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TRADE AND ENVIRONMENT

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Introduction

Governments around the world recognize the unprecedented environmental challenges we now face.¹ International economic law is potentially the engine that will reorient the global economy to assist the world in dealing with the current climate and biodiversity crises. Yet international trade law's engagement to date feels like a 'slow motion' reaction to what has become a pressing situation. As this chapter reveals, the necessary response is only gradually emerging, through a combination of formal and informal processes and a blend of multilateral, plurilateral, bilateral, and unilateral initiatives and agreements.

This chapter is divided into five parts. After this short introduction, section II tracks the interplay between environmental policies and international trade law from the 1960s to the early 1990s, when trade and environmental policy were often regarded as being in competition with one another. Section III discusses the growing recognition of trade and environments' mutual supportiveness from the 1990s to around 2020. The section highlights that this reconcilability remained more or less hypothetical. Despite the formal emphasis on the reconcilability of trade and environmental aims, the impetus for action was lacking even as the global environmental crisis became clear. Even after the adoption of the Paris Agreement in 2015, momentum for serious engagement developed only sluggishly, slowed both by traditional economic reservations and then by the COVID-19 pandemic.

Section IV explores the post-pandemic developments that aim to make trade work for the environment,² mobilizing new actors and strategies. These developments include current initiatives within the multilateral World Trade Organization (WTO) setting and beyond, including the variously configured Trade and Environmental Sustainability Structured Discussions (TESSD) Working Groups, alongside the Informal Dialogue on Plastics Pollution and Sustainable Plastics Trade

1 Dubai Consensus 2023, Advance unedited version, Decision-/CMA.5 'Outcome of the First Global Stocktake' <<https://unfccc.int/documents/636584>>; Kunming-Montreal Global Biodiversity Framework 2022, UN Doc CBD/COP/15/L25 <<https://www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222>>

2 See Locknie Hsu, 'The Evolution of the "Trade and . . ." 'Debate'—A View from ASEAN' (2023) 26 JIEL188 on the joint report by the WTO and UN, 'Making Trade Work for the Environment, Prosperity and Resilience' (2018).

and the 2021 WTO Ministerial Statement on Fossil Fuel Subsidies. Plurilaterally, they include the Agreement on Climate Change, Trade, and Sustainability (ACCTS) concluded in July 2024. There are also some particularly important developments in regional and bilateral Preferential Trade Agreements (PTAs) with novel chapters on sustainability. Unilaterally, the most prominent development is the advent of carbon border adjustment mechanisms (CBAMs). Section V focuses on WTO dispute settlement in the trade and environment sphere, primarily in the era of the Appellate Body, and developments since including provisions in PTAs.

The chapter concludes by highlighting that even with all these promising developments, international trade law's response to critical environmental challenges remains slow, piecemeal, and un-coordinated, lacking the necessary political support from all actors. To be fair, certain risks accompany the reorientation of the international trade system to address environmental imperatives. The multilateral approach that characterized the General Agreement on Tariffs and Trade (GATT) era and the first decades of the WTO meant that the trade system embraced all members. Although uneven political power enabled major disparities in market access and the permissibility of subsidies, formally all had a place at the table. Movements away from the multilateral model create situations where trade policies may be designed by a few, may be less responsive to the needs and perspectives of others, and may need to be reviewed and modified over time to gather wider support. Multilateral responses to environmental challenges arguably remain the most desirable, if they can be achieved. Broad, active participation is needed.³

Leadership in setting a new and action-oriented forward course is important. The Paris Agreement's 2023 Global Stocktake has made clear that on current trajectories the global carbon budget will all but expire by 2028.⁴ An acceleration in international actions to mitigate climate change is urgently required and trade and environment must 'partner' up in renewed pursuit of sustainable development.⁵ The sooner this realization percolates to the heart of international economic policymaking, the greater the chances that the international community can deal with the problems confronting us. For effective and meaningful action, the WTO membership as a whole needs to come on board.

II Early Years: Two Cultures

International trade law as we know it dates back to the post-war 1944 Bretton Woods conference though earlier trade treaties predate this period.⁶ Realizations in the 1960s around the pressures that the world's economic expansion was beginning to impose on the planet and its natural resources provoked a new environmental consciousness. During the 1970s through to the 1990s this continued to grow. At the same time, there arose in trade circles the awareness that environmental policies could create trade barriers.⁷ Over this period, trade and environment policies came to be perceived as being in opposition. Even where this perspective was not dominant, the trade

3 Mary Footer, Gregory Messenger and Meredith Kolsky Lewis (eds), *Final Report: Committee on Sustainable Development and the Green Economy in International Trade Law* (International Law Association 2022) <https://www.ila-hq.org/en_GB/documents/final-consolidated-draft-final-report-june2021sustainabledevelop>

4 Carbon Brief, 13 December 2023 'COP28: Key Outcomes agreed at the UN Climate Talks in Dubai.'

5 Edith Brown Weiss and Nathalie Bernasconi-Osterwalder, 'The Earth Summit and Trade-related Issues' in Panos Delimatsis and Leonie Reins (eds) *Encyclopaedia on Trade and Environmental Law* (Edward Elgar 2021) 58.

6 See Gabrielle Marceau, *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015).

7 GATT Secretariat, Industrial Pollution Control in International Trade, 9 June 1971, L/3538.

and environment communities represented what were in effect ‘two cultures’.⁸ The perspectives of those involved in each field differed significantly, and the institutions within which they worked tended to promulgate and reinforce the relevant ‘cultural’ outlook.

The landmark UN environmental conferences of the time helped bring trade and environment closer together, but always on the terms set by the rules and culture of international trade law. The 1972 Stockholm Conference helped to catalyse discussion in the 1970s and 80s on the relationship between economic growth, social development, and environment. References to trade in the Stockholm Conference Action Plan reflected developing countries’ concerns that environmental protection would create trade barriers, focusing on assurances that environmental concerns would not be used as a pretext for discrimination in international trade.⁹ Developing countries sought above all an open and fairer economic system in order to provide better living standards for their populations.

Momentum for a closer relationship between trade and environmental policy benefitted from the 1987 publication of the Brundtland Report by the World Commission on Environment and Development.¹⁰ The Report is well known for defining the concept of sustainable development as development meeting the needs of the present without compromising the ability of future generations to meet their own needs. However, at the 1992 Rio Conference developing countries’ concerns that developed countries would force adherence to environmental rules were again central. The resulting Rio Declaration sought to address the trade and environment relationship through Principle 12.¹¹ This principle indicated that unilateral environmental measures should be avoided. Commentators have criticized the clumsy wording of Principle 12 and its ‘overreach’¹² in respect of unilateral environmental measures.¹³ *Agenda 21*, the action plan accompanying the Rio Declaration, emphasized non-discriminatory, equitable trade, and improved market access. Environmental policies’ adverse impacts on trade were still the major concern.¹⁴ Reference to the ‘mutual supportiveness’ of trade and environment featured also,¹⁵ but in second place. That trade was the primary focus is evident in the use of the phrase ‘trade and environment’ rather than ‘environment and trade’.¹⁶

The fairness of unilateral environmental measures was intensely debated in the Preparatory Committee sessions leading up to Rio. Pakistan, the G77, and China lobbied hard against unilateral measures.¹⁷ The US, Canada, Sweden, and Norway had already banned most chlorofluorocarbons

8 Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (Institute for International Economics, 1994).

9 Brown Weiss and Bernasconi-Osterwalder (n 5) 60.

10 World Commission on Environment and Development, *Our Common Future* (WCED 1987) at 80.

11 Declaration of the UN Conference on Environment and Development, UN Doc A/CONF/26/Rev1, Principle 12.

12 Margaret A Young, ‘Principle 12: The Environment and Trade’ in Jorge Vinales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 325, 347, and 336–38.

13 Principle 12 specified that ‘Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.’ See also Principle 16. On related aspects of Agenda 21 see also Brown Weiss and Bernasconi-Osterwalder (n 5) 65. Consider also Principles 3 and 4 integrating developmental and environmental policy priorities. Note Chapter 2.22(i) Agenda 21.

14 Brown Weiss and Bernasconi-Osterwalder (n 5) 63.

15 See also Report of a panel of experts convened by the secretary-general of the *United Nations Conference on the Human Environment, Founex, Switzerland June 1971*, in *Development and Environment*, Report by the Secretary-General, UNGA, A/Conf.48/10, 22 December 1971, Annex 1.

16 Brown Weiss and Bernasconi-Osterwalder (n 5) 63.

17 *ibid.*

(CFCs) and aerosols, for instance,¹⁸ even prior to adoption of the Montréal Protocol on Substances that Deplete the Ozone Layer.¹⁹ The *Tuna-Dolphin* proceedings under GATT had started to test the legal limits of individual States' entitlements to adopt environmental measures affecting others' trade and economic interests.²⁰ Such unilateral environmental measures' inherently extraterritorial effects provoked intense criticism. Political efforts against unilateral environmental trade measures sought to help keep the economic playing field level by preventing arbitrary conduct and disguised protectionism. These aims remained in tension with States' legitimate interest in protecting the Earth's environment.²¹

In sum, even in UN settings where environmental policy concerns might have been expected to be uppermost, great effort was expended in the early years to articulate policy commitments on terms geared to economic interests. Of the two 'cultures' it was the trade culture which provided the lens through which scope for mutual supportiveness was evaluated. Environmental considerations were regarded as extrinsic to trade policy. This cultural dominance of trade over the environment partly reflected the genuine economic development concerns of developing countries. Yet this mode of engagement made it difficult to progress the environmental dimensions of the international trade system.

III Next Steps: Politics and Priorities

While economic politics continued to play a central role, several breakthroughs marked the institutional response to the tension between trade and environment from the early 1990s until around 2020. The year 1991 saw a first meeting of the Environmental Measures in International Trade (EMIT) Group, established in 1971 to examine, on request, matters relevant to trade policy aspects of pollution control or environmental measures, taking into account the particular problems of developing countries.²² This group again discussed concerns about the effects of environmental policies on the world trade system.

Refreshingly, in 1994 when the Uruguay Round of trade negotiations concluded, the preamble to the Marrakesh Agreement establishing the WTO reflected both trade and environmental interests and made a commitment to sustainable development.²³ The preamble to the 1994 Ministerial Declaration on Trade and Environment further clarified the compatibility of trade and environmental interests.²⁴ However, despite its theoretical merits, in practice the recognition of trade and

18 Peter M Morrisette, 'The Evolution of Policy Responses to Stratospheric Ozone Depletion' (1989) 29 *Natural Resources Journal* 793 at 809.

19 Montréal Protocol on Substances that Deplete the Ozone Layer, opened for signature 16 September 1987, entered into force on 1 January 1989, (1989) 26369 UNTS 1522.

20 Brown Weiss and Bernasconi-Osterwalder (n 5) 64. *United States—Restrictions on Imports of Tuna*, Report of the Panel, 3 September 1991, DS21/R—39S/155.

21 Daniel Bodansky and Jessica C Lawrence, 'Trade and Environment' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 505, 525.

22 GATT Council, Minutes of the Meeting of 9 November 1971, 17 November 1971, C/M/74; Aik Hoe Lim, 'History of the Trade and Environment Debate at the WTO' in Panos Delimatsis and Leonie Reins (eds) *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 7, 8.

23 Marrakesh Agreement establishing the World Trade Organization, concluded 15 April 1994, in force 1 January 1995, UNTS 1867, 1868, 1869.

24 'Considering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of

environment objectives as reconcilable supplanted positive trade policy action to help address environmental needs.

In 2001 just prior to the 2002 World Summit for Sustainable Development or ‘Rio+10’ conference in Johannesburg, the WTO launched the new Doha Round of trade negotiations with the adoption of the Doha Ministerial Declaration.²⁵ This Declaration referenced the upcoming Summit and reaffirmed commitment to the objective of sustainable development.²⁶ In the 1994 Ministerial Declaration on Trade and Environment, Ministers had already decided to set up a Committee on Trade and Environment (CTE) which had been duly established in 1995 by the WTO General Council, with membership open to all WTO members.²⁷ The Doha Ministerial Declaration further promoted work by the CTE on certain matters. Importantly, it also established the CTE Special Session (CTESS) as a forum for advancing the relationship between the WTO trade rules and trade-related obligations under multilateral environmental agreements (MEAs), procedures for MEA Secretariats’ interaction with the WTO, and the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.²⁸

The value of the CTE’s work on trade and environment has generally been underappreciated. The Committee has provided an important forum for ‘negotiation, deliberation, transparency and exchange of best practices’.²⁹ However, the politics of the trade and environment debate have remained difficult in the CTE. As scholars observe, ‘the intense political debates regarding the impact on trade of some environmental measures, and the concern by some Members (in particular developing countries) that environmental objectives would be invoked to deny them benefits from the multilateral trading system, have always made reaching consensus at the CTE extremely challenging’.³⁰

As to concrete CTSS outcomes, interface between the WTO Secretariat and the secretariats of relevant MEAs through modes including reciprocal observer status, information exchange, and cooperative agreements has helped smooth the edges of the trade and environment ‘cultural’ divide at the institutional level, albeit unevenly.³¹ The originally high level of concern around the relationship between MEAs and trade rules fell back over time with the realization that out-and-out disputes are unlikely in practice, considering the flexibility provided through the relevant general

the environment, and the promotion of sustainable development on the other.’ Decision on Trade and Environment 1994 <https://www.wto.org/english/docs_e/legal_e/56-dtenv.pdf>

25 WTO Ministerial Conference, Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1 20 November 2001 <https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf>

26 *ibid* para 7. The 2002 Johannesburg Plan of Action likewise referenced the work taking place in the WTO. Brown Weiss and Bernasconi-Osterwalder (n 5) 69.

27 WTO General Council, Minutes of Meeting of 31 January 1995, WT/GC/M/1, 28 January 1995, 12. See also Gerardo Vidigal and Ludovine Tamiotti, ‘Committee on Trade and Environment’ in Panos Delimatsis and Leonie Reins (eds) *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 107. The CTE’s ten point work agenda is summarised by Vidigal and Tamiotti at 109.

28 MEAs of particular interest included the Montréal Protocol on Substances that Deplete the Ozone Layer 1989 (n 19), the Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature on 30 April 1973, in force 1 July 1975 (1973) 14537 UNTS 993 and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1992) opened for signature on 26 March 1989, in force 5 May 1992, 1673 UNTS.

29 See Manuel AJ Techankee, *Trade and Governance at the World Trade Organisation Committee on Trade and Environment* (Wolters Kluwer 2020), reviewed by Gabrielle Marceau (2020) 23 JIEL 1055, 1058.

30 Vidigal and Tamiotti (n 27) 112.

31 Marina Foltea, ‘WTO Institutional Cooperation with Other “Environmental” IOs’ in Panos Delimatsis and Leonie Reins (eds) *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 114.

exceptions to the GATT and other rules.³² Proposals by the EU, and countries such as New Zealand and Switzerland for formally clarifying the relationship between MEAs and trade rules have not come to fruition.³³ Some proposed the adoption of an understanding explicitly allowing trade measures taken under MEAs under the GATT General Exceptions, provided the measures met the criteria in the introductory paragraph (*chapeau*) to Article XX of GATT.³⁴ This idea was based on the rationale that MEAs have a broad membership, both in economic and geographical terms.³⁵ Neither have alternative outcomes been reached. For instance, no agreement has been reached on strengthening national cooperation between government agencies with responsibilities for trade and environment respectively.³⁶ Substantive discussions in the CTESS effectively came to an end in 2011.³⁷

In 2012, a decade after the ‘Rio+10’ conference, the ‘Rio+20’ United Nations conference on sustainable development included in its outcome document the United Nations Sustainable Development Goals.³⁸ However, the document’s ‘Green Economy’ section reaffirmed that policies should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade and should avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country and ensure environmental measures are based on international consensus as far as possible.³⁹

At the same time, states underlined that they remained focused on progress in areas including trade in environmental goods and services and trade-distorting subsidies.⁴⁰ Identifying environmental goods and services is a long-running initiative. This work is important because it will allow market access for environmental goods on preferential terms and should increase their availability. In some cases it may also help bypass troublesome questions about the ‘likeness’ of goods and the matter of when process and production methods (PPMs) can be taken into account in determining likeness for the purposes of applying trade law’s non-discrimination disciplines.⁴¹ Environmentalists consider it essential that there be scope for distinction between goods produced in ways that have different environmental impacts.⁴² Yet major ongoing issues remain in relation to the effects on trade of non-tariff barriers including environmental standard setting, government procurement practices, and subsidies,⁴³ which may increase the expenses associated with production and keep

32 Gabrielle Marceau, ‘Trade and Environment Governance at the World Trade Organization Committee on Trade and Environment’ (2020) 23 *JIEL* 1055, 1058.

33 Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2012) 698–99; Bodansky and Lawrence (n 21) 535.

34 Trebilcock and others (n 33) 698.

35 On the Generalised System of Preferences (GSP) see Trebilcock and others (n 33) 707–96.

36 Vidigal and Tamiotti (n 27) 111.

37 *ibid* 110.

38 *Transforming our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (2015).

39 Brown Weiss and Bernasconi-Osterwalder (n 5) 70.

40 *ibid*.

41 On the relevant GATT panel reports see Tetyana Payosova and Isabelle Van Damme, ‘Likeness and Environment in the GATT Years’ in Panos Delimatsis and Leonie Reins (eds), *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 171, 174–76.

42 Several developing countries have opposed this. Bodansky and Lawrence (n 21) 526 and Jagdish Bhagwati, ‘The Question of Linkage’ (2002) 96 *AJIL* 126 at 133. In its active phase the EMIT group discussed the likeness issue both under GATT and in the context of non-process-related PPMs, including requirements under the TBT Agreement. Filippo Fontanelli, ‘Environment-led Technical Regulations’ in Panos Delimatsis and Leonie Reins (eds), *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 280, 288–89.

43 Bodansky and Lawrence (n 21) 513.

goods out of markets.⁴⁴ As observed in the 2021 WTO Ministerial Statement on Trade and Environmental Sustainability, it is necessary to explore trade promotion and facilitation with reference not only to market access but also supply chain, technical and regulatory elements.⁴⁵

Overall, from the early 1990s to around 2020 steps were taken toward better addressing environmental issues within and through international trade rules. However, a rhetorical emphasis on the reconcilability of trade and environmental objectives largely took the place of action. Articulation of their reconcilability in theory does not in itself promote or generate pro-environmental trade policy nor establish the terms for this reconciliation in practice.

IV Vehicles for Progress?

The adoption of the Paris Agreement by nearly 200 States in 2015 injected new energy into international environmental policy. States have collectively emphasized the urgency of climate action at successive conferences of the parties (COPs) convened under the United Nations Framework Convention on Climate Change (UNFCCC).⁴⁶ In the meantime, states party to the Convention on Biological Diversity (CBD) adopted the Kunming Montréal Biodiversity Framework in late 2022.⁴⁷ It is clear that making the international economic system work for the environment is vital to mitigate climate change, and to reverse species loss and widespread terrestrial and marine ecosystem damage.

Climate and environmental policy is increasingly becoming a mainstream preoccupation within international trade law, albeit through a multifaceted, kaleidoscopic response with many factors significantly slowing its development. Multi-party independent initiatives in the WTO setting include four differently configured Trade and Environmental Sustainability Structured Discussions (TESSD) working groups set up in 2020. They are accompanied by the Informal Dialogue on Plastics Pollution and Sustainable Plastics Trade, and ongoing work on fossil fuel subsidy reform, likewise independently and without formal connection to the WTO. The EU and New Zealand have led the way towards an inclusive Coalition of Trade Ministers on Climate manifesting a commitment to ensuring that sufficient progress is made on climate change, joined by Kenya, Ecuador, and the United Kingdom.⁴⁸ Important developments have occurred in regional and bilateral PTAs including adoption of novel chapters on sustainability, while the 2024 Agreement on Climate Change, Trade, and Sustainability (ACCTS) constitutes a unique plurilateral initiative. Unilaterally, the advent of CBAMs stands out, with many economies likely to impose carbon tariffs to lift the cost of imports so as to balance out differences in carbon pricing across jurisdictions and ensure that emissions do not escape pricing or regulation altogether.

44 See, for instance, Korea's 2019 ban on PVC plastics and packaging. See the WTO's Environmental Database of notified measures. Fontanelli (n 42) 282–83 and 288.

45 2021 Ministerial Statement on Trade and Environmental Sustainability, WT/MIN(21)/6/Rev.2, 14 December 2021 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/6R2.pdf&Open=True>>.

46 United Nations Framework Convention on Climate Change, concluded 9 May 1992, in force 21 March 1994, *UNTS* 1771 107.

47 Above (n 46). See also *Decision adopted by the Conference of the Parties to the Convention on Biological Diversity CBD/COP/DEC/15/4*, 19 December 2022, at 2.

48 'The EU Teams Up with Ecuador, Kenya, New Zealand to Forge Cooperation on Trade and Climate,' EU Directorate-General for Trade, news article, 13 June 2022 <https://policy.trade.ec.europa.eu/news/eu-teams-ecuador-kenya-new-zealand-forge-cooperation-trade-and-climate-2022-06-13_en>. See also Launch Statement of 19 January 2023, cited by Margaret Young and Georgina Clough, 'Net Zero Emissions and Free Trade Agreements: Efforts at Integrating Climate Goals by the United Kingdom and Australia' (2023) 72 *ICLQ* 393, 394.

These developments position international economic governance on the cusp of a new era in which the need to integrate environmental objectives into trade law is increasingly understood. Governments and citizens are coming to see that in practical terms there is a need to develop economic practices in ways that help address environmental objectives. The shifting of gears has been particularly evident since the adoption of the 2015 Sustainable Development Goals for 2030. SDG 12 calls for sustainable production and consumption, SDG 7 focuses on sustainable energy, and SDG 13–15 are also relevant, especially SDG 14 regarding fish stocks.⁴⁹ WTO annual reporting to the High-level Political Forum on Sustainable Development (HLPF), responsible for monitoring action taken toward the SDGs, indicates an increased institutional pivot to sustainable development within the WTO. Further support is provided by references in the Global Pact for the Environment to patterns of sustainable production and consumption respectful of the environment.⁵⁰

The 2020 launch of the TESSD constitutes the paradigmatic example of a set of critical moves to make trade work for the environment in practice. The TESSD's four differently composed working groups, each with different numbers and combinations of WTO members,⁵¹ deal respectively with (a) environmental goods and services, (b) subsidies, (c) trade-related climate measures, and (d) the circular economy. All four working groups will be important loci for vital developments on the environment-trade connection. Meantime the launch of the WTO Secretariat's Trade Policy Tools for Climate Action at UNFCCC COP 28 communicates an institutional level of awareness of the need for concrete action.⁵² However it must be recalled that participation in the TESSD working groups is voluntary and only certain WTO members are opting to participate.

The following subsections discuss these and other initiatives as vehicles for progress on trade and the environment. These subsections focus on new efforts to liberalize trade in environmental goods and services, work on the circular economy and on plastics, subsidies reform, and work on trade-related climate measures and initiatives in preferential trade agreements.

Liberalizing Trade in Environmental Goods and Services

The rationale for liberalizing trade in environmental goods and services is that this will provide significant benefits both economically and environmentally. Considerable progress liberalizing environmental goods has been made in PTAs including the New Zealand FTAs with the EU and the UK, as well as the ACCTS and CETA. However, it is important to see progress also in the WTO, with its broad, multilateral membership. The TESSD Working Group on Environmental Goods and Services has taken forward the liberalization agenda, building on the momentum generated through the launch of the Environmental Goods Agreement negotiations in 2014 which stalled in 2016.⁵³ At the time of writing, the Working Group has been focused on how to liberalize trade in goods and services that are key for the renewable energy sector including solar wind and

49 SDGs 13–15 deal with climate action, life below water and life on land.

50 Noting the General Assembly Resolution adopted on 10 May 2018 Towards a Global Pact for the Environment, GA Res 72/277, A/RES/72/277, 14 May 2014.

51 See Joost Pauwelyn, 'Taking Stakeholder Engagement in International Policy-Making Seriously: Is the WTO Finally Opening Up?' (2023) 26 JIEL 51 58–60.

52 WTO Secretariat, *Trade Policy Tools for Climate Action* (WTO 2023) <https://www.wto.org/english/res_e/publications_e/publications_e.htm>

53 Vidigal and Tamiotti (n 27) 111.

hydropower.⁵⁴ The more promptly this can be achieved, the more members will contribute to a timely global energy transition.

Reaching good outcomes on renewables could then inspire WTO members to consider the best methodological approach to the listing of environmental goods and services in other fora beyond the WTO. When last considering the matter in 2011, the CTESS was contemplating a hybrid approach to the listing of environmental goods and services. An agreed core list would be complemented by (i) a self-selected list put together by developed countries, with developing countries encouraged also to participate; (ii) a list produced through a request and offer process with concessions in relation to the listed items to be multilateralized through the MFN principle; and (iii) liberalization in goods and services to be employed in environmental projects by inclusion in any of these lists or unilaterally.⁵⁵

Breadth in coverage will be important as there has been concern that the already existing Asia-Pacific Economic Cooperation (APEC) list of environmental goods of 2011 embodies an overly narrow approach.⁵⁶ Organisation for Economic Co-operation and Development (OECD) listings have been broader, embracing the idea of liberalization to promote cleaner or *more* environmental techniques, products, and services with a view to reducing environmental risks and minimizing pollution and resource use. Such lists also include goods that are inputs into sustainable agriculture, forestry, and fisheries.⁵⁷ Of even broader scope has been the UN Trade and Development (UNCTAD) approach, centring on the idea of Environmentally Preferable Products (EPPS), which is likewise grounded in notions of relative degrees of environmental protection.⁵⁸ Positive aspects of such approaches include the promotion of technological change and environmentally sound investment while helping avoid overinvestment in environmentally inadequate or harmful enterprises. At the same time, it is hoped they will spread the benefits of liberalization in environmental goods and services widely across developing countries.⁵⁹

However suitable standards are needed to apply such schemes.⁶⁰ Relative environmental benefits should ratchet up over time as new environmental technologies became available or risks of harm rise higher. The challenge is considerable. A number of WTO members have highlighted the difficulties with basing tariffs on criteria not representing physical characteristics or product function.⁶¹ The concern is that this wedges open the door to distinctions based on how products are produced. In principle, this could operate against developing country interests at scale in respect of both environmental and labour standards. Meanwhile we see environmental goods lists in bilateral trade agreements such as the EU–New Zealand Free Trade Agreement (EU–NZ FTA),⁶² believed to be a first for the EU, with a longer list in the NZ–UK Free Trade Agreement (NZ–EU FTA).⁶³

54 ‘Members Discuss Possible TESSD Outcomes for Delivery at MC13’ (11 July 2023) <https://www.wto.org/english/news_e/news23_e/tessd_11jul23_e.htm>

55 Report by the Chairman, Ambassador Manuel A.J. Teehankee to the Trade Negotiations Committee, Committee on Trade and Environment in Special Session, TN/TE120, 21 April 2011.

56 Young and Clough (n 48).

57 Trebilcock and others (n 33) 702–3.

58 *ibid* 702–3.

59 *ibid*.

60 *ibid*.

61 *ibid* 703.

62 New Zealand-European Union Free Trade Agreement 2023 <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en>, Annex 19.

63 New Zealand-United Kingdom Free Trade Agreement 2022 <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/new-zealand-united-kingdom-free-trade-agreement/resources/>>, Annex 22A.

In the services sphere, the Council for Trade in Services adopted the Decision on Trade in Services and the Environment in 1995 requesting the CTE to report with recommendations on the relationship between the services trade and the environment including the issue of sustainable development.⁶⁴ Trade in both environmental goods and services is important for human development. As noted during the Uruguay Round by the GATT Secretariat, environmental services provide, for instance, clean drinking water and safe sanitation, remediation of contamination, and the protection of nature and the landscape. The forum for talks on environmental services was supposed to be the Special Sessions of the CTS (CTSSS) but the topic has been eclipsed by an emphasis on trade in environmental goods. Successive deadlines have been missed, even though needs for environmental goods and services will often go together in practice as seen in relation to renewable energy.⁶⁵ However, APEC ministers have meantime agreed a reference list of environmental services, in 2021.⁶⁶

In sum, progress on liberalizing trade in environmental goods and services requires a significant investment of policy and technical energy as well as political commitment. It is an important step forward at the trade and environment interface. Adopting appropriate technical standards will also assist in facilitating the necessary trade.⁶⁷

Circular Economy and Plastics

Circular economy principles require a major adjustment in the linear approach to production and consumption that has prevailed in previous periods.⁶⁸ The circular economy is a model of production and consumption which involves reusing, repairing, and recycling existing materials and products as long as possible. The aim is to make better use of the enormous volumes of resources presently funnelled through economies and discarded. The greenhouse gas (GHG) emissions associated with linear handling and use of resources are estimated to be as high as 70% of the global total emissions,⁶⁹ while resource extraction and processing is believed to drive 90% of biodiversity loss and water stress impacts.⁷⁰ The circular economy could significantly decrease these impacts, and therefore has an attraction like never before. The Circular Economy Working Group's mapping of the trade aspects of the circular economy throughout product life cycle is an important first step to assess how the trade rules can be developed to 'rewire' the global and domestic economies.

64 Regis Simo, 'Trade in Environmental Services' in Panos Delimatsis and Leonie Reins (eds) *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 447, 447–48.

65 *ibid* 452, 454.

66 APEC Ministerial Meeting, Wellington, New Zealand, 9 November 2021 <<https://www.apec.org/meeting-papers/annual-ministerial-meetings/2021/2021-apec-ministerial-meeting#:~:text=Now%20more%20than%20ever%2C%20and,%20economic%20inclusion%20for%20all>> see paragraph 33 and Annex 2 for the services schedule.

67 Trebilcock and others (n 33) 691–92; see also WTO Secretariat, Trade and Climate Change Information Brief No 6, 'What Yardstick for Net-zero? How WTO TBT Disciplines can Contribute to Effective Policies on Carbon Emission Standards and Climate Change Mitigation' <https://www.wto.org/english/news_e/news21_e/clim_03nov21-6_e.pdf>

68 Kimberley Botwright, Dominic Coppens and Nicolas JS Lockhart, 'Remaking Trade: Waste, Circular Economy, and Trade' (Villars Framework for a Sustainable Trading System 2023) <<https://remakingtradeproject.org/villars-framework>>

69 Circle Economy, 'The Circularity Gap Report 2022' (2022) <<https://www.circularity-gap.world/2022>>

70 International Resource Panel, 'Global Resources Outlook 2019' (2019) <<https://www.resourcepanel.org/impact-and-uptake>>

Circularity is addressed also within the Informal Dialogue on Plastics Pollution and Sustainable Plastics Trade (IDP) taking place among self-selected WTO members beyond the context of TESSD. Trade in plastic, food stocks, polymers, additives, pellets, products, and waste has played a significant part in creating the global plastics crisis and accompanying micro- and nano-plastic pollution.⁷¹ The IDP aims to identify how trade cooperation can reduce and end plastic pollution. Separately, current negotiations aim to develop an ‘internationally legally binding instrument on plastic pollution including in the marine environment’ as well as the Basel, Rotterdam, and Stockholm conventions.⁷² Increased involvement from the business community will be important.⁷³

Subsidies Reform

Subsidies constitute one of the most challenging aspects of traditional international trade policy.⁷⁴ As an economic tool, subsidies can be used to promote environmental policies enabling trade to work for the environment.⁷⁵ However, WTO law disciplines subsidies heavily because they are generally considered inconsistent with maintaining a level playing field for open competition. Since the expiry of previous narrow provisions under the Agreement on Subsidies, there are no longer any special rules for environment-related subsidies.

In the absence of specific rules, the Appellate Body’s 2013 decision in *Canada—Certain Measures Affecting the Renewable Energy Generation Sector* may have helped governments feel more at ease in offering renewable energy subsidies provided they are non-discriminatory.⁷⁶ Overall, though, trade remedy rules continue to militate against support for the development of renewable energy systems on a national basis, and WTO law on government procurement provides only certain elements of relief.⁷⁷

While subsidies reform is needed to better enable appropriate environmental subsidies, there has been ongoing opposition based on economic concerns. Stimulus for the development of renewable energy, and industries producing the necessary equipment, would be at the top of a potential desirable subsidies list. At the same time, local content requirements may impede the development of the renewable energy industry globally depending on the circumstances. The TESSD Working Group on Subsidies is engaged in early-stage work only, compiling member experiences in subsidy design.⁷⁸

71 ‘WTO Rules and Key Elements for Consideration in the Context of a Treaty to End Plastic Pollution,’ IUCN (2023).

72 See IDP Factual Report (2021) INF/TE/IDP/W/3, 4 October 2021.

73 Pauwelyn (n 51) 58.

74 See Ming Du’s chapter in this *Handbook*.

75 See Roland Ismer and others, ‘Supporting the Transition to Climate-Neutral Production: An Evaluation Under the Agreement on Subsidies and Countervailing Measures’ (2023) 26 JIEL 216.

76 *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, Report of the Appellate Body, 24 May 2013, WT/DS412/AB/R and WY/DS246/AB/R.

77 Ilaria Espa, ‘SCM/AD/GATT/GPA: Renewable Energy Promotion and Trade Defence’ in Panos Delimatsis and Leonie Reins (eds) *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 379, 383, 385 (noting that local content requirements in feed-in tariffs have remained problematic in all six of the renewable energy subsidy disputes heard as of 2021.)

78 WTO News, ‘Members Discuss Possible TESSD Outcomes for Delivery at MC13’ (11 July 2023) <https://www.wto.org/english/news_e/news23_e/tessd_11jul23_e.htm#:~:text=Members%20also%20considered%20suggestions%20for,trade%20and%20environmental%20sustainability%20policies>.

Persistent subsidization in the three fields of fisheries, fossil fuels and also agriculture encourages overuse of resources while distorting trade flows.⁷⁹ The perversity of subsidies that support overcapacity in fishing fleets and extraction of fossil fuels is apparent, while the permissibility of agricultural subsidies and domestic support under WTO law is often considered a perennial weakness. The 2022 Agreement on Fisheries Subsidies implemented long-standing Doha Round commitments to address environmentally and economically unfriendly subsidies. However, further negotiations are still needed to enable the Agreement to work,⁸⁰ ideally reducing subsidies that are likely to contribute to excess capacity or overfishing including subsidies for purchase of equipment, machinery, fuel, and bait, as well as personnel costs. Certain FTAs that also address the issue of fisheries subsidies include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),⁸¹ the Agreement between the United States of America, Mexico, and Canada (USMCA),⁸² and the EU–New Zealand, UK–New Zealand, and UK–Australia FTAs.⁸³

Work within the WTO on tackling fossil fuel subsidies runs contrary to entrenched interests but is long overdue.⁸⁴ Energy subsidies are a complex matter. People around the world are reliant on government interventions to help deal with energy poverty in a world where it is fossil fuels that presently provide the energy they need. The COVID-19 pandemic caused further economic hardship, while fuel prices fluctuate with global security concerns. The challenges will continue to rise as emissions pricing in national economies kicks in with States seeking to live up to their Paris Agreement commitments. Yet bringing about global decarbonization requires the collective tackling of fossil fuel subsidies. These subsidies were estimated by the OECD and the International Energy Agency (IEA) at a figure of USD 1,481.3 billion in 2022, doubling from 2021.⁸⁵

The Friends of Fossil Fuel Subsidy Reform grouping seeks to build consensus on the importance of fossil fuel subsidy reform, comprising at the time of writing Costa Rica, Denmark, Ethiopia, Finland, the Netherlands, New Zealand, Norway, Sweden, Switzerland, and Uruguay.⁸⁶ The 2021 Ministerial Statement on Fossil Fuel Subsidies by Albania, Chile, Costa Rica, the European Union, Fiji, Iceland, Liechtenstein, Moldova, Montenegro, New Zealand, North Macedonia, Norway, Panama, Switzerland, Tonga, the United Kingdom, Uruguay, and Vanuatu likewise sought to generate forward momentum on the issue.⁸⁷ Increased reporting of energy subsidies to gain

79 Bodansky and Lawrence (n 21) 512.

80 Agreement on Fisheries Subsidies, 17 June 2022, WT/L/1144.

81 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, concluded 8 March 2018, in force 30 December 2018, UNTS 3346.

82 Agreement between the United States of America, Mexico and Canada, concluded 30 September 2020, in force 1 July 2020 <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>>

83 Bernard M Hoekman, Petros C Mavroidis and Sunayana Sasmal, 'Managing Externalities in the WTO: The Agreement On Fisheries Subsidies' (2023) 26 JIEL 266, 274.

84 See Anna-Alexandra Marhold, 'SCM: Fossil Fuel Subsidies' in Panos Delimatsis and Leonie Reins (eds) *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 347, 347.

85 'Cost of Support Measures for Fossil Fuels almost Doubled in 2022 in Response to Soaring Energy Prices' (1 December 2023) <<https://www.oecd.org/newsroom/cost-of-support-measures-for-fossil-fuels-almost-doubled-in-2022-in-response-to-soaring-energy-prices.htm>>

86 For further information, see the Friends of Fossil Fuel Subsidy Reform's website <<https://ffsr.org/>>

87 Ministerial Statement on Fossil Fuel, WT/MIN(21)/9/Rev.1, 14 December 2021 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/9r1.pdf&Open=True>> See also 'Joint Statement on Fossil Fuel Subsidies' adopted at the 28th Conference of the Parties to the UN Framework Convention on Climate Change in 2023 The Netherlands, Antigua and Barbuda, Austria, Belgium, Canada, Costa Rica, Denmark, Finland, France, Ireland, Luxembourg and Spain as reported by Carbon Brief <<https://www.rijksoverheid.nl/documenten/publicaties/2023/12/09/>>

transparency will be an important first step. The 2024 WTO Ministerial statement includes an annex on planned work, including working together on roadmaps for fossil fuel subsidy elimination.⁸⁸ Certain bilateral agreements also include language on fossil fuel subsidy reform as seen in the NZ-UK FTA,⁸⁹ with weaker language in the EU-NZ FTA.⁹⁰

Trade-Related Climate Measures

The TESSD Working Group on Trade-Related Climate Measures aims to produce an outline of WTO member practices in the development of trade-related climate measures, including mechanisms for transparency and consultation as well as impact assessments and guiding principles.⁹¹ In the meantime certain WTO members are moving ahead unilaterally.

Adopted as part of the European Green Deal, the 2023 EU's CBAM aims to prevent carbon leakage that would increase greenhouse gas emissions in other countries even with emissions reduction by the EU. It also seeks to prevent the undercutting of the European economy through the delocalization of economic activity in countries with less strict climate laws.⁹² In its current transitional phase, the CBAM requires importer reporting of greenhouse gases embedded in carbon-intensive goods including cement and steel, aluminium, fertilizers, electricity, and hydrogen. The permanent system envisaged to take effect on 1 January 2026 will require the surrender of CBAM certificates with pricing calculated according to European Emissions Trading Scheme (ETS) allowances' weekly average auction prices.⁹³ Credit will be applied against these EU prices to the extent that imported products have already been subject to carbon taxes or an ETS in their exporting countries. The importer will pay the difference.

The EU CBAM will have negative effects on trade for many developing countries including China and India.⁹⁴ It has generated controversy around whether its design allows sufficient flexibility as permitted to states under the Paris Agreement, which recognizes the principle of common but differentiated responsibilities and states' different national circumstances.⁹⁵ The Paris Agreement enables countries to adopt their own pathway towards the Agreement's global goal of 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.⁹⁶ The Agreement specifies that each state's nationally determined contribution will reflect its highest possible

joint-statement-on-fossil-fuel-subsidies> and <file:///Users/cfos011/Downloads/Joint+Statement+on+fossil+fuel+subsidies.pdf>

88 Ministerial Statement on Fossil Fuel Subsidies, MC13, Abu Dhabi, WT/MIN(24)/19, 26 February 2024 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/19.pdf&Open=True>>

89 NZ-UK FTA (n 63) Art 22.8.

90 EU-NZ FTA (n 62) Art 19.7.

91 'Members Discuss Possible TESSD Outcomes for Delivery at MC13' (n 78).

92 Ilaria Espa, 'Reconciling the Climate/Industrial Interplay of CBAMs: What Role for the WTO?' (2022) 116 AJIL Unbound 191.

93 European Commission, *Carbon Border Adjustment Mechanism* <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanisms_en>.

94 Aaron Cosbey, 'Counting Carbon: The Implications of Border Carbon Adjustments on Developing Countries' (Hinrich Foundation, 14 December 2021) <<https://www.hinrichfoundation.com/research/article/sustainable/border-carbon-adjustments/>>. See 'Policy Issues for Dedicated Multilateral Discussions on Border Carbon Adjustment,' Communication from China, 10 November 2023, WT/CTE/W/258, G/C/W/839 G/MA/W/184, G/TBT/W/777.

95 Paris Agreement 2015, opened for signature 22 April 2016, in force 4 November 2016, 3156 UNTS, Art 2(2).

96 *ibid* Art 2(1)(a).

ambition, and progression beyond a state's own previous nationally determined contributions (NDCs), and be informed by the outcomes of Global Stocktakes, including the 2023 Global Stocktake.⁹⁷ It further provides that developed country parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets.⁹⁸ The argument here is that the CBAM errs in international law by adopting EU carbon pricing as set under mechanisms for achieving the EU's Paris Agreement commitments, rather than taking into account that the Paris Agreement commitments of states will differ from those of the EU, and that they may be countries entitled to benefit from the Paris Agreement's flexibility.⁹⁹ The CBAM's default emissions calculation methodology is also contentious. For exporting countries lacking an emissions trading scheme, carbon pricing, or other suitable climate change measures, the CBAM is to be applied on the assumption that production facilities in the exporting country are on a par with their worst performing EU counterparts unless reliable information can be provided to the contrary.¹⁰⁰

The major argument in support of the CBAM is that it will preserve the integrity of the EU's emissions reduction policies which would otherwise be undercut by offshored production in less demanding jurisdictions,¹⁰¹ increasing world greenhouse gas emissions and rendering EU consumers complicit in this.¹⁰² Arguably, other states are not obliged to export to the EU and further are not entitled to do so if this will contravene the EU's environmental policies.¹⁰³ The Paris Agreement envisages that certain countries may take more time than others in their emissions reduction, but this does not mean they are entitled to have their products take up EU market share.¹⁰⁴ In essence, the debate is framed as being about whether the EU should have control over environmental policy in its own market. The trouble is that in a global economy this means others who are economically dependent on that market will bear significant costs.

In the big picture, all trade and climate initiatives at present remain far behind what is needed for worldwide greenhouse gas emissions reduction. Therefore, the CBAM, even if it does require further calibration, must be viewed favourably as a significant move in gearing up the international economy to the present environmental challenges. Further, as the carbon crisis intensifies,

97 *ibid* Art 4.2; 4.3; Art 4.9.

98 *ibid* Art 4(4).

99 See Gracia Marín Durán, 'Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes' (2023) 72 ICLQ 72, 73; Ingo Venzke and Geraldo Vidigal, 'Are Trade Measures to Tackle the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' (10 January 2022) Amsterdam Law School Legal Studies Research Paper No. 2022–02.

100 Reinhard Quick and Isha Das, 'Guest Post: The EU's CBAM-Regulation Stands in Contrast to Fundamental EU-obligations under the Paris Agreement' (*International Economic Law and Policy Blog*, 19 July 2023) <<https://ielp.worldtradelaw.net/2023/07/guest-post-the-eus-cbam-regulation-stands-in-contrast-to-fundamental-eu-obligations-under-the-paris-.html>> and Reinhard Quick and Isha Das, 'Guest Post: A Reply to Aaron Cosby's Comment on our CBAM Post' (*International Economic Law and Policy Blog*, 16 August 2023) <<https://ielp.worldtradelaw.net/2023/08/guest-post-a-reply-to-aaron-cosbeys-comment-on-our-cbam-post-from-reinhard-quick-saarland-university.html>>. On the legality of the CBAM, see Geraldo Vidigal and Ingo Venzke, 'Of False Conflicts and Real Challenges: Trade Agreements, Climate Clubs, and Border Adjustments' (2022) 116 AJIL Unbound 202. See also Espa (n 93) (critiquing the CBAM's design in respect of export rebates).

101 Aaron Cosby, 'Guest Post: EU's CBAM vs. the Paris Agreement: A Response to Quick and Das' (*International Economic Law and Policy Blog*, 1 August 2023) <<https://ielp.worldtradelaw.net/2023/08/guest-post-eus-cbam-vs-paris-agreement-a-response-to-quick-and-das.html>>.

102 See Joanne Scott, 'The Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 21.

103 Cosby (n 101).

104 Cosby (n 101).

the extent of effort required of all states under international law relating to climate change increases. This has been recognized for instance under the United Nations Convention on the Law of the Sea.¹⁰⁵ It will also be the case under the customary international law due diligence requirement to prevent significant harm to the environment of other states and areas beyond national jurisdiction.¹⁰⁶ In this context, toleration and even support for unilateral action appears to have increased. For instance, states' decision on the outcome of the first Global Stocktake adopted at the 28th Conference of the Parties to the UNFCCC in Dubai in 2023 noted that 'measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'.¹⁰⁷ This contrasts with the statements adopted at the Rio conference in which unilateral action was to be avoided.

There are moves afoot challenging the EU CBAM, including on the part of India. At the same time other WTO members are considering whether they too might design and establish their own CBAMs. The UK has decided to introduce a CBAM. Taiwan has one already. Discussion is taking place in the US. Canada has been considering the matter, while the Australian government has commissioned a carbon leakage review.¹⁰⁸ Scholars have suggested that it may be valuable for small groups of countries to set the pace for a new era in climate diplomacy including through trade measures.¹⁰⁹ Most recently, the G7 Climate Club was launched at COP28 in Dubai, though trade measures are not yet specifically envisaged.

Preferential Trade Agreements

Preferential trade agreements (PTAs) are enabling significantly stronger and more speedy advances in international law and policy than seen so far in the WTO setting.¹¹⁰ For instance, the USMCA¹¹¹ and its predecessor the North American Free Trade Agreement (NAFTA)¹¹² contain arrangements in respect of environmental protection.¹¹³ The USMCA includes a specific chapter on the environment and establishes a North American Commission on Environmental Cooperation. The US filed a first formal complaint against Mexico under the environmental chapter of the USMCA in

105 United Nations Convention on the Law of the Sea, concluded 10 December 1982, in force 16 November 1994, 1833 UNTS 397. International Tribunal on the Law of the Sea, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion of 21 May 2024, paras 239–42.

106 *Request to the International Court of Justice for an Advisory Opinion on the Obligations of States in respect of Climate Change*, Written submission of the International Union for Conservation of Nature (IUCN).

107 Outcome of the First Global Stocktake (n 1) para 154.

108 Climate Strategies, 'Bridging the Divide: Assessing the Viability of International Cooperation on Border Carbon Adjustments' (December 2023) <<https://climatestrategies.org/wp-content/uploads/2023/12/Climate-Strategies-Report--Bridging-the-Divide.pdf>>.

109 Makane Moïse Mbengue and Elena Cima, 'Clubbing in the Club: Could Climate-Related Trade Arrangements Set the Pace for Future Climate Cooperation?' (2022) 116 AJIL Unbound 219.

110 Consider the arguments in Pasha L Hsieh, 'Shaping Green Regionalism: New Trade Law Approaches to Environmental Sustainability' (2024) 33 Review of European Community and International Environmental Law 172.

111 Elizabeth Trujillo, 'Climate Change Adjudication in Trade-driven Tribunals' in Panos Delimatsis and Leonie Reins (eds) *Encyclopedia on Trade and Environmental Law* (Edward Elgar 2021) 72 at 81.

112 Trebilcock and others (n 33) 707–14.

113 USMCA (n 82) Chapter 24.

2022,¹¹⁴ even though scholars have remarked on the North American parties' scepticism in respect of formal dispute resolution processes under the USMCA.

The CPTPP addresses an important new range of environmental issues.¹¹⁵ Its Environment Chapter recognizes the importance of multilateral environmental agreements¹¹⁶ and addresses liberalization in environmental goods and services.¹¹⁷ It promotes voluntary mechanisms to enhance environmental performance¹¹⁸ and cooperation for better environmental outcomes.¹¹⁹ It also incorporates important and lengthy provisions on marine capture fisheries (including on subsidies that encourage prohibited fishing),¹²⁰ vessel source pollution,¹²¹ alien invasive species,¹²² trade and biodiversity,¹²³ conservation and trade,¹²⁴ and transition to a low emissions and resilient economy.¹²⁵ A joint Environment Committee is to keep implementation of the chapter's relevant provisions under review. The chapter further refers to corporate social responsibility.¹²⁶ As with the USMCA, there are non-regression commitments.

A particularly notable development is the plurilateral *Agreement on Climate Change, Trade, and Sustainability* (ACCTS) concluded in July 2024. The ACCTS is unique to date as an attempt to generate concrete international legal change, initially among a small group of countries who will be prepared and able to commit ambitiously to the agreement's rules.¹²⁷ The negotiating group comprised New Zealand, Costa Rica, Fiji, Iceland, and Norway, as well as Switzerland. However, unfortunately, Norway was not in a position to participate at the time of the agreement's conclusion. The concept behind the ACCTS is that after a core group have concluded an appropriate agreement, further members will join over time. The content is intended to be dynamic, with the potential to include discrete new trade and climate issues. The conclusion of the ACCTS is a significant achievement. The agreement addresses market access for environmental goods and services, fossil fuel subsidies, and guidelines for voluntary ecolabelling schemes. A possible future New Zealand–Singapore open plurilateral green economy agreement could offer a further example of this type of trade treaty model.

Regional economic institutions are among the important crucibles for the development of political engagement in trade and environment issues both beyond and within the WTO. The 2023 APEC San Francisco Principles on Integrating Inclusivity and Sustainability into Trade and Investment Policy provide an example of how political and other non-binding instruments can

114 See Yukong Wang, 'Free Trade Agreements and Marine Species Sustainability: United States Files Environmental Complaint against Mexico to Protect Vanishing Vaquita' (2022) 7 *Asia Pacific Journal of Ocean Law and Policy* 156.

115 CPTPP (n 81).

116 CPTPP Art 20.4, 20.5.

117 CPTPP Art 20.18.

118 CPTPP Art 20.11.

119 CPTPP Art 20.12.

120 CPTPP Art 20.16.

121 CPTPP Art 20.6.

122 CPTPP Art 20.14.

123 CPTPP Art 20.13.

124 CPTPP Art 20.17.

125 CPTPP Art 20.15.

126 CPTPP Art 20.10.

127 Caroline E Foster, 'The Agreement on Climate Change, Trade, and Sustainability' in Panos Delimatsis and Leonie Reins (eds) *Encyclopaedia on Trade and Environmental Law* (Edward Elgar 2021) 479.

allow for advances that may assist in building momentum for hard law developments.¹²⁸ States' collective regional economic strategies also increasingly incorporate an environmental dimension, often including a subsidies aspect, as seen in the Indo Pacific Economic Framework (IPEF) Pillar III on a green and fair economy,¹²⁹ and with a longer history in the Association of Southeast Asian Nations (ASEAN).¹³⁰ Significantly the 2021 APEC outcome welcomed officials' reports on ways in which member economies could pursue a voluntary standstill on inefficient fossil fuel subsidies.¹³¹

Bilaterally, stand-out instruments include the Australia-Singapore Green Economy Agreement¹³² and various EU agreements, particularly the EU-NZ FTA. The EU is increasingly embedding environment and sustainability aims in its bilateral free trade agreements (FTAs).¹³³ The EU-NZ FTA follows in the footsteps of the EU-Korea FTA, which was the first to include a trade and sustainability chapter, as do the EU-Vietnam and EU-Japan FTAs.¹³⁴ However, the trade and sustainability enforcement mechanisms in the EU-NZ FTA are novel. Even in the 2021 EU-UK Trade and Cooperation Agreement, where specialized collaborative dispute settlement processes apply to cases concerning sustainable development,¹³⁵ there are no specific sanctions for violation of multilateral environmental agreements.¹³⁶ The EU-NZ FTA's sustainability chapter includes commitments to abide by multilateral environmental agreements, labour commitments and gender commitments. Further, the EU-NZ FTA puts in place specific panel processes for disputes arising under the sustainability chapter, in addition to a standard dispute procedure, with sanctions available if non-compliance is determined. Both FTAs also contain further wide-ranging commitments on current environmental concerns.

Although only provisionally in force the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is also a significant advance.¹³⁷ The CETA contains chapters on regulatory cooperation, sustainable development, and the environment, considering sustainable development

128 APEC San Francisco Principles on Integrating Inclusivity and Sustainability into Trade and Investment Policy 2023 <<https://www.apec.org/meeting-papers/leaders-declarations/2023/2023-leaders-declaration>>

129 The substantial conclusion of negotiations was reached on 16 November 2023. See Ministry of Foreign Affairs and Trade of New Zealand, 'Indo-Pacific Economic Framework for Prosperity (IPEF) Overview' <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-under-negotiation/indo-pacific-economic-framework-for-prosperity/ipef-overview/>>

130 Hsu (n 2) 193–95.

131 APEC Ministerial Meeting, Wellington, New Zealand, 9 November 2021 <<https://www.apec.org/meeting-papers/annual-ministerial-meetings/2021/2021-apec-ministerial-meeting#:~:text=Now%20more%20than%20ever%2C%20and,and%20economic%20inclusion%20for%20all>>, paragraph 34.

132 Australia-Singapore Green Economy Agreement, signed on 18 October 2022, in force on 18 October 2022 <[https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement#:~:text="](https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement#:~:text=)

133 See eg Eline Blot, 'Reflections on the New Approach to the TSD Chapters for Greener Trade: A Rapid Review of the New Approach and Stakeholders' Positions,' February 2023 <https://ieep.eu/wp-content/uploads/2023/02/Reflections-on-the-new-approach-to-the-TSD-Chapters-for-greener-trade_IEEP-2023-1.pdf>; Clara Brandi and Jean-Frédéric Morin, *Trade and the Environment: Drivers and Effects of Environmental Provisions in Trade Agreements* (CUP 2023).

134 Beatriz Pérez de las Heras, 'European Union and New Zealand Free Trade Agreement: Promoting a Global Climate Agenda' (2023) 25 *Araucaria: Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales* 69, 70–71.

135 Young and Clough (n 48) 423.

136 De las Heras (n 134) 76.

137 EU-Canada Comprehensive Economic and Trade Agreement <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc>>

‘for the welfare of present and future generations’¹³⁸ and asserting that trade should promote sustainable development.¹³⁹ The Agreement’s Trade and Sustainable Development Committee will oversee the implementation of this chapter.¹⁴⁰ The Agreement promotes the value of multilateral environmental agreements, and seeks facilitation of trade in environmental goods and services, and lifecycle management of goods including carbon accounting and recycling,¹⁴¹ together with wide-ranging enhanced cooperation on identified trade and environment matters.

Recent UK agreements are also forward-looking. The UK-NZ FTA affirms the parties’ commitments in terms similar to the EU-Japan Economic Partnership Agreement.¹⁴² Under the UK-Australia FTA the parties’ commitments to addressing climate change are cast in only aspirational terms and are unlikely to support a legal claim, although there are provisions for panel processes in case of a party’s failure to enforce environmental laws.¹⁴³

In respect of the US, bilateral US FTAs including the US-Dominica, US-Panama and US-Colombia FTAs focus on the parties’ compliance with their own domestic environmental laws. The model as now seen in the US-Peru FTA, based on earlier experience under NAFTA, is for citizens’ complaints concerning a party’s non-application of its domestic environmental laws to go to a secretariat for submissions on environmental enforcement matters, which then provides information to the parties.¹⁴⁴

In conclusion, scholars have continued to emphasize the value of PTAs as vehicles for climate action, including eliminating or phasing out fossil fuel subsidies, eliminating trade barriers for environmental services especially in the renewable energy sector as well as for sustainably produced goods, and promoting trade in remanufactured goods.¹⁴⁵ There are strong arguments, too, for engagement through PTAs in assisting developing countries toward emissions reduction including through technology transfer and development aid.¹⁴⁶

V Horizons in Dispute Settlement

The freshest development at the trade and environment interface is the use of PTAs to reinforce parties’ obligations under multilateral environmental agreements including the Paris Agreement. As mentioned, the EU-NZ FTA employs this approach embracing the parties’ international legal commitments in respect of labour and gender. The agreement has differentiated panel-based dispute settlement processes for trade and sustainability disputes and other trade disputes.

However, disputes in the WTO based on the traditional mainstream trade disciplines will likely continue to be the primary arena for legal clashes on trade and environment, with cases arising

138 CETA Art 22.1.

139 CETA Art 22.3(2).

140 CETA Art 22.4.

141 CETA Arts 24.3, 24.12(1).

142 Hsu (n 2) 195–96, noting that a number of Digital Economy Partnership Agreements (DEPAs) also incorporate statements committing to trade and sustainability.

143 Young and Clough (n 48) 424 (also noting differences between the UK-Singapore FTA and the UK-Australia FTA.)

144 Pablo Pena, ‘Could a Trade Agreement Strengthen the Enforcement of Domestic Environmental Laws? Envisioning the Impacts of the US–Peru Environmental Submissions Mechanism’ (2023) 32 *Review of European Comparative & International Law* 465, 468.

145 Clara Brandi and others, ‘Trade and Climate Change: How to Design Better Climate-Related Provisions in Preferential Trade Agreements’ *German Institute of Development and Sustainability Policy Brief* 21/2023.

146 Brandi and others (n 145).

under the GATT, GATS, TBT, and SCM in particular.¹⁴⁷ In this context, Article XX GATT titled ‘General Exceptions’ has remained a key anchor point for determining the legality of many environmental trade measures. Replicated in the GATS and widely in PTAs, the provision reflects international trade law’s dominance over environmental law and policy. Its title describes the provisions it contains as ‘exceptions’. Consistent with this, the burden of proof has in practice been allocated to the party relying on them.¹⁴⁸ GATT Article XX General Exceptions 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.

In actuality, the text of Article XX does not read as an exception but clarifies that the types of measure envisaged in this article are outside the scope of the rules and disciplines contained in the GATT as a whole, stating that ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures. . .’.¹⁴⁹ However, the practice is unlikely to change in the near future.¹⁵⁰

The Appellate Body has recognized the Article XX environmental subparagraphs (b) and (g) as having a broad scope.¹⁵¹ Nonetheless, when challenged through WTO settlement, measures recognized as falling within the subparagraphs have frequently failed to qualify under Article XX’s introductory paragraph or *chapeau*.¹⁵² A WTO member adopting an environmental trade measure must take special care in how the measure is designed to make sure that it aligns with all the requirements of the *chapeau*. Meantime cases decided under the Agreement on the Application

147 Analysing the current state of affairs, Harro Van Asselt, ‘Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?’ in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds) *Climate Change Litigation: Global Perspectives* (Brill 2021) 433.

148 Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (CUP 2011).

149 Caroline E Foster, ‘The Right to Regulate: An Inherent Power Enjoyed by a Government?’ (2014) 16 *European Society of International Law Newsletter* <<http://www.esil-sedi.eu/node/92>>.

150 On Art XX(a), which has also been invoked in the sustainability context, see Caroline E Foster, ‘The Problem with Public Morals’ (2019) 10 *Journal of International Dispute Settlement* 622.

151 See Peter Van den Bossche, ‘WTO Law as a Constraint on Domestic Environmental Policy: An Overview’ in Panos Delimitis and Leonie Reins (eds) *Encyclopaedia on Trade and Environmental Law* (Edward Elgar 2021) 40–42. See also Trebilcock and others (n 33) 682–84.

152 See, for instance, in *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, WT/DS2/AB/R, WT/DS4/AB/R, DSR 1996:I, 3; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, DSR 1998:VII, 2755; *Brazil—Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, 3 December 2007, WT/DS332/AB/R, DSR 2007:IV, 1527; *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, 25 November 2013, WT/DS400/R, WT/DS401/R, DSR 2014:II, 365.

of Sanitary and Phytosanitary Measures (SPS Agreement) have produced a specialized jurisprudence attuned to relevant provisions.¹⁵³ Finally, the WTO Appellate Body, before its operation was suspended, addressed also a suite of disputes arising under the Agreement on Technical Barriers to Trade (TBT Agreement). The Appellate Body has held that the TBT Agreement's Article 2.2 non-discrimination rule is breached only if a measure's detrimental impact on imported products' competitive opportunities does not stem exclusively from a legitimate regulatory distinction. Legitimate objectives include those listed in the Agreement: national security requirements, the prevention of deceptive practices, and the protection of human health or safety, animal or plant life or health, or the environment.¹⁵⁴ In principle, the Appellate Body's decisions in this sphere have offered a persuasive reconciliation of combined trade and environmental policy demands. Unfortunately, criticism of this jurisprudence was a factor in the politics that put the Appellate Body out of action.

New challenges lie on the horizon for dispute settlement bodies in the WTO and under PTAs, including in relation to the interpretation of Article XX. The enduring legal framework of Article XX continues to provide at least a consistent basis for evaluating measures taken to address the world's increasingly pressing environmental needs. Most importantly, though, states need to commit to developing new mechanisms like those analysed in this chapter to make the necessary progress on trade and environment, and this needs doing now.

Conclusion

Trade and environment initiatives suitably designed for the 21st century could produce a radically greener global economy. The international trade system should play its part in helping the world to avoid the economic and physical dispossession and instability that climate change and ecosystem disruption will provoke. Increased forward momentum in trade policy is needed as soon as practicable.¹⁵⁵ The International Tribunal on the Law of the Sea's determination that greenhouse gas atmospheric concentrations constitute 'pollution' of the oceans, and that states are required under the United Nations Convention on the Law of the Sea to address the matter, is an important wake up call, as are the proceedings in the International Court of Justice's *Advisory Opinion on Obligations of States in respect of Climate Change*.

Historically, international trade rules have constituted the centre of gravity around which environmental policies have long been required to revolve, and environmental objectives have been considered external to economic aims. Now we are moving into a new era in international trade law calling for multilateral, plurilateral, and unilateral action. This needs to be combined with major new initiatives in the private sector and in government procurement as well as ensuring knowledge and technology transfer, capacity building, and finance flows. Simultaneously, states must attend to development concerns in the context of environment-related policy proposals and trajectories. In achieving all this, trade rules will begin to respond to the environmental realities for which we are headed and take important steps toward promoting the political stability needed for thriving international economic relations.

153 Van den Bossche (n 151) 35–36; see also Foster (n 150).

154 Agreement on Technical Barriers to Trade, Article 2.2.

155 IPCC AR6 Synthesis Report *Climate Change 2023* <<https://www.ipcc.ch/report/ar6/syr/>>.