SUSTAINABLE DEVELOPMENT AND THE GREEN ECONOMY IN INTERNATIONAL TRADE LAW

Members of the Committee

Professor Mary Footer (British): Chair
Professor Locknie Hsu (Singaporean): Co-Rapporteur
Professor Meredith Kolsky Lewis (New Zealand): Co-Rapporteur

Professor Giovanna Adinolfi (Italian)
Mr Stefan Amarasinha (Danish)
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Professor Peter-Tobias Stoll (German)
Alternate: Dr Till Patrik Holterhus
Professor Satoru Taira (Japan)
Professor Harro van Asselt (Netherlands)
Professor Tania Voon (Australian)

Draft Interim Report of the Committee

Introduction

1. The Committee’s mandate is two-fold. It is concerned with the analysis and study of how far the rules-based international trading system (including but not limited to the World Trade Organization (WTO) trading system) supports open, fair and development-friendly trade, which is both socially inclusive and environmentally sustainable. And based on its analysis and study, the Committee formulates proposals to strengthen the international trading system as an enabling environment for sustainable development and a green economy.

2. At its inaugural meeting, held on 8-9 June 2015 at the WTO, Geneva, the Committee considered four thematic areas from its mandate: trade-related environmental issues; climate and energy, in the form of trade and green economy measures; trade and agriculture; and trade and development. Further details about these four themes, and a list of potential topics for the Committee to study, were presented during the public session of the Committee on 9 August 2016 at the 77th Biennial ILA Conference in Johannesburg.

3. From these four thematic areas, the Committee selected a list of specific topics. Several members presented papers on these topics at two further meetings. One was the Committee’s third meeting, held on 11 November 2016 at King’s College Cambridge, England, and another was the
Committee’s fourth meeting, held on 8 June 2017 at the offices of the Permanent Mission of the European Union to the WTO, Geneva. The Committee then produced its first interim report for the 78th Biennial ILA Conference, held in Sydney in 2018.

4. Since then two further meetings of the Committee have taken place. The fifth meeting was held on 18 May 2019 in Seoul, together with a conference on ‘Climate Change, Sustainable Development and International Trade Law’, organised by Yonsei Law School on 17 May 2019 when Committee members, present in Seoul, addressed specific topics in the Committee’s mandate. The sixth meeting was held on 17 January 2020 at the University of Liverpool, London Campus, England, when further papers were presented.

5. In preparing its second interim report, the Committee has had to take two significant factors into consideration. First, in December 2019 WTO Members failed to reach consensus in the Dispute Settlement Body on the appointment of new Appellate Body members. As a result, membership of the Appellate Body was reduced to one, rendering it inquorate. As a consequence, some trade disputes could be left pending indefinitely in the event that a WTO Member appeals a panel report while the Appellate Body remains dysfunctional. On the other hand, a temporary solution may be at hand. A group of WTO Members has adopted a set of agreed procedures for arbitration on appeal of panel reports involving themselves, under Article 25 DSU. Known as the multi-party interim appeal arbitration arrangement (MPIA), 22 WTO Members have so far subscribed to it.

6. From a systemic point of view, both developments, due to the uncertainty that they engender, could potentially undermine WTO dispute settlement, which is ‘a central element in providing security and predictability to the multilateral trading system’. Such developments have the potential for uniform trade rules, which are transparent and binding on all WTO Members, and which have hitherto been supported by a robust dispute settlement mechanism, to fall into desuetude or to be honoured more in the breach than through observance.

7. Second, and equally pertinent to the Committee’s mandate, is the emergence and rapid spread of COVID-19. It serves as a stark reminder of how, without closer and timely cooperation among states, this global pandemic could serve as a ‘dress rehearsal’ for the climate change crisis. In particular, current work on climate and energy, where it concerns the reduction of greenhouse gas (GHG) emissions, or ongoing negotiations on fisheries subsidies, has been halted or slowed down since the global pause button was pressed. An example of the former is the postponement of the UN Climate Change Conference (COP26) to November 2021 when Contracting States to the Paris Agreement must reach agreement on the Article 6 ‘rulebook’ for the implementation of the new

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1 Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994 in force 1 January 1995, 1869 UNTS 401 [hereinafter DSU], Article 17.1
2 Ibid Article 16.4.
3 DSU (n 1) Article 25 on Arbitration, where paragraph 1 provides for ‘[E]xpeditious arbitration within the WTO as an alternative means of dispute settlement [to] facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.’
4 See Communication from Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, The European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay being a Statement on a ‘Mechanism for Developing, Documenting and Sharing Practices and Procedures in the conduct of WTO Disputes’ JOB/DSB/1/Add.12, 30 April 2020, known as the ‘Multi-party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU’ [hereinafter MPIA].
5 Ibid. Aside from the original 20 WTO Members to the MPIA, Ecuador and Nicaragua have indicated their intention to join.
6 DSU (n 1) Article 3.2.
7 COP26, United Nations Climate Change Conference, Glasgow, 1-12 November 2021 [hereinafter COP26].
international legal framework for carbon trading. An example of the latter is the ongoing struggle that negotiators face in disciplining fisheries subsidies at the WTO by the end of 2020 so as to meet their commitments under SDG 14.6.9

8. The following is the second interim report of the Committee, which sets out its findings and recommendations, under three of the four thematic areas of its mandate. Accordingly, it is divided into three Parts, with individual sections in each Part. They are: trade-related environmental issues in terms of the mutual supportiveness of trade and environmental measures, and private law aspects of trade and environment (Part I: sections A and B respectively); climate and energy, namely environmental requirements for forestry management, price and market mechanisms such as carbon markets and border carbon adjustment measures, energy subsidies in international trade law, and green procurement that promotes the sustainable public purchasing of goods and services (Part II: sections A, B, C and D respectively) and trade and agriculture: fisheries subsidies and food security (Part III: sections A and B respectively).

**Part I. Trade-related environmental issues**

9. The Committee has continued to focus on the mutual supportiveness of trade and environmental measures, a topic which is dealt with under section A.1. with its emphasis on WTO ‘judicial’ organs and choice of law to give effect to mutual supportiveness, and section A.2. in examining the relationship between trade rules and specific trade obligations in preferential trade agreements. It is complemented by a discussion of some of the private law aspects of trade and the environment in terms of private standard-setting, under section B.1., and global trademark protection for certification marks/ecolabels under section B.2.

**A.1. The mutual supportiveness of trade and environmental measures: WTO ‘judicial’ organs and choice of law to give effect to mutual supportiveness**10

10. In the Committee’s interim report to the Sydney Conference in 2018, mutual supportiveness in the multilateral trading system focused on the problem of harmonisation between WTO law and international environmental law. In particular, it examined the situation where one WTO Member takes a trade restrictive measure for the purposes of environmental protection under international environmental law and other WTO Members challenge the consistency of it with WTO law. In the first part of that report the emphasis was on the way in which WTO ‘judicial’ organs sought to interpret WTO law harmoniously with international environmental law.11

11. In its second interim report, and notwithstanding the current dysfunctionality of the Appellate Body (see paragraph 5 above), the issue of choice of law is addressed from a conflict of laws perspective. Specifically, the following paragraphs examine (a) how WTO ‘judicial’ organs – the panels and the MIPA, to the extent that the latter applies to WTO Members12 – may act when WTO law conflicts with international environmental law and (b) how choice of law rules may be applied by those organs to give effect to mutual supportiveness.

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9 For the Sustainable Development Goals (SDGs) see http://www.sustainabledevelopment.un.org.
10 Drafted by Professor Satoru Taira (Japan Branch); some additional drafting by Professor Tania Voon (Australian Branch).
12 See the MIPA (n 4) for the list of 22 WTO Members currently subscribing to this temporary means of ‘appealing’ WTO panels through Article 25 arbitration; it is not a recognised ‘judicial’ organ under the DSU.
12. Broadly speaking, a conflict of norms arises in a situation where one norm grants certain rights or imposes certain obligations which, once exercised or complied with, will constitute a breach of the other norm.\(^\text{13}\) However, whether there is a conflict of norms, or how a \textit{prima facie} conflict of norms can be resolved, will depend largely on how to interpret these two norms, since they may be compatible or contradictory as a result of interpretation.\(^\text{14}\) Therefore, it is necessary for WTO ‘judicial organs’ to determine whether WTO law can be interpreted harmoniously with international environmental law in order to avoid a conflict between them.

13. Where it is difficult to interpret WTO law harmoniously with international environmental law, even if this happens rarely,\(^\text{15}\) there is, indeed, a conflict of norms. How then can WTO ‘judicial’ organs, confronted with such a conflict, resolve the dispute brought before them? One possible way may be to apply the law according to the available conflict rules of international law, as stipulated under the Vienna Convention on the Law of Treaties (VCLT)\(^\text{16}\) and customary international law, namely the principles of \textit{lex posterior}\(^\text{17}\) and \textit{lex specialis}.

14. However, a problem arises as to whether the WTO ‘judicial’ organs can apply such conflict rules of international law. And were any conflict rule to indicate that non-WTO law is applicable law, another problem arises as to whether WTO the ‘judicial’ organs could apply it. These twin problems stem from the fact there are no general rules on applicable law, including conflict rules, under the DSU compared to other international judicial mechanisms, as for example exist in the ICJ Statute\(^\text{18}\) or the UNCLOS.\(^\text{19}\)

15. Instead, Article 3.2 of the DSU\(^\text{20}\) provides that the dispute settlement system of the WTO must clarify the existing provisions of WTO law in accordance with ‘customary rules of interpretation of public international law’. This provision suggests no more than that WTO law and ‘customary rules of interpretation of public international law’ can become applicable law for WTO ‘judicial’ organs. Moreover, Article 19.2 of the DSU\(^\text{21}\) stipulates that ‘the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements’ and supports such an interpretation. As a result, there has been a controversy as to whether other non-WTO law can also become applicable law.\(^\text{22}\) There does, however, appear to be theoretical agreement on two points.

16. First, the scope of applicable law is limited by the substantive jurisdiction of WTO ‘judicial’ organs. Many provisions of the DSU strongly suggest that the substantive jurisdiction of WTO

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\(^{15}\) States are presumed to perform their treaty obligations in good faith (\textit{pacta sunt servanda}). The good faith principle also implies that States are presumed to have negotiated all their treaties in good faith, that is taking into account all their other international law obligations ... In this sense, States’ obligations are cumulative and, thus, should be read together’. G Marceau, ‘Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties’ (2001) 35(6) \textit{JWT} 1081, at 1089.


\(^{17}\) \textit{Ibid} Articles 30 and 59.

\(^{18}\) United Nations, Statute of the International Court of Justice (ICJ), 18 April 1946, 33 UNTS 993, Article 38.1.


\(^{20}\) DSU (n 1) Article 3.2.

\(^{21}\) DSU \textit{ibid} Article 19.2.

'judicial’ organs is limited to claims under WTO law, i.e. the ‘covered agreements’. Therefore, any claims under non-WTO law such as claims of violation of international environmental law or even general international law cannot be brought before WTO ‘judicial’ organs. This means that other international law cannot become applicable law in such cases.

17. Second, non-WTO law, which the DSU specifies as applicable law, can only be the ‘customary rules of interpretation of public international law’. As noted previously, the WTO ‘judicial’ organs have affirmed that the rules of interpretation of VCLT form part of them. However, the WTO ‘judicial’ organs have applied other provisions of the VCLT and many procedural rules of general international law, as well as general principles of law, in order to secure the proper application of WTO law or to deal with problems which the DSU does not necessarily cover in the administration of dispute settlement procedures. Theoretical opinion recognises these factual applications of law affirmatively as the inherent competence of the WTO ‘judicial’ organs. Therefore, at least, in light of this second point, conflict rules of general international law which have a procedural character can become applicable law, though it is doubtful whether conflict rules stipulated under an environmental treaty which conflicts with WTO law can be directly applied.

18. A controversial problem, on which there is theoretical disagreement, is whether non-WTO law can be invoked as a defence against a claim under WTO law. For instance, when a rule of international environmental law is invoked as a defence against a claim of violation of WTO law and is chosen as applicable law by the conflict rules of customary international law, can the WTO ‘judicial’ organs apply it? As far as we can observe in the practice of the WTO ‘judicial’ organs, there are no cases where substantive rules of treaty-based international law (including international environmental agreements) or general international law have been used as applicable law.

A.2. The mutual supportiveness of trade and environmental measures, including the relationship between trade rules and specific trade obligations in preferential trade agreements

19. As emphasised in the Committee’s previous interim report, the interaction between trade and environmental policies and treaties is found in a considerable number of preferential trade agreements (PTAs). Many PTAs include a chapter on Trade and Sustainable Development (TSD), wherein trade (and investment) liberalisation is combined with environmental (and labour rights) protection. The scope of these TSD chapters extends to a wide range of topics, covering specific environmental concerns (e.g. climate change, biodiversity, management of forests, etc.) or trade-related environmental issues (e.g. renewable energy or fishing subsidies, trade in timber and fish products or in environmental goods and services). Many TSD chapters pay attention to public

23 DSU (n 1) Article 1.1, Article 3.2, Article 7, paragraphs 1 and 2, Article 11 and Article 23.1.
24 See Pauwelyn (n 22 (2005)), 1409; J Trachtman, ‘Jurisdiction in Dispute Settlement’, in R Yerxa and B Wilson(eds), Key Issues in WTO Dispute Settlement: The First Ten Years (2005), 134.
25 See the Interim Committee Report, 2018 (n 11), paragraphs 7 and 9-11.
26 For an example regarding the allocation of the burden of proof, see Appellate Body Report, United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted on 23 May 1997, 14.
27 See Pauwelyn (n 22 (2005)) 1410; Trachtman (n 24) 136.
28 Pauwelyn ibid 1415; Trachtman ibid.
31 The term preferential trade agreement or PTA denotes all forms of international economic agreements, including a free trade agreement or FTA. In this report when referring to trade agreements the terms PTA and FTA are used interchangeably.
participation in environmental decision-making and in monitoring the implementation of the PTAs themselves.

20. This interim report focuses on a selection of PTAs that address some of the above issues, with the purpose of giving an indication of emerging trends in international trade law aimed at mutual supportiveness of trade and the environment. There may be specific provisions in a TSD that address the relationship between the PTA and multilateral environmental agreements (MEAs) according to the principle of mutual supportiveness, and call for interpretation and elucidation (sub-section (ii)). In some cases, TSD chapters may include ad hoc regimes on enforcement that depart from the general procedure envisaged for the settlement of disputes concerning the violation of other trade chapters in the PTA (sub-section (ii)). Other PTAs emphasise the parties’ right to regulate and, in particular, their discretion in determining the domestic level of environmental protection, according to their laws and regulations. Still others take up specific language on regulatory cooperation (sub-section (iii)). An increasing number of PTAs, especially those entered into by the EU, the US or Canada, contain provisions on public participation in decision-making under PTAs. Usually such provisions recognise the role of civil society organisations (CSOs) in the making and performance of trade agreements; in some instances CSOs may be involved in dispute settlement under a PTA (sub-section (iv)). One important – and frequently controversial issue – is the extent to which international trade agreements have a constraining, or even a chilling effect, on regulation at the national level taken for sustainability-related purposes (e.g. environmental protection). This topic also concerns WTO law and is discussed in sub-section (v).

(i) Interpretative aspects of TSD chapters and applicable law

21. The inclusion in recent EU PTAs of an ad hoc two-step mechanism for the enforcement of the TSD chapter (see below section (ii)) raises some issues for PTA dispute settlement panels as to the applicable law. Indeed, their mandate is usually to examine the referred matter ‘in the light of the relevant provisions’ of the TSD chapter. Seemingly, applicable law exclusively takes account of the TSD chapter. Most TSD chapters include a provision whereby the establishment of a free trade area, or other commitments accepted under the PTA, shall not prevent the parties from adopting or maintaining measures to implement MEAs. Accordingly, in order to facilitate the decision-making by panels in the fulfilment of their mandate it is envisaged that they may seek views and information from the relevant bodies established under the MEAs, including any pertinent available interpretative guidance, findings, or decisions adopted by those bodies.

22. At the same time, some of the provisions of TSD chapters are modelled on WTO law. This is particularly the case for clauses on the relationship between a PTA and an MEA and for provisions on

32 Drafted by Professor Giovanna Adinolfi (Italian Branch).
33 See for instance, Agreement between the European Union and Japan for an Economic Partnership Economic, [2018] OJ L 330/3 in force 1 February 2019 [hereinafter JEEPA], Article 16.4(5). However, see the Comprehensive Economic and Trade (CETA) Agreement between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23 provisionally in force 21 September 2017 [hereinafter CETA], which follows a different approach. The adoption of measures implementing MEAs comes under the general exception clause provided for in Article 28.3 CETA, as stated in Article 24.4(4) CETA. For a comparison of EU practice on PTAs concluded by other parties, see G. Adinolfi, ‘A Cross-Cutting Legal Analysis of the EU PTAs’ Chapters on Sustainable Development: Further Steps Towards the Attainment of the SDGs?’ in C Beverelli, J Kurtz, D Raess (eds), International Trade, Investment, and the Sustainable Development Goals (World Trade Forum/CUP [forthcoming]).
regulatory autonomy. Once the right of parties to implement MEAs and to adopt and modify domestic laws and regulations, consistent with their desired level of environmental protection, is acknowledged this entails a prohibition to act ‘in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade’. 36

23. The source of inspiration for these clauses is the chapeau of Article XX of GATT 1994. This may lead to WTO case law being the primary source of reference for their interpretation in the event that their violation is claimed under the enforcement procedure in the relevant PTA. However, Article XX language, when used in a PTA, is usually intended to give a more detailed normative content to the principle of mutual supportiveness. If trade and environment are to be mutually supportive, then PTA environmental measures exceptions should be read such that trade restrictions are legitimate to the extent they are not applied so as merely to restrict market access or to discriminate against foreign products. At the same time, it remains to be seen whether a more flexible approach than under WTO case law could be justified on the basis of the context of a TSD chapter under a particular PTA.

24. Overall, the objective pursued in EU PTAs is to incorporate environmental considerations into a regime aimed at the establishment of a free trade area, with the result that environmental issues become an integral part of trade policies. The trade-and-environment link is no longer perceived in terms of a confrontation between clashing and competing concerns (trade liberalization or environmental protection). On the contrary, the overall approach recognizes the legitimate interest of the parties in pursuing coherent and effectively mutually supportive trade and environmental policies (trade liberalization consistent with environmental protection, and vice versa). 38

(ii) Enforcement of environmental obligations under PTAs 39

25. When it comes to the enforcement of environmental obligations in PTAs two main enforcement options are emerging from recent trade agreements. The first option, utilised in the US-Korea FTA (KORUS) 40 and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 41 provides for the utilisation of general state-to-state dispute settlement and for economic sanctions. The second option, used in recent PTAs to which the EU is a party, forbids the use of standard dispute settlement for PTAs and instead provides for a softer separate enforcement mechanism without the possibility of using sanctions. This section identifies the main procedural elements of the two options.

26. In the KORUS and CPTPP, which were influenced by the trade policy of the US and Canada respectively, environmental obligations are enforced via the standard state-to-state dispute settlement provisions under each PTA. This allows parties to the PTA to start a dispute against a non-complying

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35 See for example, the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020] L 186/3 in force 1 August 2020 [EU-Viet Nam FTA], Article 13.2(1)(b) and (c); and JEEPA (n 33), Article 16.2(1).
36 See EU-Viet Nam FTA ibid Article 13.3(4) and JEEPA (n 33), Article 16.2(3).
38 For greater detail, see Adinolfi (n 33).
39 Drafted by Dr Giovanni Gruni (Netherlands Branch).
41 Comprehensive and Progressive Agreement for the Trans-Pacific Partnership between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Viet Nam, 8 March 2018, in force for Australia, Canada, Japan, Mexico, New Zealand, Singapore and Viet Nam as of 14 January 2019 [hereinafter CPTPP].
state. The case is then heard in front of a panel, the members of which are selected on the basis of a roster of experts. In the case of disputes on environmental obligations both PTAs provide that the members of the panel shall have knowledge of environmental law. The panel proceeding is preceded by mandatory consultations, which in the case of the CPTPP include three steps (standard consultations, senior representative consultations and Ministerial consultations).

27. The fact that environmental obligations can be litigated via the standard dispute settlement process means that sanctions can also be imposed against the non-complying State where there is a violation of the panel ruling. This can take the form of retaliation by means of the withdrawal of trade benefits, compensation or the payment of a ‘monetary assessment’. Both treaties remain vague on how the amount of ‘nullification or impairment’ should be calculated in the case of environmental obligations. In EU PTAs the approach is different, as clarified by the European Commission in a recent non-paper on the enforcement of sustainable development obligations.

28. All the new generation of EU PTAs with Canada, Colombia, Peru, Japan, Korea, Mercosur, Singapore and Viet Nam, which have environmental obligations, also include a clause forbidding the use of the standard state-to-state dispute settlement of the relevant PTA in enforcing these obligations. Instead, these free trade agreements include a two-step mechanism of enforcement allowing for consultations between the parties and the appointment of a panel to review the alleged violations. The Panel of Experts can determine that one of the parties has not complied with its environmental obligations. In that case a Committee composed of representatives of the parties to the PTA will ‘monitor’ the implementation of the Panel Report.

29. The EU approach in providing weaker enforcement of environmental obligations is in line with current EU domestic rules where a procedure allowing the European Commission to investigate third country violations of obligations in PTAs (the Trade Barriers Regulation) excludes violations of environmental obligations. In order to improve sustainability chapters in the EU’s PTAs, the EU should close the still very wide gap in the quality of enforcement of environmental obligations when compared to other economic obligations in its PTAs.

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42 CPTPP ibid Article 28.9 (5); and KORUS (n 40), Article 22.9 (4).
43 CPTPP ibid Article 20.22.
44 CPTPP ibid Article 28.20; and KORUS (n 40), Article 22.13.
46 See for example, EU-Mercosur Association Agreement, agreement in principle, 28 June 2019 [hereinafter EU-Mercosur Association Agreement], Trade and Sustainable Development Chapter at https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc_158166.pdf [hereinafter EU-Mercosur Association Agreement,] Article 15; EU-Viet Nam FTA (n 35), Article 13.16; EUSFTA (n 34) Article 12.16; CETA (n 33) Article 24.16; and JEEPA (n 33) Article 16.17.
47 See for instance CETA ibid Article 24.15(11); and the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3, applied since 2013, with Ecuador joining in November 2016 [hereinafter EU-Colombia-Peru-Ecuador FTA], Article 285.5.
49 On the state of the art of the enforcement of sustainability obligations on EU’s FTAs see M Bronckers and G Gruni, ‘Taking the enforcement of labour standards in the EU’s free trade agreements seriously’ (2019) 56:6 CMLR 1592-1622.
30. First, EU PTAs should include specific procedural obligations on the enforcement of environmental standards via domestic courts as is done with intellectual property rights. Second, environmental standards should be enforced via the standard dispute settlement mechanism of the relevant PTA, which includes economic sanctions. Moreover, economic sanctions can be adapted to the case of environmental obligations to ensure enforcement where there is protracted non-compliance.

31. Finally, a major contribution to the enforcement of environmental standards would result from the reform of the EU Trade Barriers Regulation, which the European Commission, led by Ursula von der Leyen, is seeking to undertake. In the context of this reform, private parties (companies, trade unions and environmental groups) should be allowed to submit complaints to the European Commission, which would then investigate violations of environmental standards protected by the EU’s PTAs, as already happens for economic obligations.

(iii) Regulatory cooperation: a comparative approach

32. Increasingly, it is common for PTAs to include a specific chapter in the agreement between parties that deals with the issue of regulatory cooperation. This is particularly so for PTAs between developed countries where both parties are seeking to apply a level playing field for future regulatory activities to their mutual benefit, as is evident from the brief survey below.

33. The EU - Canada Comprehensive and Economic Trade Agreement (CETA) is designed to be a ‘living instrument’ and the text of the agreement is intended to be only the starting point for various forms of future regulatory co-operation. The inclusion of a wide representation of societal actors in these processes is therefore of particular importance. Chapter 21 of CETA is devoted to Regulatory Cooperation and builds on an existing agreement between the EU and Canada on the matter. According to the heading, it ‘encourage[s] regulators to exchange experiences and information, and to identify areas where they could cooperate. All cooperation is voluntary and regulators in the EU and Canada retain their power to adopt legislation.’ Its objectives specifically include to ‘contribute to the protection of human life, health or safety, animal or plant life or health and the environment.’ A Regulatory Cooperation Forum (RCF) is established as an environment in which to discuss regulatory policy issues of mutual interest to the parties’. It also aims to ‘encourage the development of a wide range of bilateral cooperation activities.’ Since the CETA came into force the RCF has met twice, in 2018 and 2020.

34. A similar approach is taken in the Japan – EU Economic Partnership Agreement (JEEPA) although to a more limited degree. Chapter 18, entitled ‘Good Regulatory Practices and Regulatory Cooperation’, is incorporated in the JEEPA to ‘promote good regulatory practices and regulatory cooperation’ by ‘(a) promoting an effective, transparent and predictable regulatory environment; (b)
promoting compatible regulatory approaches and reducing unnecessarily burdensome, duplicative or divergent regulatory requirements; (c) discussing regulatory measures, practices or approaches of a Party, including how to enhance their efficient application; and (d) reinforcing bilateral cooperation between the Parties in international fora.”

35. Instead of specifying regulatory cooperation activities, Chapter 18 simply provides that each party may propose a regulatory cooperation activity to the other Party. Presumably this could include any matter covered by the JEEPA, including sustainable development. The Committee on Regulatory Cooperation is established to enhance and promote good regulatory practices and regulatory cooperation between the Parties in accordance with relevant provisions of the chapter. The Committee of Regulatory Cooperation has met once in 2020.

36. When compared to the CETA and the JEEPA, the CPTPP takes a cautious approach towards regulatory cooperation. While the importance of developing regulatory cooperation is noted in its chapter 25 on Regulatory Coherence, the importance of ‘each Party’s sovereign right to identify its regulatory priorities and establish and implement regulatory measures to address these priorities, at the levels that the Party considers appropriate’ is stressed in the same chapter. Regulatory coherence is defined as ‘the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment’. Chapter 25 does not define regulatory cooperation, nor does it specify regulatory cooperation activities. Its objective is limited to facilitating regulatory coherence ‘through domestic mechanisms that increase interagency consultation and coordination associated with processes for developing regulatory measures’.

37. The Agreement between the United States of America, the United States of Mexico and Canada (USMCA) is slightly more ambitious than the CPTPP. Chapter 28 on Good Regulatory Practices defines regulatory cooperation as ‘an effort between two or more Parties to prevent, reduce, or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection’. Good regulatory practices are fundamental to effective regulatory cooperation. To this end each party should encourage not only its regulatory authorities to engage in mutually beneficial regulatory cooperation activities with its relevant counterparts but also members of the public to identify promising avenues for cooperation activities. The Committee on Good Regulatory Practices is established to enhance the parties’ communication and collaboration in matters relating to the chapter, including encouraging regulatory compatibility and regulatory cooperation.

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61 Ibid Article 18.1(1).
63 Joint Meeting of the First Meeting of the Committee on Regulatory Cooperation under the Agreement between the European Union and Japan for an Economic Partnership, which took place by video conference on 20 January 2020, at https://www.mofa.go.jp/mofaj/files/100054089.pdf.
64 CPTPP (n 41), Chapter 25.
65 Ibid Article 25.2(2)(b).
66 Ibid Article 25.2(1).
67 Ibid Article 25.4(1).
69 Ibid Article 28.1, third paragraph.
70 Ibid Article 28.17, paragraphs 1 and 2 respectively.
71 Ibid Article 28.18.
Trade agreements and civil society

Trade negotiations have, on occasion, been accompanied by strong mobilisation from civil society organisations (CSOs). Involving civil society in the drafting and implementation of trade agreements has the potential to enhance legitimacy and to ensure that sustainable development is taken into account in an appropriate manner. There is, however, a differing degree to which CSOs, understood here as non-state actors committed to various dimensions of sustainable development and excluding the business sector, are involved in decision-making on, or under, trade agreements, i.e. in the making or performance of such agreements. In terms of mutual supportiveness between trade and the environment, there is value in studying the role that civil society has to play.

With regards to PTAs, the following analysis focuses primarily on the involvement of civil society in EU and US agreements. The more recent EU and US PTAs include clauses on the role of civil society. Typically, those agreements provide for a domestic advisory group in each of the countries that are parties to the agreement as well as a transnational mechanism with representatives of civil societies from both parties, with both accompanying the implementation of the agreement in some manner. For example, the EU-Korea FTA stipulates in paragraph 4 of Article 13.12 that each Party ‘shall establish a Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation’ of the TSD chapter of the agreement. Paragraph 1 of Article 13.13 states that ‘Members of Domestic Advisory Group(s) of each Party will meet at a Civil Society Forum’ in order to conduct a dialogue on sustainable development aspects of the trade relations between the two parties. Meanwhile, the KORUS obliges parties, in paragraph 3 of Article 20.7, to each establish a national advisory committee on environmental matters while paragraph 4 of Article 19.5 also stipulates that parties ‘may’ establish a national advisory committee on labour matters.

There are, however, significant variations between the agreements concerning the regulation of these bodies in the relevant PTAs, including the selection of representatives, the frequency of meetings and the interaction between CSOs and parties to the agreements. The US agreements have been described as having a more ‘comprehensive’ and ‘serious’ approach towards civil society involvement. The provisions are, however, broadly similar in that the bodies representing CSOs have, at most, an advisory function; their decisions are not legally binding upon the parties.

Limited empirical research has examined the degree to which these bodies effectively influence party decision-making in favour of sustainable development although some studies conclude

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72 Drafted by Dr Christiane Gerstetter (German Branch).
73 The important role of public participation in decision-making in the environmental field is recognised, for example, in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 25 June 1998, in force 30 October 2001, 2161 UNTS 447.
76 KORUS (n 40), Article 20.7(3).
77 KORUS ibid Article 19.5(4).
that it has been limited.\textsuperscript{80} For example, civil society in partner countries may not have the capacity (yet) to meaningfully accompany the implementation of PTAs, there is a lack of funding and institutional support for civil society dialogues, delays in the \textit{de facto} establishment of the mechanisms, and civil society representatives do not consider their views on sustainable development issues are taken seriously by state parties.\textsuperscript{81} Others, however, do see some positive effects for sustainable development from such mechanisms. For example, CSO representatives learn from each other about successful strategies for influencing governments.\textsuperscript{82}

42. With regard to CSO involvement in dispute settlement under PTAs, there is generally much less dispute settlement practice under PTAs than at the WTO; the topic of civil society involvement in PTA dispute settlement proceedings is thus of less practical relevance. In terms of the legal situation, however, some PTAs foresee a role for civil society in dispute settlement. Notably, the US PTAs tend to include a final provision that dispute settlement panels must ‘consider requests from non-governmental persons or entities in the Parties’ territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties’.\textsuperscript{83} Some EU PTAs also provide for a – usually very limited – role for a civil society mechanism established under a PTA in dispute settlement.\textsuperscript{84}

43. A particularly noteworthy but exceptional complaint mechanism was contained in NAFTA’s environmental side agreement, i.e. the North American Agreement on Environmental Cooperation (NAAEC).\textsuperscript{85} It allowed ‘any non-governmental organization or person’ to make a submission to the Secretariat of the Commission on Environmental Cooperation claiming that ‘a Party is failing to effectively enforce its environmental law’.\textsuperscript{86} Such a complaint could result in a ‘factual record’ by the Secretariat on the matter but had no further direct legal consequences. Opinion is divided as to whether the mechanism under the NAAEC had a positive impact on solving environmental problems.\textsuperscript{87}

44. The North American Free Trade Agreement (NAFTA) has been replaced by the USMCA as of 1 July 2020.\textsuperscript{88} The USMCA contains an environmental chapter, in which Article 24.27 and Article 24.28 provide for a complaint mechanism similar to that of the NAAEC.\textsuperscript{89} The USMCA’s environment chapter also refers to the new Agreement on Environmental Cooperation among the

\textsuperscript{80} Orbie et al (n 74) 532; Andreas Dür and Dirk De Bièvre, ‘Inclusion without Influence? NGOs in European Trade Policy’ (2007) 27(1) \textit{J Public Policy} 79–101

\textsuperscript{81} See James Harrison, Mirela Barbu, Liam Campling, Ben Richardson and Adrian Smith, ‘Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Charters’ (2019) 57(2) \textit{Journal of Common Market Studies} 260–277, which is based on case studies, drawn from three EUP PTAs.


\textsuperscript{83} See for example KORUS (n 40), Article 22.10(1)(e); Free Trade Agreement between the United States of America and Australia, signed 18 May 2004, in force 3 August 2004 at http://ustr.gov/archive/Trade-Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html, Article 21.8 (1)(d).

\textsuperscript{84} See for some examples, Martens et al (n 78) at 50.

\textsuperscript{85} North American Agreement on Environmental Cooperation, Canada, United States of Mexico, United States of America, 14 September 1993, 32 \textit{ILM} 1480 [hereinafter NAAEC]. It should be noted that NAFTA (and the NAAEC) have been replaced by the USMCA (n 68).

\textsuperscript{86} \textit{Ibid} Article 14(1).


\textsuperscript{88} See for details USMCA (n 68).

\textsuperscript{89} USMCA \textit{ibid} Articles 24.27 and 24.28.
Governments of the United States of America, the United Mexican States, and Canada (ECA) for some details. For example, the ECA stipulates that the Commission on Environmental Cooperation, which receives complaints, will continue to exist.

(v) International trade law and regulatory chill

Whether or not international economic law contributes to or impedes sustainable development does not depend only on the letter of the law. Its real-world impact also depends on how states behave in its shadow. Such (strategic) behaviour can be motivated by mere perceptions of law-related risks or actual dispute settlement outcomes. One controversial issue is whether international economic law produces a ‘regulatory chill’. This term refers to a situation where a policy measure taken for public policy purposes, such as protecting the environment, is not adopted or enforced, or is delayed or narrowed in scope or level of ambition, as a consequence of external (in this case international economic law) obligations. Whether regulatory chill exists is not only contested but also difficult to show in a methodologically sound manner, which may explain why there are relatively few in-depth studies on the matter. The following summary focuses on what has been examined.

With regard to the WTO, there have been few in-depth studies. A 2012 study assesses the impact of WTO dispute decisions on domestic policy-making in the US and Canada. It concludes that the WTO dispute settlement system has had a ‘relatively narrow and limited impact on national politics’ with the potential exception of WTO decisions on US trade remedies. According to this study there are three main factors limiting the impact of WTO dispute settlement on domestic decision-making. First, there is a strategic response by national governments to minimise the domestic impact of international judicial decisions. Second, the WTO dispute settlement mechanism tends to exercise restraint, in particular in cases involving contested public policy issues. And third, WTO procedural rules prevent the dispute settlement organs from becoming involved in matters of public policy.

There have been more limited case studies of the impact of WTO law on specific regulatory proposals and/or policies with different results. Research into the influence of WTO law on the EU’s sustainability requirements for biofuels has found regulatory chill. Another study has found

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91 ECA-USMCA ibid Article 2.
92 Drafted by Dr Christiane Gerstetter (German Branch).
93 For a recent overview of different definitions of regulatory chill, see S Shekhar, “‘Regulatory Chill’: Taking Right to Regulate for a Spin”, Working Paper, Centre for WTO Studies (September, 2016), 14-16.
95 The focus has been on empirical studies that seek to demonstrate regulatory chill through interviews or extensive analysis of documentation.
97 Ibid at 12.
98 Ibid at 13.
99 E Barrett Lydgate, ‘Biofuels, Sustainability, and Trade-Related Regulatory Chill’ (2012) 15:1 JIEL 157–180. Currently, there is a WTO complaint by Indonesia against the EU’s biofuel scheme, see Request for Consultations by Indonesia, WT/DS593/1.
evidence of regulatory chill in the area of climate change policies in the US and the EU.\textsuperscript{100} These outcomes contrast with studies on the impact of international investment law on regulatory chill, which have produced mixed results.\textsuperscript{101}

\textbf{B. Private law aspects of trade and environment}

48. Related to the previous section on mutual supportiveness is the private law side of public international law-making in terms of trade and environment. Of particular interest is the role of private, voluntary standards and their significance for the governance of sustainable development and the green economy in international trade law, which is taken up in section B.1. Linked to the foregoing is the issue of global trademark protection for certification marks and ecolabels, which is dealt with under section B.2.

\textbf{B.1. Private standard-setting}\textsuperscript{102}

49. Private standards have come to play a significant role in international trade. Along with the trend towards deregulation of public standards, either international or domestic, the proliferation of private, voluntary standards, mainly established by international private actors for assuring standardisation of production, service supply, global value chains and so on, has triggered certain concerns. Primarily, the \textit{de facto} regulatory effects of private standards have been called into question alongside their legitimacy regarding the principles of transparency, accountability, and non-discrimination in international trade law.\textsuperscript{103}

50. Various private standards exist in different company-specific schemes (for example, ‘Tesco’ and ‘Nature’s Choice’) or in consortium standards in the electronics sector and in food schemes.\textsuperscript{104} Most of them are ‘process orientated’ not ‘outcome orientated’ and may constitute non-product related process and production methods (NPR-PPM) for labour, environment\textsuperscript{105} and health considerations.\textsuperscript{106} Occasionally, there is also some interaction between public and private standards. An example is the ‘CE’ marking system, in which manufacturers self-declare a product as being of ‘CE’ status in order for it to be circulated in the European market. CE markings apply to goods covered by the EU’s product directives, including those relating to the protection of the environment.

51. As to the effects of these private standards. Some just constitute contractual obligations based on party autonomy while others serve as minimum standards, established by industrial associations

\textsuperscript{100} E Neumayer, ‘Do countries fail to raise environmental standards? An evaluation of policy options addressing “regulatory chill”’ (2001) 4(3) \textit{Int J Sustain Dev} 231-244


\textsuperscript{102} Drafted by Professor Yao-Ming Hsu (Chinese (Taiwan); some drafting on private standards in the forestry sector by Dr Gregory Messenger (British Branch) and Dr Tracey Epps (New Zealand Branch).


\textsuperscript{106} See for example, five key private food standard-setting bodies as follows: Global GAP (Good Agricultural Practices), GFSI (Global Food Safety Initiative), SQF (Safe Quality Foods), IFS (International Food Standards), and BRC (British Retail Consortium).
and based on group interest and commercial practices. Still others contain concrete requirements for health, food safety or environmental protection.\footnote{C Glinski, ‘Competing Transnational Regimes under WTO Law’ (2014) 30 Utrecht J Int'l & Eur L 44, 51-52.} 52. Based on the negotiating history of the GATT and from studies of the SPS\footnote{Agreement on Sanitary and Phytosanitary Measures, 15 April 1994, in force 1 January 1995, 1867 UNTS 493.} and TBT\footnote{Agreement on Technical Barriers to Trade, 15 April 1994, in force 1 January 1995, 1868 UNTS 120 [hereinafter TBT Agreement or TBT].} disciplines it has been argued that existing WTO norms are insufficient for regulating private standards\footnote{For the TBT Agreement, see M J Kim, ‘The Standard in the GATT/WTO TBT Agreements: Origin, Evolution and Application’ (2018) 52 JWT 765, at 777; for the SPS Agreement, see Du (n 85) at 885.} and/or evaluating their WTO compatibility. A dilemma occurs because TBT norms are only binding on Members in the event that they constitute mandatory regulations and therefore do not apply to private actors’ voluntary standards. The latter is notwithstanding the fact that the TBT Agreement has an annex on a code of good practice for private standards,\footnote{TBT Agreement (n 109), Annex 3 – Code of Good Practice for the Preparation, Adoption and Application of Standards, especially at paragraph B.} which has been cited by business and industry as the benchmark for their development.

53. Of the various private standards schemes, ecolabelling is increasingly prevalent in the field of sustainable development and the green economy. The International Organization for Standardisation (ISO)\footnote{International Organization of Standardization (ISO) is a world-wide federation or ‘network’ of 162 national standardising bodies (NSBs), see about ISO at http://www.iso.org/about-us.html#0.} identifies an ecolabel as ‘a voluntary, multiple-criteria based, third party programme that awards a license that authorises the use of environmental labels on products indicating overall environmental preferability of a product within a particular product category based on life cycle considerations.’\footnote{Reference is to ISO 14024 Type 1 standard, available at http://www.iso.org/standard/72458.html [hereinafter ISO 14024 Type 1 standard].} While ecolabelling can support the identification and validation of products or practices, the schemes on which they are based are far from perfect.

54. Aside from their lack of a formally binding status, ecolabels are mostly \textit{ad hoc}. Additionally, there may be a plethora of standards schemes for a single product, such as timber in the forestry sector (see below Part II: A, paragraphs 72 to 77) or the certification of coffee for environmental and social purposes (for example, Fairtrade, Rain Forest Alliance certified, UTZ certified, Carbon Footprint etc.). This can lead to overlapping schemes creating confusion over the scope of the standard's certification and to criticisms of ‘greenwashing,’ and to certificates (especially ‘business to consumers’ or B2C) presenting a product as being more sustainable than it actually is.

55. Market-based eco-labelling, which promotes products having a reduced environmental impact, may play an important role in strengthening CSR and shaping consumers’ choices to prefer eco-labelled goods. As private business initiatives, they would represent a ‘ground-up’ rather than a top-down regulatory approach.

56. If there is uncertainty as to whether WTO norms could directly apply to private standards, and a new negotiation for another plurilateral agreement is not feasible,\footnote{Du (n 103) at 867.} a ‘soft law’ approach may be an appropriate way to incorporate private standards into any system of global governance. One way might be to take a ‘reference paper’ approach,\footnote{Mavroidis and Wolfe (n 103) at 18.} borrowed from the WTO Telecommunications
Reference Paper,\textsuperscript{116} in which a notification obligation is set, or a guideline emerges from a WTO Committee or a WTO Ministerial Conference.

57. In summary, to establish the legitimacy of private standards in international trade law procedurally, there needs to be fuller participation of all relevant stakeholders. The process by which legitimacy could be established could first take the form of ‘soft law’, and could evolve into a more ‘concrete’ arrangement through the partnership of such stakeholders.

B.2. \textit{Global trademark protection for certification marks/ecolabels}\textsuperscript{117}

58. As indicators of the commercial origin for goods or services, trademarks (TMs) convey an image, flair, or other connotations or associations with a product or company.\textsuperscript{118} In principle, TMs will not be available for terms that are descriptive (e.g. as to the features, geographic origin, or other characteristics of products/services) or that are generic (i.e. have become common in the respective field of trade) so as to ensure that others can use these terms as well. Under the TRIPS Agreement, the basic protection WTO Members have to implement in their domestic laws allows the holder of a registered TM to prevent the use of an identical or similar sign in relation to identical or similar goods/services, if that is likely to confuse consumers. At the same time, extra protection is available for trademarks with a reputation, against uses which, for example, dilute, tarnish or otherwise affect the interests of the TM holder.\textsuperscript{119}

59. Certification marks (CTMs) are usually given for by those who can show that their products/services comply with defined standards.. Using a CTM indicates that the related product/service complies with the standards set by the certification body. Around 500 ecolabels are currently in use, while the ISO has established the 14024 Standard, setting out guiding principles for Type 1 ecolabels (including relevance of criteria for sustainable development, environment; verifiability & transparency of criteria, open to all, monitoring & quality control systems).\textsuperscript{120} Ecolabels can be private (e.g. CAFE from Starbucks), or government controlled (e.g. Bio in Germany). Occasionally, ecolabels do not appear to involve any form of vetting or certification, as for example with the symbol indicating ‘recycled content’. Some carbon emission-related ecolabels exist, such as ‘CarboNZero’ – a certification scheme for organisations, products, services and events – that have measured, managed (reduced) and mitigated (offset) GHG emissions.\textsuperscript{121}

60. Several ecolabels are registered as CTMs, including the wordmark ‘Energy Star’. This is a CTM for energy efficiency, awarded by the US Environmental Protection Agency (EPA) and the US Department of Energy which signifies that a product meets EPA energy efficiency criteria.\textsuperscript{122} The ‘Carbon Trust’ Standard is a certification mark of excellence, designed to recognise organisations for real carbon reduction.\textsuperscript{123} To qualify, organisations must measure, manage and genuinely reduce their carbon footprint and commit to reducing it year on year. The Certification is valid for two years, after which, organisations must undergo re-certification.


\textsuperscript{117} Drafted by Dr Henning Grosse Ruse-Khan (British Branch).


\textsuperscript{119} TRIPS \textit{ibid} Article 16(1).

\textsuperscript{120} ISO 14024 Type 1 Standard (n 113) and paragraph 53 of this report for the ISO definition of ecolabels.

\textsuperscript{121} For details on the CarboNZero ecolabel, see http://www/ecolabelindex.com/ecolabel/carbonzero.


\textsuperscript{123} For details of the Carbon Trust Standard, see http://www.ecolabelindex.com/ecolabel/carbon-trust-standard.
61. TMs, including CTMs, are territorial in that they confer nation- (and exceptionally in the EU, region-) wide rights. In order to facilitate global reliance on and awareness of ecolabels, there are strong arguments for their common, cross-border use, in particular in relation to certification of CO2 emissions, or ‘climate-friendly’ products or services. This would facilitate the use and acceptance of common standards which in turn would a) allow measurement/identification of carbon emissions related to products/services, and b) allow consumers to make informed choices.

62. In addition, a common, cross-border certification system would ensure the application of common standards (if sufficient checks were to be in place). Implementing cross-border certification standards via a CTM system means ensuring that the relevant CTM is registrable in all countries where it is meant to operate as a standard. This could be facilitated via international TM registration systems such as the Madrid Agreement or the Madrid Protocol. Examples of terms for which common (ideally global) protection, as indicating particular features of goods or services with regard to their contribution to sustainable development/green economy/tackling climate change (CC), would be desirable are: ‘Carbon neutral’, ‘Zero Carbon’, ‘climate friendly’, and ‘green energy’.

63. A key issue, however, is whether there is a common, cross-border understanding among the relevant public of what certification/labelling signifies. Given potentially different connotations among consumers in different jurisdictions, under the current territorial principles in trademark law, there seems to be little prospect for global uniform protection of key terms. That is also due to the national differences about key concepts, such as when a sign is distinctive (i.e. not descriptive, not generic, not liable to mislead, etc.) and when a sign infringes on the rights of a registered TM (similarity of signs, goods/services). Concerted efforts to find common terms for a global CTM, and their wide-spread dissemination and promotion could, however, ensure distinctiveness (and hence protection) through use.

64. A further question is whether protection for ecolabels against unfair competition, under the Paris Convention for the Protection of Industrial Property (Paris Convention), can be considered as an alternative. In particular, Article 10bis (3) (iii) of the Paris Convention might be a useful remedy for ecolabels even if not protected under a certification mark scheme. However, a key question will be whether local consumers understand the ecolabel as guaranteeing certain characteristics (e.g. what exactly would a term like carbon neutral convey to a consumer?). Similarly, would someone using the label without authorisation be seen as misleading the public as to characteristics of the goods? An alternative form of global protection might be a specific multilateral agreement that could offer protection (see, for example the Nairobi Treaty for the Protection of the Olympic Symbol, or agreements on the mutual recognition of each other’s certification standards, and hence certification marks (for example, between EU and Australia).

124 The Madrid system for the international registration of trademarks comprises the Madrid Agreement Concerning the International Registration of Marks, opened for signature 14 April 1891, as subsequently revised through 1979, in force variously from 1892, and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted 27 June 1989, revised in 2006 and 2007, in force variously from 1 April 1996 onwards, see http://www.wipo.int/treaties/en/registratopm/madrid/.
125 Paris Convention for the Protection of Industrial Property, open for signature 20 March 1883, as subsequently revised through 1979, in force variously from 1883, see http://www.wipo.int/treaties/en/ip/paris/.
126 Hereinafter Paris Convention.
127 Ibid paragraph 3(iii) of Article 10bis covers indications or allegations of unfair use which in the course of trade could mislead the public.
Part II. Climate and energy

65. One area of study in the Committee’s mandate concerns the environmental requirements for natural and energy resources. In the following paragraphs an overview is given of the place of forestry management (for conventional and renewable energy resources) in international trade. The appraisal is conducted from a public and private law perspective.

A. Environmental conditions for natural & energy resources: forestry management and trade

66. Trade in forestry products can contribute to deforestation and degradation of forest cover while growth in agricultural production also impacts deforestation as land is taken for crops. At the same time, it has been argued that trade in forestry products can act as a motor to support the development of a sustainable forestry industry and provide an important source of income for some of the world’s poorest. In either case, forest management is crucial to securing sustainable outcomes for trade in forestry products. This is of increasing importance in the face of two key factors: first, the powerful economic driver of an increase in demand for timber led, in particular, by dramatic economic growth in China. And second, an increasing recognition of forests in the context of climate change mitigation as a result of the direct link between forestry management and climate change and the importance of forest cover to store carbon. In 2016 the OECD reported that deforestation and forest degradation accounted for approximately 17 per cent of global greenhouse gas (GHG) emissions in 2016. Meanwhile, it is estimated that since the turn of the century, tropical forests have removed 22-26 per cent of all human-caused carbon emissions.

67. There has been considerable activity over forestry issues on the international plane from both public (e.g. the UN under SDG 15, and related agencies such as the FAO) and private bodies (such as the Forest Stewardship Council). While some WTO members have included specific commitments under their PTAs (e.g. CETA and CPTPP), both of which support

130 Drafted by Dr Gregory Messenger (British Branch) and Dr Tracey Epps (New Zealand Branch). The views expressed in this section are the authors’ own and do not reflect the view of any institution with which either of them is affiliated.


134 Ibid.


136 SDG 15 (n 9).

137 Constitution of the United Nations Food and Agriculture Organization (FAO), done at Quebec, 16 October 1945, in force 16 October 1945.


139 CETA (n 33) Article 24.10.

140 CPTPP (n 41) Article 20.17.
engagement with the CITES system to protect endangered fauna and flora\textsuperscript{141}, most trade-specific bodies have lagged behind. This is of concern since where governments seek to regulate trade to enforce forestry management standards within their markets, questions of compliance with their WTO obligations – in particular the TBT Agreement\textsuperscript{142} – can be raised.

68. Further, there is a concern that without specific provisions to support sustainable forestry, the liberalisation of trade encourages a ‘race to the bottom’ in the logging industry where unsustainable logging provides an unfair advantage in the market. This is complicated by the existence of complex global supply chains which make it difficult to trace the provenance of inputs; high demand for timber further incentivises illegal or fraudulent practices.\textsuperscript{143}

69. While there is no overarching comprehensive framework for trade in forestry products, multilateral, regional, and domestic systems do provide a patchwork of regulation. For example, US federal law penalises importers or manufacturers that use unsustainably logged timber.\textsuperscript{144} The EU mixes its own legal measures with bilateral consultations through an elaborate certification scheme (Forest Law Enforcement, Governance and Trade or FLEGT),\textsuperscript{145} which links Voluntary Partnership Agreements (VPAs) with trading partners that commit to develop appropriate certification schemes, and the EU Timber Regulation (EUTR),\textsuperscript{146} which imposes obligations on timber importers to demonstrate that they meet specific sustainability requirements.

70. Unlike PTAs that often make reference to specific international environmental obligations, under the FLEGT VPAs scheme, partners are required to introduce domestic legislation, which will be presumed to comply with the EUTR only after the EU determines that it provides sufficient protection of sustainable forestry management.\textsuperscript{147} EU PTAs support the sustainable forestry management scheme but less directly than other topics such as labour standards, for example. Under some EU FTAs there is soft encouragement to develop VPAs,\textsuperscript{148} or they include implicit expectations that partners will introduce such schemes.\textsuperscript{149}

\textsuperscript{141} Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243 [hereinafter CITES]. CITES sets out lists of endangered fauna and flora the trade of which is to be restricted or prohibited.

\textsuperscript{142} TBT Agreement (n 109).


\textsuperscript{144} The Lacey Act of 1900 (16 U.S.C. §§ 3371-3376), as amended 22 May 2008, as part of the 2008 U.S. Farm Bill, is commonly described as a ‘fact based’ system as compared to the EU’s ‘document-based’ approach under the EU Timber Regulation (see footnote 137 below). In the US evidence is provided to confirm the situation, whereas the EU relies on certification to presume compliance.


\textsuperscript{147} To date only Indonesia has been authorised by the EU to provide certificates under the FLEGT VPA scheme.

\textsuperscript{148} For example, Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other [2012] OJ L 346/3 provisionally in force between the EU and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama since 2013, Art 289.

\textsuperscript{149} EU-Colombia-Peru-Ecuador FTA (n 47), Article 273.
71. New Zealand takes an alternative approach. It does not have mandatory legislation addressing trade in illegally logged timber (unlike Australia).\(^{150}\) Instead, it maintains a voluntary Code of Practice that sets out recommended guidelines based on industry best practice with the aim of ensuring that all tropical timber and timber products imported and sold in New Zealand are from logs which are legally harvested, and wherever possible from sustainably managed forests.\(^{151}\) In addition, New Zealand has sought to embed forestry management within other systems, such as its emissions trading scheme.

72. These systems of public governance (whether national, regional, or international) coexist with private schemes.\(^{152}\) Private voluntary standards (see above Part I: B.1.) are layered across formal public requirements, overlapping rather than replacing them.\(^{153}\) While private standards are prevalent, they are predominant in a limited number of states – most notably the US and the EU.

73. China, now the world’s largest importer of timber, is also estimated, according to recent studies by Chatham House’s ‘Forest Governance and Legality’ project,\(^{154}\) to have the largest share of illegal timber imports, demonstrating the important link between domestic forestry policy and international trade policy.\(^{155}\) It is developing a Timber Legality Verification Scheme; in the first instance, the Scheme is built on the use of voluntary standards that it is hoped will form the basis for a formal legal framework.\(^{156}\) At the end of 2019 China also revised its Forest Law, which now criminalises the purchase, process, or transport of timber that is ‘clearly’ known to be illegally sourced.\(^{157}\) Notwithstanding the fact that the Chinese law marks a significant advance in combatting the illegal sourcing of timber, its effectiveness will depend on whether a rule, which relies on actors being ‘clearly’ aware of illegality, is achievable in practice.

74. A slightly different type of scheme is used by Japan (the fourth largest importer of timber after China, the US, and the EU). The Clean Wood Act 2017 creates a voluntary register for

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\(^{150}\) Illegal Logging Prohibition Act 2012, Act No. 166 of 2012 as amended, and the Illegal Logging Prohibition Regulation 2012, as amended and in force on 27 November 2018 (to include due diligence requirements), Select Legal Instrument No 271, 2012


\(^{152}\) In many states voluntary schemes exist together with public regulation rather than gap-filling or conflicting with public regulation; instead they layer across. For an analysis, with particular reference to forestry management, see P Paiement, Transnational Sustainability Laws (Cambridge University Press 2017) 90ff.


\(^{155}\) The increase in timber imports was a pre-existing trend as a result of China’s increasing economic activity and enhanced as a result of previous bans on commercial logging in key forests in China. See C Nellemann/INTERPOL Environmental Crime Programme (eds) Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World’s Tropical Forest (UNEP/GRID-Arendal, 2012) at https://www.interpol.int/content/download/5158/file/Green%20Carbon,%20Black%20Trade%20-%20Illegal%20Logging,%20Tax%20Fraud%20and%20Laundering%20in%20the%20World%27s%20Tropical%20Forests%20EN.pdf, 14 and 53-54.

\(^{156}\) As part of an EU FLEGT Facility project (n 145), supporting the Bilateral Coordination Mechanism between the EU and China on Forest Law Enforcement and Governance.

companies that are able to demonstrate their responsible sourcing of legal timber.\textsuperscript{158} While structured similarly to the EUTR, the Clean Wood Act system is built around encouraging registration as a benefit in and of itself. It has been suggested, however, that the kudos attached to government recognition and support for such enterprises is considerable. While it is a voluntary process of recognition, it is expected to produce successful outcomes that support responsible sourcing.\textsuperscript{159}

75. Although ecolabelling can support the identification and validation of sustainable forestry practices, the schemes that establish the labels are imperfect. Aside from their lack of a formally binding status their coverage is \textit{ad hoc}: while a plethora of standard schemes exist for timber, schemes covering deforestation in relation to palm oil are considered less comprehensive.\textsuperscript{160} Moreover, as noted previously with other private standards (see above Part I: B.1), the existence of multiple overlapping ecolabels and schemes for forestry products (e.g. Forest Stewardship Council (FSC)\textsuperscript{®} management and certification schemes, Sustainable Forestry Initiative (SFI) etc.) invariably creates confusion over the scope of a given standard’s certification.

76. Further, in the forestry sector private standard schemes are often developed in a less transparent or inclusive manner than public standard setting. They can constitute disproportionately burdensome requirements for business that may \textit{de facto} bind producers or exporters where buyers require compliance with private standards or national regulatory schemes require them.\textsuperscript{161} Managing some of these tensions is one of the goals of a group of WTO members negotiating the proposed Agreement on Climate Change, Trade, and Sustainability (ACCTS),\textsuperscript{162} which seek, among other things, to develop guidelines for voluntary ecolabelling programmes to encourage their promotion and application.

77. As noted, ecolabelling schemes and national schemes (such as the EUTR or Lacey Act), building on the large market size and corresponding influence of the EU and US, have created a proto-system that embeds commitments on sustainable forestry across supply chains. This approach is imperfect. There remains a burden for businesses that must navigate complex overlapping requirements in different markets and comply with a multiplicity of similar but different – and potentially discriminatory or unreasonably burdensome standards. They may also face challenges in effective application and delivery, given illegal or fraudulent practices. Nonetheless, this phenomenon \textit{does} represent an interesting development, especially if pursued not by multilateral or bilateral trade policy but instead by internal or domestic regulation to leverage conditional market access.

78. There are two further areas where sustainable forestry practices are encouraged through the trade policies of states. First, in the field of public procurement. Although there is no coherent picture (indeed, even within the procurement systems of individual EU Members), a large number of states now condition the government procurement of timber on demonstrating compliance with specific

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\item See P Pacheco, G Schoneveld, A Dermawan, H Komarudin, and M Djama, ‘Governing sustainable palm oil supply: Disconnects, complementarities, and antagonisms between state regulations and private standards’ (2020) 14 Regulation & Governance 568-598.
\item The challenge with sustainable forestry products most commonly relates to their process and not the end product \textit{per se}. A further difficulty is that such standards require more burdensome verification, which in turn calls for the maintenance of objectivity and quality control of third-party verification of conformity of standards. However, potential conflicts of interest may exist: in-house accredited conformity assessment bodies (CABs); externals CABs; or manufacturers themselves seeking verification while being consumers of the service.
\item Joint Leaders’ Statement on the launch of the ‘Agreement on Climate Change, Trade and Sustainability’ initiative (25 September 2019) by Costa Rica, Fiji, Iceland, New Zealand and Norway [hereinafter ACCTS].
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voluntary schemes such as the FSC, Smartwood, or PEFC. Second, while increasing attention paid by WTO members to the ‘circular economy’ focusses on plastics, such efforts can also encourage the use of sustainable high-quality timber.

Recommendations

79. While existing WTO rules may provide sufficient flexibilities for governments, continued work on guidelines for technical regulations and standards in the field of forestry management at the Committee on Trade and Environment (CTE) and the TBT Committee is crucial to secure support for schemes that do not constitute undue burdens for traders or discriminate against developing members. Plurilateral approaches such as the ACCTS may provide a useful basis for these efforts. Continued efforts at international standard setting bodies are also essential (for example, building on the work of the ISO) as they in turn provide cover for regulating members under the TBT Agreement.

80. More ambitious efforts should also be made. For example, at the multilateral level WTO members could agree to introduce national measures to prohibit trade in unsustainable HS44 products which are subject to a rebuttable presumption of non-compliance where not appropriately certified. More ambitiously, states could seek to develop a scheme of regional forestry management, drawing on lessons learned from fisheries management, and presume compliance of products where harvested or produced within areas covered by such agreements. Finally, seeking to use tariff policy to encourage sustainable forestry practices, WTO members could create a new set of ‘ex-outs’ to allow differential tariff rates for ‘sustainably’ and ‘unsustainably’ sourced timber.

81. At a bilateral or regional level, members could consider a range of options. One is to continue with the practice of cross-referencing obligations under relevant MEAs such as CITES, possibly drawing on the example of the EU in considering environmental elements as ‘essential’ for the purposes of the agreement (and, therefore, non-compliance potentially leading to suspension of the agreement). Alternatively, members could consider developing more detailed annexes relating to the recognition of standards relating to sustainable forestry management, drawing on the example of annexes relating to the use of technical barriers to trade in the TBT Agreement.

B. Price and market mechanisms

82. A further element in the Committee’s mandate on climate and energy, in the form of trade and green economy measures, concerns the matter of price and market mechanisms. The issue of carbon

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163 See the speech of DG Azevêdo, ‘Members have the opportunity to address global plastic pollution at the WTO’ (25 November 2019) at https://www.wto.org/english/news_e/spra_e/spra295_e.htm.
164 Specifically GATT 1994 (n 37), Article XX, paragraphs (b) and (g), which seek to protect human/animal/plant life, and exhaustible natural resources respectively, and claiming that differential treatment arises exclusively as a result of a legitimate regulatory distinction under the TBT Agreement (n 109).
165 ACCTS (n 162).
167 TBT Agreement (n 109), Article 2.5 provides that where a Member regulates for the protection of human health or the environment (inter alia) and such regulation is based on an international standard, the regulation shall be rebuttably presumed not to create an unnecessary obstacle to trade.
168 This would echo current proposals in the talks on prohibiting subsidies that contribute to IUU fishing, see Interim Committee Report 2018 (n 11), Part III.
169 Ideally this would be pursued through the World Customs Organization (WCO) in a future Harmonized System (HS) revision, though this is increasingly less likely; in this respect, see previous efforts to negotiate an Environmental Goods Agreement (EGA) in Interim Committee Report 2018 ibid Part I.B.
170 CITES (n 141).
171 It should be noted that the EU has not used ‘essential elements’ in this manner. One could question the efficacy of a potential measure so drastic in its application that few outside of the EU consider it meaningful.
172 See TBT Agreement (n 109).
pricing (or setting the price for greenhouse gas (GHG) emissions) and the development of market mechanisms at national and international levels are taken up in sub-section (i). There follows an analysis of border carbon adjustment (BCA) measures in sub-section (ii), as well as a brief discussion of the prospects of carbon pricing clubs in sub-section (iii). Finally, this section addresses the WTO compatibility of the above measures.

(i) Carbon pricing

Setting a price for GHG emissions ensures that emitters pay for the damage they cause. The main policies used to set prices for GHG emissions are carbon taxes and emissions trading. The use of market-based mechanisms was first tested under the United Nations Framework Convention on Climate Change (UNFCCC) through a pilot scheme known as Activities Implemented Jointly, which did not generate tradable carbon units. Subsequently, three market-based mechanisms with tradable carbon units were included in the 1997 Kyoto Protocol: international emissions trading, Joint Implementation and the Clean Development Mechanism (CDM). The CDM, which is based on emission reduction projects implemented in developing countries, has been particularly widely used. The CDM Executive Board, operating under the Kyoto Protocol, issues Certified Emission Reductions upon independent validation and verification that the project design complies with international rules and the degree to which the project has reduced emissions.

As of 2020, 60 regional, national, and subnational carbon pricing schemes were being implemented, or are scheduled for implementation, covering 58 per cent of global GHG emissions. However, short-term environmental benefits of emissions trading have been limited due to loose caps that do not adequately constrain emissions. Moreover, allowance prices have been too low to drive innovation in the sectors covered by emissions trading.

As part of the Paris Agreement, adopted in 2015, a new international legal framework for carbon trading was created with the objective of limiting the global average temperature increase to well below 2 degrees Celsius from pre-industrial times, pursuing efforts to limit it to 1.5 degrees.

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173 Drafted by Professor Harro van Asselt (Netherlands Branch), Professor Kati Kulovesi (Finnish Branch) and Dr Ilaria Espa (Swiss Branch).
175 Ibid at 356–361.
177 Ibid Article 4(2)(a) and (d), and UNFCCC ‘Decision 5/CP.1, Activities Implemented Jointly under the Pilot Phase’ UN Doc FCCC/CP/1995/7/Add.1 (6 June 1995).
180 Ibid Article 6.
181 Ibid Article 12.
182 Ibid Article 12.
184 See https://carbonpricingdashboard.worldbank.org/map_data.
Celsius, and achieving a balance between anthropogenic GHG emissions and their removal by carbon sinks by the second half of the century.\textsuperscript{188}

86. Article 6 of the Paris Agreement establishes new market-based mechanisms and constitutes the main international legal basis for carbon trading from 2021 onwards. Articles 6(2) and 6(3) lay the legal groundwork for cooperative approaches, whereby countries voluntarily create bilateral and plurilateral cooperation arrangements that will lead to international transferred mitigation outcomes (ITMOs).\textsuperscript{189} In practice, these provisions will apply to interlinked emissions trading schemes, international carbon crediting programmes as well as direct intergovernmental collaboration to implement the Paris Agreement.\textsuperscript{190} Article 6(2) also introduces some international safeguards to ensure the environmental integrity of the internationally transferred carbon credits.\textsuperscript{191} Articles 6(4) to 6(7) create the legal basis for a new international carbon crediting mechanism that aims to both contribute to climate change mitigation and support sustainable development.\textsuperscript{192}

87. The mechanism builds on experience from the CDM and Joint Implementation under the Kyoto Protocol (see above paragraph 83), albeit with some important differences. Instead of carbon crediting based mainly on individual projects, the new mechanism leaves the door open for a much broader range of climate policies.\textsuperscript{193} Reflecting the universal nature of the Paris Agreement both developed and developing countries may generate credits under this mechanism. However, mitigation through this mechanism must lead to an overall reduction in global emissions rather than just offsetting.\textsuperscript{194} The new mechanism will be governed under the Paris Agreement to give it international legitimacy and create a universal approach and infrastructure for crediting.\textsuperscript{195}

88. The controversial nature of Article 6 of the Paris Agreement is reflected in the international climate change negotiations. While detailed implementing rules were adopted in December 2018 at the UN Climate Change Conference in Katowice, rules for Article 6 remain outstanding. Given that international climate change negotiations have been postponed in light of the COVID-19 pandemic, the next opportunity to finalise these rules will be at COP26 in November 2021.\textsuperscript{196} The delay in adopting international rules for carbon trading has led some countries to take steps, parallel to the UNFCCC negotiations, to develop ambitious carbon trading benchmarks.\textsuperscript{197}

89. Market mechanisms are important policy instruments used to mitigate GHG emissions; their potential links to international trade and WTO law thus merit consideration. However, carbon units have an uncertain legal status for the purposes of WTO law.\textsuperscript{198} Different types of carbon units are

\textsuperscript{188} Ibid Articles 2(1) and 4(1).
\textsuperscript{189} For detailed discussion and background, see A Howard, ‘Voluntary Cooperation (Article 6)’ in D Klein, M P Carazo, M Doelle, J Bulmer and A Higham (eds) The Paris Agreement on Climate Change: Analysis and Commentary (Oxford University Press, 2017), 179.
\textsuperscript{190} Ibid 185.
\textsuperscript{191} Paris Agreement (n 8), Article 6(2) uses language on ‘promoting sustainable development’, ‘ensuring environmental integrity and transparency’, and ‘robust accounting’, as well as ‘avoidance of double counting’ (i.e. two or more countries claiming the same climate benefit).
\textsuperscript{192} Paris Agreement \textit{ibid} Article 6(4).
\textsuperscript{193} Howard (n 189) 188.
\textsuperscript{194} \textit{Ibid} at 188–189.
\textsuperscript{195} \textit{Ibid} at 189.
\textsuperscript{196} COP26 (n 7).
generated through different methods. Some are issued by authorities in the context of emissions trading schemes, while others are created through either official or voluntary carbon crediting schemes.

90. In practice, voluntary international standards and crediting schemes play an increasingly important role in international carbon trading, for example, in the form of carbon units generated under the Gold Standard and the Verified Carbon Standard. The various carbon units are tracked and recorded through different GHG registries, and then can be characterised as accounting units. However, they are also traded and transferred between different private and public entities. Thus, there is no uniform characterisation of their legal nature. Different jurisdictions treat carbon units, as, inter alia, personal property of an intangible nature, administrative authorisations to emit, sui generis administrative rights or a combination of administrative and property rights. It is therefore unclear how carbon units should be classified for the purposes of WTO law.

91. Nevertheless, various WTO law questions will arise as carbon trading becomes more widespread. Do carbon credits fall under the GATT 1994 or the General Agreement on Trade in Services (GATS) (or both)? If emissions trading systems are linked under Article 6(2) of the Paris Agreement, could there be compatibility challenges regarding the national treatment requirement under GATT Article III or the prohibition of quantitative restrictions under GATT Article XI or GATS Article XVI? Challenges could arise, for example, if a group of countries decides to link their emissions trading schemes under Article 6(2) of the Paris Agreement, while restricting trade in carbon units from WTO Members who are not part of this arrangement.

92. Another question is whether free allocation or over-allocation of emission allowances could constitute a subsidy under the Agreement on Subsidies and Countervailing Measures (ASCM). Free allocation is used in the most long-standing and largest emissions trading scheme (ETS) in the world, the EU Emissions Trading Scheme (EU ETS). All allowances under the ETS were initially allocated for free during the first phase (2008–2012). The proportion of allowances allocated for free has gradually been decreased so that only those (sub-)sectors that are exposed to the most carbon leakage will continue to receive 100 per cent of their allowances for free in the fourth phase (2021–2030). For less exposed sectors, free allocation is expected to be phased out after 2026. Over-

200 Ibid at 179.
201 Ibid.
203 Ibid at 199.
205 S Hawkins, Carbon Market Clubs under the Paris Agreement. Climate and Trade Policy Considerations (International Center for Trade and Sustainable Development (ICTSD), 2016).
207 See Hawkins (n 205) 13–14.
208 Ibid 14.
allocation of emission allowances occurs when some or all participating installations receive more allowances than is justified by their emission levels.

93. The compatibility of any ETS with the ASCM depends on the allocation method and how it can be characterised. Only measures that qualify as (a) a subsidy, defined as a financial contribution by or on behalf of the government providing a benefit to the recipient and (b) that is specific to certain enterprises, are subject to ASCM disciplines. Depending on whether the allocation of permits occurs for free, or amounts to over-allocation, the allocation could be covered under the ‘revenue foregone’ or the ‘direct transfer of funds’ categories of financial contribution, respectively. In either case, it appears that a benefit could be found to be conferred, at least where free allocation or over-compensation is granted only to particular sectors.

94. However, opinion is divided over the rationale for finding that a benefit is conferred, albeit that allowances have a market value that can be traded openly. The Appellate Body report in Canada – Renewable Energy provides support for the ‘benefit’ argument, given that the market for allowances has been created by governments’ intervention, as in that dispute. The same line of argument applies regarding the specificity requirement, which can only be fulfilled when free allocation or over-allocation are selective. Such allocations could lead to an actionable subsidy claim if adverse effects can be shown, and/or countervailing duties could be imposed.

(ii) Border carbon adjustments (BCAs)

95. The introduction of carbon constraints, including emissions trading systems, can lead to carbon leakage, which occurs when climate policies lead to a shift in production – and associated GHG emissions – to jurisdictions with no or less stringent policies in place. Although there is limited evidence that carbon leakage has taken place in jurisdictions that have introduced an ETS, such as the EU, some (sub-)sectors may be more at risk than others. Aside from WTO compatibility questions, free allocation has led to windfall profits for industries as well as a distorted carbon price signal.

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213 ASCM (n 210), Articles 1 and 2.

214 See further Coppens (n 212) 521–522.


217 In principle, specificity would also hold also in cases where allocated are granted for free to all sectors, but only some of them are over-compensated; see Coppens (n 212) 522.

218 Ibid 525.


96. Border carbon adjustments (BCAs) have long been suggested as a means to address carbon leakage. BCAs are charges levied on traded products based on their carbon content, which can in principle be linked to any of the carbon pricing mechanisms already discussed. BCAs can be difficult to administer, as they require verifiable information about the carbon embedded in traded products.\(^{222}\)

97. As a unilaterally imposed trade measure with extraterritorial implications (and arguably coercive effect), BCAs can be politically contentious. Nevertheless, following the adoption of the Paris Agreement, calls for BCAs have continued, due to the expected growing heterogeneity in national climate policy responses.\(^{223}\) The European Commission suggestion of a ‘carbon border adjustment mechanism’ as part of its European Green Deal proposal\(^ {224}\) reflects that the discussion on BCAs is evolving from theory to practice.

98. In the design and implementation of BCAs, ensuring compliance with WTO law will play a crucial role.\(^ {225}\) From the wealth of literature on BCAs and WTO law,\(^ {226}\) it is clear that it is possible to design BCAs in line with international trade rules, but the devil lies in the details.

99. The first decision policymakers face is which trade flows to cover: imports, exports or both? While covering both may level the playing field both at home and abroad, exempting exports may lower the environmental benefits of the measure. A second scope-related question is which countries to target. Although a measure could apply to all countries, policymakers may decide to exempt small emitters such as least developed countries (LDCs) and small island developing states, or other countries that have already put in place certain climate policies (e.g., a carbon price).\(^ {227}\)

100. Determining the sectoral scope is a third choice. One option is to focus on basic materials produced by energy-intensive, trade-exposed sectors, such as steel, aluminium and cement.\(^ {228}\) Another option is to also include electricity, following the example of the California ETS.\(^ {229}\) Yet another option is to look at more complex products down the value chain, for instance electronics or cars. However, while focusing on basic materials can make the measure less administratively complex to apply, it only covers a limited set of products.

101. Beyond the scope of the measure, a fourth question is how the measure will calculate the emissions embedded in an imported product. Policymakers could determine the actual embedded emissions, or instead refer to a default value or benchmark, such as average carbon intensity of domestic producers.

102. A fifth challenge is how to account for other countries’ climate policies. For instance, if another country has a carbon price, it may be possible to take that into account in the design of a BCA for the EU, which also works with a price-based system. It is less clear how to take into account non-

225 As noted also by the European Commission *ibid*.
228 Mehling et al *ibid* 474.
pricing instruments. Differentiated responsibilities and capabilities make it challenging to compare different countries’ climate actions.\textsuperscript{230} Lastly, an important question concerns what to do with BCA revenues. Such revenues could be used for environmental purposes, the general budget, or to relieve the impacts on developing countries.\textsuperscript{231}

103. These various choices, and related questions, will ultimately determine which WTO Agreements will be applicable. While it is beyond the scope of this section to discuss all WTO-relevant issues, a few indications can be offered of which design choices are more likely to be WTO-consistent.

104. First, even-handedness should be ensured in that similar carbon prices – or other forms of carbon constraint – are placed on like, competing domestic products. Second, including exports in a BCA (i.e. rebating the charge upon export) may raise challenges: such a measure may be considered a prohibited export subsidy;\textsuperscript{232} additionally, as it would discourage emission reductions in export-oriented sectors, it could undermine the environmental rationale of the BCA, and hence affect its defensibility under GATT Article XX\textsuperscript{233}

105. Third, to reduce the risk of violating the most-favoured-nation rule in GATT Article I, BCAs must avoid differentiating between trade partners based on country-specific considerations. BCAs applied to ‘like’ products based on country of origin could violate MFN (though an Article XX defence may be available).\textsuperscript{234} Instead, countries could allow foreign producers to demonstrate the carbon embodied in their products.\textsuperscript{235} This could make it easier for a BCA to be designed without violating the national treatment principle in GATT Article III.

106. Any standardised benchmarks governments may opt for, on grounds of administrative feasibility, remain an approximation,\textsuperscript{236} which may end up treating imports less favourably when assessing the carbon content in concrete cases. In this respect, the coverage of BCAs will be critical. Depending on the sectors covered, the approximation of standardised benchmarks may indeed be closer to, or further from, the actual carbon content of the product. Accordingly, the option of implementing a BCA with a limited sectoral orientation, i.e. targeting the most-carbon intensive standardised commodities in the most leakage-exposed sectors (for example cement, steel, aluminium), is seemingly the least problematic from a WTO viewpoint.\textsuperscript{237}

107. Fourth, following WTO jurisprudence on the chapeau of GATT Article XX, and assuming that the measure falls within the scope of one of the general exceptions,\textsuperscript{238} the design and implementation of BCAs should follow principles of basic fairness and due process,\textsuperscript{239} and provide

\textsuperscript{230} Mehling et al (n 223) 477–478.
\textsuperscript{231} Cosbey et al (n 227) 18–19; Mehling et al, \textit{ibid} 478–479.
\textsuperscript{232} To be clear, it is not certain that the inclusion of BCAs would qualify as a ‘subsidy’ nor that they would be considered a prohibited subsidy ‘contingent … upon export performance’ under the ASCM (n 210). See Mehling et al \textit{ibid} 470–471.
\textsuperscript{233} \textit{Ibid} 471.
\textsuperscript{234} \textit{Ibid} 463; see on this point, Pauwelyn (n 226) at 33, who points out that ‘for a U.S. competitiveness provision to target only countries with no emission cuts in place would most likely violate MFN (the United States would then be treating “like” products differently based on their origin).’
\textsuperscript{235} Cosbey et al (n 227) 14.
\textsuperscript{236} A combination of standardised benchmarks (e.g. best available or worst available technology, average performance) with direct emissions measurement (i.e. actual emissions) still being (residually) allowed remains the WTO-safest option; see Mehling et al (n 223) 476.
\textsuperscript{237} Mehling et al \textit{ibid} 474.
\textsuperscript{238} It is beyond the scope here to discuss the conditions of GATT 1994 (n 37) Article XX, paragraphs (a), (b) and (g), but generally scholars find that BCAs can meet these conditions, with Article XX, paragraph (g) the most feasible option. See for instance Pauwelyn (n 218); Holzer (n 226) 150–157; Will (n 226) 219; Mehling et al (n 223) 468.
\textsuperscript{239} Appellate Body Report, \textit{United States – Import Prohibition of Certain Shrimp and Shrimp Products}, WT/DS58/AB/R (6 November 1998) (US – Shrimp), para 181. This may mean, for instance, that in the
for ‘sufficient flexibility to take into account the specific conditions prevailing in any exporting Member’. Relatively, to avoid the measure being seen as a disguised restriction on international trade, the introduction of a BCA should preferably be preceded by ‘serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements’. Although the negotiations under the UNFCCC, in particular the ones leading to the Paris Agreement, arguably satisfy this requirement, BCA-specific negotiations with potentially affected countries may be warranted.

(iii) Carbon pricing clubs

108. In the absence of further multilateral rule development, carbon pricing could develop further through agreements among a small coalition of countries. Nobel laureate William Nordhaus has proposed ‘climate clubs’ of countries that would implement an international target carbon price. Countries would be free to choose how to pursue the price. To incentivise broader participation, Nordhaus suggests imposing tariffs on imports irrespective of their carbon content.

109. Another suggestion is to create a club of carbon markets, which would seek to reap the benefits of strengthened co-operation between different jurisdictions with an ETS. Going beyond the mere linking of systems, the club would provide a common market infrastructure. A carbon pricing club would provide incentives to participate, including cheaper emissions-abatement and greater market liquidity. Participants may also be attracted by the prospect of support for policy planning and implementation. If countries choose to adopt BCAs, club members would likely exempt each other, creating a ‘safe harbour’. However, carbon pricing clubs may raise various WTO issues. For instance, giving members exclusive access to each other’s emission units may raise MFN concerns.

C. Energy subsidies in international trade law

110. The Committee’s first interim report included a detailed discussion of the existing policy space for governments to adopt green economy measures consistent with their WTO obligations, including whether GATT Article XX, or another exclusionary measure, could be applied to justify an otherwise WTO-inconsistent subsidy that promotes green energy. In this report we take a closer calculation of the adjustment level, the affected country would be involved in the decision-making process, and that opportunities for appealing decisions are provided for; see Mehling et al (n 223) 468.


241 US – Shrimp (n 239) para 166.

242 Mehling et al (n 223) 469.


244 Nordhaus, ibid.


247 Keohane et al (n 245) 89.


249 Drafted by Professor Harro van Asselt (Netherlands Branch) and Dr Ilaria Espa (Swiss Branch); additional drafting by Dr Dominic Coppens (Belgian Branch) whose views expressed in this section are his own and do not reflect the view of any institution with which he is affiliated.

250 Interim Committee Report, 2018 (n 11), Part II:A, paragraphs 43-54.
look at energy subsidies in international trade (sub-section (i)), before focusing on renewable energy subsidies (sub-section (ii)) and fossil fuel subsidies (sub-section (iii)).

(i) Energy subsidies

111. States support the production and consumption of sources of energy, including fossil fuels, renewables, biofuels, and nuclear, with a view to providing affordable energy, creating or protecting jobs, incentivising the uptake of low-carbon energy technologies, and securing their energy supply. The Organisation for Economic Co-operation and Development (OECD) and the International Energy Agency (IEA), relying in part on self-reporting by governments, jointly estimated support for fossil fuels at US$ 340 billion back in 2017.251 Government support to renewable energy is lower, with the International Renewable Energy Agency (IRENA) pegging such subsidies at US$ 166 billion in 2017.252

112. While government support to all forms of energy is substantial, the environmental effects of different types of energy subsidies vary. Notably, government support for fossil fuel production and consumption drives GHG emissions and results in carbon lock-in,253 leading to adverse impacts on public health254 and disproportionately benefitting the richer segments of society.255 Renewable energy subsidies, by contrast, can drive the uptake of low-carbon technologies, and help renewable energy industries take off, which could lead to making renewables more competitive vis-à-vis fossil energy sources.

113. Global political attention for energy subsidies received a major boost following the commitment made by the G20 at its Pittsburgh Summit in 2009 to ‘phase out and rationalize over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption’.256 Subsequently, in Agenda 2030,257 a similar – yet less specific – target (SDG 12.c)258 was included, which called on states to “[r]ationalize inefficient fossil-fuel subsidies that encourage wasteful consumption …’. In recent years, a host of international organisations have come to address energy subsidies, including by promoting transparency and offering countries economic incentives to implement subsidy reform.259

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251 OECD and IEA, ‘Update on Recent Progress in Reform of Inefficient Fossil-Fuel Subsidies that Encourage Wasteful Consumption’ (OECD and IEA 2019) 16.
258 SDG 12.c (n 9).
As energy subsidies fall within the remit of multilateral trade agreements, the WTO has also begun to address them. As the following paragraphs will demonstrate, however, the stories of energy subsidies and the WTO have been very different for renewable energy and fossil fuel subsidies.

(ii) Renewable energy subsidies in international trade law

Renewable energy subsidies have gained prominence in international trade law due to the upsurge of WTO disputes targeting support schemes given to clean energy generation (i.e. electricity produced from renewable sources) and/or technologies (renewable energy equipment and components). In addition, there has been an increase in national trade remedy cases, often by those governments which are using subsidies domestically to lower renewable energy prices. Three support schemes have so far been successfully challenged before the WTO: against Canada (Canada – Renewable Energy), India (India – Solar Cells), and, most recently, the US (US – Renewable Energy). Importantly, in all these cases the WTO violations all stemmed from local content requirements. In other words, these WTO Members made support for renewable energy conditional on the use of domestic over imported inputs (e.g. solar cells or modules, wind generators). The WTO adjudicators did not rule that the support for renewable energy itself was WTO-inconsistent.

Since support was conditioned on the use of domestic over imported inputs, the schemes at issue discriminated against imported like products, and therefore violated the national treatment obligation under GATT Article III:4 and Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMS). While Canada and the US did not invoke any justification, India unsuccessfully tried to justify the violations under the general exceptions of GATT Article XX. India thereto relied on paragraph (j) of GATT Article XX that allows WTO Members to adopt measures ‘essential to the acquisition or distribution of products in general or local short supply’.

However, the WTO adjudicators disagreed that the inputs at issue (solar cells or modules) were in short supply. To address this issue, due regard must also be given to the availability of imports to meet domestic demand. In other words, GATT Article XX paragraph (j) provides no basis for developing a domestic local input industry for renewable energy through discriminatory measures, in particular in the presence of undisrupted availability of imported inputs to meet domestic demand. Thus, in order to implement the WTO ruling, the Members at issue had to remove the local content requirements but did not need to withdraw the support for renewable energy itself.

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263 Canada – Renewable Energy (n 216).
266 Agreement on Trade Related Investment Measures, 15 April 1994, in force 1 January 1995, 1868 UNTS 186. Additionally, should the support qualify as a ‘subsidy’ under Article 1 of the ASCM (n 210), the measure also amounts to a prohibited local content subsidy under Article 3(1)(b) ASCM ibid.
267 GATT 1994 (n 37), Article XX, paragraph (j).
268 Appellate Body Report, India – Solar Cells (n 264) paras 5.83 and 5.89.
269 Ibid paras 5.76–5.77 and 5.89.
118. It is also possible that support for renewable energy qualifies as a ‘subsidy’ under the ASCM,271 in which case it would amount to a prohibited local content subsidy if it contains a local content requirement.272 The Appellate Body in Canada – Renewable Energy273 provided important guidance on the subsidy definition regarding support for renewable energy. Under the challenged scheme, renewable energy producers were paid a higher price (a so-called feed-in-tariff) for their electricity than was paid to conventional energy producers.

119. Although this seems a textbook example of subsidisation, the Appellate Body considered that a ‘benefit’ was not necessarily conferred. Instead, it found that, if a government uses financial contributions to create a market (e.g. creates a market for electricity generated by solar or wind energy), the benchmark for the ‘benefit’ analysis must be found within the contours of each newly-created market (e.g. respectively, solar and wind energy), and not the electricity market as a whole. The Appellate Body held that a ‘benefit’ might not be conferred where the price paid by the government for electricity is not above the costs plus a reasonable rate of return to produce electricity from each type of renewable energy (e.g., solar or wind energy).274

120. Under this jurisprudence, a support scheme for renewable energy that meets these conditions, and without a local content requirement, would be WTO-consistent, because the scheme would not amount to a subsidy, and therefore not be subject to the ASCM disciplines. The Appellate Body’s approach towards ‘benefit’ in this dispute has been widely criticized, and as such it is unclear what impact this dispute will have.275

(iii) Fossil fuel subsidies in international trade law

121. Unlike renewable energy, there have been no disputes on fossil fuel subsidies.276 Various reasons for the lack of disputes on fossil fuel subsidies have been put forward.277 The first set of explanations refers to the legal particularities of the ASCM. First, it can be challenging to determine whether a particular fossil fuel subsidy meets the ASCM definition of a ‘subsidy’. ‘Regulatory subsidies’ – i.e. the failure to regulate (for example, by imposing a carbon price) – would in any case not be considered a ‘financial contribution’ under the ASCM.278 Whether a benefit has been conferred needs to be determined on a case-by-case basis by looking at ‘whether the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market’.279 Suffice it to say that in some cases – for instance, a fossil fuel exporting country pricing

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271 For the definition of a subsidy under the ASCM (n 210) Articles 1-2; for discussion with reference to carbon pricing, see section B, at paragraphs 93 to 94, with reference to BCAs, see section B, paragraph 103, and n 232.
272 ASCM ibid Article 3(1)(b).
273 Canada – Renewable Energy (n 216).
274 Ibid paras 5.225–5.234.
276 Only one case has come close to a formal dispute, involving a company that sought to impose an anti-dumping or countervailing duty against fossil fuel subsidies; see R Steenblik, J Sauvage and C Timiliotis, ‘Fossil Fuel Subsidies and the Global Trade Regime’ in J Skovgaard and H van Asselt (eds) The Politics of Fossil Fuel Subsidies and their Reform (Cambridge University Press) 121-139, at 127.
278 Coppens (n 212), 448–449.
energy above production costs but below international market prices – it will be hard to establish the
conferral of a benefit. 280
122. Second, assuming the subsidy definition is met, it will be hard to prove that such a subsidy is
‘prohibited’ by the ASCM in that it is de jure or de facto contingent on export performance or on the
use of local content. 281 Third, demonstrating ‘specificity’ – a precondition for the ASCM’s category of
‘actionable’ subsidies – is very difficult for the large sub-set of fossil fuel consumption subsidies
(such as dual pricing)282 that benefit a wide range of consumers. 283 Fourth, it is ‘burdensome and
expensive’ to overcome the evidentiary hurdles to show that a specific fossil fuel subsidy – or the
subsidised imports – has caused ‘adverse effects’ on trade. 284
123. In addition to these legal hurdles, the lack of disputes may be due to political and other
factors. One reason is that WTO Members have been unwilling to challenge fossil fuel subsidies for
fear of jeopardising diplomatic relationships or possible retaliatory action. 285 Another underlying
factor is that there is limited data on fossil fuel subsidies; compliance with the WTO requirement to
report subsidies has been poor. 286 Finally, the fact that consumer subsidies may also benefit importers
may lower the incentives for challenging them. 287 Having said that, fossil fuel subsidies could be both
prohibited and actionable under the ASCM. Some proposed producer subsidies in major exporting
countries could be argued to be contingent on export performance,288 and the use of local content
requirements is not limited to renewable energy. 289 Moreover, fossil fuel subsidies can affect trade
flows directly (for example, by increasing the supply of energy commodities such as crude oil or coal)
or via pass-through effects (for example, leading to benefits for downstream producers of energy
products, such as gasoline or energy-intensive products, such as steel)290
124. Efforts to tackle fossil fuel subsidies under the WTO have been limited. Fossil fuel subsidies
have received some attention in a few WTO accession negotiations (including those of Russia and
Saudi Arabia) and in Doha Round proposals related to dual pricing. 291 More recently, a ‘Fossil Fuel
Subsidies Reform Ministerial Statement’ was adopted at the 11th Ministerial Conference by a group of
12 WTO Members, 292 which seek to ‘advance discussion in the [WTO] aimed at achieving ambitious

125.
281 ASCM (n 210) Article 3.
282 Dual pricing refers to practices by fossil fuel exporters that set a lower domestic price for fuels than the price
charged internationally. See A Marhold, ‘Fossil Fuel Subsidy Reform in the WTO: Options for Constraining
283 De Bièvre et al (n 277) 418.
284 ASCM (n 210) Article 5; see C Wold, G Wilson and S Foroshani, ‘Leveraging Climate Change Benefits
685.
285 Meyer (n 277) 401 and 405
286 L Casier, R Fraser, M Halle and R Wolfe ‘Shining a Light on Fossil Fuel Subsidies at the WTO: How NGOs
Can Contribute to WTO Notification and Surveillance’ (2014) 13(4) WTR 603.
287 Steenblik et al (n 276) 127–128.
288 C Harris Slattery, ‘Fossil Fueling the Apocalypse’: Australian Coal Subsidies and the Agreement on
289 S Tordo, M Warner, E Osmel and Y Anouti, Local Content Policies in the Oil and Gas Sector (World Bank,
2013).
291 K Lang, P Wooders and K Kulovesi, ‘Increasing the Momentum of Fossil-Fuel Subsidy Reform: A Roadmap
for International Cooperation’ (IISD, 2010) 11–12 and 17; V Rive, Fossil Fuel Subsidy Reform: An
292 Fossil Fuel Subsidies Reform Ministerial Statement, WT/MIN(17)/54 (12 December 2017). Its signatories
are Chile, Costa Rica, Iceland, Liechtenstein, Mexico, the Republic of Moldova, New Zealand, Norway, Samoa,
Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Uruguay.
and effective disciplines on inefficient fossil fuel subsidies that encourage wasteful consumption, including through enhanced [WTO] transparency and reporting …’. 293

125. Following the example of fisheries subsidies, it may be possible to negotiate new rules for fossil fuel subsidies — either through amending the ASCM or by negotiating a standalone agreement. 294 Doing so would allow for the focus to shift from the trade effects of fossil fuel subsidies to their environmentally harmful impacts. 295 To do so raises the question of how to distinguish fossil fuel subsidies in terms of their environmental impacts. Suggestions have been made to focus on ‘the most egregious kinds of subsidies’, including subsidies for new coal-fired power plants and subsidies for new fossil fuel exploration and extraction. Developing new rules — for example, prohibiting certain types of fossil fuel subsidies — would need to take into account the different circumstances of WTO Members, for instance by exempting LDCs, linking a subsidy phase-out to technical assistance and capacity-building, or providing an exemption for subsidies aimed at providing energy access to low-income communities. 296

126. In addition to developing new rules, which would involve lengthy negotiations, a more immediate option for reform is strengthening transparency. This could include improving voluntary notifications or introducing mandatory notifications under the ASCM, or more consistently addressing fossil fuel subsidies in Members’ Trade Policy Reviews. 297 To garner support for these transparency-related options, it may be possible to link them to proposals by major trading nations for broader WTO transparency reforms. 298

127. Fossil fuel subsidies could also be addressed through PTAs. Thus far, the only PTA including a specific provision on fossil fuel subsidies is the EU–Singapore FTA. 299 However, the wording of this provision is merely hortatory and is not subject to the agreement’s dispute settlement system. 300 One of the most often stated reasons for the paucity of (fossil fuel-related) subsidy commitments in PTAs is that subsidies regulation does not lend itself to being dealt with preferentially due to MFN-like spill-over effects. In other words, even if only the parties to a particular PTA agree on limiting the use of certain types of subsidies, all other states will benefit from such a commitment. 301 Draft text on fossil fuel subsidies was also proposed in the negotiations for the CPTPP 302 but not incorporated in the final version of the agreement. 303 Specific rules for eliminating fossil fuel subsidies are currently under negotiation under the ACCTS. 304 These negotiations are noteworthy in that they link subsidies not to their impacts on trade but rather to their adverse effects on climate change. The negotiations could thus offer important lessons on how to design rules on fossil fuel subsidies that could work for the green economy.

293 Ibid para 10.
296 Das et al (n 294) 10576–10577.
297 See in this respect, Verkuijl et al (n 277) 358–359.
299 EUSFTA (n 34) Article 12.11(3).
300 Ibid, Article 12.16.
302 CPTPP (n 41).
303 Steenblik et al (n 276) 134.
304 ACCTS (n 162).
D. **Green procurement that promotes sustainable public purchasing of goods and services**

128. The Committee’s mandate includes the analysis of ‘how far the rules-based international trading system … supports open, fair and development-friendly trade, which is both socially inclusive and environmentally sustainable, and to formulate proposals for strengthening the international trading system as an enabling environment for sustainable development and a green economy.’ From this perspective, it is acknowledged that sustainable consumption and production patterns are part of SDG 12, and the target of 12.7 is to promote public procurement practices that are sustainable, in accordance with national policies and priorities. Following the 2012 revisions to the WTO Government Procurement Agreement (GPA) there has been an integration of sustainability goals in public procurement policy. The revised GPA, which came into force in 2014, recognises the importance of sustainability objectives in relation to public procurement policy. It also embraces a shared perspective with other important multilateral instruments, including the SDGs and the new World Bank procurement framework.

129. Within the 2012 GPA framework, there are some important issues concerning the implementation of sustainable public procurement, such as determining what ‘sustainable public procurement’ encompasses, how sustainability can be incorporated into the different stages of the procurement cycle, and how sustainability measures in procurement processes are practiced in a manner consistent with both the principle of ‘best-value for money’ and with international trade obligations. It balances the traditional goals of public procurement, e.g. securing market access, with new ‘good governance’ principles, e.g. prevention of corruption, in a low regulatory system.

130. However, the GPA framework is still short on encouraging innovation. The only references in the revised 2012 GPA are to technical specifications, under Article X. It may be expected that at a future date a further revision of the GPA might contain a more detailed set of legal provisions regarding the implementation of sustainable and innovative goals on green procurement, such as ‘innovation partnerships’ or the inclusion of a ‘life-cycle cost methodology’. The GPA Committee will work on a set of recommendations on sustainable and green procurement that could be targeted towards the negotiations of PTAs with procurement chapters. When it comes to procurement, a number of institutions, such as the EU, the Inter-American Development Bank, (IADB) and ICLEI Africa have been developing frameworks or recommendations stressing the importance of linking green procurement and the inclusion of innovation goals for sustainability.

131. In finalising the work under its mandate, the Committee aims to set out the basic elements of green procurement, making a stronger link between innovation and the green economy and, therefore, identifying recommendations and/or developing best practices on green procurement and innovation for sustainability.

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Drafted by Dr Tiago Melo Cartaxo (Portuguese Branch) and Professor Markus Krajewski (German Branch).

SDG 12 (n 9).


See in particular SDG 12.7 (n 9).

The EU does this through its directives on procurement to the Member States.

See the 2019 proposal for the Expansion of IADB Procurement Policies, both for Goods/Works and Consultancy Services, which were made available for public consultation at https://www.iadb.org/en/procurement/idb-procurement-policies-expansion.

III. Trade and agriculture

A. Fisheries subsidies and sustainable ocean and freshwater fisheries management

132. The Committee’s interim report to the Sydney Conference in 2018 provided an extensive report on fisheries subsidies and sustainable ocean and freshwater fisheries management. This included coverage of ongoing negotiations to develop a set of global disciplines to ensure effective control over fisheries subsidies, which are being conducted under the auspices of the WTO, originally as an integral part of the Doha Round.\footnote{Drafted by Mr Stefan Amarasinha (Danish Branch) and Dr Gregory Messenger (British Branch). The views expressed in this section are the authors’ own and do not reflect the view of any institution with which either of them are affiliated.}

133. As a result of COVID-19, the Negotiating Group on Rules (RNG) suspended face to face meetings in March 2020.\footnote{Interim Committee Report, 2018 (n 11), Part III, especially at paragraphs 75 to 83 for the negotiations.} This happened on the eve of meetings at the level of ambassadors, initially set to discuss a draft text from the Group Chair on a possible discipline on overcapacity and overfishing. Following the halt to face to face meetings, WTO Members have continued exchanging written proposals and comments relating mainly to the issue of special and differential treatment (SDT). During a meeting on 25 June 2020, called at ambassadorial level, the Chair of the fisheries subsidies negotiations presented a broader draft consolidated text, encompassing elements of all three substantive disciplines (overcapacity and overfishing, overfished stocks, and IUU) and elements related to scope and definitions, transparency and SDT. The draft text was circulated to members immediately thereafter.

134. A further meeting at ambassadorial level, held on 21 July 2020, gave WTO Members the opportunity to offer initial reactions to the draft consolidated text. On the basis of comments received and further bilateral consultations, the Group Chair plans to circulate a more detailed Work Programme. Absent an explicit statement to the contrary, the assumption is that WTO Members still intend to meet their commitments under SDG14.6\footnote{SDG 14.6 (n 9).} and to reach an agreement by the end of 2020.

B. Food security

135. A matter that has not received the attention that it deserves until now is sustainable development and food security in international trade law. The issue of food security and the stockpiling of basic foodstuffs by developing and LDCs forms part of the Committee’s mandate where it implicates agricultural policies and climate change in the context of trade and development. A fuller analysis of the current situation will be provided in the Committee’s final report, which takes the multilateral trading system as its point of departure and links food security to the reform of agricultural subsidies, which are of key importance for developing countries and LDCs.

136. In the meantime, the COVID-19 pandemic raises the spectre of renewed food insecurity for net-food importing developing countries, many of which are located in sub-Saharan Africa and parts of Asia. Some may be impacted by trade-related measures, such as export restrictions or unnecessary domestic stock-piling, leading to shortages of basic staples in global markets and ensuing price rises and price volatility. Additionally, some developing countries face man-made or natural disasters, such as flooding or locust plagues, for which they must resort to emergency food aid to feed the most
vulnerable groups even though this may have a highly distortionary effect on normal food supply chains and local markets.

137. The Committee supports the Statement, adopted by the ILA Committee on Global Health Law, which drew attention *inter alia* to the matter of food security and trade in light of the COVID-19 pandemic.317 It joins the Global Health Law Committee in welcoming the joint statement by the heads of the UN Food and Agriculture Organization (FAO), the World Health Organization (WHO) and the World Trade Organization (WTO), which calls upon states to minimize the potential impacts of the COVID-19 pandemic on the food supply or its unintended consequences on global trade and food security.318

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