

MADE ON EARTH: ENVIRONMENTAL EXTERNALITIES OF GLOBAL SUPPLY CHAINS

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Abstract: Three decades of trade and environment debate have delivered minor advances in the quest for world sustainable development. Nowadays, trade liberalization is delinked from sustainable global standards of production, distribution and consumption. As a result, process and production methods (PPMs) in global supply-chains are not legally relevant in the trade-based development equation. Solutions to achieve global sustainable development are certainly not easy: however, constructing a global market in which environmental costs are 100% legally irrelevant (like product distinction) does not help.

Key words: process and production methods, trade, externalities, like product, sustainable development.

Resumen: Tres décadas de debate sobre el comercio y el medioambiente han producido avances menores para el desarrollo sostenible. Actualmente, la liberalización del comercio se encuentra desconectada de estándares globales de producción, distribución y consumo. A resultas, los métodos y procesos de producción (MPP) en las cadenas globales de suministro no son relevantes legalmente en la actual ecuación del desarrollo basada en el comercio. Las soluciones para alcanzar el desarrollo sostenible mundial no son ciertamente sencillas: ahora bien, construir un mercado global en el que los costes medioambientales son 100% irrelevantes en términos legales (distinción de *producto similar*) no ayuda.

Palabras clave: métodos y procesos de producción, comercio, externalidades, producto similar, desarrollo sostenible.

Sumario: I. Trading environment. II. The regulatory hub. III. Variable legal optics. IV. TREMs and tests. V. Global supply-chains.

I. Trading environment

Trade opening and reducing trade barriers, has been, is and will remain, essential to promote growth and development, to improve standards of living and to tackle poverty reduction. The World Trade Organization remains the most efficient and most legitimate forum to open and regulate world trade. The most efficient because it works at the service of all the participants and because of its modern system to solve trade disputes. The most legitimate, because it is the fairest system of all, as all the decisions are taken by all the members, large or small, strong or weak.

But although the opening up of markets produces benefits to many, it also creates adjustments costs which we cannot ignore. These adjustments must not be relegated to the future: they must be an integral part of the opening-up agenda.

1. The paragraph transcribed above is taken from a speech made by French social democrat Pascal Lamy who, until recently, was Director General of the WTO (2005-2013). This rare bird of pro-

gressive global politics, who also was chief of staff for Jacques Delors, during a critical decade for the European Commission (1985-1994), termed the view expressed above as the *Geneva consensus*: «a belief that trade opening works for development but only if we address the imbalances it creates between winners and losers, imbalances that are all the more dangerous the more fragile the economies, societies or countries».

2. To paraphrase this ‘pragmatic practitioner’, *this is the only way to ensure that the opening up of markets will produce real benefits to all people in their everyday lives*. Certainly, it is difficult not to agree with such a vision. The challenge, however, lies in just how that consensus is to be achieved.

3. Environmental externalities present a dilemma for world trade¹; this article analyses how and to what extent those *adjustments* are handled within world trade regulatory structures.

4. One of the challenges faced by global governance nowadays is how to reconcile environmental protection with the liberalization of trade². In fact, achieving a balance between the two has been formally recognized as a major critical policy issue since the final years of the last millennium³. Two decades later, however, no world policy transformation has taken place.

5. Developing a workable balance in this field is certainly not easy. Critics target the world trading system, for obvious reasons. However, the WTO cannot be held directly responsible for environmental degradation worldwide. The greenhouse effect, erosion, pollution, extinction of species, over-exploitation of natural resources, to name some critical issues, are not the result of its system of rules, but of the absence of global environmental standards on production, distribution, and consumption.

6. The lack of global environmental standards, which neither this institution nor any other global institution are regulating at present have led, by default, to a development model which is structurally (read environmentally) inefficient.

7. Currently, the environmental externalities of global supply chains providing global consumers with goods and services, are not multilaterally regulated. The pertinent question is, to what extent does free trade promote social efficiency, when the price of those goods and services does not reflect the environmental costs of producing, distributing and consuming them?.

8. Conventional ideas on the efficiency of free trade are thus oversimplified, as non-repairable environmental degradation cannot be quantified in monetary terms; reasonably, *price* systems cannot determine value when costs are incommensurate (read, the survival of our species). In this vein, free trade regulatory structures contribute to an inefficient development model.

9. Transforming this *status quo* is anything but easy. On one hand, traditional political cycles in parliamentary democracies do not tend to govern issues with the «very» *long term* in mind (as in centuries, not decades). Essentially, environmental conservation is not a critical issue of the global public agenda because the citizens of the future cannot vote, nature has no standing⁴. Generally, public leaders have little incentive to make global environmental governance the rules of the game and, in consequence, we trade the environment.

¹ JH. JACKSON, «World Trade Rules and Environmental Policies: Congruence or Conflict», 49 *Washington and Lee Law Review*, Symposium: Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict? (1992):1227-1277.

² For one of the first fine work on the links between the multilateral trade system and the environment see, in particular, D. ESTY, *Greening the GATT. Trade, Environment, and the Future*, Institute for International Economics, 1994. More recently, see J.K. WATSON. *The WTO and the environment: development of competence beyond trade*, Routledge, 2013.

³ J. BHAGWATI, «Trade and the Environment: The False Conflict?», *Trade and the Environment: Law, Economics, and Policy*, Durwood Zaelke et al (eds), Island Press, p.159.

⁴ See CH. STONE, *Should trees have standing?: law, morality, and the environment*, Oxford University Press, 2010.

10. In practice, environmental policies depend very much on the degree of social awareness and pressure in developing and developed countries alike. While this lack of awareness endures, development policies will continue to free-ride on the environment. As a result, setting up standards for production, distribution and consumption is not a priority in the short or medium-term for developed societies, and less so for developing societies, as their legitimate priority tends to be improving the living conditions of their population.

11. However, the genuine public agenda for *pareto efficiency* in global governance is *inter-generational equity*, as this would maximize the preservation of both the Earth and our own species⁵.

12. Under this rationale, what makes markets (and market transactions) possible is the environment itself: in the absence of such a 'medium', markets and market-mechanisms (prices) do not function, as they simply don't exist (read, no life).

13. As some environmental damages can never be internalized (monetization, remediation, etc), approaching efficiency through the mere prism of *alternative uses* is macro-inefficient. Sustainable development is the optimum efficiency criterion for our species, or the 'most *efficient criterion of efficiency*': at least while we fail to develop further technologies enabling us to migrate elsewhere. While such technologies remain unavailable, *sustainable development* should reasonably govern the functioning of the current rule-based global marketplace.

14. The concept, originally coined by the so-called Brundtland Report of the UN World Commission on Environmental and Development (*Our Common Future*) in 1987, has some 'penumbras of doubt' but nevertheless also a lucidly captured 'core of certainty': «sustainable development is *development that satisfies current needs without endangering the capacity of future generations to satisfy their own needs*». The problem is how we operationalize sustainable development in practice.

II. The regulatory hub

15. By simply reading the Preamble to the WTO Agreement, it is easy to conclude that sustainable development is an end-goal of the world trading system). In fact, the first decision of the Appellate Body sustained that in both the Preamble and the WTO Decision on Trade and Environment «there is specific acknowledgement to be found about the importance of coordinating policies on trade and environment»⁶. WTO *panels* have also defined sustainable development as «one of the objectives of the WTO agreement»⁷. However, the regulatory structures of world trade do not integrate sustainable development.

16. Currently, trade representatives promote progressive liberalization by practicing, as they see fit, a complex game of «trade-offs» in which environmental dilemmas are embedded. In essence, these representatives concentrate on feverishly negotiating better market access at world-scale.

⁵ On intergenerational ethics see, in particular, C. WOLF, «Environmental Ethics, Future Generations and Environmental Law», *The Routledge Companion to Philosophy of Law*, Andrei Marmor (ed), Routledge, 2012, pp.397-414; C. WOLF, «Intergenerational Justice», *Blackwell Companion to Applied Ethics*, R. Frey and C. Wellman (eds), Blackwell, 2003, pp. 279-294 as well as the fine monograph of E. BROWN WEISS, *In fairness to future generations: International Law, Common Patrimony and Intergenerational Equity*, Transnational publisher, 1989.

⁶ WT/DS2/AB/R, *United States-Standards for Reformulated and Conventional Gasoline* (20 May 1996), par 30. See also J.H. JACKSON, «Justice Feliciano and the WTO Environmental Cases: Laying the Foundations of a 'Constitutional Jurisprudence' with implications for Developing Countries», *Law in the Science of human Dignity*, Cambridge University Press, 2005.

⁷ See WTDS58/R/W *United States-Import Prohibition of Certain Shrimp and Shrimp products (recourse to article 21.5)*, paragraph 5.54.

17. Protection of the environment is subject to the vicissitudes of a cacophonous scenario in which multiple special and general interest groups coincide in one thing only, namely, endeavouring to ensure that the world trade regulatory structures reflect their interests.

18. As a result, trade negotiations are carried out to the sound of intense background noise: a complex network of companies, industry associations, civil society organizations propose, claim, suggest, whisper in the ear of the masters of the game (ministers of economy).

19. It is no accident that environmental ministers have no seat at the negotiating table. The world trading system (WTO) is in itself a regulatory by-product of the values of those who manage it. Reconciling the value of «free trade» with the value «environment» within such a rule-based system is thus a responsibility of those public representatives who manage and control the inner evolution of this *functionalist* institution, namely, the ministers of economy.

20. The failed Havana Charter in which the GATT of 1947 was embedded, had a more open and multi-functional approach⁸. After its demise, trade representatives adopted a long-term functionalist regulatory objective, mainly based on the liberalization of trade. As a result, social issues relating to trade, including environmental conservation, were addressed from a firm pro-liberalization (read functional) legal stance.

21. Nowadays, this functionalist approach permeates not only the world trading system but an increasing number of complementary trade regulatory structures (bilateral, regional, etc). Certainly, it is not easy to refute the criticisms of those who denounce the restrictive (or self-contained) rationality of these regimes.

22. The foundations for greater environmental awareness and sensitivity were laid with the advent of ecology groups in developed countries during the nineteen sixties. But it was not until the eighties that the first conservationist voices were heard in political circles and the media, pointing their finger at the GATT. Before that, in the seventies, the GATT Secretariat made a small contribution to the UN Stockholm Conference on Human Environment (1972)⁹, and provided technical assistance to the drafters of the Convention on International Trade and Endangered Species (CITES) on issues of legal compatibility with GATT rules (1973).

23. From then on, and during the first half of the nineties in particular, a climate of concern arose among conservation organizations (particularly in the United States¹⁰) with respect to the (pervasive) *development model* promoted by the GATT: a model based purely on progressive liberalization of trade, and functioning without any sustainability criteria.

24. The shortcomings of this model, but also the functioning of the GATT itself, laid the foundations for a long-lasting negative attitude towards the world trading system among the environmental community in general. In this regard, the problems of transparency, the panels functioning behind closed doors, and the pro-trade bias of their case law (in particular the second report of 1991 in the *Tuna case*) contributed to consolidating a climate of concern.

25. The cultural origins of that situation are embedded in the historically complex evolution of the world trading system. Following the adoption of GATT in 1947, and until the Tokyo Round was

⁸ C.A. WILCOX, *A Charter for world trade*, Macmillan, 1949.

⁹ See *Industrial Pollution Control and International Trade*, GATT Studies in International Trade 1, GATT Secretariat, 1971.

¹⁰ See for example the advertisement by Greenpeace, Friends of the Earth, Sierra Club and Public Citizen, entitled «Sabotage», published in various US periodicals (eg, *New York Times*) under the title «Sabotage» (14 December 1992).

completed (1973-1979), the world trading system basically evolved in relative isolation towards non-trade branches of domestic government, as well as other global institutions.

26. The GATT Contracting Parties had some reasons for proceeding in such a way: the GATT (as an organization) originally lacked institutional structure (except for that loosely provided in article XXV) and survived under provisional application (read non ratification) for almost half a century. Given such structural weaknesses, trade representatives strategically chose to promote liberalization in relative self containment, engaging in few relationships with non-trade global institutions as well as non-trade domestic agencies. Certainly, they successfully protected the remains (GATT) of a failed creature: the International Trade Organization (ITO).

27. This original (and odd) legal status, outside any international legal standard, inoculated its inner structures with a deep functionalism, and thus a tendency to avoid multi-functional ventures such as, among others, conditioning trade to non-trade policies.

28. Interestingly, in fact, the first multi-state body to address the link between trade and the environment was not within the confines of the GATT but the OECD, when the latter created a working group in 1991 on this issue¹¹. Prior to this, a working group on environmental measures and international trade had been established by the GATT Contracting Parties in 1971, but it never actually met.

29. However, trade diplomacy moved to a radically different level playing field with the Uruguay Round (8th round of multilateral trade negotiations), by successfully negotiating an impressive number of legal instruments (24 «covered agreements») under its so-called «package deal» approach.

30. The «only trade» approach was no longer tenable. As a result, at the Ministerial Conference in Marrakesh (1994), the Final Act concluding the Uruguay Round, and officially establishing the World Trade Organization, incorporated a General Council Decision creating a new Committee on Trade and Environment (CTE).

31. Since its inception, ten years after the publication of the Brundtland Report (1984), the CTE has performed an important task of analysis, data compilation as well as inter-institutional dialogue with the Secretariats of the United Nations Multilateral Environmental Agreements (MEAs). However, the contribution to environmental protection by ministers of economy though the CTE can be described as limited at best.

32. As it stands today, the CTE functions (together with the Committee on Trade and Development) as a «forum to identify and debate developmental and environmental aspects of negotiations» (paragraph 51 of Doha Development Declaration), and thus is devoid of any endeavour to promote structural policy change in such matters.

33. Despite being well into the 21st century, in an era of increasing policy interdependence, the inclusion of environmental issues in the world trading system is scant. The efforts of environmental groups to have some impact on the *status quo* through this committee inevitably end in disappointment.

34. Reconciling trade and environment on the basis of the long established pro-liberalization *acquis* is not easy: it requires breaking with the deep-rooted inertia of a system of rules which, for more than half a century (progressive liberalization), has been functioning and providing measurable results (eight successful rounds of trade negotiations).

¹¹ K. WOODY, «The World Trade Organization's Committee on Trade and Environment», 8 *Georgetown International Environmental Law Review* 3 (1996): 458-463.

35. The CTE is in itself a clear example of the difficulties inherent in this task. Established by the above mentioned Decision of the GATT General Council on 15 April 1994, it first operated as a *preparatory subcommittee* until it was incorporated in the institutional structure of the WTO with the final entry into force of the Uruguay Round Agreements on 1 January 1995.

36. From its beginnings, this deliberative body lay in no-man's land, and was viewed with mistrust by developing countries and by ecologist movements alike. The latter, in particular, have always questioned that such a critical issue should be dealt with by a mere committee. In politics, creating committees is often a delaying tactic, allowing public-decision makers to press on with their agendas, while providing a temporary buffer for some problems. The ecologist community is well aware of this phenomenon. The general attitude was clearly encapsulated by the WWF:

Internally, the time has come to «mainstream» environmental concerns into the work of all relevant WTO bodies and agreements, rather than leaving the topic to the debate of a single, disconnected committee¹².

37. Even during the early days of the committee, the specialized literature was conclusive in this regard. Tarasofsky, for example, holds that the CTE will not be an appropriate forum for seeking a balance between trade and environment while it remains unable to act and choose different and difficult political decisions¹³.

38. The CTE's inability to submit proposals lies in the polarization of their positions and the reluctance of trade representatives of some developing countries, to whom the committee facilitated disembarkation of the so-called *green protectionism* at the WTO. In fact, Item 6 of the CTE's work program as well and paragraph 32 (i) of the Doha Ministerial Declaration give particular attention to this particular issue under the rubric of «environmental requirements and market access»¹⁴.

39. Essentially, the problem has two related dimensions. As mentioned above, during the initial stages of the world trading system, ministers of economy from developed countries, who designed the GATT and controlled its evolution, provided it with intensely functional (pro-liberalization) regulatory structures. In the current post-consolidation stage, their counterparts from developing countries have gained significant control over its functioning, and are not willing to amend a set of rules that give them a competitive advantage for attracting investments in a variety of export-oriented sectors.

40. Interestingly, the first report submitted by the CTE to a Ministerial Conference (Singapore) made this fact clear¹⁵: no less than 9 delegations, dissatisfied with some content, formally specified that the report did not modify rights and obligations under the WTO Agreements, was not binding, and could therefore not be used as a basis for legal action under the Dispute Settlement Understanding (sic)¹⁶.

41. This 'declaration of principles reflects' the main problem, namely, that the pervasive development model nowadays is free trade; as the transfers of income and public resources from developed to developing countries (read incentives) are marginal in comparison with world trade volumes.

42. Developing countries are fully aware that their lifeline for development is to produce goods and services and distribute them on a global-scale: no country has achieved a sustained high growth

¹² See «An Open Letter to WTO Members on the Occasion of the High Level Symposium on Trade and Environment», WWF (15-16 March 1999).

¹³ R.G. TARASOFSKY, «The WTO Committee on Trade and Environment: Is it making a Difference?», *Max Planck Yearbook of United Nations Law*, J.A. Frowein y R. Wolfrum (eds), 1999, pp.471-488.

¹⁴ WT/MIN(01)/DEC/1, *Doha Ministerial Declaration*, adopted on 14 November 2001.

¹⁵ WT/CTE/1, *Report (1996) of the Committee on Trade and Environment* (12 November 1996).

¹⁶ WT/CTE/M/13, *Committee on Trade and Environment-Report of the Meetings held on 30 October and 6-8 November 1996*, Note by the Secretariat (22 November 1996).

without exporting a diversifying range of goods and services. In addition, developed countries have not supported development models that combine free trade with significant transfers of income and public resources to developing countries: world trade is the all pervading tool for economic development.

43. Logically, therefore, developing countries fiercely resist all policy proposals conditioning market access to compliance with (x) process and production standards in the absence of significant incentives (read global redistribution of income). The structural tension between developing and developed countries on this issue has a direct impact on public environmental policies in general. As a result, getting trade representatives from developing countries to see eye to eye with the world environmental constituency on issues such as global standards of production and distribution is in itself a Herculean task.

44. For developing countries, raising these standards (environmental, labour, etc) has an impact on their competitive advantage. Therefore, it is highly unlikely that consensus will be achieved on this point in the future (no matter how limited it may be), without developed countries regularly and significantly compensating developing countries for that loss.

III. Variable legal optics

45. This state of affairs also largely impedes global environmental institutions from playing a critical role in the global economy, and thus from becoming a (jurisdictional) counterbalance to the world trading system¹⁷. As a result, both the UN Multilateral Environmental Agreements (MEAs) and the world trading system are international regimes the rules of which do not converge, or even diverge.

46. Nowadays, some long term strategies to avoid such problems are currently being pursued. Legal issues related to the link between world trade law and MEAs absorbed the endeavours made in the first meetings of the CTE, almost two decades ago. In this respect, the issue was included in the work programme from the very first days of the CTE. The related legal issues addressed in the programme are as follows:

- (1) Conflicts between provisions,
- (2) Conflicts between their different dispute settlement mechanisms and
- (3) The use of trade measures in MEAs¹⁸.

47. Furthermore, point 1 was «the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements». In turn, point 5 addressed «the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements».

48. For many, a promising channel for integrating environmental protection in the world trading system is to defer legally to both domestic and international environmental law. Obviously, however, trade representatives have been unable to agree on any protocol granting deference to the rules and acts of MEAs, or to domestic measures in compliance with them.

49. As a result, the task of defining these questions has been undertaken by world trade case law. However, this case law does not accept the fact that the aforementioned MEAs have identical legal

¹⁷ See in particular F. BIERMANN, «The emerging debate on the need for a World environmental organization: a commentary», 1 *Global Environmental Policy* 45 (2001) and S. CHARNOVITZ, «A World Environment Organization» 27 *Columbia Journal of Environmental Law* (2002): 323.

¹⁸ For an excellent work on treaty and jurisdiction conflicts between the MEAs and WTO law, see G. MARCEAU, «Conflicts of Norms and Conflicts of Jurisdictions: the relationship between the WTO Agreement and MEAs and other Treaties», 35 *Journal of World Trade* 6 (2001): 1081-1131.

status to WTO law within the framework of its dispute settlement procedures. That is, the legality of environmental rules and acts is conditioned on compliance with pro-trade criteria: in other words, «we decide» rather than the rest.

50. At the Seattle Conference (1999), a joint expert report submitted to the USTR (United States Trade Representative) by US environmental NGOs proposed establishing a policy of legal *deference* towards the UNEP and the MEAs: under such a proposal, the world trading system would grant legal deference to their rules and acts (granting legal relevance *ad intra* to external rules and acts); in addition, the UNEP and the MEAs Secretariats should be granted some leverage within the WTO jurisdiction in cases dealing with disputes related to environment¹⁹. It goes without saying that this type of proposal, shared by some environment ministers, has not come to fruition.

51. For a time, there were some who felt that questions on the legal relationship between these regimes would be resolved in eventual future disputes over MEA-WTO contradictions²⁰. However, no such cases have arrived at the WTO jurisdiction for an obvious reason: access to its procedures (*locus standi*) is in the hands of trade representatives; and as it is they who hold the whip hand, it is unlikely that structural issues such as these will arise in legal practice.

52. If environmental agencies had standing in WTO dispute settlement procedures, things would certainly be different. In short, trade representatives avoid making claims or allegations based on MEAs and international environmental law in general.

53. Furthermore, the panelists and judges working within the WTO jurisdiction tend to be advocates (or at least supporters) of its system of rules (the technically called *applicable rules*) and not of any others. Thus, they have strong incentives to follow the rule-based path (progressive liberalization), or at least they are reluctant to depart from it.

54. In the light of this situation, environmental ministers are powerless to act, as they perceive how, pursuant to trade law, national measures applying environmental agreements may be subject, among other requirements, to compliance with the criteria of article XX of the GATT (*exceptions*) and its case law, among other legal conditions.

55. In addition, at the present time, it is becoming increasingly difficult to include trade measures for environmental purposes in new treaties being negotiated. In fact, the use of this type of measure is quite restrictive nowadays, given the particular zeal with which trade diplomats control international rule-making developments in this area. Steve Charnovitz explained the state of affairs some years ago with his natural clarity:

The WTO of the future must make sure that nature is not just another commodity. It is only by building environmental safeguards into the trading systems that the public can gain the confidence that it needs to support free trade²¹.

56. A million dollar question: why has it not been possible to make concessions on this point? In the end, for example, article 104 of the NAFTA has granted primacy to several environmental agreements (CITES, the Basel Convention and the Montreal Protocol) and such a move has certainly not opened a Pandora's box in trade relations between Mexico, Canada and the United States.

¹⁹ NGO Technical Statement ...op.cit.p.3.

²⁰ See C. WOLD, «Multilateral Environmental Agreements and the GATT...op.cit.p.921.

²¹ S. CHARNOVITZ, «The World Trade Organization and the Environment», 8 *Yearbook of International Environmental Law* (1997):116.

57. The traditional flexibility of the world trading system in addressing sensitive issues over decades (the well known «pragmatism» of the GATT community) contrasts sharply with the rigidity with which it addresses environmental issues.

58. Paradoxically, in fact, the Committee on Regional Trade Agreements (CRTA) has validated (either expressly or implicitly) hundreds of RTAs which certainly produce trade diversion (market segmentation) thus contradicting its own basic principles of Most Favoured Nation (MFN) treatment and national treatment. However, the way that the world trading system administers its legal relationships with MEAs is more problematic for evident reasons:

- (1) The WTO lacks specific rules and procedures on this issue, such as those available for RTAs (article XXIV of the GATT or article V of the GATS),
- (2) The *applicabl e rules* of its dispute settlement mechanism prevents the application of international rules or acts in conflict with WTO law (read MEAs, etc), and finally,
- (3) The general rules of conflict (which operate by default) do not function in practice²².

59. In turn, the evident pro-trade orientation of most WTO rules affects almost all its basic disciplines (GATT, GATS, SPS agreement, TBT agreement, etc). The following are just a few examples:

1. Prohibition or limitation on import of a product for environmental protection purposes (eg, quotas),
2. Prohibition or restriction of export or import of products, or the activity of services providers,
3. Imposition of environmental taxes on imported products,
4. Discrimination based on non-product related PPM (Process and Production Methods),
5. Compulsory ecolabelling on PPM, etc.

60. As a result, the world trading system monitors and inhibits the use of «Trade Related Environmental Measures» (TREM) while the international regimes administered by environmental ministers face serious difficulties in regulating «Environment Related Trade Measures» (ERTM). Interestingly, the first acronym (TREM) is highly visible in global politics²³. The latter, however, was coined right now for the shake of the argument. What goes first then? Who rules in practice?

61. The status of MEAs *vis-à-vis* the world trading system clearly defines the relative value of free trade and the environment in the current regulatory structures of global governance. Some environment ministers resist this state of affairs by attempting to regulate the relationships of WTO law with those of MEAs through self-referential provisions incorporated in the latter.

62. In consequence, from the nineties onward, some environmental agreements incorporate legal references to the world trading system with diverse degrees of legal detail. Thus for example, article 3.5 of the United Nations Framework Agreement on Climate Change contains the following provision:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. 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.

63. For its part, article 22 (*Relationship with other international agreements*) of the 1992 Convention on Biodiversity stipulates the following in paragraph 1:

²² See P. ZAPATERO, *Derecho del comercio global*, Cívitas, 2003 (part III).

²³ See also «Specific Trade Obligations» (STOs).

The provisions of this Convention *shall not affect the rights and obligations* of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

64. Thus, the Biodiversity Convention indirectly declares that its rules prevail over those of the WTO, at least in the event of *serious damage or threat to biological Biodiversity*. In short, the Convention grants itself a conditioned primacy over other treaties through this self-referential provision.

65. Section 2 of article XIV (*effect on domestic legislation and international conventions*) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) expressly regulates its relations with trade agreements:

The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.

66. Furthermore, section 3 of article XIV of this Convention states as follows:

The provisions of the present Convention *shall in no way affect* the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a *union or regional trade agreement* establishing or maintaining a common external Customs control and removing Customs control between the parties thereto insofar as they relate to trade among the States members of that union or agreement.

67. To sum up, MEAs contain diverse wordings regulating their relationships with trade treaties. However, on the other hand, many trade treaties are also provided with self-referential clauses in this respect.

68. In addition, such clauses are costly to design and tend to be non-operational in practice. In this regard, agreeing on the final wording of these provisions is becoming increasingly difficult in international negotiations.

69. As a result, the battle for primacy between treaties tends to be resolved by other means: compliance with treaties is essentially dependent on their institutional design; that is to say, the incentive structures embedded in those treaties.

70. In consequence, these issues are solved in pure Darwinist terms by the so-called secondary rules of adjudication contained in each treaty. For example, failure to comply with an IMF determination backed by a pending tranche of credit is significantly different from not complying with a cultural cooperation treaty. The same applies to the relationship between WTO and MEAs.

71. The WTO jurisdiction relies on its potential capacity to authorize the suspension of trade concessions and other obligations. In this regard, WTO dispute settlement is particularly effective comparatively.

72. Like the WTO, some MEAs have their own dispute settlement instruments and therefore their own specialized *applicable rules*. However, these are not backed by similar incentives for compliance.

73. Finally, problems of *forum shopping* also arise: technically, the same dispute may always be resolved by applying world trade rules or, alternatively, international environmental rules. In this regard, it is always possible for an environment minister to submit a claim to an MEA dispute settlement mechanism which also addresses issues relating to the world trading system.

74. Notwithstanding hard-cases such as the *Swordfish case*²⁴, governments generally tend to avoid entering into these somewhat schizoid (and lose-lose) scenarios. Interestingly, the relationship between the WTO dispute settlement and the dispute settlement mechanisms contained in MEAs has been point 5 of the CTE work programme, since its adoption. In fact, the WTO Secretariat regularly monitors the MEAs dispute settlement trends for this reason²⁵.

IV. TREMs and tests

75. Environmental policies may require trade measures to be adopted: (a) prohibitions or restrictions on trade (b) trade sanctions on certain products or services, (c) tariffs, (d) border tax adjustments (e) compensatory measures (f) compulsory or voluntary ecolabelling, etc²⁶.

76. Non-trade treaties have used trade measures for over a century. In fact, one of the first treaties to use such measures (for health and environmental purposes) was the International Convention on *Phylloxera* (1878)²⁷. Currently, however, trade representatives are increasingly blocking non-trade treaties from employing trade measures to protect the environment. In fact, the WTO Secretariat keeps an updated *Matrix on trade measures pursuant to selected multilateral environmental agreements* at the request of WTO Members²⁸.

77. The worldview of trade representatives tends to identify *trade measures*, generically, as policy instruments within their natural competence, and therefore within the institutions that they manage²⁹. For many of them, trade restrictions (trade «barriers» in the jargon) are seen as the second best option for resolving environmental problems. In their view, there are always better alternatives available than restricting free trade. Paraphrasing Howse, free traders can always imagine, in the abstract, an alternative policy instrument to trade restrictions, which is less trade restrictive and supposedly more efficient³⁰.

78. Unquestionably, trade measures are not sufficient to protect the environment. Environmental protection generally requires complex regulatory frameworks going beyond trade measures, and thus also using other complementary policy tools (funding, technology transfer, capacity building, etc)³¹. However, the pressures against using trade measures to advance non-trade objectives and policies in such frameworks are highly questionable. As Steve Charnovitz points out:

In view of the fact that the environment regime does not use trade measures differently than the trade regime does, it is astonishing that the trade regime has had the temerity to question such use. Envi-

²⁴ See WT/DS193/1, *Chile-Measures affecting the transit and importation of Swordfish* (26 April 2000), and *Case concerning the conservation and sustainable exploitation of Swordfish Stocks in the South Eastern Pacific Ocean, International Tribunal for the Law of the Sea*, Order 2000/3 (20 December 2000), as well as WT/DS193/3, *Chile-Measures affecting the transit and importation of Swordfish: arrangement between the European Communities and Chile* (6 April 2001).

²⁵ For a detailed description of these mechanisms see WT/CTE/W/191, *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, Note by the WTO and UNEP Secretariats, Secretariat Note (6 June 2001).

²⁶ See «Synthesis Report: Trade and Environment: PPM Issues», *Trade and Environment: Processes and Production Methods*, OECD, 1994, pp.7-22.

²⁷ See in particular, S. CHARNOVITZ, «A Taxonomy of environmental Trade measures», 6 *Georgetown International Environmental Law Review* 1 (1993): 1-46.

²⁸ For the last revision See TN/TE/S/5/Rev.3 and WT/CTE/W/160/Rev.5, *Matrix on trade measures pursuant to selected Multilateral Environmental Agreements*, Note by the Secretariat–Revision (15 June 2011).

²⁹ See, in particular, the comments of Alan Oxley (former GATT Council chairman) in A. OXLEY, «The relationship between MEAs and WTO rules», *Trade and Environment Review* 2003, UNCTAD, p.93.

³⁰ R. HOWSE, «Human rights in the WTO: whose rights, what humanity? Comments on Petersmann» 13 *European Journal of International Law* (2002): 645.

³¹ See C. OSAKWE, «Finding New Packages of Acceptable Combinations of Trade and Positive Measures to Improve the Effectiveness of MEAs: A General Framework», *Trade and Environment: Bridging the Gap...* op.cit.p.48.

ronmentalists are being put through psychoanalysis to explain why they depend on trade measures; yet the habits of the trade regime receive no similar scrutiny (or self-scrutiny). Given this situation, the best strategy for environmentalists is to point out the hypocrisy in the trade regime's stance toward MEAs.³²

79. As mentioned, the actual term coined by trade representatives when referring to these measures is biased and self-interested: *trade related environmental measures* (TREM). In essence, these measures could well be termed *environmental related trade measures* (ERTMs). What is related to what, environment to trade? Or trade to environment? Reasonably, both are interrelated, and thus not subject to any hierarchy.

80. Acronyms coined in policy making are not neutral. By accepting the use of the term TREMs, we are condoning a conceptual framework which surreptitiously influences the formal allocation of authority in such measures to free trade regimes (eg, WTO, etc). By doing so, in short, we transform trade representatives into the ultimate authority when deciding whether or not (and in which cases) such measures shall be used to manage global governance³³.

81. The problem affects two particularly significant phenomena: on one hand, a chilling effect on the use of trade measures by global environmental legislation; on the other, the possibility that such measures (albeit domestic or international) may be subject to the jurisdiction of the world trading system.

82. With respect to the first issue, there is an extended perception among trade politicians and officials that international environmental negotiations have used trade measures too freely in recent years. However, moving from fiction to facts, only 20 out of 250 MEAs include trade measures.

83. In any case, the CTE, the OECD and the Sustainable Development Commission have worked on seeking ideal criteria for using trade measures in MEAs. With respect to MEAs, a WTO panel may declare at any time that any measure adopted for environmental purposes is contrary to the world trade law. Both phenomena, inevitably, produce a serious regulatory chilling effect on environmental public policies nowadays.

84. Any domestic environmental measure is eventually subject to a compliance test with WTO rules. Historically, notable provisions which hamper the adoption of optimum environmental public policies are articles I (MFN clause), III (national treatment) and XI (quantitative restrictions) of the GATT, as well as article XX (exceptions), which goes explicitly (among other issues) into the protection of natural resources.

85. In addition, the agreements resulting from the Uruguay Round contain new legal requirements. In any case, article XX (*exceptions*) of the GATT is perhaps the most interesting provision on this point, as it is the «classical» parameter of legality for environmental policies pursuant to GATT rules.

86. In principle, this provision acknowledges the right of domestic public institutions to apply environmental policies. However, it requires these policies to fulfil a series of conditions. Thus, the preamble to article XX requires that the measure in question (1) would not constitute a means of *arbitrary or unjustifiable* discrimination and (2) it would not be a *disguised restriction* on international trade. In turn, sections *b* and *g* regulate in detail the exceptions that determine the GATT compatibility (or legality) of the measures adopted for environmental purposes.

³² S. CHARNOVITZ, «The Role of Trade Measures in Treaties...op.cit.p.117.

³³ See T.J. SCHOENBAUM, «Trade-Related Environmental Measures (TREM): The United States Perspective», *Trade and the Environment: The search for Balance...op.cit.pp.366-372.*

87. The requirements of article XX merit careful reading: «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 [the GATT] 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...»

88. The case law of the Appellate Body explains how the exceptions are to operate in practice. In this respect, any *restrictive trade measure* is subject to a «needs test» modulated with some elements of proportionality. In order to determine whether or not a measure is *necessary*, the test requires a number of operations:

- (1) estimating the value protected by the measure in question,
- (2) evaluating the choice of the measure selected to protect said value and
- (3) analysing the impact of the measure on trade.

89. Pursuant to the preamble of article XX, from the moment the measure in question is considered «necessary», it will then be required to evaluate whether it is being applied in a *non- protectionist* manner.

90. To this effect, the case law to date has established that there should be a balance between WTO requirements on market access and the state's right to promote non trade policies. The task of determining whether or not this is the case, is based on the preamble, designed to combat undercover protectionist measures:

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception . . . and the rights of the other Members under varying substantive provisions . . . The location of the line of equilibrium... is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ³⁴.

91. The firm pro-trade approach is evident. In addition, it is sufficient to recall that the Appellate Body has defined article XX, from its earliest years, as an *affirmative defence*; that is, there are no presumptions: justification is required. Thus, for example, in *United States-Shirts and Blouses*, the adjudicative body of the WTO determined as follows:

Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it»³⁵.

92. Therefore, in the case of controversy, the state that is applying a measure to protect the environment should demonstrate (burden of proof) that the measure is compatible with GATT rules. Needless to say, *prima facie* presumptions are not easy to rebut in practice³⁶. The implications for non trade related public policies are self-evident...

93. Furthermore, world trade rules were not designed to confirm the legality of provisions or measures adopted within the framework of treaties such as the MEAs. Notwithstanding this fact, the

³⁴ WT/DS58/AB/R, *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998), paragraph 159.

³⁵ WT/DS33/AB/R, *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (25 April 1997).

³⁶ J. CAMERON, «The GATT and the Environment ...op.cit.p.101.

jurisdiction of the WTO rules and procedures is not prevented from deciding on domestic measures applied in compliance with the MEAs.

94. In this respect, any domestic measure or legislation adopted by WTO Members for environmental purposes not only needs to comply with article XX of the GATT and related case law, but also with provisions included in the so called «covered agreements» resulting from the Uruguay Round (GATS, TRIPs, etc)³⁷.

95. It is sufficient to cite, for example, the TBT agreement (Agreement on Technical Barriers to Trade) and the SPS agreement (Agreement on Sanitary and Phytosanitary Measures). Such a complex regulatory hub seriously inhibits the development of global environmental regulation.

96. *Standards* related to the global supply chain are particularly important from an environmental policy perspective, as a considerable portion of environmental degradation is not caused by the products, but by the process and production methods employed to produce them. Therefore, it is reasonable for environmental policies to address both the effects resulting from the products (*product standards*), as well as from their production process (*process and production standards*).

97. The conventional terminology on this point is the so-called process and production methods (PPM). In this regard, the OECD distinguishes between «product-related PPM» (in which consumption externalities are generated) and «non-product related PPM» (which generate production externalities)³⁸.

98. The fact that the latter are regulatory tools with significant power to protect the environment on a global scale is obvious to any informed observer. However, the world trading system enables compulsory PPM on domestic products, but not on imported products³⁹. World trade rules prevent treating national and foreign products differently because of the way in which these have been produced.

99. Given this state of affairs, in essence, world trade liberalization is constructed on the basis of equal treatment for *like products*⁴⁰. In fact, articles I and III of the GATT (coining such critical legal category) are usually described as the «corner stone of the GATT».

100. The term «similar product» only regulates the physical characteristics of the products. Thus, any discrimination between products with similar characteristics is, *a priori*, illegal within the GATT legal framework. As a result, environmental policies based on PPM are particularly difficult to implement nowadays. The only PPM regulation allowed by GATT rules is in relation to work in prisons: the exception in section (e) of article XX authorizes trade measures against articles produced in prisons.

³⁷ C. WOLD, «Multilateral Environmental Agreements and the GATT ...op.cit.p.863.

³⁸ C. STEVENS, «Synthesis Report: Trade and Environment: PPM Issues», *Trade and Environment: Processes and Production Methods*. OECD Documents, 1994, pp.7-22.

³⁹ On this issue see in particular See CH.R. CONRAD, *Processes and production methods (PPMs) in WTO law: interfacing trade and social goals*, Cambridge University Press, 2011; R. READ, «Process and Production Methods and the Regulation of International Trade», *The WTO and the Regulation of International Trade: Recent Trade Disputes between the European Union and the United States*, Nicholas Perdakis and Robert Read (eds), Elgar, 2005; S. CHARNOVITZ, «The Law of Environmental PPMs in the World Trade Organization», *27 Yale Journal of International Law* (2002); S. CHARNOVITZ, «Solving the Production and Processing Methods (PPMs) Puzzle», *The Earthscan Reader on International Trade and Sustainable Development*, Kevin P. Gallagher and Jacob Werksman (eds), Earthscan, 2002, and S.E. GAINES, «Processes and production methods: how to produce sound policy for environmental PPM-based trade measures?», *27 Columbia Journal of Environmental Law* 2 (2002): 383-432.

⁴⁰ See T. HOWSE, and D. REGAN, «The Product/Process Distinction- an illusory basis for disciplining 'unilateralism' in trade policy», *11 European Journal of International Law* (2000)2: 249-289, and F. ROESSLER, «Beyond the Ostensible: A Tribute to Professor Robert Hudec's Insights on the Determination of Likeness of Products Under the National Treatment Provisions of the General Agreement on Tariffs and Trade» *37 Journal of World Trade* (2003): 771-781.

101. Obviously, these legal limitations on the use of PPM are controversial beyond the confines of the «free trade community». In the words of Esty, «today, *how* things are made as well as *what* is traded is an issue»⁴¹ In this regard, the «environmental community» has for years been criticizing the pro-liberalization bias with which the former is developing the regulatory structures managing our increasingly integrated global economy.

102. The importance of the matter is clear; higher PPM standards in a given domestic market can work to the advantage of foreign exporting companies operating under less rigorous domestic PPMs, at least in the short term. As a result, those companies producing under less strict PPMs may eventually enjoy a competitive advantage in global markets.

103. Consequently, the states may ultimately consider it inevitable to make their standards less rigorous, or to enforce them more leniently, in order to promote the competitiveness of their local businesses *vis-à-vis* foreign free riders.

104. Furthermore, any domestic authority which unilaterally regulates the PPM of imported products and services faces a potential legal claim before the world trade jurisdiction. On the other hand, from a multilateral perspective, global PPM regulation is today extremely difficult in practice. In fact, regulatory projects for developing compulsory global *eco standards* are notable for their absence⁴². In this sense, establishing global PPM regulation will not be on the agenda unless there is a structural political transformation.

105. In the absence of any harmonization of process and production standards on the horizon, the environmental community is currently resorting to pragmatism, and thus attempting to promote second-best solutions. This is the case, in particular of so-called *responsible consumption*. The underlying policy idea is that information-based responsible consumption (PPM information on both domestic and imported products and services) may internalize part of the environmental costs of the production of goods and service through consumer freedom of choice.

106. In a world of pragmatic solutions and second bests, global *compulsory eco-labelling* has become an interesting alternative to advance environmental policies related to PPM⁴³. However, can we really demand that the labelling of a product informs the citizen/consumer that said product is made from Amazonian timber and is not from wood grown in a sustainable forest?

107. The Austrian parliament asked this very question 20 years ago in order to decide whether or not to regulate on the compulsory labelling of imported tropical woods. The proposed piece of legislation required a label to indicate the wood's origin, while regulating the labelling criteria for timber from sustainable forests.

108. The regulation was obviously hotly debated within the Board of the GATT⁴⁴. However, threats to exclude Austrian bidders from public calls for tender (public contracting) by some countries in Southeast Asia (as timber exporters) forced the Austrian government to amend its legislation and make the labelling voluntary⁴⁵.

⁴¹ D. ESTY, «Economic Integration and the Environment», *The Global Environment: Institutions, Law, and Policy*, Norman J. Vig y Regina S. Axelrod (eds), 1999, p.203.

⁴² T. COTTIER, «The WTO and Environmental Law: Three Points...op.cit.p.57.

⁴³ See, JOB/TE/9, *Eco-labelling: Overview of Current Work in Various International Fora*, WTO Secretariat (29 September 2010), JOB/TE/7 *Environmental Labelling-related Specific Trade Concerns and Notifications in the TBT Committee*, WTO Secretariat (17 September 2010) and WT/CTE/W/10, G/TBT/W/11, *Negotiating History of the Coverage of the TBT Agreement with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, WTO Secretariat (29 August 1995).

⁴⁴ See *Communication of the Contracting Parties members of the ASEAN (L/7110)*, GATT C/M/260 (26 November 1992) pp.45-64.

⁴⁵ W. LANG, «Is the Protection of the Environment a Challenge ...op.cit.p.466.

V. Global supply-chains

109. Not only are PPM on imported products and services, as mentioned, incompatible with WTO law; so is the binding disclosure of information on PPM for imported products and services. PPM information may only be introduced voluntarily by producers, traders and retailers in the actual world supply chains. That is, public powers are no longer authorized to provide us, as consumers (read also as citizens), with such information.

110. These world regulatory developments go beyond mere trade policies, by structurally restricting the way we model our common future. The Earth Summit's Agenda 21 clearly recommends that environmental policies should be present throughout the production cycle, and not just at the end.

111. However, the WTO dispute settlement procedures function as a «red danger button» with regard to such measures. In addition, economy ministers keep other cabinet colleagues (ministers of environment, health, education, justice, etc) conveniently distanced from the world trade regulatory structures.

112. For Steve Charnovitz, the world trading system wants the power to tell governments what measures they cannot use for the environment, but it also wants to avoid any environmental responsibilities. In his words, «there is a clear danger in giving the WTO power over the use of environmental measures without any responsibility for achieving environmental outcomes»⁴⁶.

113. World trade law has cast a shadow over multiple environmental initiatives, effectively inhibiting them. Global PPM regulation as well as the disclosure of PPM information on imported products and services, are certainly critical examples in this regard.

114. As a result, when an official or public environmental decision maker is assessing alternative public policy proposals related to trade, the question which automatically comes to mind is «is this proposal compatible with the rules of free trade?».

115. However, it is difficult to reform the current world trade regulatory structures of trade liberalization. Amending any treaty framework backed with a strong constituency is particularly difficult in practice. To sum up, changing these treaty-based structures exacts a very high political cost.

116. There are proposals on the table to provide for a counterbalance, by establishing new global environmental institutions. For Tarullo, for example, the pre-eminence of the WTO *vis-à-vis* other international regimes is due to the political weight of trade agencies nowadays, as well as the relative weakness of some of those regimes⁴⁷. Pascal Lamy himself, as Director General of the WTO explained the problem in the *European Journal of international Law*:

The solution to the potential imbalance [...] lies, I believe, in strengthening the enforcement (the effectiveness) of other legal orders so as to rebalance the relative power of the WTO in the international legal order.⁴⁸

117. Establishing a new global environmental institution as counterbalance would perhaps constitute a 'structural solution' to some of these problems. However, as has been mentioned, it is not easy

⁴⁶ S. CHARNOVITZ, «A new paradigm for trade and the environment», 11 *Singapore Yearbook of International Law* (2007): 40.

⁴⁷ D.K. TARULLO, «The Relationship of WTO Obligations to Other International Arrangements», *New Directions in International Economic Law. Essays in Honour of John.H.Jackson*, Marco Bronckers and Reinhard Hilf (eds), Kluwer Law International, 2000, pp.171-172.

⁴⁸ P. LAMY, «The Place of the WTO and its Law in the International Legal Order», 17 *European Journal of International Law* (2006): 984.

to expect that the free trade constituency (including, in particular, the ministers of economy from developing countries) would accept such a transformation to take place.

118. The same occurs with respect to the establishment of a higher global institution which would mediate, settle, and seek regulatory synergies between specialized regimes (eg, WTO/MEA).

119. Trade representatives obviously tend to be reluctant to alter the current rules of the game with regard to global inter-institutional relationships. Far from it, in fact, it is more likely that trade representatives (read ministries of economy) will take exactly the opposite path in coming years: that is, they will redouble their efforts to prevent other international negotiating fora (climate change, etc) from changing any cornerstone (eg, like product) of the rule-based structures created to liberalize world trade. In this sense, any (non trade) international conference which comes to the negotiating table with measures related to trade will inevitably have its knuckles rapped.

120. In any case, environment ministers and their constituencies have not remained idle; taking a pragmatic approach, they are pushing at least for small goals in the short and medium term, waiting for future policy momentum for major structural transformations.

121. As a result, the new pragmatic vocabulary concentrates on «increasing synergies» and «reducing tensions» between the trade and environment different regulatory structures. Thus, the term *synergy* has gained credence in high-level meetings, plans, programmes, and policy documents; as a less confrontational and more pragmatic solution than those currently offered by public international rules on conflicts on treaties, and their traditional tools of «conflicts» or «antinomies» (*ergo* «disputes» or «controversies») ⁴⁹.

122. The UNEP itself, for example, has for several years been leading an initiative to increase synergies and reduce tensions between the rules and policies of MEAs and the WTO, and thus to improve mutual support:

Building mutually supportive relationships will require policy-makers to identify areas of intersection between MEAs and the WTO, to maximize synergies, and to minimize areas of potential tension. While each is significant, the discussions until now of MEA-WTO linkages have, in the view of many environmental policy-makers, focused disproportionately on potential tensions (e.g. potential for MEA measures to create «trade distortions», or their theoretical compatibility with WTO rules). This perspective does not necessarily reflect the priorities of MEAs⁵⁰.

123. The objective of closer cooperation was also recognized in the implementation plan of the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg, calling for efforts to «strengthen cooperation among UNEP and other United Nations bodies and specialized agencies, the Bretton Woods institutions and WTO, within their mandates».

124. These new long-term micro-policies are becoming increasingly common. In the absence of political will to carry out major structural transformations, they are at least one way of moving forward⁵¹. In short, these pragmatic approaches are certainly of some use in building bridges between the world trading system, the UNEP and the MEAs.

⁴⁹ For the first steps see, in particular, *Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization: A Synthesis Report*, UNEP (January 2002) and also WT/CTE/W/155, *UNEP Statement at the Information Session with Multilateral Environmental Agreements*, Communication from UNEP (7 July 2000).

⁵⁰ See «Background and Opening of the Meeting», *UNEP Meeting on Enhancing Synergies and Mutual Supportiveness of MEAs and the WTO*, Palais des Nations (23 October 2000).

⁵¹ TN/TE/S/2/Rev.2, *Existing forms of cooperation and information exchange between UNEP/MEAs and the WTO*, Note by the Secretariat, Revision (16 January 2007).

125. Interestingly, the Ministerial Declaration launching the ongoing Doha Development explicitly includes environmental issues for the first time in the WTO Multilateral Trade Negotiations (MTN) agenda, «with a view to enhancing the mutual supportiveness of trade and environment» (paragraph 31).

126. In doing so, WTO Members agreed to begin negotiations on «the relationship between existing WTO rules and *specific trade obligations* set out in multilateral environmental agreements (MEAs)» (section i), on «procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status (section ii) as well as on the liberalization of trade in goods and services that can benefit the environment (section iii).

127. For its part, paragraph 51 of the Declaration also calls on the CTE and the Trade and Development Committee to act as «forums for debating the environmental and developmental aspects of the negotiations so that the objective of sustainable development can be achieved».

128. That is certainly an undertaking by WTO Members to change its ‘cultural isolation’ by actively seeking major inter-institutional dialogue and collaboration with the MEAs and the UNEP. The Preamble of the Doha Declaration Preamble is in itself a clear expression of good intentions:

We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development (paragraph 6).

129. In turn, the WTO has already granted observer status at the CTE to several MEAs Secretariats⁵², and also holds annual «information sessions» since 1997, which are attended by the MEA Secretariats⁵³. Similarly, the WTO regularly organizes senior level meetings and events in collaboration with the UNEP (eg, providing technical assistance to developing countries).

130. Nowadays, promoting synergies means no less, but no more, than just that. However, structural changes are highly unlikely under such collaborative schemes, and are certainly not welcomed by the world trade professional community.

131. Decades of non-coordinated international rulemaking activity by domestic agencies have turned global governance into a kind of *Wild West*. As a result, regulatory convergence (read also international legal coherence) of this multiplicity of hyper-specialized international regimes already in place is no easy task. Jacobson accurately described the phenomenon two decades ago:

Decision making in Intergovernmental Organizations [IGOs]... tends to be a dialogue among segments of governments and the executive head and permanent staff of the IGO. What counts is what governments say in the particular IGO, not what they say in another; hence the relative unimportance of representatives of other IGOs. If governments wished or were able to enforce coordination among their departments concerning IGO policy, they would do this in national capitals, not through other IGOs. *The lack of coordination within governments permits and indeed fuels considerable rivalry among IGOs and jurisdictional disputes among IGOs are frequent*⁵⁴.

132. In fact, this is quite an accurate description for the current state of affairs with regard to environmental protection and world trade.

⁵² WT/CTE/W/41/rev.10, *International Intergovernmental Organizations-Observer Status in the Committee on Trade and Environment*. Revision (4 February 2003).

⁵³ See WT/CTE/W/160/Rev.5, TN/TE/S/5/Rev.3, *Matrix on trade-related measures pursuant to selected Multilateral Environmental Agreements* (15 June 2011).

⁵⁴ H.K. JACOBSON, *Networks of Interdependence: International Organizations and the Global Political System*, Alfred A.Knopf, 1984, p118.

133. While awaiting greater responsibility from our public leaders, it would be reasonable to concentrate some efforts on increasing the regulatory synergies among these international regimes in the mid and long term. In this regard, inter-institutional dialogue and coordination will probably help. However, the *status quo* is not really an option.

134. To conclude, major structural transformations are required. Trade is a means to an end, not an end in itself. Thus, developing a rule-based global marketplace in which the supply-chains do not deliver goods and services under minimum standards of environmental protection is probably not the wisest of all human decisions.

135. However, it is self evident that only major global redistribution of income from the developed to the developing world would allow to change such socially inefficient *status quo* in the long term. In the meantime, sustainable development will certainly not be a driving force of global supply chains. The stakes for building *consensus* on a trade-based sustainable development model for the earth are high.