

# Lessons from the Multilateral Trading System for Reforming the Architecture of the International Environmental Regime\*

by Thomas Cottier, Manfred Elsig and Judith Wehrli

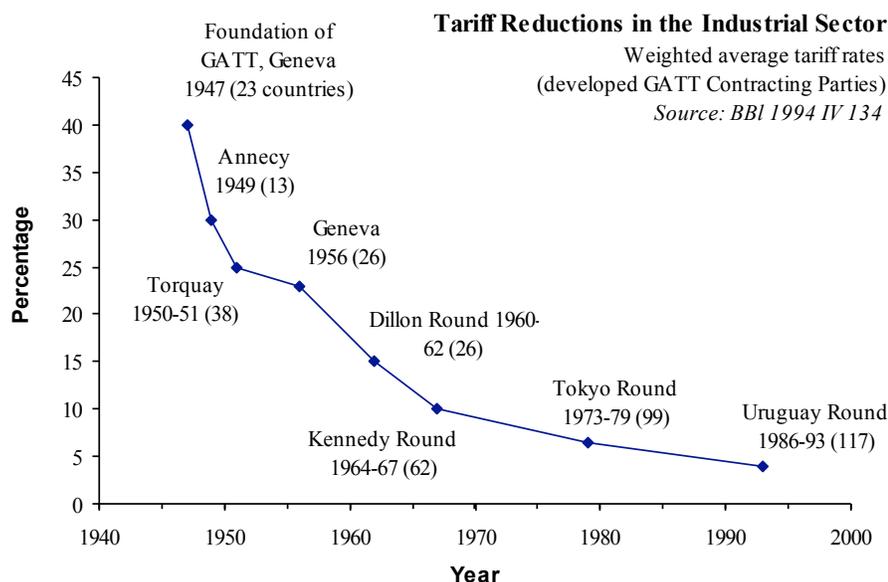
Recent studies on environmental regimes suggest that important lessons and policy recommendations may be drawn from the functioning of the multilateral trading regime.<sup>1</sup> This brief compares the needs and goals of the trade and environment regimes, and discusses how insights from over sixty years of experience of the multilateral trading system might provide ideas for redesigning the architecture of the international environmental regime. It further calls for a better dialogue and improved complementarities between the two fields in order to enhance coherence within international law.<sup>2</sup>

## I. The trading regime

### *Achievements of the trading regime*

The General Agreement on Tariffs and Trade (GATT) system, created following World War II, 'multilateralized' bilateral tariff concessions between member states through the principle of most-favoured-nation (MFN) treatment. This principle meant that all participating actors enjoyed the same market access opportunities as those negotiated among the dominant trading nations. The GATT system led to a substantial lowering of tariffs and thus to an increase in trade in goods in the second part of the 20<sup>th</sup> century. During the last successfully concluded round of trade negotiations (Uruguay Round, 1986–1995), the regime expanded in scope to include partial liberalization of trade in services and protection of intellectual property rights, while trade in goods was further liberalized by tackling non-tariff barriers and subsidies. In brief, the multilateralization of tariff and non-tariff policies and law through the MFN principle entailed a progressive liberalization of trade in goods and services.

*Multilateral cooperation in trade has pointed the way towards enhanced economic growth, and in addition ensures transparency and predictability within the trading system.*



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The creation of the World Trade Organization (WTO) in 1995 established one of the most legalized dispute settlement systems in world politics.<sup>3</sup> This system increased compliance with international trade rules, and helped buffer against the protectionist tendencies particularly prevalent in times of economic downturn. Based on the principle of non-discrimination, the WTO provides for equal conditions of competition. Multilateral cooperation in trade has pointed the way towards enhanced economic growth, and in addition ensures transparency and predictability within the trading system.

### **Modes of negotiation**

Historically, certain negotiation modes played a crucial role in the development of the trading regime:

- **Limited membership:** The GATT began with a limited membership of 27 states, and increased membership only over a long period of time. The WTO comprises 153 members. Universal membership does not exist currently, and would only be achieved as the result of a long negotiation process.
  - **Progressive liberalization:** The structure and design of WTO negotiations allow members to progressively extend market access in accordance with their development situation. The process of progressive liberalization is advanced in each negotiation round through bilateral, plurilateral and multilateral negotiations directed towards increasing the general level of specific commitments undertaken by member states.
  - **Consensus principle:** Although the WTO Agreement sets out detailed voting rules, they are not applied even when consensus fails. Instead, negotiations are undertaken in formal and informal committees and decisions reached on the basis of consensus of those Parties that are present at a meeting.<sup>4</sup>
  - **Package-deal negotiations:** Package deals entail indivisibly bundling together sets of issues in ways that are acceptable to all members. However, heavy packages may result in defensive posturing by negotiators, as countries often face pressure from domestic interest groups to veto certain proposals where their “national interests” are at stake.<sup>5</sup> Package-deal negotiations are typical of multilateral trade rounds and were crucial for the creation of the WTO, where countries had to accept (with some exceptions) all key agreements in order to join the new organization.<sup>6</sup>
  - **Critical mass approach:** Critical mass negotiations are sectoral initiatives leading to plurilateral agreements, whereby only those WTO Members that together are responsible for a major percentage or ‘critical mass’ of world trade in a specific market take on new obligations.
- Current challenges of the trading regime**
- In spite of the successes that have been achieved in the trading regime, further progress on negotiations has been stalled since the so-called Doha Round started in 2001.<sup>7</sup> The reasons for this are manifold:
- **Increasing multipolarity:** During the Uruguay Round, a Transatlantic partnership between the US and the EU dominated the system, with Japan and Canada acting as systemically important middle powers supporting the 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 and India.<sup>8</sup> This structural change creates new types of collective action problems and brings actors with increasingly diverging economic and political interests to the core negotiations.
  - **Limits of consensus diplomacy:** The consensus principle gives a *de facto* right of veto to all WTO members. While the great political cost of blocking decisions in political processes means that in practice, it is only the large players which exercise this veto power,<sup>9</sup> the WTO nevertheless cannot move faster than the collective ambition of its members will allow. In light of a substantial increase in (active) membership, the consensus approach seems to have reached its limits, as the multiplying number of potential veto players makes it difficult to achieve a balance of results which is acceptable to all participating actors.
  - **Lack of effective graduation:** The concept of 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.<sup>10</sup> It builds upon the idea of individual commitments listed in schedules for goods and services, and applies it to non-tariff barriers and to trade remedies more generally. Although the WTO Agreements contain provisions on special and differential treatment with special rights for developing countries, the WTO lacks an effective graduation system for changing the status of developing countries and countries in transition.
  - **Legalization:** The establishment of the WTO’s highly legalized dispute settlement system has had a significant impact on the relationship between rule-making and adjudication. During the ‘legislative’ stage of negotiation rounds, decisions are still taken by consensus, but there is no power of veto in the ‘adjudication’ stage of dispute settlement, where members are subject to majority ruling (negative consensus). Decisions taken in the process of dispute settlement are difficult to review in succeeding legislation. Realising that this structure means decisions on international trade law have long-term implications, a growing number of participants have adopted more pre-emptive defensive tactics and posturing in trade negotiations.<sup>11</sup> A balance could be restored by enhancing the potential for legislative action and response, for instance by introducing a hierarchy of sources of law within the WTO, with a number of regulatory levels and varying rule-making processes.<sup>12</sup>
  - **Fragmentation:** In light of the difficulties with current negotiations on the Doha Development Agenda trade round, many members have turned their attention to “new regionalism”. They are actively exploring partial liberalization of markets



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and related economic objectives through other avenues such as bilateral preferential trade agreements (PTAs) or sector plurilateral agreements (e.g. the Anti-Counterfeiting Trade Agreement (ACTA)). The proliferation of such agreements has led to a fragmentation of authority in the previously fairly centralized trade regime.

## II. Comparing trade and environment

Seeking to apply lessons from the multilateral trading system to environmental law and policy begs a basic question – to what extent is the nature of rules and commitments in the two spheres comparable, and to what extent therefore can these issues be dealt with in a comparable manner?

### *The excludable nature of international trade regulation*

The multilateral trading system has been built with the aim of creating a level playing field.<sup>13</sup> It is politically based on reciprocity, with all parties required to make appropriate contributions for negotiations to succeed. The motivation to engage in negotiations, or to refrain from engaging, is essentially commercial interest. Enhanced market access is paid for, in a mercantilist manner, with trade concessions offered on an MFN basis.

Negotiations on tariff and non-tariff barriers to trade all follow the same patterns of interfacing the import and export interests of domestic industries. Governments, moreover, are subject to clear external pressures, which often allow them to make decisions which would be impossible in a purely domestic context.

International trade law and trade regulation deal with excludable goods and services, and so are based upon privileges obtained in the process of negotiations and especially reflecting particular interests of industries; whereas the overall system offers the quality of a global public good, providing legal security and protection against state failures and arbitrary discrimination.

### *The non-excludable nature of international environmental law*

International environmental law, on the other hand, is mainly concerned with the regulation of the interaction of humanity

and the natural environment. Its objectives include pollution control and mitigation, preservation of natural habitats, sustainable use of resources and sound waste management. Its subject matter directly affects economic and developmental issues, such as adaptation to climate change, land use or infrastructure, and forms therefore an immanent part of sustainable development.

The goals of environmental law are long-term and deal with public or common goods, both of which are non-excludable in nature.<sup>14</sup> The advantages these goods provide generally benefit all concerned, and therefore the incentive for those affected by environmental measures to engage is inherently limited, as benefits are shared with the public at large – in short, environmental goods often present a commons-type problem. Operators subject to environmental regulation generally do not obtain particular benefits in return (although it may be argued that such regulations may foster long-term competitiveness in the industries affected).

### *Prerequisites for interfacing trade and environmental architectures*

While the multilateral trading system does produce an important public good in terms of institutions and legal security, trade diplomacy and the WTO system continue to be primarily based upon the interests and incentives for members and their industries to participate in the global system. The public good produced is the aggregate of the individual interests at stake. In the field of international environmental law, the situation is exactly reversed. Measures and efforts to protect the environment primarily entail the production of public goods at different levels of governance. Individual benefits are ancillary, and are not the driving force behind the pursuit of the defined goals. Environmental law does not exclude the provision of particular incentives in terms of advantages in competitiveness, but the industries concerned often consider environmental regulation to be a burden, as they would presumably bear costs for the benefit of the public at large. In the absence of clear particular self-interests and drivers to engage, motivation to participate in an environmental law regime depends, to a large extent, on appeal to a sense of ethical and social responsibility.

### ***The environmental regime's recourse to multiple policy tools***

International environmental law currently employs a host of different instruments, entailing both financial programmes and regulation. Regulation employs a panoply of different tools, including principles, guidelines, prohibitions, charges and taxation, conditions, tradable and non-tradable permissions, licensing, monitoring, product and process standards, and technical norms.<sup>15</sup> Apart from fundamental principles, such as 'polluter pays' or the precautionary principles, international environmental law largely applies existing legal instruments in the pursuit of its goals. Due to the vast variety of available policy tools, the mode of implementation of new environmental obligations is often uncertain at the time of their adoption, an uncertainty which may give negotiators and interest groups pause. Many of the instruments deployed are instruments of trade policy, such as export or import restrictions, product and process standards, transparency, and regulation of services. Emissions trading deploys financial instruments, and transfer of technology and knowledge has implications for intellectual property rights. Overall, international environmental law is strongly interlinked with international economic law. Its recourse to trade instruments – as opposed to trade goals – explains the complex interface between the two fields, and why these tools often fall under the jurisdiction of trade panels and the Appellate Body of the WTO.<sup>16</sup> Its cross-cutting nature also explains why international environmental law is inherently fragmented and has not so far lent itself to being concentrated under the umbrella of a single international organization.

### **III. Lessons for the environmental regime**

Past successes in the trading regime have resulted from a combination of critical mass and bottom-up approaches, as well as the use of incentives to overcome domestic resistance. These approaches recognise that states essentially pursue national interests and are not willing to commit to actions or regulation unless these interests are directly or indirectly served. One major lesson from the trading system, therefore, is that multilateral approaches to the environmental architecture need to focus on identifying excludable national interests which may be affected in different areas of environmental law and policy. It is the imposition of particular disadvantages on those who do not participate, or the granting of MFN-based privileges to participating members, which creates the incentive to join international instruments focusing on the production of environment-related public goods.

*The example of CFCs:* The success of the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocols (including the 1990 and 1992 amendments) in reducing the use of chlorofluorocarbons (CFCs) in industrial production and products is largely attributable to the fact that commitment and compliance with the relevant provisions provided open market access, while abstainers faced barriers to trade in products that were incompatible with the product standards agreed.<sup>17</sup>

*The example of climate change mitigation:* In the absence of an international system based upon the United Nations Frame-

work Convention on Climate Change (UNFCCC), climate policy is likely to be focused on regional, national and local measures and initiatives. 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 by a country to abstain from taking unilateral trade measures may serve as incentive to other countries, that have not yet committed to climate policies, to participate in a multilateral system on climate change.<sup>18</sup> Membership would bring them legal security and predictability, and thus offer them more than just the production of a global public good (in terms of climate change mitigation) from which they could benefit anyway as free-riders.

Lessons may also be drawn from the challenges currently faced by the multilateral trading system. The trade regime's deficiencies are to a great extent ascribable to an important shift of power in world diplomacy. This stems from the rise of a number of new economic powers, affecting the Transatlantic partnership and traditional negotiation structures. The international environmental regime faces similar challenges with regard to these structural changes. They might therefore be tackled in a similar way:<sup>19</sup>

- *Multipolarity:* Highly divergent interests in a multipolar world are a concern in international environmental negotiations as well. A critical mass approach would, in combination with the polluter-pays-principle, allow seeking solutions among the biggest polluters or countries consuming the most resources, without negotiations being hampered by small players demanding exceptions. In the climate change regime, critical mass negotiations make sense for mitigation issues, while negotiations on adaptation matters obviously need to include developing countries. With regard to sustainable public procurement, plurilateral agreements among the big players could be an incentive for others to join in.
- *Limits of consensus diplomacy:* In most international environmental negotiations, decisions are usually taken by consensus. However, if negotiation rounds are about to fail in spite of widespread agreement because consensus is unattainable, a fall-back strategy is needed, such as, for instance, critical mass negotiations.
- *Lack of effective graduation:* The idea of graduation aims to account for the vast differences in social and economic development between countries, and is closely related to the principle of common but differentiated responsibilities. Rather than merely differentiating between industrialized and developing countries, graduation could link substantial obligations to objective indicators, such as a country's absolute or per capita CO<sub>2</sub> emissions.
- *Legalization:* A high degree of legalization may render the adoption of new agreements more difficult, since participants would only commit to what they are sure they are able to comply with. On the other hand, this could lead to more substantial outcomes. Compared to the highly legalized



world trade regime, most multilateral environmental agreements lack strong compliance mechanisms and dispute settlement systems.

- **Fragmentation:** In the absence of any hierarchy among different instruments of international law, including within international environmental law, it is important to clarify the relationship between existent agreements and institutions, particularly if there is an overlap in their thematic scope or mandate. It seems crucial to avoid inconsistencies by streamlining structures and enhancing central institutions like UNEP, which plays an important interfacing and coordinating role.

#### IV. Dialogue between the two regimes

To enhance coherence within the sustainable development framework, it is important to improve the dialogue between international trade and environmental institutions. The concept of the green economy, for instance, links economic growth to environmental factors such as resource efficiency, low pollution or other environmental costs, and sustainable use of biodiversity and its components.<sup>20</sup> The concept addresses trade-environment interfaces, and so can only succeed if convergence can be developed between the two regimes at national, regional and global levels.

In fact, the multilateral trade regime is increasingly confronted with environmental issues in areas such as process and production methods, labelling, or valuation of ecosystem services and genetic resources. Its dispute settlement system cannot address such issues in isolation, and instead has to take into account parties' obligations and commitments under environmental regimes.

The legal nature of international environmental law, on the other hand, calls for an architecture of horizontal legal integration. Since it uses legal tools pertaining to other areas of law, efforts should be made to bring environmental concerns systematically into the relevant bodies in the process of consultation, decision-making and implementation. The environmental regime needs to make sure that environmental agreements are taken into account in other fora, in particular in dispute settlement. This could best be achieved through an anchor institu-

tion (such as UNEP) that is provided with strong procedural rights and the competence to mainstream environmental issues in existing institutions of other regimes, such the World Bank, the IMF, the WTO, other UN Organizations, and the multilateral environmental agreements.

#### V. Conclusion

The development of the multilateral trading system has been remarkable for its rapid expansion in membership and scope, and for the progressive liberalization of trade in goods and services that was achieved under its auspices. Increased membership, however, entails a number of new challenges, including multipolarity, the need for effective graduation, and the increasing difficulty and limitation of consensus diplomacy. In order to surmount the slowdown in current negotiations, negotiation strategies and voting procedures have to be reconsidered. The international environmental regime could benefit from this review process by applying, where appropriate, the more successful negotiation methods such as a critical mass approach.

While comparing the two regimes may give some ideas of common challenges and possible approaches to surmount them, differences between the two fields have to be taken into account. Above all, the two regimes differ in their focus with regard to the interests they protect, and their degree of excludability. When comparing the two regimes, it seems reasonable to suppose that the identification of excludable goods and drivers in the field of environmental policy and law could create incentives for states to join international instruments in that field.

Moreover, it is important to enhance the dialogue and coherence between the two regulatory areas in order to avoid tensions and inconsistencies. The institutional setup of international environmental governance would have to provide any anchor institution with the necessary means to influence the decision-making of other institutions, including the WTO, when decisions have important environmental implications, so as to ensure that all regimes function in a coordinated and effective manner.

#### COMPARING THE TWO REGIMES

Trade	Environment
Interest driven: market access and country-based benefits	Public goods approach
Focus on individual benefits; public good in terms of legal security	Focus on the creation of public goods, low priority of individual interests
Reciprocity in terms of political economy	Non-reciprocity
Responsive to domestic and foreign pressure	Responsive mainly to domestic pressures
Excludable nature of trade regulation (benefits limited to participants)	Non-excludable nature of environmental regulation (benefits for the public at large)
Incentives to obtain market access and non-discriminatory treatment	Free riding; limited incentives to participate
Independent nature of the trade regulation system	Heavy dependence on funding and technical assistance
Strong institutions and legalization	Fragmented treaty system and weak compliance mechanisms

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## Endnotes

<sup>1</sup> See Keohane and Victor 2010.

<sup>2</sup> Cottier et al. 2011.

<sup>3</sup> Bernauer et al. 2012.

<sup>4</sup> Cottier 2010.

<sup>5</sup> Elsig and Cottier 2011.

<sup>6</sup> Steinberg 2002.

<sup>7</sup> Elsig and Dupont 2012.

<sup>8</sup> Narlikar 2011.

<sup>9</sup> Cottier 2010.

<sup>10</sup> Cottier 2006.

<sup>11</sup> See Goldstein and Martin 2000, Stavvasage 2004.

<sup>12</sup> Cottier 2010.

<sup>13</sup> See generally Cottier and Oesch 2005.

<sup>14</sup> Both public and common goods are non-excludable in the sense that no one is excluded from their consumption. However, real public goods such as sunlight or, to a certain extent, fresh air and climate, are non-rivalrous, which means that their consumption by one person does not prevent others from consuming them at the same time. Common goods, which are also referred to as common pool resources, are used up by their consumption, which prevents simultaneous consumption by others. Examples of common pool resources are fish stocks, timber or petroleum.

<sup>15</sup> For a useful survey of regulatory approaches in international environmental law, see Sands 1995 at 126–136.

<sup>16</sup> For a succinct account, see Charnovitz 2008.

<sup>17</sup> For an account see Sands 1995 at 259–271. The negotiation process also benefitted from the fact that there were only few actors involved and that there was an affordable alternative technology.

<sup>18</sup> See Cottier, Nartova and Singhal 2011.

<sup>19</sup> For concrete reform proposals, see Elsig and Cottier 2011.

<sup>20</sup> For a definition of green economy, see UNEP 2011.

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