any multilateral endeavour.

The simulation exercise described in this paper was designed, in part, to open up certain procedural issues so that participants could strengthen their knowledge and understanding of the Rules of Procedure as tools for more effective and efficient negotiation. The idea was for the participants to negotiate conceptual ownership of procedures while they negotiated practical textual solutions. The premise was that the Rules of Procedure constitute a code which reflects the values and interests of Parties and informs the way negotiators work together to take decisions. The rules frame what happens, who can make it happen, when, where and how. The higher the level of common understanding and agreement of the rules in any given body, the more efficiently and effectively that body can operate and reach agreement to attain common objectives.

1.3 Simulation objectives

The negotiation simulation exercise described in this paper focused on issues related to plastic pollution in global oceans. The general objectives were to promote among participants, through simulation experience:

- understanding of the challenges and opportunities related to the inclusion of trade-related provisions in MEAs;

[8] For an analysis of the importance of the rules of procedure in a particular MEA, see Joanna Depledge, *The Organization of Global Negotiations: Constructing the Climate Change Regime* (Earthscan, 2005), particularly at 80–102.

- understanding of the principles and practices of multilateral environmental negotiations; and
- familiarity with specific substantive and drafting issues.

The INC's rules of procedure were included in the general instructions distributed to the participants. Accordingly, the INC was set to operate on the basis of a consensus rule and no voting rules had been adopted. This is a common approach in MEA negotiations. In light of this, it was recommended to the INC Co-Chairs and other delegates to consult informally, trying to reach agreement on the appointment of the drafting group facilitators already before the INC 5 opening plenary.

Overall, within the exercise, the specific objective was to conduct negotiations on the following issues:

(1) election of officers;
(2) control measures for PVC;
(3) trade-related provisions concerning trade among Parties and non-Parties; and
(4) arrangements for the next and final scheduled session of the INC with a focus on how to take the INC5 outcomes forward and how to proceed with issues that potentially remain outstanding after INC5.

The theme also provided an opportunity for participants to gain understanding about building new legal architectures in international environmental governance.

Within the exercise, the specific objective of the meeting was to produce agreement on the two issues set out for the drafting groups to negotiate on.

1.4 Procedural scenario

The exercise began with the opening plenary meeting of INC 5 where delegates were expected to adopt the agenda and agree to the organization of work. At the opening plenary, delegates had to also formally appoint two drafting group facilitators by a consensus.

After the opening plenary, participants proceeded to the drafting groups in accordance with their individual instructions. For the purposes of the exercise, the drafting groups had already been established at previous sessions of the INC and their existence and mandate were not among the issues to be negotiated.

Each drafting group worked based on relevant parts of a negotiating text forwarded by INC 4. The drafting groups were chaired by Facilitators appointed by the INC at the opening plenary, with each drafting group then choosing one rapporteur from within the group.

The INC was expected to adopt a new legally binding instrument on ocean plastics. In light of this, the ideal outcome from INC 5 was for the drafting groups to complete their work and for the INC to forward agreed text to its final scheduled session. However, as it often happens in real-life negotiations, a possible outcome from the exercise was that not both drafting groups reach agreement. In such a case, the closing plenary of INC 5 – scheduled to take place during the exercise – had to agree on how to take the work forward to INC 6. For example, the INC could agree to continue working through the two drafting groups at INC 6 based on the texts developed at INC 5; or it might wish to give the INC Co-Chairs a mandate to prepare a compromise text to be considered in a negotiating setting that is different from the two drafting groups.

1.5 Introduction to the exercise

Each participant played a specific role of a country representative. Participants were expected to represent their national interests based on their individual instructions. Participants were encouraged to play their part in the overall scenario for the simulation, following general and individual instructions. Where possible, it was a good idea to make alliances and develop coordinated strategies to intervene in support of others, or to take the lead in other cases. Some roles, including the Co-Chairs and Facilitators, played a resource function. Those playing such roles were to serve all participants and work for a positive outcome in addition to their individual instructions. They were encouraged to signal to the other Parties when they take up their partisan roles (e.g. 'I'm taking off my Co-Chair's hat…').

Participants were advised to keep in mind their interests and positions with respect to all issues under negotiation at INC 5, but focus on the issue assigned to their drafting group. Participants were encouraged to work hard to achieve their objectives.

Participants were strongly urged to follow their instructions, and to elaborate interventions with a compelling rationale to advance their positions. Participants were also encouraged to take the initiative and be inventive and to intervene in drafting groups and in plenary even if they had no specific instructions on a particular issue. Participants were strongly encouraged to seek support from other participants for, and identify opposition to, their positions, including positions discussed in drafting groups in which they do not participate. To this end, participants were encouraged to consider developing joint drafting proposals and making interventions on behalf of more than one Party, and might wish to consider using regional and negotiation groups as a point of departure. Participants were also asked to think about issues for discussion in the post-mortem following the exercise, including issues of both process and substance within the exercise, as well as issues relating to the structure and management of the exercise itself.

The simulation was designed to be difficult, with failure to reach agreement a real possibility. Unavoidably, a random distribution of positions was likely to result in making some Parties appear more or less constructive. Indeed, for simulation purposes, some positions were designed to cause difficulties. It is important to note that the positions in individual instructions were developed and assigned randomly. They were entirely hypothetical and were not intended to reflect specific positions of particular Parties or the views of organizations or individuals.

Individual delegates often face situations similar to this exercise, where they have little opportunity to prepare, but should still define objectives and develop a strategy. Informal diplomacy is where most progress toward agreement on concepts is made, while drafting group and plenary discussion is often required for agreement on specific texts. Drafting often involves a fine balance between accommodation and clarity. Decision-making on final text in plenary may be pro-forma, but there can be surprises. Decisions in the plenary are critical and can sometimes move very quickly, at times moving back and forth on an agenda, so that being prepared with an effective intervention at any moment is essential.

The two Co-Chairs and the drafting group Facilitators played an important role, setting up and managing the process – and managing time – to produce agreement. They were encouraged to consult broadly, including with each other and Party representatives (note that the simulation organizers might be able to provide advice acting as senior secretariat officials). The key to success was thoughtful organization of the work of the groups, including strategic management of how the smaller drafting groups and the plenary sessions function and are linked.

2 Instructions

2.1 Individual instructions

The core of the simulation was set out in confidential individual instructions of 1-2 pages in length. They provided very brief positions and fall-back positions on each of the issues being negotiated, but no rationale or strategy (this had to be developed by each participant). In some cases, the instructions might seem internally inconsistent and even contradictory (this happens in real life, and is interesting to watch!). In some cases, instructions stipulated that a position could not be abandoned for a fall back without consulting a designated senior official in the state's capital. For the purposes of this simulation, the simulation coordinators served in this capacity.

2.2 General instructions

The following general instructions were provided:

1) At a minimum, please review the general and individual instructions and the key simulation documents (subsection 3.1) as well as the rules of procedure for the INC. The remaining material is for reference / use as needed, but should not be overlooked.[9]

2) Each participant will be assigned a role as a representative of a country delegate. They have been sent with full credentials from their governments to participate in the meeting of the INC, using their confidential individual instructions as a guide. Delegates *should do their best to achieve the objectives laid out in their instructions*. They should develop a strategy – but not too rigid - and an integrated rationale to support their positions.

3) Do not share your confidential individual instructions with other participants. Do not concede to a fall-back position without a serious effort to achieve your primary objective (and not on the first day!). If possible, consult with others before the session, to identify and coordinate with those who have similar instructions, and even prepare joint interventions. *You should build alliances and try to support anyone with a similar position who is out-numbered. You should try to identify participants with opposing views, and influence them both in formal negotiations, as well as in informal settings. Also note that during the exercise, you may receive supplementary instructions.* Participants should, of course, always be respectful of each other's views and background.

4) The Simulation Coordinators will remain as far as possible outside of the simulation and should not be consulted unless necessary. Questions on procedure, etc. should a priori be addressed to the Co-Chairs, drafting group facilitators or Secretariat officials. The Simulation Coordinators may, as needed, play the role of a Senior Secretariat official and/or one of the designated senior government officials in a state's capital authorized to provide supplementary instructions to their delegations.

5) In the INC plenary, the Co-chairs sit at the head of the room, with the Secretariat officials beside them. Parties will be provided with the opportunity to select a 'flag' or country nameplate (fold it twice, so the name is in the mid panel). To speak, please raise your 'flag' and signal the Secretariat official keeping the speakers' list.

[9] See also the MEA Negotiators' Handbook ibid, in particular, sections 3.1, 3.2, 3.3, 3.6, 2.4, 4.3 and 5.

6) The INC will begin work in plenary. As explained above, the INC has previously agreed to continue working in drafting groups established at INC4 based on text forwarded from the previous session.

7) In addition to adopting tha agenda and agreeing to the organization of work, the INC plenary will need to elect Facilitators for the two drafting groups.

8) When INC5 breaks into the drafting groups, please join the group identified in your individual instructions. The groups will operate much like an informal drafting group (see the *MEA Negotiator's Handbook*,).

9) The drafting groups must reach agreement on what to report back to the plenary. Each group will select a rapporteur to compile a report of the discussions (see the *MEA Negotiator's Handbook* on drafting, especially use of brackets).

10) Co-Chairs and Facilitators must play their roles throughout the negotiation simulation exercise, and generally refrain from openly taking positions, and only do so when explicitly indicating that they are 'taking their Chair's hat off'.

11) Please use only the materials provided, as well as advice and information from other participants, and don't be distracted by internet resources or use any precedent found there or elsewhere (even though this is often a good idea in real life!).

12) The exercise will take place over a two-day period. Participants are encouraged to consult informally before the exercise for nominations to the drafting group Facilitator positions and in the evening of the first day to from alliances and broker solutions (as often happens in real life).

2.3 Evaluation

Following the exercise, participants were requested to respond to the evaluation questions in the course evaluation in relation to this exercise.

3 Background material

3.1 Plastic wastes and global oceans

More than 8 million tonnes of plastic leaks into the ocean each year – equal to dumping a garbage truck of plastic every minute.[10]

Plastics pollution has risen in massive quantities across the globe, resulting from the prevalent consumption of plastic products and lack of sustainable plastic waste management. It has become a leading concern on the global environmental governance agenda. Common plastic wastes disposed in oceans can endure for several hundreds to thousands of years, and thus immensely threaten ocean health by poisoning marine life, curtailing biodiversity and spreading invasively in various species along the food chain.[11]

Under the theme of the 3rd United Nations Environment Assembly (still upcoming at the time of the negotiation simulation), a 'Pollution-free Planet', the international community adopted several new commitments towards reducing air, water and soil pollution. These include a resolution specifically addressing marine litter and microplastics as well as a Ministerial Declaration calling for enhanced actions on various aspects of pollution, with explicit reference to ocean plastics.[12]

The sound management of plastic wastes will be a forefront issue in this context, considering that plastics account for 60-90 per cent of marine pollution.[13] Globally, there is an urgent need to rethink how we produce, use and dispose of plastics. The failure to do so will have devastating impacts on marine ecosystems and human health.[14] Global stakeholders play a part in this endeavour – civil society, governments, plastic manufacturers as well as downstream users in the vast number of commodity chains that rely on plastics.

Sustainable governance requires that governments and plastics industries work together to make available the sustainable recuperation of various forms of plastic wastes, including those dumped in oceans. This includes marine shore litter like food packaging and water bottles, plastic debris resulting from marine-based activities such as fishing nets and ship wastes from cruise tourism and shipping. Many

[10] UN Environment, 'UN declares was on ocean plastic' (2017), available at <http://web.unep.org/unep-map/un-declares-war-ocean-plastic> (visited 29 June 2018),

[11] Roland Geyer, Jenna R. Jambeck and Kara Lavender Law, 'Production, use, and fate of all plastics ever made', 3(7) *Science Advances* (2017) e1700782.

[12] 'Marine Litter and Microplastics', UNEA Res. 3/7 (2017).

[13] Joan Fabres et al (eds), 'Marine Litter. Vital Graphics' (UNEP and GRID-Arendal, 2016), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/9798/-Marine_litter_Vital_graphics-2016MarineLitterVG.pdf.pdf?sequence=3&isAllowed=y> (visited 15 August 2018) at 7.

[14] For instance, a relativekly recent comprehensive study revealed marine litter in 100 per cent of marine turtles, 59 per cent of whales, 36 per cent of seals and 40 per cent of seabirds. *Ibid.*

countries are in the process of setting in place legislative and other strategies to combat pollution from plastics, both upstream (at the manufacturing and retail levels) and downstream (at end-of life management). At the global level, policy interventions targeting plastics pollution have been of a more cooperative nature and mainly focused on voluntary guidance.

3.1.1 Governance mechanisms

International cooperation on plastic wastes in the marine environment takes place under a number of international and regional legal instruments as well as non-legal initiatives. These instruments aim to curtail marine pollution, including from plastic waste streams.

TREATIES

The London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[15] was adopted in 1972, with the aim of promoting states to take individual and collective action towards effectively controlling all sources of marine pollution. Under Article 1, Parties 'pledge themselves especially to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea'. Dumping refers to the deliberate disposal of wastes at sea. The Convention prohibits dumping of any wastes except as specified in its Annexes. The dumping of wastes listed under Annex 1 is prohibited while wastes listed under Annex 2 require a special permit issued under a national permitting system. The dumping of all other wastes requires a special permit. In 1996, the Parties adopted a Protocol to the Convention (London Protocol)[16] that came into force in 2006. The Protocol requires Parties to adhere to the precautionary approach as a general obligation. It also encourages Parties to adopt the polluter pays principle with respect to the costs of authorized activities (Article 3). The Protocol further adopts a reverse list approach, whereby all dumping is prohibited, unless explicitly permitted. The Convention has 87 Parties to date.

The International Convention for the Prevention of Pollution from Ships (MARPOL)[17] came into force in 1983. It is the primary international legal instrument

[15] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 13 November 1972, in force 30 August 1975, 11 *International Legal Materials* (1972) 1294, <http://www.imo.org>.

[16] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 7 November 1996, in force 24 March 2006, <http://www.imo.org>.

[17] International Convention for the Prevention of Pollution from Ships, 1973, first signed 2 November 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), adopted 17 February 1978. The combined instrument entered into force on 2 October 1983, 12 *International Legal Materials* (1973) 1319, <http://www.imo.org>.

to address pollution from ships, including from accidents and routine operations. Annex V (Regulations for the prevention of Pollution by Garbage from Ships) of the Convention entered into force on 31 December 1988 and imposes a complete ban on the disposal into the sea of all forms of plastics.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[18] was adopted in 1989 to protect human health and the environment from the adverse effects of the transboundary movement of hazardous and 'other wastes' (refers household waste and incinerator ash). Plastics listed as 'hazardous waste' under the Convention and plastics that appear in household waste streams are regulated under the Convention. To the extent that plastic wastes fall under the scope of the Convention, its provisions regarding the minimization of waste generation, environmentally sound management and prior informed consent procedures upon transboundary movement may be applicable.

The Basel Convention has also produced voluntary guidance instruments to assist Parties in the environmentally sound management of plastic wastes. Technical Guidelines were adopted in 2002 on the identification and ESM of plastic wastes and their disposal. At the 13th Conference of the Parties (COP-13) in 2017, the Parties adopted a number of decisions broadening the Convention's focus over plastic waste, marine plastic litter and microplastics. Notably, the Open-ended Working Group (OEWG) has been mandated to consider, in its upcoming work programme, how marine plastic litter and microplastics could be further addressed under the Convention.[19] Under a synergies approach, regional and coordinating centres of the Basel and Stockholm Conventions are encouraged to look at the impact of plastic waste, marine plastic litter, microplastics and measures for the prevention and environmentally sound management.[20]

VOLUNTARY MECHANISMS

In 1995, the UN launched an intergovernmental mechanism called the Global Programme of Action (GPA) for Protection of the Marine Environment from Land-based Activities.[21] The GPA was created under the 1995 Washington Declaration on Protection of the Marine Environment from Land-based Activities,[22] signed by 108

[18] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

[19] 'Classification and hazard characterization of wastes: review of cooperation with the World Customs Organization and its Harmonized System Committee', Basel Dec. BC 13/7 (2017).

[20] 'Basel Convention regional and coordinating centres', Basel Dec. BC-13/11 (2017) and 'Technical assistance', Stockholm Dec. SC-8/15 (2017).

[21] See <http://web.unep.org/nairobiconvention/unep-global-programme-action-unepgpa> (visited 30 June 2018).

[22] See <http://wedocs.unep.org/bitstream/handle/20.500.11822/13421/WashingtonDeclaration.pdf?sequence=1&isAllowed=y> (visited 30 June 2018).

states. The GPA addresses ocean degradation by providing guidance to governments in the adoption of national and regional action plans to prevent, reduce, control or eliminate marine pollution. The GPA recognized land-based marine litter as a priority concern in the 2012 Manila Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities.[23] The multi-stakeholder Global Partnership on Marine Litter (GPML)[24] was launched at Rio+20, with the objective of protecting human health and the global environment by the reduction and management of marine litter.

The Honolulu Strategy is a global collaborative framework for the prevention and management of marine debris. It is a framework that targets the reduction of marine debris through three overarching goals: (1) reduced amount and impact of land-based litter and solid waste into the marine environment; (2) reduced amount and impact of sea-based sources of marine debris; and (3) reduced amount and impact of accumulated marine debris on shorelines. Each goal is associated with a list of strategies and potential actions for their implementation. UNEP introduced the Honolulu Strategy in 2012, at the Third Intergovernmental Review Meeting on the Implementation of the GPA. The Honolulu Strategy was developed following the Fifth International Marine Debris Conference (2011) where the Honolulu Commitment[25] was adopted in the aim of establishing a cross-sectoral approach to reduce marine debris and its associated damages to ecosystem and human health.

UNEA RESOLUTIONS

Marine debris and microplastics have been addressed in several resolutions adopted by the United Nations Environment Assembly (UNEA). UNEA Resolution 1/6 on Marine Plastic Debris and Microplastics recognized the growing problem caused by these waste streams and mandated UNEP to prepare a study on the issue.[26] Resolution 2/11 on Marine Plastic Litter and Microplastics stressed the importance of prevention and environmentally sound management, and contained guidance on actions to be taken.[27] Notably, Resolution 2/11 also provides upstream guidance with respect to plastics production in encouraging:

> product manufacturers and others to consider the life cycle environmental impacts of products containing microbeads and compostable polymers, including possible downstream impacts that may compromise the recycling of plastic waste; to eliminate or reduce the use of primary microplastic particles in products, including, wherever possible, products such as personal care products,

[23] See <https://wedocs.unep.org/bitstream/handle/20.500.11822/12347/ManillaDeclarationREV.pdf?sequence=1&isAllowed=y> (visited 30 June 2018).
[24] See <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/addressing-land-based-pollution/global-partnership-marine> (visited 30 June 2018).
[25] See <https://5imdc.wordpress.com/about/commitment/> (visited 30 June 2018),
[26] 'Marine Plastic Litter and Microplastics', UNEA Res. 1/6 (2014).
[27] 'Marine Plastic Litter and Microplastics', UNEA Res. 2/11 (2016).

> industrial abrasives and printing products; to ensure that any replacement products are environmentally sound; and to cooperate in the environmentally sound management of such plastic waste.[28]

Resolution 2/11 also mandated UNEP

> to undertake an assessment of the effectiveness of relevant international, regional and subregional governance strategies and approaches to combat marine plastic litter and microplastics, taking into consideration the relevant international, regional and subregional regulatory frameworks and identifying possible gaps and options for addressing them, including through regional cooperation and coordination.[29]

3.2 Moving forward

From the existing international legal framework, it is clear that plastic waste, marine plastic litter and microplastics are addressed in very limited ways under different instruments, and for the most part, only at the end-of-life phase. A more holistic approach to plastic pollution would involve looking as the plastics lifecycle and targeting pollution prevention interventions upstream, during design, production and manufacturing. This could involve prohibiting or limiting the use of certain plastics and chemical additives commonly used in production chains. It could also involve the mandated use of a certain percentage of recuperated plastic materials (recycled plastics) in new products. Proposals have been made for a new international legal instrument targeting plastic pollution. Treaty models that have been suggested thus far include the Paris Agreement that has a national action plan approach, and the Montreal Protocol to the Vienna Convention which mandates the restriction and phasing out of certain substances.[30]

3.3 Understanding plastics

3.3.1 Introduction

Plastic is a generic name that covers many different materials made of different combinations of chemical compounds and additives. Plastics are usually solid and durable, with a slow rate of biodegradation. Some plastics are nonbiodegradable.

Polymers are composed of elements such as carbon, hydrogen, nitrogen, oxygen, chlorine, fluorine and bromine. Polymers can occur in nature or be anthropogenically produced. Most industrial plastic is made from petrochemicals. Common polymers found in plastic waste are provided in the table 'Common Polymers in Plastic

[28] *Ibid.* para. 18.
[29] *Ibid.* para. 21.
[30] Karen Raubenheimer and Alistair McIlgorm, 'Is the Montreal Protocol a model that can help solve the global marine plastic debris problem?', 81 *Marine Policy* (2017) 322-329.

Waste' below. Additives are used to give plastics certain characteristics (i.e. make them stronger, more durable, colorful, soft, fireproof, improve their processability).

Additives are toxic and non-toxic chemical substances and include colorants, plasticizers, stabilizers, fillers, antimicrobials and fragrances. Depending on the additives contained in plastics, the latter may be more or less harmful to human and environmental health. Examples of plastic additives that have been banned in the manufacturing of certain products for their endocrine-disrupting, developmental and neurological health effects include BPA (Bisphenol A), phthalates and ADA (azodicarbonamide).

Common Polymers in Plastic Waste.[31]

Polymer	Typical Applications	Typical Lifetime Range
high density polyethylene (PE-HD)	packaging & industrial film, bottles, tubs, cups, closures, toys, tanks, drums, milk & beer crates, cable insulation, pipes, gasoline tanks, shipping containers, seating	up to 2 years up to 30 years
low density polyethylene (PE-LD,PE-LLD) polyester (PET)	packaging film, cling -film, bags/sacks, lids, toys, coatings, flexible containers, tubing, irrigation pipes, bottles, food packaging film, strapping, recording tapes, carpets, vehicle tyre cords, fibres	up to 2 years up to 5 years up to 20 years up to 5 years up to 10 years
polypropylene (PP)	yoghurt & margarine pots, sweet & snack wrappers, packaging films, bottles/caps automotive battery cases, parts & body components, electrical components, carpet pile and backing	up to 5 years up to 10 years 15 years +
polystyrene (PS)	packaging applications, dairy product containers, cups & plates electrical appliances, tape cassettes,	up to 5 years up to 10 years
expanded polystyrene (EPS)	shock resistant packaging, cups & plates thermal insulation, building components,	up to 5 years up to 30 years
polytetrafluorethylene (PTFE)	cable insulation, heat -resistant coatings, electrical components, corrosion resistant fittings and seals	up to 30 years
polyvinylchloride (unplasticised PVC -U) (foamed PVC-E) (plasticised PVC -P)	**PVC-U,** window & door frames, ducting, water supply & drainage pipes, rainwater goods, **PVC-E** building components, building facades **PVC-P** flooring, cable & wire insulation, medical tubing & bags, shoes, cling film, food packaging, beer & milk & food processing tubing, concentrated chemicals packaging	up to 50 years up to 50 years up to 50 years up to 5 years

3.3.2 Focus on a problematic plastic: PVC

Vinyl chloride is a flammable, explosive gas, and known human carcinogen used to make PVC plastics. PVC plastics are often marketed as 'vinyl' and are amongst the

[31] Basel Technical guidelines on the identification and environmentally sound management of plastic wastes and for their disposal (2002), available at <http://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/cop/cop6/cop6_21e.pdf> (visited 30 June 2018).

most commonly used plastics. Phthalates are chemical additives used in PVC manufacturing to makes the plastics pliable. Exposure to phthalates is known to harm human health and aquatic life. Other toxins such as lead and cadmium are also used in PVC manufacturing.

PVC has been addressed as an environmental and health concern in several parts of the world for decades. Certain multinational corporations have banned the use of PVC in their products since the 1990's, and many others are in the process of phasing out the use of PVC in products ranging from athletic footwear, automobile interiors, building materials, consumer packaging and children's toys, amongst others. Certain health institutions and hospital networks have eliminated the use of PVC-products and many countries have enacted legislation restricting the use of PVC and phthalates in certain product categories.

Due to its non-renewable source (petrochemicals), non-biodegradability and its highly toxic chemical additives that may leach into the environment at disposal, PVC should be managed throughout its lifecycle and gradually phased out worldwide.

3.4 Trade measures in MEAs

MEAs generally encompass a range of mechanisms to achieve their environmental and human health objectives. One of the tools available in this regard are trade measures, which encompass prohibitions or other forms of restrictions or rules on the trading of certain types of substances, products, hazardous wastes, flora and fauna. Examples of trade measures include:

- export or import bans on certain goods, applicable to trade between Parties, that may also impact trade between Parties and non-Parties;
- export or import licencing systems on certain goods;
- production and consumption restrictions (for instance, phase-outs, bans) on certain goods, applicable in the jurisdiction of all Parties;
- reporting and consent requirements on transboundary movements of certain goods;
- reporting and monitoring obligations on the extent of trade in certain goods; and
- labelling requirements.

It is important to note that trade measures in MEAs enforce rules between the Parties to the MEA and may also have implications for how Parties can trade with non-Parties.
Depending on their individual trading relationships with non-Parties and the structure of their domestic or regional supply chains, the Parties to an MEA may have differing stances on the desirability of adopting trade measures as tools to achieve

MEA objectives. Moreover, since the rules of international trade are not the exclusive factor affecting the protection of human and environmental health, conservation of natural and living resources, or other such objectives embodied in MEAs, the adoption of trade measures alone do not guarantee the effectiveness of an MEA.

In certain cases, the adoption of international trading restrictions has played a central role in bringing an end to polluting and socially detrimental business practices, such as hazardous waste dumping from developed to developing countries, which had become prevalent in the 1970s before the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

In combination with other tools, such as national environmental action plans, public education mechanisms, technology-transfer arrangements and capacity-building cooperation, trade measures may greatly enhance the effectiveness of an MEA.

Examples of trade measures in MEAs

Treaty	Overarching Objectives	Trade Measure	Effect on Parties	Effect on Non-Parties
Rotterdam Convention (2004)	"promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm" "to contribute to the environmentally sound use of those hazardous chemicals, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties"	Prior Informed Consent (PIC)* procedure for chemicals listed in Annex III of the Convention - currently, **50 industrial chemicals and pesticides** in international trade. **note that this form of PIC is different than the PIC procedure elaborated in the Basel Convention*	**INFORMATION REPORTING:** For each chemical listed in Annex III, the Parties indicate whether they wish to accept future imports. These 'import responses' are collected by the Secretariat and communicated to all Parties every 6 months in the 'PIC Circular'. **MONITORING EXPORTS:** All Parties must ensure that exports of these chemicals from their territories conform to the import responses of the importing Parties. **RESTRICTING DOMESTIC PRODUCTION:** Parties that refuse to accept imports of an Annex III chemical must also stop domestic production of that chemical for domestic use. **INFORMATION DISSEMINATION:** Parties must ensure that information contained in PIC Circulars has been communicated to all industries, exporters and relevant authorities in their territories.	Parties that have indicated in their import responses their refusal to import an Annex III chemical from other Parties are also prohibited from importing the chemical from non-Parties. The Convention thus **limits chemical export opportunities of non-Parties into the domestic markets of the Parties.**

Treaty	Overarching Objectives	Trade Measure	Effect on Parties	Effect on Non-Parties
Minamata Convention on Mercury (2017)	"to protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds"	Ban on new mercury mines Phase-out of existing mercury mines in a Party within 15 years of entry into force of the Convention for that Party. Export and import restrictions on mercury Phase-out and phase-down of mercury use in multiple products and processes Ban on manufacture, import and export of mercury-added products beyond the phase-out date specified for those products Control measures on air emissions and land and water releases Restrictions on transboundary movements of mercury wastes	Parties commit to domestic restrictions on the production, use and disposal of mercury and certain mercury compounds and mercury-added products. Notification and consent procedures apply to mercury exports and imports between Parties. Parties cannot export or import mercury except for the uses allowed in the Convention. Parties assume various information reporting and mercury monitoring commitments.	Parties cannot export mercury to a non-Party unless the non-Party can prove with certification that it has measures in place to ensure protection of human health and environment, and its compliance of the relevant provisions of the Convention on environmentally sound interim storage and waste management. Like Parties, non-Parties can submit general notification to Secretariat of certification and compliance measures in place domestically, for inclusion in a public register.

4 Key simulation documents

4.1 Agenda for INC5

4.1.1 Provisional agenda

Intergovernmental Negotiating Committee on Ocean Plastics
Fifth Session
16-17 October 2017, Chambèry, France

Provisional Agenda UNEP/INC.5/1, 1 October 2017

1. Opening of the session
2. Election of Officers
3. Organizational Matters
   (a) Adoption of the agenda
   (b) Organization of work
4. Preparation of a Legally Binding Instrument on Ocean Plastics
5. Other matters
6. Adoption of the report
7. Closure of the session

4.1.2 Annotated agenda

Intergovernmental Negotiating Committee on Ocean Plastics
Fifth Session
16-17 October 2017, Chambèry, France

Annotations to the Provisional Agenda UNEP/INC.5/1/Add.1, 1 October 2017

Item 1 Opening of the session

1. The fifth session of the Intergovernmental Negotiating Committee to prepare a legally binding instrument on ocean plastics, to be held from 17 to 18 October 2017, will be opened at 10 am on Tuesday, 17 October 2017.

Item 2 Election of Officers

2. It is expected that the intergovernmental negotiating committee will elect its officers, including two co-chairs and a rapporteur at the beginning of its fifth session.

Item 3 Organizational Matters

3. The committee may wish to adopt the agenda for its fifth session based on the provisional agenda set forth in document UNEP/INC.5/1.

4. The committee may wish to decide that it shall meet every day from 10 a.m. to 5 p.m. and from 10 p.m. to 4 p.m., subject to adjustments as necessary.

5. The committee may wish to proceed on the basis of the agreement reached at the previous meeting (UNEP/INC.4/Add.1) that the two drafting groups established at the committee's fourth session continue their work at the fifth session. During the session, the committee may wish to establish such other in-session working groups as it deems necessary and specify their mandates.

Item 4 Preparation of a Legally Binding Instrument on Ocean Plastics

6. The committee may wish, as agreed at its fourth session, to begin discussions on this agenda item in drafting groups.

Item 5. Other matters

7. The committee may wish to consider other matters raised during the session.

Item 6. Adoption of the report

8. At its closing meeting, the committee will be invited to consider and adopt the report on the work of its fifth session prepared by the rapporteur.

Item 7. Closure of the session

9. It is expected that the committee will conclude its work by 4 p.m. on Wednesday, 17 October 2017.

4.2 Rules of procedure

Rules of procedure for the intergovernmental negotiating committee to prepare a legally binding instrument on ocean plastics were provided to the participants (not reproduced here).

4.3 Group A negotiation text

DRAFT PROVISIONS ON CONTROLLING PVC

Article 1 Definitions

1. For the purposes of this Convention:

(a) "Polyvinyl chloride", abbreviated as "PVC", refers to the synthetic, thermoplastic material derived from the polymerization of vinyl chloride;

(b) "PVC product" refers to a product or product component that contains PVC or PVC compounds;

(c) "PVC waste" refers to a PVC product that has reached its end-of-life and must be disposed of or recycled.

(d) ….

Article 2 Objective
The ultimate objective of this Convention is to protect human health and the environment from the adverse effects of pollution from plastics.

[Article 3 PVC control measures]

1. Each Party [shall][should]
   Option 1: [not allow primary PVC production that was not being conducted within its territory at the date of entry into force of the Convention for it].
   Option 2: [[strive to reduce][enact [legally-binding] measures to reduce] primary PVC production within its territory].
   Option 3: [enact measures to reduce the generation of PVC wastes within its territory].
2. Each Party [shall][should]
   Option 1: [only allow primary PVC production within its territory for a period of up to [ten][fifteen][twenty] years after the date of entry into force of the Convention for it. During this period, PVC production [shall] [should] only be used in the manufacturing of PVC products in accordance with Article 4 and Annex A.
   Option 2: [seek to ensure that all manufacturers of PVC and PVC products listed in Annex A within its territory establish systems for the recuperation and environmentally sound management of PVC wastes.]

[Article 4 Trade in PVC products]
…

Article 5. Updating Annex A
1. Any Party may submit a proposal to the Secretariat for listing a PVC product in Annex A, which shall include information related to the availability, technical and economic feasibility and environmental and health risks and benefits of the non-PVC alternatives to the product.

2. No later than five years after the date of entry into force of the Convention, the Conference of the Parties shall review Annex A and may consider amendments to that Annex in accordance with the procedure set out in this Convention.

[Article 6. Exemptions]

…

[Article 7. Financial resources and mechanisms]

…

[Article 8. Capacity-building, technical assistance and technology transfer]

…

[Article 9. Reporting and review]

…

[Article 10. Non-compliance]

…

[Article 11. Effectiveness evaluation]

…

[Article 12. Conference of the Parties]

…

[Article 13. Secretariat]

…

[Article 14. Settlement of disputes]

…

[Article 15. Relationships with other international agreements]

…

[ANNEX A]

Products subject to Article 3, paragraph 1

PVC Product	**Date after which the manufacture, import or export of the product [shall][should] not be allowed**
Automobile components	[8 years][12 years][20 years]
Medical bags, tubing and other health care products	[5 years][10 years]
Cable insulation	[10 years]
Pipes	[10 years][20 years]
Bottles	[2 years]
Product packaging (cosmetics, detergents, household goods)	[4 years]
Food packaging and utensils	[6 years]
Electronic appliances	[5 years][15 years]
Children's toys and baby products	[2 years][7 years]
Medical devices	[3 years][5 years][7 years][20 years]

4.4 Group B negotiation text

Article 1 Definitions

…

Article 2 Objective

…

[Article 3 PVC control measures]

…

[Article 4 Trade in PVC products]

1. Each Party

   Option 1: [shall][should] not allow, by taking appropriate measures, the manufacture [and export] of PVC products listed in Annex A after the phase-out date specified for each of those products [except where the Party has a registered exemption pursuant to Article 6].

   Option 2: [shall][should] implement measures in an effort to [effectively] [reduce][prohibit] the manufacture [and export] of PVC products listed in Annex A by the phase-out date specified therein.

   [2. Each Party [shall][should] not allow from a non-Party the import of PVC

products listed in Annex A by the phase-out date specified therein.]

[Article 6. Exemptions]

…

[Article 7. Financial resources and mechanisms]

…

[Article 8. Capacity-building, technical assistance and technology transfer]

…

[Article 9. Reporting and review]

…

[Article 10. Non-compliance]

…

[Article 11. Effectiveness evaluation]

…

[Article 12. Conference of the Parties]

…

[Article 13. Secretariat]

…

[Article 14. Settlement of disputes]

…

[Article 15. Relationships with other international agreements]

Option 1: This Convention shall not alter the rights and obligations between the Parties under other international agreements to which they are a Party.

Option 2: This Convention shall not alter the rights and obligations between the Parties under other international agreements to which they are a Party, except when the exercise of those rights and obligations would lead to severe and irreparable damage to human health and the environment.

Option 3: In the event of an inconsistency between this Convention and any other international agreement applicable between the Parties, this Convention shall prevail [to the extent of the inconsistency].

Option 4: In order to effectively address plastics pollution and its adverse effects, States shall formulate, elaborate and implement this Convention in a mutually supportive manner with other relevant international law [including the Agreements of the World Trade Organization].

Option 5: no text.

[ANNEX A]

5 Review of the exercise

The following is a brief summary of the proceedings and analysis based on our observation of the exercise, as well as written evaluations from participants.

There were 24 official participants in all, not including the facilitators and the other resource people who supported or played various roles in respect of the simulation. The participants were mainly from Ministries of Foreign Affairs or from ministries responsible for environmental matters of their respective countries. Academic, non-governmental organizations and intergovernmental organizations were also represented.

The negotiations commenced with a plenary session of INC 5, in which the sole purpose was to agree on the formation of two drafting groups (on PVC control measures and trade-related provisions to control trade among Parties and non-Parties). Opening statements were generally well-prepared, and struck a fine balance between substance and diplomacy. Agreement in the opening plenary on the formation of the drafting groups was mostly straightforward, though there was some confusion about who should be Facilitator and who should be rapporteur, leading to an agreement that there should be two Co-Facilitators for the drafting groups (see also below).[32] This may be due to the fact that agenda items were taken up in a different order. It was important for the Co-Chairs to clearly indicate the order in which issues will be discussed, and to clearly indicate what is being discussed, to avoid confusion. Moreover, a few points of order were raised, but they were not – as is usual – dealt with immediately, before returning to the substance.

Participants in the drafting group A on PVC control measures first focused their discussions on the options for primary PVC production and the handling of PVC waste. While all participants agreed that some text should be included to address both, there was divergence on the level of obligation to be contained in the text. Participants reached basic agreement to have a binding obligation ('shall') to develop

[32] This of course was for Parties to decide but was not our original intention because there were only a limited number of participants. As those who declined to chair well pointed out, they had instructions to negotiate and be part of their negotiating group.

policies and measures. However, this was subject to contextual language focusing on common but differentiated responsibilities and the provision of support. Having decided to include an Annex with phase-out dates for the production of specific PVC products, negotiations then continued to focus on specific dates. These negotiations were successful for some products, but were left open for other products.

Drafting group B on trade-related provisions to control trade among Parties and non-Parties started off with some confusion, as it was unclear what the role division would be between the Co-Facilitators. Once a division of labour was established, negotiations focused first on Article 4.1. Following a proposal by one of the Parties, which quickly gained agreement from other Parties, the text of Article 4.1 became: 'Each Party, taking into account individual levels of development and capabilities, shall aim to reduce and eventually eliminate, by taking appropriate measures with the presence of technical and financial assistance, the manufacture and export of PVC products listed in Annex A after the phase-out date specified for each of those products.' This text meant that any measures to reduce the manufacture and export would only kick in after the phase-out dates in Annex A. On the second day, some participants realized that this would not only be problematic – but also would go against their individual instructions – leading to some fraught negotiations, which ultimately led to a revised text.

The drafting group then continued to discuss Article 15. The final text here was agreed much more quickly, with Parties quickly centring in on Option 4, as other options were seen as unnecessarily creating a hierarchy between the new instrument and other existing international agreements. Option 4 was amended to emphasize the importance of not undermining the object and purpose of the new agreement.

Following the conclusion of the drafting groups, all participants reconvened as the INC 5 plenary. They had before them the texts as agreed (and outlined below). The final plenary proceeded smoothly and agreed to forward the texts to the final session of the INC without changing what had been agreed by the drafting groups.

The drafting group on PVC control measures produced the following text as the outcome of their negotiations:

2. Each Party [shall][should]

Option 1: [not allow primary PVC production that was not being conducted within its territory at the date of entry into force of the Convention for it].

Option 2: [[strive to reduce][enact [legally-binding] measures to reduce] primary PVC production within its territory].

Option 3: [enact measures to reduce the generation of PVC wastes within its territory].

Article 3 PVC control measures

1. Each Party shall, taking into account their common but differentiated responsibilities, and consistent with existing capabilities and programs supported by the financial, technical assistance, capacity building and technology transfer under Articles 7 and 8, seek to develop and implement policies and measures including national action plans to ensure sustainable PVC production towards the phase out dates in ANNEX A, in consistence with exemptions under Article 6.

2. Each Party shall enact measures to ensure the availability of adequate recovery, recycling and disposal facilities for the recuperation and environmentally sound management of harmful PVC waste within its territory.

[ANNEX A]

Products subject to Article 4, paragraph 1

PVC Product	**Date after which the manufacture, import or export of the product shall not be allowed within the exceptions under article 6**
Automobile components	[20 years]
Medical bags, tubing and other health care products	15 years
Cable insulation	[20 years]
Pipes	15 years
Bottles	5 years
Product packaging (cosmetics, detergents, household goods)	5 years
Food packaging and utensils	5 years
Electronic appliances	[15 years]
Children's toys and baby products	2 years
Medical devices	[18 years]

The drafting group on trade-related provisions to control trade among Parties and non-Parties produced the following text as the outcome of their negotiations:

[Article 4 Trade in PVC products]

[the principle of Common but differentiated responsibilities - preamble]

1. Each Party, taking into account individual levels of development and capabilities, shall [aim to reduce and eventually eliminate] [not allow], by taking ap-

propriate measures with the presence of technical and financial assistance, the manufacture and export of PVC products listed in Annex A after the phase-out date specified for each of those products.

2. Each party shall not allow from a non party the import of PVC products listed in Annex A by the phase-out date specified therein, except where the party has registered a PVC product under exemption pursuant to Article 6.

…

[Article 15. Relationships with other international agreements]

Option 4: In order to effectively address plastics pollution and its adverse effects members States shall formulate, elaborate and implement this Convention in a mutually supportive manner with other relevant international agreements. Accordingly, Parties should aim to ensure in the implementation of other international agreements they do not contradict the object and purpose of this convention.

6 Concluding remarks

Overall, participants had an ambitious task given the subject matter and scope of the provisions. However, their commitment to the exercise was commendable. Participants recognized quickly the importance of the relationship between the various provisions, and the need to understand and undertake negotiations in the context of the whole text rather than just the specific provisions they were responsible for.

Overall, the tone of negotiations was respectful, constructive and civilized. However, at times some small instances of non-diplomatic language slipped in. For some of the Co-Facilitators, it was difficult to make sure – in a diplomatic way – that all Parties could agree. However, given that MEA negotiations are Party-driven, it is important for the presiding officers to listen carefully to Parties' views. Moreover, from a procedural perspective, it is key to have a good system in place to track which Parties raise their flags, and in which order.

Participants were also generally well coordinated, and good at forming alliances. However, for textual proposals, it would have been more effective for some participants if they had consulted their colleagues informally, and if they had come up with proposals that build on text that is already there and being discussed, rather than introducing completely new text.

The participants also displayed creativity in crafting provisions. One example is the reference in Article 4.2 to Article 6, the content of which was not a given in the negotiations, meaning that participants could introduce flexibility in the drafting of

Article 4.2. Another example is the new text crafted for Article 15.

Finally, the Co-Chairs played a helpful role in guiding the process. They organized a stocktake during the negotiations, and set clear deadlines for the drafting groups to finalize their textual negotiations. This put pressure on those negotiations and enabled the Co-Chairs to adjust the process when needed, for instance, by organizing informal consultations.

According to the feedback from the Course participants, the exercise was generally considered as a good way to practice negotiation skills and improve understanding of international negotiations. According to another participant opinion, the exercise provided an interesting opportunity to 'negotiate on behalf of other country and understand what other countries would do'. Furthermore, the simulation was considered to be a 'good reminder of "Dos" and "Don'ts" in international negotiations'. There was also a suggestion for improvement for next years as one participant stated that the course 'could have given us a bit more guidance on drafting prior the simulation'. All the feedback has been analysed by the Course organizers and will be taken into account in the planning of future Courses and negotiation exercises.