Can the Trade Regime Offer Lessons for Reforming the Architecture of the Environmental Regime?

A Discussion Note

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I. Introduction

Recent studies on the state of environmental regimes suggest that important lessons (and specific policy recommendations) may be drawn from the functioning of the trading regime.[1] This note discusses how insights from the trading system might provide ideas for redesigning the architecture of the environmental regime. In particular the multilateral trade regime can build on more than 60 years of experience characterized by ups and downs. Yet, the overall aim of the regime (gradual liberalization of markets and keeping protectionism in check) has been largely achieved.

We first describe how the trading system has evolved over time. Second, we discuss how institutional features and underlying structural conditions have changed.[2] Third, we map a number of current reform discussions. The final part reflects on potential lessons for the environmental regime complex. It discusses the nature of environmental law, its differences to trade regulation and to what extent the experience of the two fields may be combined in further efforts at creating a coherent architecture of global and multilevel governance. It concludes by suggesting an overarching International Economic Organization.

[1] See for instance, see Keohane and Victor 2010.

II. Evolution of the trading regime

For a long time the engine of the trade regime had been the multilateral platform. At the beginning of the GATT (General Agreement of Tariffs and Trade) system, put into operation following WW2, trade negotiations were characterized by the so-called principal supplier approach. Thousands of bilateral concessions between key trading nations led to a substantial lowering of tariffs (down from an originally high level). Building on the GATT principle of MFN (most favorite nation), these concessions were then "multilateralized", meaning that all participating actors enjoyed the same market access opportunities negotiated among the dominant trading nations. This led to a remarkable increase in trade in goods in the second part of the 20th century. With the success of the GATT also grew its membership. Developing countries discovered the multilateral forum that was largely dominated by industrialized countries. Significant progress occurred during the last successfully concluded trade round (Uruguay Round 1986-1995). The multilateral trade regime continued its work it had begun through earlier trade rounds (additional liberalization in industrial products, tackling of non tariff barriers and subsidies), it expanded in scope (including partial liberalization of trade in services, the protection of intellectual property rights), moved towards an intergovernmental organization (with the creation of a new organization: the WTO) and directly addressed woes with past compliance (through establishing one of the most legalized dispute settlement systems in world politics).[3] The WTO is today moving towards a universal organization with 156 Members. Since 1995 however, progress on the negotiation front has been meager. The so-called Doha Round which started in 2001 following 9-11 remains stuck.[4] Liberalization and further work on trade rules are currently under way through the use of other regulatory venues, in particular bilateral and regional trade agreements. By contrast, dispute settlement seems to work well (e.g., big powers change domestic policies more often than not and comply with rulings, and absence of trade wars or heavy recourse to protectionism in times of economic downturn).

What has also changed over time is that originally the GATT system offered the contracting parties different degrees of integration into the trading system. While developing countries were largely exempted from concessions, initial agreements on rules during the

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[2] For a more elaborated discussion, see Elsig and Cottier 2011, Elsig 2010b.

[3] Bernauer et al. 2012.

[4] Elsig and Dupont 2012.

Tokyo Round in the 1970s (e.g. subsidies, technical standards, etc.) were designed on a voluntary basis. Due to the lack of universal obligations (beyond general constituting rules such as MFN and national treatment), few actors actively participated in a system. In recent years, we witness a more inclusive system characterized through a mix of bottom-up and top-down processes.[5]

III. What makes decision-making in the WTO today more complicated than in the past?

A. Cooperation problem

The key cooperation problem has been for a long time a free-rider problem exemplified in game theory with the prisoner's dilemma. States are under constant pressures from domestic interest groups to offer protection against more competitive foreign firms threatening market shares at home (and on third markets). The GATT was the institutional answer to tackle protectionist tendencies by providing information, offering a platform to make package deals, and addressing incentives against reneging of past commitments.[6] This was supported by the political economy of exporters' joint interests that led to an increase of successful lobbying at the domestic level. Informal coalitions managed to overcome domestic veto players, in particular import-competing groups. This was further backed up by institutional innovations in a number of key GATT members' decision-making apparatus (e.g. US fast track (today trade promotion authority) or European Community competence for trade negotiations).[7]

Today, we have moved away from cooperation to lower barriers to trade (negative integration approach) and face a different cooperation challenge. The system needs to cope more with regulatory issues where parties need to agree on common rules and standards (positive integration). This cooperation situation resembles much more a battle of sex game with stronger distributional implications.[8] This directly affects how WTO members derive their preferences and strategically act in global negotiations.

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[5] See Cottier 2011.
[6] Keohane 1984.
[7] See Baldwin 2010 on the „juggernaut mechanism".
[8] Krasner 1991.

B. Calculation of interests (gains and losses)

In the older days of tariff negotiations the calculation of gains and losses was more straightforward. Based on the shared belief of positive aggregate gains through cooperation, contracting parties assessed the loss of market shares and the gains through increased exports in a rather straightforward manner. Today, in elaborating new standards in fields as diverse as investment, competition, intellectual property rights, etc. benefits and costs do not follow immediately and are more difficult to calculate. Not least the option that other parties would converge to ones' own standards makes finding solutions hard in the shadow of long cooperation.[9]

C. Legalization: Good for dispute settlement, less favorable for further liberalization?

The significant shift in the main cooperation objective was accompanied with a transformation from a more power-based system in settling disputes to an international organization with a highly legalized dispute settlement system. This had political-economy implications at home.[10] It mobilized not only protectionist forces in relative terms, but also produced higher audience costs which in turn tied negotiators' hands further.[11] But more importantly, it made – given the experience with moving towards harder law (commitments can be actually enforced) – negotiators realize that trade law had even more significant implications in the long run leading to defensive tactics and posturing by a growing number of participants.

D. Decision-making trilogy: Consensus, single undertaking, and member control

One of the advantages to this day has been the informal character of decision-making. Most deals have been concluded in smaller groups outside official meetings (top down), while the Geneva process allowed for inclusion of many active members that worked through ad hoc coalitions (bottom up).

Three elements of decision-making dominate today's system: First, the search for consensus. While the organization foresees the option of voting, this has never occurred on any substantial issue on the table. The mantra of consensus has been a constituting decision-

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[9] Fearon 1998.

[10] Goldstein and Martin 2000, Stavasage 2004.

making norm in the GATT and WTO system. However, in light of a substantial increase of (active) membership, the number of potential veto players also multiplied leading to longer processes of finding balanced results for all participating actors. Second, with the Uruguay Round the system based on variable geometry changed to a system where countries had to accept (with some exceptions) all key agreements in order to join the new organization.[12] What became known as single undertaking is creating problems for negotiators today, as they have to be able to calculate gains and losses across very different areas of trade regulation. In addition, it allows more defensive posturing as countries are under pressure by domestic interest groups to veto certain proposals where "national interests" are at stake.[13] Third, over time the Secretariat – as the custodian of the treaties – has lost influence in the negotiations depriving opportunities for acting as tie-breaker in the negotiations.[14]

F. The structural break 1: A multipolar trade world

While important institutional transformations occurred over time, the overall balance of power has also changed. Originally, the US was able to offer leadership to create a system that was characterized by "embedded liberalism", gradual liberalization of markets supported by strong national institutions.[15] The US lead was later replaced by a transatlantic partnership which peaked during the Uruguay Round negotiations. Agreement between the US and EU often proofed necessary (and at times sufficient) to bring about movement in the negotiations leading up to tangible outcomes. In addition, Japan and Canada acted as systematically important middle powers supporting transatlantic leadership. In recent years, we have witnessed the ascent of a number of new economic powers, such as China (which joined the WTO in 2001), Brazil (which was already quite active in the Uruguay Round) and India (which is representing in particular the developing countries' voices).[16] This structural change creates new types of collective action problems and brings actors with increasingly diverging economic and political interests to core negotiation table.

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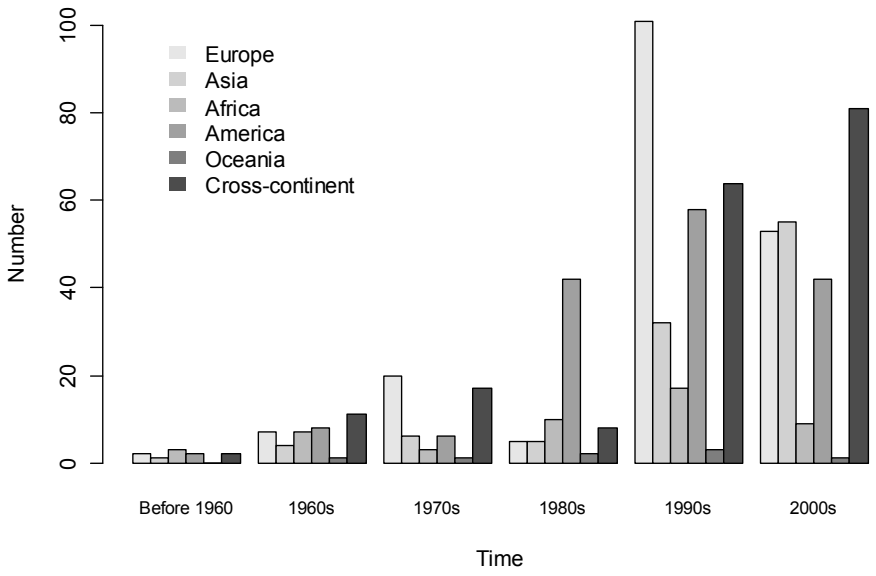
[11] However, see Poletti 2011.
[12] Steinberg 2002.
[13] Elsig and Cottier 2011.
[14] Elsig 2011, Elsig 2010a.
[15] Ruggie 1982.
[16] Narlikar 2011.

G. The structural break 2: New regionalism

In light of difficulties with current negotiations in the realm of the Doha Trade Round (the negotiations have been dragging on for 10 years), many members have turned their attention to "new regionalism". They actively explore partial liberalization of markets and related economic objectives (on investment, competition, public procurement, intellectual property rights beyond WTO rules) through other venues. Today, all WTO members (except Mongolia) have negotiated and signed bilateral preferential trade agreements (PTAs). This development is in particular noteworthy in Asia where a "juggernaut" effect is visible leading to a new wave of bilateral and plurilateral trade agreements. Yet, most agreements are today concluded between countries that are geographically far apart (cross-continent) (see Figure 1). Most empirical studies suggest that new PTAs create trade more than they divert trade. Also, there is evidence that PTAs can go hand in hand with economic reforms domestically. Therefore, states have largely embraced going bilateral, in turn making calls to return to the multilateral chess board not yet appealing.

Figure 1: New Regionalism



Source: Baccini et al. 2011.

IV. WTO reform discussions today…

How can the multilateral platform again be strengthened today? Actually, there is a dearth of policy proposals (not least proposals that might pass the Geneva test to have a chance to be considered in policy circles). Like for most international organizations, change of the status quo is difficult without some major external shocks. Following elements are being discussed:[17]

- To allow for a two-tier approach in negotiations. While trade rounds may continue to be required to build momentum on classical market access issues, a continuum of legislative work and process should take place within the organization. The WTO needs to be able to take up specific legislative problems in treaty negotiations outside of agreed agendas of trade rounds. This also allows bringing about legislative responses to dispute settlement decisions, and therefore a more proper balance between legislation and adjudication.[18]
- To allow states again to move quicker within the multilateral system. The concept of "critical mass" is being developed in this context. It may put pressure on those that are excluded and may address some existing free-riding problems. There could be issue-specific areas (e.g. tariff reductions on environmental goods) or new rules (e.g. TRIPS+, competition, investment).[19]
- A related concept refers to "graduation". The concept is based upon single undertakings binding all members, but operating different levels of commitment within an agreement on the basis of defined economic performance indicators. These factors essentially seek to define levels of competition. Graduation is based upon the philosophy that while all members are bound by general principles and rules, more detailed commitments should be commensurate with levels of social and economic development and competitiveness on world markets. It essentially builds upon the idea of individual commitments of schedules in goods and services and applies it to non-tariff barriers and trade remedies more widely.[20]
- To rely more on coalitions to reduce the number of active participants in small circles. This includes the provision of additional assistance for developing countries in

[17] See also Elsig and Cottier 2011, Davey and Jackson 2008, Steger 2010.
[18] Cottier 2010.
[19] Elsig 2010b.
[20] Cottier 2006.

coordinating their efforts (e.g., the example of the West-African Cotton producers stands out).

- To allow the Geneva judges to engage more actively in addressing clear contractual gaps and therefore clarify existing obligations (yet, a number of important contracting parties push currently for more control of members over the dispute settlement system).
- To give the Secretariat (and its Director-General) a stronger standing in the negotiations by allowing Secretariat official to chair negotiation groups and carrying out an active mediating function.
- To consider types of majority voting (based upon a new system of weighted voting) depending on the sensitivity of the issue at hand.[21]
- To involve Trade Ministers more actively in the functioning of the system to bridge the Geneva-Capital divide and allow ownership to develop.
- To create incentives to multilateralize bilateral commitments done outside the WTO through PTAs.

V. Lessons for the environmental regime?

How can we draw lessons from 60 years of GATT/WTO experience for the environmental regime? It has been a system characterized by strong member control and unlike the environmental regimes non-governmental groups and the public have been less influential (while economic interest groups were even more pivotal). However, the multilateral regime has also transformed from a system that had its main focus on opening markets towards a system that also started to take into account many more legitimate concerns (development, environment). In particular in WTO case law, we have witnessed more attention to environmental and other trade-related concerns over time. This is also due to growing public attention which can not escape officials and "judges". At the same time the proliferation of new trade agreements is providing some impetus to continue liberalizing. Therefore, it's seems important that countries have multiple options and are not completely paralyzed when the opening of markets through the WTO is dead-locked. While more institutionalization through the creation of an international organization (backed up with strong compliance tools) has proofed important for economic integration, there are some unintended consequences as

[21] Cottier and Takenoshita 2003.

described above (e.g. effects of legalization on negotiations) which calls for a cautious approach to "export" lessons to other regimes.

In terms of design features, following (combination of) elements seem to have been important for WTO performance in the past:

- Early on strong shared norms (MFN, national treatment, and embedded liberalism).
- Strong informalism, inclusive processes, many opportunities to exchange ideas and deliberate in Geneva behind closed doors
- Mutual support of bottom-up and top-down processes, in which a group of leading states makes more concessions and goes ahead at some stage
- Active Secretariat (in the GATT times)
- Creating some buffers against domestic interest groups' "capturing" efforts (fast-track/trade promotion authority in the US, EU version of fast-track)
- Package solutions that can be sold domestically and create coalitions across countries (e.g. exporter coalitions)
- Providing for incentive structure to address free-riding (through dispute settlement and reporting and transparency, e.g. country trade policy reviews)
- Dispute settlement system to address reneging of past commitments and controlling the abuse of power[22]
- The option to continue liberalization and combat protectionism through other platforms (e.g. bilateral), but also the recourse to unilateral trade policy measures (e.g. given preferences to the least developing countries)

The difficulties and stalemate in concluding the Doha Agenda suggests that some of the foundations of success in GATT and the WTO no longer prevail. It is interesting to note that the Doha Round does not fail primarily due to new and complex issues; the stalemate is with classical topics of market access in goods and services. We have not yet reached the more difficult problems of addressing global standards and rules, or even the pressing issue of climate change and other challenges which legally and technically are way beyond of what WTO negotiators have been confronted with so far. The stalemate in classical market access issues also suggests that the reasons of failure are related to deep structural changes in the world economy and power relations in an era following the membership of China to the WTO, of monetary instability, debt crisis a return of creeping nationalism in many countries.

The accession of China to the WTO in 2001 amounts in its practical effects to a trade round in itself, and has subsequently altered the interest of many countries in the WTO. It may well be that levels of market access are sufficient today. 50% percent of World Trade today takes place among developing countries and was able to grow substantially under the present WTO regime. There is no significant and burning pressure from the private sector, except for conservative ones in the field of agriculture. In hindsight, we may realize that the Doha Round was a project void of economic and commercial foundations, launched in response of September 11, 2001. The political will to live up to the commitment has been weak from the outset, and the financial crisis further reduced and demolished it. There are real needs of developed countries, having not more than 1 percent of total world trade, and enhanced efforts for example in the field of cotton really should be made. For most of it, however, the problem is one of lacking product innovation and distribution and failure to overcome monocultures. It takes more than trade policy to change this.

The strength of the WTO in these recent years has been the existing rule based system, supported by dispute settlement. Unlike in the 1930s, there was no significant backlash to rent seeking protectionism which would have impaired the recovery of world trade to pre-crisis levels in a short period of time. It is important to realize that the public perception of WTO linked to the fate of a current trade round does not live up to the real contributions of the legal system. Communication policies of the governments and the WTO should takes this into account and present the role and function of the Organization in a much more stable and constitutional manner. The value of a constitutional system is not measured upon the state of current affairs and legislation alone. We take a more long-term view. The same should be true for the WTO.

Yet, we remain skeptical whether future challenges, in particular in the interface of trade and environment (climate change) can be managed on the basis of consensus diplomacy in WTO and elsewhere. Consensus is based upon an oligopolistic and duopolistic world order, but fails to deliver under conditions of an emerging multipolar world, accompanied with great shifts in economic and eventually military power. There will always be one Member which for domestic or other reasons will be able, and can afford, to block decision-making under consensus diplomacy. Efforts toward a system of weighted voting in international organizations, essentially excluding blockages by single members, is in our view an

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[22] Grant and Keohane 2004.

imperative prerequisite in producing global public goods. Environmental law and in particular climate change offers the most pressing case to this effect. It will not be possible to set targets, and achieve common goals and instruments on traditional foundations of state hood and international law. There is a need to develop the doctrinal and political foundations for moving away from traditional perceptions of national sovereignty and independence. The doctrine of multilayered governance, offering criteria for power allocation and vertical checks and balances, offers such foundations. It may have its most prominent application in the field of environmental law due to its very legal nature. We also believe that vast differences in social and economic development among Members of the WTO need to be taken into account in developing either concepts of variable geometry or, preferably, of graduation.

VI. The diverging legal nature of trade and environmental law

Lessons to be drawn from the multilateral trading system for environmental law and policy raises the basic question to what extent the nature of rules and commitments are compatible and therefore also able to be channeled and dealt with in a comparable manner.

A. The excludable nature of international trade regulation

As described in the first part, the multilateral trading system has been built upon shared interests to improve market access for products and to eliminate discrimination faced by imported products on domestic markets.[23] It is about creating a level playing field. Tariff and non-tariff barriers have been addressed with this goal in mind, partly off-set by other policy goals, such as the protection of the environment, or by rent seeking protectionist interests. The multilateral trading system is politically based upon reciprocity. It requires all parties to make appropriate contributions. Short of it, negotiations cannot succeed. The application of agreed rules, however, is subject to MFN and rights and obligations are independent on levels of commitments made in terms of reciprocity: the system, in its practical application, allows for a considerable degree of free riding.

Rights and obligations under WTO law are rights and obligations pertaining to States. Private operators are indirectly benefitting from such rules, defining levels of market access and barriers alike for commercial operations. Motives to engage in negotiations, or to refrain from

engaging, are essentially driven by commercial interests of national industries concerned, apart from general trade policy considerations of the government in power. Enhanced market access is paid for, in a mercantilist manner, by trade concessions offered on an MFN basis. The internationalization of tariff policy – so far the only area of tax being internationalized – was at the outset of the process and brought about substantial reductions of overall tariff rates from an average of 40% down to 4% in industrial tariffs by the end of the Uruguay Round. The new possibility to bring about tariff reductions abroad altered the political economy at home. While tariffs were unilaterally defined commensurate with the interests of domestic producers, considerations of export interests forced domestic producers to compromise and to agree to tariff reductions for which, beforehand, no incentives other than unorganized consumer interests existed. The internationalization of tariff changed the political economy and brought additional domestic players to the table. The same is true with subsequent negotiations on non-tariff barriers of different generations. Negotiations on trade remedies and technical barriers to trade, as much as negotiations increasingly dealing with domestic regulation in the field of agriculture, services and intellectual property, all follow the same patterns of interfacing import and export interests of domestic industries. Governments moreover are subject to external pressures which often only allow them to make decisions impossible in a purely domestic context.

The nature of international trade law and trade regulation therefore is based upon excludable interests and privileges obtained in the process of negotiations. These rights and obligations are partly of a horizontal and general nature, partly specific to a sector and a country. Specific rights and obligations are firmly anchored, and reflect, particular interests of industries and actors concerned or what the governments thinks to be an appropriate framework for these industries. Overall, the system offers the quality of a global public good, providing legal security and protection against state failures and arbitrary discrimination.

B. The non-excludable nature of international environmental law and its recourse to multiple policy tools

Environmental law is mainly concerned with the preservation of natural habitats and the balance of the ecosystem. It has been essentially defined by the purpose of action contemplated and undertaken. It protects nature and mankind against the onslaughts of unfettered industrial exploitation of natural resources. It contributes to the protection of public

[23] See generally Cottier and Oesch 2005.

health and welfare. It pursues a long-term goal of maintaining and developing conditions for sustainable development, interfacing economic growth, social justice and ecological balance.[24] The important point to make is that these goals all entail the creation of public goods, local, regional or global. Environmental law generally speaking entails non-excludable advantages to all concerned. The benefits of measures go to the public at large and are not limited to those who had to pay for these measures. The incentive to engage by those affected by such measures inherently is limited as benefits are shared with the public at large. Operators generally do not obtain particular benefits in return, albeit it may be argued that environmental regulations may foster long-term competitiveness of industries affected.

Environmental law, in pursuing these goals, employs a host of different instruments. It entails financial programmes and regulation. Regulation shows panoply of different instruments, from principles, guidelines, prohibitions, charges and taxation, conditions, permissions, (tradeable and non-tradeable), licensing, monitoring, product and process standards, and technical norms.[25] A part from fundamental principles, such as polluter pay or the precautionary principles, environmental law applies existing legal instruments in the pursuit goals defined. The same is true in international environmental law. Many of the instruments deployed are instruments of trade policy, such as export or import restrictions, product standards, production standards, transparency, and regulation of services and protection of intellectual property rights. Emission trading deploys financial instruments, and transfer of technology and knowledge affects the realm of intellectual property rights. Overall, environmental law is part of international economic law. The use of trade policy tools in the pursuit of international environmental law also explains why trade and environment has become an important and prominent issue in WTO litigation.[26] Recourse to trade instruments – as opposed to trade goals – explains the complex interface and why these tools fall under the jurisdiction of trade panels and the Appellate Body of the WTO. It is submitted that there not only is a close relationship to trade law and trade policy, but that environmental law – both national, regional and international – is a paradigm of cross-cutting regulation, influencing other fields, and being influenced by other fields of the law. In international law, it depends upon the fundamentals of public international law, the concept of sovereignty and territoriality

[24] For early and founding definitions see Birnie and Boyle 1993 at 2/3.
[25] For a useful survey of regulatory approaches in international environmental law, see Sands 1995 at 126-136.
[26] For a succinct account, see Charnovitz 2008.

of Nation States and the law of international organizations.[27] Beyond trade regulation, it closely relates to the law of investment protection, energy law, the law of the sea, space law. It cannot be separated from social and economic development under the principle of sustainable development. Environmental law, more than any other field, cannot be read in isolation. Its cross cutting nature also explains why environmental law is inherently fragmented and has not lend itself so far to be concentrated under the roof and umbrella of a single international organization.

C. Prerequisites of interfacing trade and environmental architectures

While the multilateral trading system produces an important public good in terms of institutions and legal security, trade diplomacy and the WTO system remain based upon the incentives of Members and their industries to participate in the global system. The public good produced is the aggregate of individual interests at stake. In the field of environmental law, it is exactly the other way round. Measures and efforts primarily entail the production of public goods on different levels of governance, and individual benefits are ancillary, but not the driving force in the pursuit of goals set and defined. Environmental law does not exclude the allocation of particular advantages in terms of competitiveness, but industries concerned often consider environmental regulation to amount to a burden for which they have to bear the costs to the benefit of the public at large. There is no particular self interests and driver to engage, and motivation to a large extend is required to appeal to ethics and social responsibility. It is not a coincidence that developing and emerging economies, in particular, are less than keen to engage in extensive environmental protection as this may hinder the formation of capital and progress. Europeans, and North America, having built capital in the 19th and 20th Century in engaging in highly polluting activities, are more open to take environmental concerns into account and pay the price for it under a principle of shared but differentiated responsibility. In trade regulation, efforts to enhance environmental protection is mainly hampered by emerging economies unwilling to engage in potentially restricting international engagement, while industrialized countries may see this as an opportunity to strengthen and foster technological leadership and dominance in a changing world.

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[27] The seminal book by Byrnie and Boyle 1993 undertook to examine environmental issues through the lenses of public international law without attempting to distinctly define the topic and essentially relate to a positivist definition based upon existing instruments relating to the protection of the environment, id. at 1.

Lessons to be learnt from the trading system therefore depend on the issue to what extent we can identify excludable interests and drivers in the field of environmental policies and law. We need to focus on particular interests of countries and industries, and how best they can be brought to the table, possibly in combination with trade policy and trade regulation.

1. THE EXAMPLE OF CFCS

The 1985 Vienna Convention for the Protection of the Ozon Layer and the 1987 Montreal Protocols (including the 1990 and 1992 amendments) successfully reduced the deployment of chlorofluorcarbons (CFCs) in industrial production and products, and in many ways set the example for succeeding work on the United Nations Framework Convention on Climate Change. Abatement was successful because commitment and compliance provided open market access while abstention faced trade barriers to products non compatible with product standards agreed. Moreover, the industry entailed a number of important players who could be rallied behind the Convention and considered implementation of the adopted limitation and reduction requirements to their long term advantage.[28]

2. THE EXAMPLE OF CLIMATE CHANGE MITIGATION: CARBON TARIFFS AND BTA

Failing an international system based upon UNFCC, climate policy is likely to be focused on regional, national and local measures and initiatives. Bottom up approaches have been increasing in recent years, and dominate in the North America. The lack of a multilateral system does not mean that there is a lack of programmes of measures. Many, including China, prefer to operate autonomously and are hostile to the European approach of integrated and coordinated policy measures. The constellation is likely to trigger responses in trade regulation in order to offset carbon leakage, to reestablish equal level playing field in competition, and to bring about leverages and incentives to join a multilateral framework. These measures may entail Border Tax Adjustment, Carbon Tariffs on highly polluting products, or recourse to countervailing duties in relation to subsidy programmes. The offer to abstain from unilateral trade measures entails specific advantages and interests to countries and producers to join a multilateral system on climate change.[29] Membership brings them legal security and predictability, and thus more than the production of global public goods of which they anyway benefit as a free rider. It is the imposition of particular disadvantages, or

[28] For an account see Sands 1995 at 259-271,

[29] See Cottier, Nartova and Singhal 2011.

the granting of MFN based privileges to Members, which creates the incentive to join an international instruments focusing on the production of public goods. Trade policy has been operating using such leverage. Membership of China to the WTO was mainly motivated to bring about MFN treatment on global markets, in particular the US. These interests are important to governments. It would otherwise be difficult to explain the trend of the WTO towards a truly global organization with some 30 remaining countries, including Russia, engaged in accession negotiations which come with a price tag.

VII. Conclusions

The success of GATT over 50 years and the establishment of the WTO are based upon a hegemonial and, subsequently duopolistic transatlantic World Order. It was able to develop to ward a global institution and player as Members to the Club obtained substantial privileges and legal security. The system, based upon common principles of non-discrimination and transparency, entails general provisions, but leaves tariff and services commitment to individual schedules reflecting diverging levels of social and economic development. Such differentiation does not exist in the field of non-tariff barriers and creates unresolved tensions among industrialized and developing countries. The concept of S&D largely failed, and new approaches are required.

Lessons to be learned for a multipolar world are difficult to define. Critical mass, bottom up approaches and the use of incentives in order to overcome domestic resistance explain past successes. They take into account that Members essentially pursue national interests and are not willing to commit unless these interests are directly or indirectly served. Considering these interests is critical in building a system which in return is able to produce global public goods in terms of legal stability and predictability. Multilateral approaches to the environmental architecture therefore need to identify national interests which may be affected in different policy areas. Environmental goals may be pursued in linking them up with national interests otherwise negatively affected.

The turn toward a multipolar world indicates that approaches based upon consensus are unlikely to produce results. No country, or group of country, today is in a position to forge a global deal. This is true for trade. It is even more so true for the achievement of environmental goals as free-riding is readily available in the pursuit of global and regional public goods.

Under doctrines of multi-level governance, we need to arrive at systems of decision-making which no longer allow a single Member to block the decision. The dispute settlement system of the WTO proves that this can be achieved and works. The loosing party to a dispute, in the end of the day, is not able to block the implementation of the decision. In the field of negotiations, similar effects can be realized by introducing a system of weighted voting based upon a number of factors defined.

The vast differences of social and economic development of Members of a system need to be taken into account. It is impossible to achieve global results without introducing variable geometries, graduation and implementing different set of rules commensurate with the level of competitiveness of Members to a system (Graduation).

The legal nature of environmental law calls for an architecture of horizontal legal integration. Since it uses legal tools pertaining to other areas and fora, efforts should be made to systematically bring environmental concerns into these bodies in the process of consultation, decision-making and implementation. There is room for a proper architecture in relation to funding programmes (UNEP), special agreements addressing particular issues using legal tools. Synergies can be found in coordinating and funding these efforts. Environmental law, however, depends upon integration into major fields of international law, in particular trade regulation, investment, energy and the law of the sea. As a cross-cutting issue, it needs to make sure that environmental agreements are taken into account in other fora, in particular in dispute settlement. This in return requires better coordination and harmonization of membership to international agreements and the evolution of treaty practice under the Vienna Convention of the Law of Treaties.

Coordination and harmonization of Membership to diverging agreements and the interface of different subject matter could best be achieved under the umbrella of an overarching international organization. Since the UN system does not offer such an umbrella, it is worth studying the establishment of a *World Economic Organization.*

This organization operates as an umbrella to a range of existing organizations including the World Bank, the IMF, the World Trade Organization, UN Organizations, and environmental agreements. The Organization is formed by States willing to share participation in a defined minimal number of international organizations and conventions relevant in international economic law, perhaps also including human rights. It will be committed to the principles of sustainable development and its three main components of economic, social and

environmental welfare. Its main tasks consist of bringing about coherence between different regulatory areas and provide a forum to discuss and negotiate upon tensions and inconsistencies. It would operate on the basis of weighted voting. It offers a legal dispute settlement mechanism with jurisdiction over instruments to which members would be obliged to participate in order to work within the Organization. The court in particular would have power to adjudicate interfaces between different agreements on the basis of the Vienna Convention on the Law of Treaties. This entails a mechanism of preliminary rulings and advisory opinions for governments, international organizations which inform and instruct more specialized courts and panels in organizations, including panels and the AB of the WTO.

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