

## Beyond Multilateral Treaty Reforms: Adapting International Trade to Environmental Objectives

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### Abstract

International trade law is primarily concerned with facilitating the flow of goods and services across national borders by minimizing tariff and non-tariff barriers to trade. However, there is a nexus between international trade and the environment. First, international trade is reckoned to have destructive environmental effects. The liberalization of global trade results in increased economic activity, including industrial processes, manufacturing, innovation of new technology, and extraction of natural resources from the earth and the sea, which inevitably results in environmental externalities such as biodiversity loss, pollution, and climate change. Second, international trade law intersects environmental law whenever trade restrictive measures such as import bans, export control and border taxes are adopted by states as a means of achieving environmental goals. Such measures condition market access on the fulfilment of environmental norms related to the characteristic of the product or the process of its production. The World Trade Organization (WTO) currently oversees the largest multilateral regime for international trade. WTO covered agreements expressly recognises some exceptions to trade liberalization commitments for environmental objectives, this policy space is subjected to a system of strict limitations and review procedures designed to protect the global trading system from arbitrariness and disguised restrictions on trade. This scrutinized policy space accounts for the contention that the multilateral trading system constrains environmental regulation and requires treaty reforms for the purpose of adapting to contemporary environmental concerns. Others have focused on a change of approach in the reasoning of WTO adjudicators in their review of trade-restrictive environmental measures. However, the process of multilateral negotiations for new agreements needed to effect rule change is notably complex and has been fraught with deadlocks in the last couple of decades. The stalemate over appointment of members of the Appellate Body has hampered the effective functioning of third-party adjudication in the WTO and the prospect of ‘pro-environmental’ approaches in the interpretation of WTO law on environmental measures. Meanwhile, numerous environment-related measures continue to be notified within the WTO. I argue that notwithstanding the absence of treaty reforms, international trade law continuously evolves through various formal and informal norm-generating practices by member states and trade stakeholders. Viewed through the lens of legal pluralism, these practices contest, modify and transform normative meaning in the multilateral trading system thereby creating a permissive setting for trade-restrictive environmental measures within the framework of extant international trade law.

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## Résumé

Le droit commercial international se soucie principalement de faciliter la circulation des biens et services à travers les frontières nationales, en minimisant les droits de douanes et autres barrières aux échanges. Pour autant, il existe une connexion entre le commerce international et l'environnement. D'une part, il est reconnu que le commerce international a des effets destructeurs sur l'environnement. La libéralisation du commerce mondial implique un accroissement de l'activité économique, entraînant des procédés industriels, des productions, le développement de nouvelles technologies, et l'extraction de ressources naturelles depuis la terre ou la mer, qui conduisent inévitablement à des externalités environnementales : perte de biodiversité, pollution ou réchauffement climatique. D'autre part, le droit commercial international recoupe le droit de l'environnement lorsque des mesures de restriction des échanges – interdiction des importations, contrôle des exportations, taxes aux frontières – sont adoptées par les États dans le but d'atteindre des objectifs environnementaux. De telles mesures conditionnent l'accès au marché au respect de normes environnementales liées aux caractéristiques des produits, ou à leurs modes de production. L'organisation mondiale du commerce (OMC) supervise actuellement le plus grand système multilatéral de commerce international. Les accords visés par l'OMC reconnaissent expressément certaines exceptions aux engagements de libre échange pour des objectifs environnementaux. Cet espace politique est sujet à un système strict de limitations et de procédures de vérification, conçues pour protéger le commerce mondial de décisions arbitraires ou de restrictions des échanges dissimulées. Cet espace politique surveillé de près doit répondre de l'affirmation selon laquelle le système d'échange multilatéral limite la réglementation environnementale, et nécessite une réforme des traités dans le but de s'adapter aux problématiques environnementales modernes. D'autres auteurs se sont concentrés sur un changement d'approche dans le raisonnement des arbitres de l'OMC lors de leur contrôle des mesures environnementales de restriction des échanges. Cependant, le processus de négociations multilatérales de nouveaux accords, nécessaire à un changement effectif de réglementation, est particulièrement complexe et a connu de nombreux blocages au cours des dernières décennies. L'impasse relative à la nomination des membres de l'Organe d'appel a freiné le fonctionnement effectif du processus de règlement des différends de l'OMC, ainsi que l'espoir d'une approche « pro-environnement » dans l'interprétation des accords de l'OMC sur les mesures environnementales. Pendant ce temps, de nombreuses mesures liées à l'environnement continuent d'être notifiées au sein de l'OMC. Je soutiens que malgré l'absence de réforme des traités, le droit commercial international évolue constamment à travers différentes pratiques normatives, formelles et informelles, mises en place par les États membres et les parties prenantes du commerce. Approchées sous l'angle du pluralisme juridique, ces pratiques contestent, modifient et transforment l'interprétation des normes du système d'échange multilatéral, créant ainsi un contexte permissif pour des mesures environnementales de restriction des échanges, le tout dans le cadre actuel du droit commercial international.

**Mots-clés :** *Commerce international, mesures environnementales, vue pluraliste, droit de l'OMC, accords visés de l'OMC.*

## **The Trade and Environment Problem**

International trade law is primarily concerned with facilitating the flow of goods and services across national borders by minimizing tariff and non-tariff barriers to trade. However, there is an obvious nexus between international trade and the environment. First, international trade is reckoned to have destructive environmental effects. The liberalization of global trade results in increased economic activity, including industrial processes, manufacturing, innovation of new technology, and extraction of natural resources from the earth and the sea, which inevitably results in environmental externalities such as biodiversity loss, pollution, and climate change.<sup>1</sup> Second, international trade law intersects environmental law whenever trade restrictive measures such as import bans, export control and border taxes are adopted by states as a means of achieving environmental goals. Such measures condition market access on the fulfilment of environmental norms related to the characteristic of the product or the processes of their production.

The World Trade Organization (WTO) currently oversees the largest multilateral regime for international trade. The multilateral trading system has often been referred to as a ‘rules-based’ order designed to ensure compliance with member states’ commitments, which reinforces the perception of the institution as a highly legalized system of international politics based on the criteria of obligation, precision and delegation.<sup>2</sup> This perspective of the multilateral trading system speaks to its role in expanding and elaborating rules and procedures, its focus on precision and bindingness of member states’ commitments, and its development of a judicialized third party dispute resolution system that restricts the use of escape clauses.<sup>3</sup> However, such hard law account of the trade regime over-

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<sup>1</sup> For a detailed discussion on the environmental impacts of trade liberalization, see *The Environmental Effects of Free Trade: Papers Presented at the North American Symposium on Assessing the Linkages between Trade and Environment*, by Commission for Environmental Cooperation of North America (2002).

<sup>2</sup> In this context, “obligation” means that the behavior of actors is governed by a set of legally binding rules as opposed to soft instruments or non-binding norms. “Precision” implies that such rules are unambiguous as to their requirements, authorizations, and proscriptions, in contrast to vague principles. “Delegation” refers to consent of actors to the interpretative and decision-making authority of third-party adjudicators, as opposed to diplomacy. See Kenneth W Abbott et al, “The Concept of Legalization” (2000) 54:3 *International Organization* 17 at 21, 25–35.

<sup>3</sup> *Ibid* at 21; Judith Goldstein & Lisa L Martin, “Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note” (2000) 54:3 *International Organization* 219 at 235.

emphasizes its formalist features and restricts the scope of WTO law to WTO-covered agreements and decisions of panels and the Appellate Body.<sup>4</sup>

Much of the existing literature on trade and environment is influenced by this positivist account of WTO law, with emphasis on the implications of WTO-covered agreements and their interpretation through decisions of panels and the Appellate Body on the environmental policies of member states. The treaties and decisions are thought to produce a ‘hard legalization’ of WTO law, which is understood to constrain state behaviour and sovereignty.<sup>5</sup> These arguments also echo popular views that the pressure of globalization exerted by international economic regimes limits the policy space available to states for other welfare enhancing regulatory objectives, including environmental protection.<sup>6</sup> Scholarly accounts of decisions of Panels and the Appellate Body contend that while WTO-covered agreements expressly recognise some exceptions to trade liberalization commitments of member states in order to attain environmental objectives, this policy space is subjected to a system of strict limitations and review procedures designed to protect the global trading system from arbitrariness and disguised restrictions on trade. Notable cases cited include Appellate Body decisions in *US – Tuna II (Mexico)*,<sup>7</sup> *US – Gasoline*,<sup>8</sup> and *US – Shrimp*.<sup>9</sup> Because decisions in these cases were to the effect that the disputed environmental policies fell short of the regulating states’ obligations under WTO law, they are cited to justify contentions that the WTO engenders an asymmetrical relationship between trade and environment.<sup>10</sup>

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<sup>4</sup> For a discussion on the limits of formalist conceptions of legalization and international law, see Martha Finnemore & Stephen J Toope, “Alternatives to ‘Legalization’: Richer Views of Law and Politics” (2001) 55:3 *International Organization* 743.

<sup>5</sup> Kenneth W Abbott & Duncan Snidal, “Hard and Soft Law in International Governance” (2000) 54:3 *International Organization* 37 at 38.

<sup>6</sup> Joseph Stiglitz, *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (New York: W. W. Norton & Co., 2017).

<sup>7</sup> Report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, (WT/DS381/AB/R) 16 May 2012.

<sup>8</sup> Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, (WT/DS2/AB/R), 29 April 1996.

<sup>9</sup> Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, (WT/DS58/AB/R), 12 October 1998.

<sup>10</sup> See for instance Sanford Gaines, “The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures” (2001) 22:4 *University of Pennsylvania Journal of International Economic Law* 739; Andrew Green, “Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules” (2005) 8:1 *Journal of International Economic Law* 143.

This scrutinized policy space accounts for the contention that the multilateral trading system constrains environmental regulation and requires treaty reforms for the purpose of adapting to contemporary environmental concerns.<sup>11</sup> Other scholars have also focused on a change of approach by WTO adjudicators in their review of trade-restrictive environmental measures.<sup>12</sup> However, the process of multilateral trade negotiations for new agreements needed to effect rule change is notably complex, lengthy and has been fraught with deadlock in the last couple of decades.<sup>13</sup> The stalemate over the appointment of members of the Appellate Body has equally impeded the effective functioning of third-party adjudication in the WTO and the prospect of ‘pro-environmental’ approaches in the interpretation of WTO law on environmental measures. Meanwhile, numerous environment-related measures continue to be notified within the WTO.

The WTO recorded a total of 5,468 environment-related notifications by member states under its notification mechanism between 1997 and 2018,<sup>14</sup> and 7,869 entries of environment-related measures and policies by member states under its trade policy review mechanism (TPRM) between 2009 and 2018.<sup>15</sup> A total of 598 formal disputes have been initiated through requests for consultations in the WTO between January 1995 and December 2020.<sup>16</sup> This covers a wide range of disputes including those in connection with environmental measures. From these formal dispute proceedings, Panels have been established in respect of 365 disputes, leading to 265 Panel reports after discounting the number of settled cases.<sup>17</sup> Further, Appeals have been lodged in 174 disputes.<sup>18</sup> Compared to the

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<sup>11</sup> Jennifer Schultz, “The GATT/WTO Committee on Trade and the Environment – Toward Environmental Reform”(1995) 89:2 American Journal of International Law 423; Carolyn Deere Birbeck, “WTO Reform: A Forward-looking Agenda on Environmental Sustainability” in Teddy Y Soobramanien, Brendan Vickers & Hilary Enos-Edu, eds, *WTO Reform: Reshaping Global Trade Governance for 21st Century Challenges* (London: Commonwealth Secretariat, 2019) 33; Jeffrey Dunoff, “The Death of the Trade Regime”(1999) 10:4 European Journal of International Law 733.

<sup>12</sup> See Michael M Weinstein & Steve Charnovitz, “The Greening of the WTO” (2001) 80:6 Foreign Affairs 147.

<sup>13</sup> See Amrita Narlikar & Pieter van Houten, “Know the enemy: uncertainty and deadlock in the WTO” in Amrita Narlikar, ed, *Deadlocks in Multilateral Negotiations: Causes and Solutions* (Cambridge: Cambridge University Press, 2010) 142. The adoption of the WTO Agreement on Fisheries Subsidies at the 12th Ministerial Conference (MC12) on 17 June 2022 after over 20 years of negotiations illustrates the slow pace of updating multilateral trade agreements to address environmental challenges. Negotiations for the agreement began at the World Trade Organization in 2001 as part of the Doha Round.

<sup>14</sup> *Environmental Database – Infographics* <https://edb.wto.org/charts> accessed on October 11, 2020. (World Trade Organization, 2020).

<sup>15</sup> *Environmental Database – Trade Policy Reviews* <https://edb.wto.org/tpr> accessed on October 11, 2020 (World Trade Organization, 2020).

<sup>16</sup> *Dispute settlement activity — some figures* [https://www.wto.org/english/tratop\\_e/dispu\\_e/disputats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm) accessed on October 11, 2020 (World Trade Organization, 2020).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

number of entries of environmental related notifications, the data suggests that in well over 90% of cases, environmental measures notified by states have not resulted in a formal dispute settlement process. With barely 12 environment-related disputes resolved by Panels and the Appellate Body, this trend suggests that processes other than formal adjudication have normative significance on the relationship between international trade and environmental protection.

If there has been no multilateral treaty reform in the last three decades, the question that follows is: How do member states create a permissive environment within the multilateral trading system for the adoption of numerous environmental measures, notwithstanding the constraining effect of WTO rules and adjudicatory decisions?

I argue that the multilateral trading system and its impact on domestic environmental policies of member states is best understood from a pluralist perspective – the interplay between formalism and other significant jurisgenerative activities of actors that modify and transform formal norms and formal institutions.<sup>19</sup> The interpretation of WTO-covered agreements through the process of adjudication is undoubtedly a significant aspect of trade law. However, compared to outcomes of other interactive processes of decision-making within the trade regime, the number of litigated cases touching on the use of trade-restrictive measures for environmental protection is quite limited and relatively insufficient to justify the critique that the multilateral trading system constrains the regulatory autonomy of states to pursue environmental protection.<sup>20</sup> My hypothesis is that an empirical study of other decision making mechanisms and processes within the multilateral trading system would show an expanding policy space for environmental protection. This occurs through the practice of states in decentralized frameworks that may not be obvious from an analysis of WTO-covered agreements and decisions interpreting them.

Further, the argument that trade rules and their application by the WTO dispute settlement machinery constrain domestic regulatory autonomy suggests a unidirectional influence of WTO law on member states who are posited to simply accept the provisions of WTO-covered agreements as

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<sup>19</sup> Roderick A Macdonald, “Custom Made—For a Non-chirographic Critical Legal Pluralism” (2011) 26:2 Canadian Journal of Law and Society 301 at 319.

<sup>20</sup> Robert Wolfe, “See You in Geneva? Legal (Mis)Representations of the Trading System” (2005) 11:3 European Journal of International Relations 339 at 357.



binding and controlling. It also presupposes that WTO law enjoys a high degree of effectiveness. However, compliance in international law often yields varied outcomes compared to what is typically obtainable in the application of domestic law. Pluralist views of international trade law attend not only to its traditional, formal, or centralized sources but also to the various means by which law is created, applied, and transformed through actors' interactions.<sup>21</sup> International law, in this perspective, is embedded in social context. This pluralist view underscores the significance of social interaction and contestation within international regimes for the creation and evolution of international norms.

As regime participants are both law-abiding and law-creating through their own actions and interactions,<sup>22</sup> an inquiry into the impacts of the trade regime on environmental policies of WTO member states also raises a fact-based debate which would benefit from empirical analysis. Empiricism, by implication, extends the scope of consideration beyond WTO-covered agreements and decisions of adjudicative mechanisms to include outcomes of self-directed decision-making processes among relevant actors in the multilateral trading system.

### **Dynamics of the Global Trade Regime**

The description of the multilateral trading system administered by the WTO as the 'global trade regime' is a reference taken for granted in international trade scholarship. Here, I begin by exploring its implications for international trade law. International regimes have been defined as a set of "implicit or explicit principles, norms, rules and decision-making procedures, around which actors' expectations converge in a given area of international relations".<sup>23</sup> This definition is drawn upon by Ruggie who notes that regimes are imbued with an intersubjective quality, and cannot be understood simply by reference to a "descriptive inventory of concrete elements" but rather should be approached through their underlying principles of order and intersubjective framework of meaning.<sup>24</sup> In other words, they are best studied and understood through the shared expectations they foster. This perspective emphasizes that the normative structure of international regimes is shaped by the shared

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<sup>21</sup> Finnemore & Toope, *supra* note 4 at 750.

<sup>22</sup> Macdonald, *supra* note 19 at 310.

<sup>23</sup> Stephen D Krasner, "Structural causes and regime consequences: regimes as intervening variables" in Stephen D Krasner, ed, *International Regimes* (Ithaca: Cornell University Press, 1982) 1 at 2.

<sup>24</sup> John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order" (1982) 36:2 *International Organization* 379 at 380.

understandings generated through intersubjective communication among its participants, through which normative meaning is attributed to the behaviour of actors.

From the foregoing, international regimes can be generally understood to have three interrelated features that are relevant to understanding the multilateral trading system. First, processes of social interaction are pervasive within international regimes and tend toward fostering shared expectations constitutive of the behaviour of its participants. Secondly, the legal order of international regimes is pluralistic, comprising both hard and soft law features, third-party adjudication, and self-directed processes for resolving trade disagreements. Such dispute resolution processes are also jurisgenerative in the sense that they foster shared understandings among actors with respect to the development and adaptation of norms. Thus, the components of the WTO legal order are not limited to WTO-covered agreements and adjudicative decisions. They are complemented by normative outcomes of both centralized and decentralized decision-making processes which, either simultaneously or sequentially, serve to shape, reinforce, or modify the normative structure of the regime.<sup>25</sup>

The third feature of international regimes relates to ‘a congruence of social purpose’ among actors.<sup>26</sup> To the extent that international regimes embody principles about political rights and obligations, Ruggie argues that international regimes represent a concrete manifestation of internationalization of political authority (concerned with balancing rights and obligations), which he defines as the fusion of power with legitimate social purpose, or congruence of social purpose among leading economic powers.<sup>27</sup> The fusion of power and legitimate social purpose speaks to the feature of international economic regimes as rules, norms and institutions promoted by leading powers to facilitate international cooperation for the purpose of attaining specific goals of mutual interest. It is significant to the understanding of the international trade regime because such regimes which are rooted in broadly shared objectives serve to provide “a permissive environment for the emergence of specific kinds of international transaction flows that actors take to be complementary to the particular fusion of power and purpose that is embodied within those regimes”.<sup>28</sup> As I would explain in the next

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<sup>25</sup> On the development of international law as a process of authoritative decision-making, see Myres S McDougal & W Michael Reisman, “The Prescribing Function in World Constitutive Process: How International Law is Made” (1980) 6:2 Yale Journal of International Law 249 at 251.

<sup>26</sup> Ruggie, *supra* note 24 at 384.

<sup>27</sup> *Ibid* at 380, 384.

<sup>28</sup> *Ibid* at 383.



section, the social purpose that undergirds the multilateral trading system is the compromise for international economic and domestic social accommodation expressed as ‘embedded liberalism’.<sup>29</sup> The nature of trade flows permitted by the multilateral trading system is therefore subject to legitimate modification in order to reflect the adaptation of this shared purposes of regime participants to new contexts or prevailing circumstances. Actors in the trade regime, whose actions are shaped by, and constitutive of regime norms,<sup>30</sup> influence the evolution of norms that either authorize or proscribe specific trade flows through the processes of social interaction and contestation that produce shared understandings.

Accordingly, the extent to which international regimes order or constrain behaviour cannot be determined solely through the objective examination of action by reference to the letters of specific texts, but rather, through the “intersubjective evaluation of the intentionality and consequences of acts within the broader normative framework and prevailing circumstances”.<sup>31</sup> What actors consider as permissible would depend on the sense of legal obligation shared among regime actors in the light of prevailing circumstances. Viewed in this way, the legal order of the trade regime reflects the conception of international law as a continuous process of decision-making. According to Higgins, the implication of this pluralistic view is that international law has to be identified by reference to what actors, often without the benefit of judicial pronouncement, accept as normative in their relations with each other.<sup>32</sup> Thus, norms derive their legitimacy and effectiveness primarily from the “shared intersubjective acceptance of their obligatory claims”<sup>33</sup> by regime participants. The meaning and implications of formal norms are constantly modified through interaction among actors whose interpretations and practices result in the evolution of norms without the sanction of third-party adjudicatory institutions.<sup>34</sup> This process of modifying or ‘customizing’ formal rules through shared understandings operates as a distinct source of normativity.<sup>35</sup> However, because international regimes comprise actors with diverse backgrounds, worldviews, and interests, norms are open to conflicting interpretations.

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<sup>29</sup> See generally, Ruggie, *supra* note 24.

<sup>30</sup> Macdonald, *supra* note 19 at 303; Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 118.

<sup>31</sup> Ruggie, *supra* note 24 at 405.

<sup>32</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) at 18.

<sup>33</sup> Nicole Deitelhoff & Lisbeth Zimmermann, “Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms” (2020) 22:1 International Studies Review 51 at 53.

<sup>34</sup> Macdonald, *supra* note 19 at 320.

<sup>35</sup> *Ibid.*

Consequently, the meaning and validity of norms are regularly contested.<sup>36</sup> This implies that the emergence of shared understandings is not always plain sailing and is often preceded or accompanied by contestation.<sup>37</sup>

Contestation generally encompasses a range of social practices by which actors engage critically with norms. This often translates to disagreement over normative meaning in their application to specific contexts,<sup>38</sup> on whether to maintain or change the status quo, and on the direction, extent or implementation of desirable norm change.<sup>39</sup> In this process, actors justify preferred positions under some form of contention for the (re)interpretation of norms, thereby justifying such positions by reference to extant rules of the regime.<sup>40</sup> They engage themselves argumentatively, albeit cooperatively, with a view to a collective decision on a preferred normative meaning, while avoiding confrontational approaches out of an overall interest in a stable international order.<sup>41</sup> By so doing, actors ensure the progressive evolution and adaptation of the meaning of norms over time, without destabilizing the international order.<sup>42</sup> In this sense, the process of intersubjective communication within regimes necessarily involves some form of contestation.

Constructivist literature identifies a second form of contestation, described as ‘validity contestation’, which concerns the disapproval of the very core of specific norms, or rejection of the normative underpinning of regimes.<sup>43</sup> This strident form of contestation encompasses resistance to

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<sup>36</sup> Antje Wiener, “A Theory of Contestation—A Concise Summary of Its Argument and Concepts” (2017) 49:1 *Polity* 109 at 113–14, 122.

<sup>37</sup> Brunnée & Toope, *supra* note 30 at 63.

<sup>38</sup> Antje Wiener, *A Theory of Contestation* (Heidelberg: Springer, 2014) at 2; Deitelhoff & Zimmermann, *supra* note 33 at 52; Nicole Deitelhoff & Lisbeth Zimmermann, “Norms under Challenge: Unpacking the Dynamics of Norm Robustness” (2019) 4:1 *Journal of Global Security Studies* 2 at 11.

<sup>39</sup> Wiener, *supra* note 38 at 2; Harald Müller & Carmen Wunderlich, “Not lost in contestation: How norm entrepreneurs frame norm development in the nuclear nonproliferation regime” (2018) 39:3 *Contemporary Security Policy* 341 at 359.

<sup>40</sup> Gunther Teubner, “Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?” in Karl-Heinz Ladeur, ed, *Public Governance in the Age of Globalization* (Ashgate, 2004) 71 at 79; For example, the position canvassed by the United States seeking the interpretation of failure of member states to adopt or enforce effective environmental protection laws as subsidies under the Agreement on Subsidies and Countervailing Measures (ASCM). See World Trade Organization (WTO), *Advancing Sustainability Goals through Trade Rules to Level the Playing Field: Draft Ministerial Decision* (WT/GC/W/814) 17 December 2020.

<sup>41</sup> Müller & Wunderlich, *supra* note 39 at 351–52.

<sup>42</sup> Deitelhoff & Zimmermann, *supra* note 38 at 11.

<sup>43</sup> Deitelhoff & Zimmermann, *supra* note 33 at 56–57.

the bindingness of norms, or even subversiveness towards normative orders.<sup>44</sup> The occurrence of such contestation may be less where regime participants, though having diverse interests, remain keen to maintain coordination in an area of mutual interest such as the stability of supply chains through trade cooperation. In general, contestation, whether of the application or validity of norms, may be performed explicitly through speech acts or implicitly through neglect or disregard in the form of defiant behaviour.<sup>45</sup> Generally, processes of interaction and contestation in the trade regime are significant to facilitating the international economic and domestic social accommodation that underly the shared purpose of the multilateral trading system.

### **Embedded Liberalism: Understanding the ‘Trade and...’ Nexus**

The compromise of embedded liberalism is a theoretical framework espoused by Ruggie to explain the congruence of social purpose among leading economic powers on which the postwar regimes for trade and currency were originally structured. According to Ruggie, the essence of the embedded liberalism compromise was a widely shared consensus that the post-war multilateral order for trade had to reflect the prevailing transformation of role of states in the regulation of domestic markets for social and economic stability, as well as the increasing demands within states for social protection against the fallouts of self-regulation of markets. In short, embedded liberalism explains the organization of the postwar economic order as a nearly universal rejection of unimpeded liberalism.<sup>46</sup> In this compromise, the objective of trade liberalization based on the core principle of non-discrimination, was accompanied by state intervention in international trade by means of safeguards, exemptions and restrictions designed to protect domestic stability and a variety of domestic social policies.

Ruggie’s account of collaboration among leading economic powers with the shared social purpose of reimposing social control over domestic and international market forces was influenced

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<sup>44</sup> Deitelhoff & Zimmermann, *supra* note 38 at 11; Brent Steele, “Broadening the Contestation of Norms in International Relations” (2017) 49:1 Polity 132 at 132.

<sup>45</sup> Wiener, *supra* note 38 at 2.

<sup>46</sup> Unimpeded liberalism describes the 19th century economic order marked by market rationality and isolation from state control, in which the role of the state was to “institute and safeguard the self-regulating market.” See Ruggie, *supra* note 24 at 386–88; Joost Pauwelyn, “The Transformation of World Trade”(2005) 104:1 Michigan Law Review 1 at 13.

by Polanyi.<sup>47</sup> According to Polanyi, the evolving political authority of the state to intervene in markets, which was internationalized through post-war global trade regime, was necessitated by concerns for a range of social protections including the conservation of nature.<sup>48</sup> In this view, certain limits around both trade liberalization and domestic interventionism are justified with a view to maintaining an appropriate equilibrium. Accordingly, the maximization of the benefits of global economic interdependence had to correspond with minimizing its social costs.<sup>49</sup>

Embedded liberalism explains the multilateral trading system as a framework for a continuous convergence of shared expectations, grounded in the synthesis of the economic logic of free trade on the basis of non-discrimination, and the political logic that recognises the right and freedom of member states to undertake domestic policy for legitimate policy objectives.<sup>50</sup> In this reading, the multilateral trading system was, by design, structured as a ‘*Trade and... Regime*’ in which the goal of trade expansion is consistently in a dialectical relationship with legitimate policy objectives of member states, including environmental protection. Where the line of equilibrium between the goals of free trade and justifiable state intervention may be drawn in any given context is often the subject of shared understandings produced through interactions and contestation among member states within the multilateral trading system.<sup>51</sup> Accordingly, measures by member states for environmental protection, the conflicts they generate regarding their compatibility with trade liberalization norms, and the ensuing interactions and decision-making between actors, are implicit features of the trade regime, and account for the evolution of its normative order. The means by which such conflicts are resolved includes, but is far from limited to, adjudication.

The adjudicatory process, in terms of both design and operation, places higher emphasis on the enforcement of obligations contained in WTO-covered agreements,<sup>52</sup> compared to rights of the

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<sup>47</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (New York: Farrar & Rinehart, 1944).

<sup>48</sup> *Ibid* at 76.

<sup>49</sup> Such as the costs that businesses and private enterprises shift to society, including socio-ecological problems. See K William Kapp, *The Social Costs of Private Enterprise* (New York: Schocken Books, 1950).

<sup>50</sup> Ruggie, *supra* note 24 at 393; Wolfe, *supra* note 20 at 341.

<sup>51</sup> Clara Weinhardt & Tobias ten Brink, “Varieties of contestation: China’s rise and the liberal trade order” (2020) 27:2 Review of International Political Economy 258 at 259.

<sup>52</sup> Understood as “acts of self-restraint undertaken by the States themselves”. See Sabino Cassese, “Global Standards for National Administrative Procedure” (2005) 68:3 Law and Contemporary Problems 109 at 111.

Respondent states.<sup>53</sup> As a consequence, the adjudicatory process serves to bring the exercise of rights under strict legal scrutiny. It was introduced in response to the need to enforce adherence to obligations in the face of exercise of rights by member states to block the adoption of dispute panel rulings.<sup>54</sup> Complaints submitted for adjudication raise issues for determination bordering on measures of member states falling short of specific obligations, with adverse rulings requiring the respondent member state to bring the disputed measures under review in compliance with their obligations. However, because the WTO is not only a regime of legally binding norms but also a forum for negotiations,<sup>55</sup> outcomes of other jurisgenerative processes within the regime are able to mitigate the constraining effects of its formalism on the regulatory autonomy of member states.

The interplay between WTO-covered agreements and adjudicative decisions on one hand, and outcomes of other jurisgenerative processes in the WTO accords with the view that the evolution of the trade regime's normative order is best understood as an outcome of a 'bi-directional interaction' between law (strict legalism, disciplines and strong or automatic enforcement) and politics (broader participation, contestations, and cooperative decisions). This stands in contrast to the legalization narrative focused exclusively on the trade system's adjudicatory mechanism.<sup>56</sup> Embedded liberalism finds expression in this dialectic interaction between law and politics. It serves to explain normativity in the WTO as outcomes of the various processes of decision-making which tend toward fostering continuous mutual accommodation of trade liberalization and other legitimate policy goals, including environmental protection.

### **The other 'Jurisgenerative Processes': Fragmented and Decentralized**

The governance of trade restrictive measures for environmental protection evolves significantly through the practice of actors in decentralized fora both within and outside the multilateral trading system. Notably, the increased negotiation of Free Trade Agreements (FTAs) produces decentralized institutional frameworks for cooperation and norm-generation that are supportive of trade-restrictive

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<sup>53</sup> The right of member states to invoke exceptions. See Chios Carmody, "Theory and Theoretical Approaches to WTO Law" (2016) 13:2 *Manchester Journal of International Economic Law* 152 at 155.

<sup>54</sup> Pauwelyn, *supra* note 46 at 24.

<sup>55</sup> Eyal Benvenisti, "The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions" (2005) 68:3 *Law and Contemporary Problems* 319 at 332.

<sup>56</sup> Pauwelyn, *supra* note 46 at 15.

measures for environmental protection. Within the WTO, the notification of measures adopted by member states elicit disagreements and requests for clarifications that are resolved through various processes of decision-making in the trade regime other than adjudication. The outcomes of various processes for addressing such concerns foster the evolution of norms applicable to the use of trade-restrictive measures for environmental protection goals. These processes include the trade policy review mechanism (TPRM), mechanisms for raising and resolving specific trade concerns (STCs) within the committees on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) following notifications of trade measures,<sup>57</sup> procedures for consultations in relation to trade disputes both prior to adjudication, and post-adjudication compliance processes, proceedings of the committee on Trade and Environment (CTE), as well as frameworks for cooperation between the WTO and other international organisations such as the United Nations Environmental Program.<sup>58</sup>

International trade cooperation is increasingly being undertaken through FTAs negotiated among sets of fewer countries. FTAs as used here encompasses Bilateral, Regional or Preferential Trade Agreements between countries within, as well as across specific geographical regions. The WTO accounts for 354 FTAs in force as of March 2022.<sup>59</sup> As instruments of deeper integration and inter-connection of markets, FTAs operate alongside multilateral trade agreements of the WTO regime and are known to incorporate more ambitious and progressive provisions on various policy issues, including environmental protection.<sup>60</sup> While FTAs are not recent developments, the spike in the negotiation and conclusion of FTAs coincides with the stalemate in the Doha Round of trade negotiations at the WTO. It is reasonable to hypothesize that the proliferation of FTAs with

<sup>57</sup> Henrik Horn, Petros C Mavroidis & Enrik N Wijkström, “In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees” (2013) 47:4 Journal of World Trade 729.

<sup>58</sup> Anne Peters, “The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization” (2017) 15:3 International Journal of Constitutional Law 671 at 699.

<sup>59</sup> World Trade Organization (WTO), “Regional Trade Agreements Database”, online: <<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>>.

<sup>60</sup> See for instance Chapter 24, *Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States* signed on 30 October 2016 and entered into force (provisionally) on 21 September 2017; Chapter 7, *Trade and Cooperation Agreement between the European Union and European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland* signed on 30 December 2020 and entered into force 1 May 2021. Markus W Gehring, Marie-Claire Cordonier Segger, Fabiano de Andrade Correa, Patrick Reynaud, Alexandra Harrington and Rodrigo Mella, “Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview” (2013) Issue Paper No.3 International Centre for Trade and Sustainable Development (ICTSD) Programme on Global Economic Policy and Institutions; *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, by Jean-Baptiste Velut et al (London: London School of Economics and Political Science, 2022).

permissive provisions for environmental measures is in response to the stalemate in negotiations for multilateral agreements with such provisions at the WTO.

It is worth underscoring that FTAs are negotiated pursuant to the *General Agreement on Tariffs and Trade* (GATT), which permits their conclusion as long as their provisions bind signatory states (Article XXIV). This means that FTAs are not merely emerging as disaggregated or fragmented frameworks in competition with the multilateral trading system. In fact, they produce within the multilateral trading system a nested governance architecture for the adoption of trade-restrictive environmental measures in which decision-making on the propriety or necessity of such measures is deferred to networks of mutual accountability established between trading partners. FTAs also serve to override the highly constraining WTO Appellate Body jurisprudence on the regulatory space for environmental protection. Pursuant to these FTAs, an increasing number of WTO member states are creating normative frameworks within which national regulations conditioning trade flows based on compliance with environmental measures remain unconstrained and indeed encouraged. In sum, this emerging use of FTAs enables a decentralization of norm development and dispute resolution in counterweight to the more formal, centralized WTO adjudicative system.

FTAs with environmental provisions that go beyond commitments and restrictions in WTO-covered agreements may also serve as decentralized platforms for convergence of interests among like-minded countries. From these decentralized frameworks, binding norms could emerge and possibly be diffused at the multilateral level through multilateral agreements and shared regulatory practices. In this sense, FTAs may be likened to laboratories from which successful experiments on definitive legal solutions to regulatory issues are shared across states, trading blocks, and eventually, the multilateral trading system.<sup>61</sup> Cottier argues that international trade regulation has historically moved from preferential relations to multilateral frameworks and vice versa. In this dialectical relationship between preferential and multilateral trade regulation, FTAs and multilateralism are

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<sup>61</sup> Bernard Hoekman, “Plurilateral Agreements, Variable Geometry and the WTO” in Andreas Dür & Manfred Elsig, eds, *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge: Cambridge University Press, 2015) 533 at 542.



considered intertwined because standards developed in FTAs provide the basis for regulatory convergence in the multilateral trading system.<sup>62</sup>

The TPRM is a key process of transparency in the WTO, serving as a source of information and providing a platform for peer-review and collective evaluation of trade policies and practices of member states.<sup>63</sup> Its function has been noted to include the examination of the impact of member states' trade policies and practices on the multilateral trading system.<sup>64</sup> By serving as a vehicle for peer review of trade policies, the mechanism, in practice, also serves as a process of interaction concerning adherence of trade policies of member states to commitments and obligations under WTO agreements.<sup>65</sup> Trade Policy Reviews of WTO member states are also significant evidence of state practice with respect to the adoption of trade measures for environmental protection.

The procedure for raising and resolving Specific Trade Concerns (STCs) following notification of environmental measures in the TBT and SPS committees is also a key transparency mechanism within the multilateral trading system, providing members with a platform to seek clarifications, request information and also raise concerns regarding compliance with obligations under WTO agreements.<sup>66</sup> It serves as a process of “multilateral review of both draft and existing measures”.<sup>67</sup> It has been argued that in practice, STC processes in the SPS and TBT Committees also serve as a well-functioning, albeit informal, conflict resolution mechanism for non-tariff barriers, operating parallel to the formal dispute settlement process in the WTO.<sup>68</sup> The majority of STCs are noted to be bilateral or between few members states<sup>69</sup> and mostly touch on environmental protection and public health measures.<sup>70</sup>

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<sup>62</sup> Thomas Cottier, Charlotte Sieber-Gasser and Gabriella Wermelinger, “The dialectical relationship of preferential and multilateral trade agreements” in Andreas Dür and Manfred Elsig, ed, *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge: Cambridge University Press, 2015) 465 at 467.

<sup>63</sup> Sam Laird & Raymundo Valdés, “The Trade Policy Review Mechanism” in Martin Daunton, Amrita Narlikar & Robert M Stern, eds, *The Oxford Handbook on the World Trade Organization* (Oxford: Oxford University Press, 2012) 463 at 464.

<sup>64</sup> *Ibid* at 466.

<sup>65</sup> *Ibid* at 467.

<sup>66</sup> Horn, Mavroidis & Wijkström, *supra* note 57 at 732.

<sup>67</sup> *Ibid* at 733.

<sup>68</sup> *Ibid* at 730.

<sup>69</sup> *Ibid* at 735.

<sup>70</sup> *Ibid* at 744–46.

Along with other mechanisms which include the Committee on Trade and Environment<sup>71</sup> and processes of compliance negotiations leading to ‘mutually agreed solutions’, the processes mentioned above serve as platforms of both interactions and contestations in the WTO. These interactions and contestations among actors produce shared understandings by which normative meaning evolves notwithstanding the deadlock in multilateral treaty reforms and adjudication. Further, they are structured to employ negotiation, persuasion and more sympathetic considerations to the representations made by member states concerning the measures in question, in contrast to the strict legalism of adjudication.<sup>72</sup> Consequently, they serve as fora for adaptation of the trade regime through bargains to accommodate environmental measures.

Multilateral trade agreements and adjudicatory decisions doubtlessly contribute to shaping “intersubjective understandings about the objectives and values which the trade regime embodies”.<sup>73</sup> However, just as Wolfe posits from a pluralist view, “they do not foreclose new bargains that will lead to a different understanding of WTO law”.<sup>74</sup> These bargains often occur within fragmented and decentralized interactions through the various processes identified above and are often bi-laterally specific, or in ‘minilateral’ forms of collective action,<sup>75</sup> thereby producing what can be described as “a very specific selectivity of the norm-making”.<sup>76</sup> These decentralized interactions allow actors to adapt formal WTO norms to the particularities of their economic interdependence. Thus, the adaptation of formal WTO rules to specific contexts through shared understandings among actors is also be fragmented and diffused rather than multilateral.<sup>77</sup> For such actors, outcomes of these decentralized processes produce a sense of legal obligation even though such norms may not be recognized according to yardsticks of formal norm ascertainment in international law.<sup>78</sup> In other words, they are

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<sup>71</sup> See Gregory C Shaffer, “The World Trade Organization Under Challenge: Democracy and The Law and Politics of WTO’s Treatment of Trade and Environment Matters” (2001) 25:1 Harv Env’tl L Rev 1.

<sup>72</sup> Article 4(2), *Annex 2 of the WTO Agreement – Understanding on rules and procedures governing the settlement of disputes*, 1994.

<sup>73</sup> Andrew T F Lang, “Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime” (2006) 9:1 Journal of International Economic Law 81 at 111.

<sup>74</sup> Wolfe, *supra* note 20 at 347.

<sup>75</sup> Stewart Patrick, “The New ‘New Multilateralism’: Minilateral Cooperation, but at What Cost?” (2015) 1:2 Global Summitry 115 at 116; Andrew Lang, “Protectionism’s Many Faces”(2018) 44 Yale Journal of International Law Online (International Trade in the Trump Era) 54 at 4.

<sup>76</sup> Teubner, *supra* note 40 at 76.

<sup>77</sup> *Ibid* at 78; Brunnée & Toope, *supra* note 30 at 102.

<sup>78</sup> Teubner, *supra* note 40 at 72–73; Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011) at 122.

not mere sociological facts or data for formal rules but laws in themselves.<sup>79</sup> They have the effect, as do formal rules and adjudicatory rulings, of causing member states to adjust trade measures in line with shared expectations reached or clarified through such processes.

As the interpretation and application of rules by actors in decentralized fora depend on specific contexts, legal certainty at the stage of *de facto* norm application may be initially illusory.<sup>80</sup> In view of the multiplicity of decentralized processes of interaction and decision making, it has been argued that “the question of what legal rule actually applies can be answered unambiguously now only for the individual case which has been decided”.<sup>81</sup> However, normative meaning that is modified through these decentralized processes may eventually influence practice beyond parties to the specific bargains and gain broad normative significance across the entire regime through recursive application by the vast majority of actors.<sup>82</sup> Norm crystallization emerges from these institutional processes through accretion of decisions and development of patterns of practice that actors accept as obligatory and consistent with their shared expectations.<sup>83</sup> According to Krasner, “partnered behaviour accompanied by shared expectation is likely to become infused with normative significance”.<sup>84</sup>

Through this lens, WTO law is understood as socially constructed, allowing participants within the trade regime to decide among themselves in favour of variance around limits of WTO-covered agreements and past adjudicatory decisions, which enables adaptability to evolving social, economic, and scientific realities.<sup>85</sup> Therefore, adaptation of international trade law to environmental objectives by member states is feasible, even in the absence of multilateral treaty reforms, through processes of interaction and contestation structured in the trade regime. The extent to which the regulatory capacity of states for environmental protection is constrained by the trade liberalization objectives of the multilateral trading system is largely determined by the capacity of states to leverage the room for interactions, trade-offs, and contestation in the trade regime to accommodate environmental

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<sup>79</sup> Teubner, *supra* note 40 at 77; Macdonald, *supra* note 19 at 319.

<sup>80</sup> Wolfe, *supra* note 20 at 347.

<sup>81</sup> Teubner, *supra* note 40 at 78.

<sup>82</sup> McDougal & Reisman, *supra* note 25 at 255.

<sup>83</sup> Wayne Sandholtz, “Explaining International Norm Change” in Wayne Sandholtz & Kendall Stiles, eds, *International Norms and Cycles of Change* (New York: Oxford University Press, 2008) 1 at 13; On the conjunction of implicit and explicit norms, see generally Macdonald, *supra* note 19.

<sup>84</sup> Krasner, *supra* note 23 at 18.

<sup>85</sup> Wolfe, *supra* note 20 at 348.

measures. Admittedly, the capacity of states to withstand the impact of global economic pressures may depend on varying degrees of factors, such as the institutional capacity of the state, its share of trade and that of the affected trading partners.

## **Conclusion**

In this brief paper, I have laid down the framework from which to better understand international trade law in order to empirically ascertain the extent of its impact on domestic environmental policy. This pluralist perspective takes into account the significance of both formalist conceptions of WTO law and outcomes of jurisgenerative politics.

As part of a much larger research project, I have proposed this framework to test my hypothesis on the extent to which WTO law constrains the policy space for environmental protection. That is to say, when examined beyond the scope of multilateral agreements of the WTO and decisions of panels and the Appellate Body, member states, through various processes with normative outcomes within the multilateral trading system, are able to create and maintain policy space for the implementation of environmental measures. I argue that notwithstanding the absence of treaty reforms, international trade law continuously evolves through various formal and informal norm-generating practices by member states and trade stakeholders. Viewed through the lens of legal pluralism, these practices contest, modify and transform normative meaning in the multilateral trading system, thereby creating a permissive setting for trade-restrictive environmental measures within the framework of extant international trade law.