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Sustainable development in the WTO: from mutual supportiveness to balancing

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Abstract: The WTO Secretariat describes sustainable development as a central WTO principle. Relevant international law treaties have declared sustainable development's mutual supportiveness with trade liberalization, and also emphasized the need to balance its 'pillars': economic development, often equated with trade liberalization, with environmental conservation and social welfare. While 'mutual supportiveness' suggests that sustainable development's environmental and social goals are a side effect of trade liberalization, 'balancing' involves weighing these different goals, and prompts the difficult question of which are most important, and who is empowered to decide. This paper traces these two broad theoretical conceptions through WTO legal texts, negotiations and dispute settlement, arguing that they have important pragmatic implications. In particular, to create mutual supportiveness WTO Director-General, Pascal Lamy, has stated the need for adequate domestic policies, suggesting that the WTO should support these. Yet, if they have negative trade impacts, pure 'sustainable development' policies may be difficult to balance against the WTO obligation to liberalize trade.

1. Introduction

In the words of the WTO Secretariat, 'the WTO's founding agreement recognizes sustainable development as a central principle, and it is an objective running through all subjects in current Doha negotiations' [emphasis added].[1] Its stated importance to the WTO Secretariat, and in the *Doha Ministerial Declaration*, suggests that the concept wields great influence. However, sustainable development forms only an oblique part of the WTO's legal framework. Rather than a binding legal rule, it remains a broad principle. The Appellate Body has well characterized this influence by stating that the term 'gives colour, texture, and shading to the rights and obligations of Members under the WTO Agreement' (*US–Shrimp*,

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WTO, 2001a: para. 155). To some extent, this role reflects the vague nature of the concept itself. This vagueness results from its breadth, and resulting disagreement about how it should be interpreted.

The WTO interpretation has emphasized that the goals of trade liberalization and sustainable development are mutually supportive. The underlying assumption is that trade liberalization leads to greater prosperity, which creates the resources for better environmental management and social policies.[2] However, some environmental and social welfare advocates have argued that there is a lack of mutual supportiveness between trade liberalization and sustainable development. In their view, trade liberalization creates a race to the bottom in terms of standards, by globalizing markets and encouraging more exploitation of resources.

Any conclusion about the fundamental relationship between sustainable development's three 'pillars', economic development (often equated with trade liberalization in a WTO context), environmental conservation, and social welfare, is bound to be not only broad-based but also polarizing. For this reason, rather than mutual supportiveness (or its converse, mutual unsupportiveness), a more productive concept to characterize the relationship between sustainable development's pillars is that of balancing. International law on sustainable development includes statements that describe both the mutual supportiveness of the pillars, and also the need to balance the goals they represent. Balancing is not a normative concept. It includes the possibility that sustainable development's various goals may harmonize; however, if they do not, it may be necessary to prioritize certain objectives at the expense of others.

The sustainable development represented by mutual supportiveness suggests a non-intrusive role for the concept with regard to the WTO mandate of trade liberalization. However, the sustainable development represented by 'balancing' prompts the question of which goals are more important, and who is empowered to decide. Apart from the specific context of sustainable development, balancing has been the theme in WTO dispute settlement. A core function of the WTO is to ensure that Members do not discriminate against imported products and services. The question is: when national regulations are trade-restrictive, how can the balance be drawn between a Member's right to set regulations to achieve their own domestic goals, and their WTO obligation to liberalize trade? Sustainable development thus echoes or amplifies some of the most controversial challenges facing the WTO as an institution.

However, it is not only a metaphor for these broader challenges. Given its institutional embrace of the term, it would be hoped that the WTO framework supports its Members in setting policies that aim to achieve sustainable

2 Prominent international treaties that address sustainable development, notably the *World Summit on Sustainable Development: Plan of Implementation* (UN, 2002), www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

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development, rather than hindering them. Yet, given the breadth and vagueness of the term's definition, if accepted *carte blanche*, sustainable development provides tremendous discretion for national governments to set trade-restrictive regulations based on broad or vague justifications. Thus, while sustainable development seems a principle of compromise, its national application may be quite controversial from the perspective of WTO law. This paper will highlight these key challenges through outlining the term's legal weight, its 'ordinary meaning', and its role in WTO treaties, negotiations, and dispute settlement.

2. Sustainable development as a WTO legal principle

The term sustainable development has been included in the *Marrakech Agreement* (WTO, 1994) which founded the WTO, as well as Appellate Body decisions, the Doha Development Agenda (WTO, 2001b), and the terms of reference for the Committee on Trade and Environment. WTO Director-General Pascal Lamy remarked that 'Sustainable development should be the cornerstone of our approach to globalization and to the global governance architecture that we create. If I have come to this forum, it is to deliver a message: the WTO stands ready to do its part' (Lamy, 2006). Lamy has also characterized sustainable development as a 'formal goal' of the WTO (Sampson, 2005: viii).

The basis for this recognition is that the expansion of global trade and the growth in the number of WTO members means that its influence has become more pervasive. The influence of trade liberalization includes impacts on sustainable development; the WTO has a responsibility to respond (Lamy in Sampson, 2005: vii). As a trade organization, its response is not to set out positive policies to achieve sustainable development. Instead, its approach is based upon identifying areas of overlap between trade and sustainable development.

Sustainable development is featured in the first sentence of the preamble to the *Marrakech Agreement*, setting the tone for this founding agreement of the WTO:

> Recognizing that their [Members'] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development [emphasis added]. (WTO, 1994)

Later in the text, the Agreement cites the preamble as a justification for the establishment of the Committee on Trade and Environment, one of whose objectives is 'to identify the relationship between trade measures and environmental measures, in order to promote sustainable development' (WTO, 1994).

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The 2001 *Doha Ministerial Declaration* furthered the notion that trade liberalization should contribute to sustainable development. As well as mandating sector-by-sector analysis of sustainable development by the Secretariat, it also contains Paragraph 51, which instructs the Committee on Trade and Environment ('CTE') and the Committee on Trade and Development ('CTD') 'to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected' (WTO, 2001b).

The legal weight of sustainable development forms a debate in the context of public international law in general. Some have interpreted its role in treaties and international commitments as a binding legal requirement; on the other side of the spectrum, it has been seen as a source of general conceptual guidance (Campins-Eritja and Gupta, 2004). While setting out a focus on sustainable development in WTO negotiations, these WTO Agreements do not make it a legal rule. Instead, it is a general principle. Preambular language is non-binding, and so the concept does not carry as much weight as it could in the WTO agreement. Sustainable development is not included as one of the Article XX general exceptions, for example, which can be cited by a country to justify domestic regulations that otherwise violate WTO law. As an exception, its relevance would be more clearly defined, as a country would be able to state as a direct defence that a regulation seen as violating WTO law had as its objective the goal of sustainable development.

This oblique role reflects in part widespread resistance among developing countries, who feared that developed countries would set national regulations based on the concept of sustainable development which would act as disguised barriers to trade. Another concern among developing countries was that sustainable development's emphasis on intergenerational equity deemphasized contemporary problems of inequality. They did not want to be forced to make sacrifices to solve problems they did not create. Finally, a common argument against giving sustainable development too much influence held that the WTO was originally conceived as a trade organization; thus, sustainable development is outside its mandate (Sampson, 2005, 20–21).

To understand sustainable development's legal weight as a 'central WTO principle', an important question has to do with the influence of principles in general in the WTO system. Formally, this role is not well defined (Hilf, 2001). Vranes usefully summarizes the relationship between rules and principles. Though they are both based upon the concept of norms, the difference comes from the matter of degree, having to do with four basic criteria: the extent of its generality, the immediateness of its link to the concept, or idea, of law, its importance for the legal order, and the manner of its creation (Vranes, 2009: 110). With this framework, specific factors that contributed to sustainable development's status as a principle, rather than a rule, can be identified. These include its general and broad nature, the fact that it is not necessarily primary to the WTO's function of

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liberalizing and making predictable international trade, and the controversy associated with its adoption.

The role of a principle is to provide general guidance that can be adhered to as much as possible. The extent to which it can be adopted, Vranes indicates, is determined by 'opposing rules and principles'. Rules, as opposed to principles, are fixed points (Vranes, 2009: 110). Thus, sustainable development is not as formally important or influential as binding WTO rules. In the event that they conflict, rules prevail. The presence of opposing rules or principles may also limit sustainable development's influence. Non-discrimination, for example, is more integral to the WTO's legal order. Thus, if a sustainable development policy discriminated against imported goods, it does seem that the principle would not prevail against WTO rules prohibiting such discrimination.

This is not to say the term has no formal influence. While preambular language is non-binding, it can be cited as a justification for decisions by the dispute settlement bodies. When analysing the interpretation and application of the WTO Agreement's Preamble, the WTO Secretariat recognized this influence. It listed the Preamble's importance to environmental disputes as the first item of consideration.[3]

There is precedent for this influence. Important decisions on trade and environment, such as the Appellate Body Report from *US–Gasoline* (WTO, 1996), included reference to the Preamble. In this dispute, though sustainable development was not mentioned, the Appellate Body cited the Preamble in reference to the need to coordinate trade and environment policies (WTO, 1996: para. v(c) 30). The Preamble has also been invoked in disputes regarding trade and development. In *India–Quantitative Restrictions,* the Panel stated the importance of developing countries receiving their share of the benefits of international trade, in accordance with the Preamble (WTO, 1999: para. 7.2).

The *US–Shrimp* dispute provided the most direct demonstration of the potential of the Preamble's inclusion of 'sustainable development' to influence interpretation of the WTO Agreement. The trade-restrictive regulation in dispute was a US requirement that its trade partners install a device on fishing nets to exclude, and thereby protect, sea turtles. While this regulation was found to violate GATT Article XI, the US argued that it should be upheld under XX(g), which addresses measures 'relating to the conservation of exhaustible natural resources' (WTO, 1994). The Appellate Body took the controversial position that the phrase 'exhaustible natural resources' included not just inert natural resources, such as minerals, but also living natural resources, in this case endangered sea turtles (WTO, 2001a: paras. 129–131). Among other justifications, the Appellate Body emphasized the importance of the Preamble's citation of sustainable

3 See the WTO website's analysis of the Preamble: www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm.

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development in illustrating the overall approach of WTO Members (WTO, 2001a: paras. 152, 153, 155).

3. Defining sustainable development

The 'ordinary meaning' of sustainable development

When evaluating the role of sustainable development in the WTO, as a preliminary consideration it is necessary to establish, as precisely as possible, what the term means. As a WTO treaty term, sustainable development has already had some influence in the *US–Shrimp* dispute, as documented above. There, sustainable development was equated with biodiversity conservation. However, this example leaves open important questions, such as whether social welfare policies may be seen as integral to the concept. Establishing sustainable development's definition is also a useful investigation of whether it is by nature vague, so that it is impossible to conclude its meaning with any precision.

WTO legal texts do not include a definition of sustainable development, nor do Appellate Body Reports provide further clarity. The WTO Dispute Settlement Understanding points to the Vienna Convention on the Law of Treaties (VCLT) as a source of customary rules of treaty interpretation. VCLT Article 31(1) has frequently been cited in WTO dispute settlement as a framework for approaching questions of textual interpretation. It states that: 'a treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*' [emphasis added] (UN, 1969).

In the past, the Appellate Body approach to treaty interpretation has been criticized for emphasizing one of these components, ordinary meaning, over the others: context, object, and purpose (Ortino, 2006; Horn and Weiler, 2005). The underlying sentiment is that, the further the WTO strays from textual interpretation, the more likely it is to be judicially activist. If reasoning is grounded in the text, it will reflect more faithfully the intent of the Member States who negotiated the Agreement (Weiler, 2000).

Despite this historic emphasis on establishing a term's 'ordinary meaning', the Appellate Body hardly ever considers just a dictionary definition as sufficient, and sometimes relies upon cross-referencing between the treaty as a whole, or with other relevant treaties (Van Damme, 2009: 232). Nonetheless, it is interesting to note the failure of textualism with regard to sustainable development. The term consists of two words, each of which has wider independent applications, but the *Oxford English Dictionary* (1989) does not contain a definition for the term as a whole.

The process of constructing a definition, where one does not exist, requires interpretation. A textualist approach aims to eliminate ambiguities, and sustainable development resists such treatment. Yet, a formal recognition that the term is

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ambiguous would likely highlight fears of judicial activism. If interpretation of sustainable development is based solely on its textual meaning, the result would seem to be a conclusion that the term is vague, and reluctance to give it much legal weight.

As compared to text, the context is much more useful. In the case of sustainable development, as the two words form a well-established concept in UN treaties, these can help inform its interpretation. The lack of dictionary definition of sustainable development points to the importance of international law definitions.

Supporting the legitimacy of this approach, in *US–Gasoline*, its first decision, the Appellate Body stated that the WTO Agreements are 'not to be read in clinical isolation from public international law' (WTO, 1996: para. 16). In this spirit, Lamy commented that 'the WTO is not more important than other international organizations and WTO norms do not necessarily supersede or trump other international norms…' (Lamy, 2006). Thus, the subsequent section will consider common international law definitions when determining the meaning of sustainable development in the WTO.

Another important source of context comes from interpreting statements by the WTO Secretariat itself, as well as throughout the WTO Agreements, to discern what they reveal about the WTO interpretation of the term. While no precise definition has been given, these statements help narrow the possible relevant international law definitions to identify the WTO's particular approach, even if it is somewhat implicit. Thus, this analysis will also form the focus of a subsequent section.

The final element of the VCLT 31(1) (UN, 1969) has to do with the treaty's object and purpose. The Preamble to the *Marrakech Agreement* (WTO, 1994) itself sets this out. Thus, as the function of the Preamble is to provide guidance for the application of the Agreement, sustainable development can be seen as a general guiding principle. Whether or not the concept is cited in a dispute is a matter of discretion; nevertheless, its applicability is relatively unbounded. Affirming this conclusion, the Appellate Body in *US–Shrimp* stated that the objective of sustainable development should inform all the WTO covered agreements (WTO, 2001a: para. 129).

Public international law definitions of sustainable development

Strictly speaking, there is no official definition of sustainable development in international law. However, two main concepts emerge from major international treaties on sustainable development, which are specific and recurrent enough to act as definitions. The first and most conventionally accepted definition of sustainable development comes from the Brundtland Report: 'meeting the needs of the present without compromising the ability of future generations to meet their own needs' (Brundtland Report, 1987). The second definition describes sustainable development as consisting of three pillars: economic development, social welfare and environmental protection. This definition first appeared in the 2002 *World Summit*

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on Sustainable Development: Plan of Implementation which focused on practical rather than conceptual, elements of sustainable development (UN, 2002a).

The centrality of these two definitions has been affirmed by Lamy, who stated that:

> In common usage, the term 'sustainable development' means securing a growth path that provides for the needs of the present generation without compromising the ability of future generations to meet their own needs. From a policy perspective, the pursuit of sustainable development requires a careful balancing between progress in each of its pillars: policies designed to advance economic development, for instance; to conserve the environment, and to ensure social progress. (Lamy in Sampson, 2005, vii)

While not a formal WTO definition, this statement demonstrates that WTO leadership affirms the legitimacy of these definitions.

Critiques of the two definitions

As previously noted, one of the most common critiques of sustainable development, in the WTO and beyond, is its vagueness (Sampson, 2005, 4). 'Meeting the needs of the present while allowing future generations to meet their needs' identifies a conceptual problem with a vast scope. This scope makes pragmatic applications seem difficult. It also gives the term a wide range of possible interpretations. The concept of needs, for example, is based upon subjective norms, and continues to change, in part as a reflection of development itself. Also, while some may believe that future generations will meet their needs through technology, making conservation unnecessary, others will believe that ecosystem degradation is irreversible. Thus, there may be disagreements on exactly what should be maintained (Kane, 1999: 17–19). This ambiguity can result in the term demonstrating the beliefs or objectives of the practitioner, rather than representing an external, quantifiable goal. Also, even if the principle of the need for intergenerational equity is agreed, the definition provides no framework for evaluating, or attaining, sustainable development. The interpretation will vary vastly between WTO Members, and seems difficult to translate into specific shared commitments.

The three pillars definition, on the other hand, raises the controversial question of the relationship between the pillars. The *Plan of Implementation* sets out the view that the pillars are mutually supportive:

> These efforts [proposed in the Plan] will also promote the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and *mutually reinforcing pillars*. Poverty eradication, changing unsustainable patterns of production and consumption, and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, sustainable development [emphasis added]. (UN, 2002a, para. 1)

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This emphasis on the integration of the pillars has been echoed in subsequent UN treaties and conferences, such as the 2005 World Summit Outcome document of the UN General Assembly (UN, 2005: 12).

As well as the concept of mutually reinforcing or mutually supportive pillars, principal UN agreements on sustainable development also often refer to balancing the pillars. The *Plan of Implementation* frequently cites this need, as in its objective (b): 'Integration of the economic, social and environmental dimensions of sustainable development in a balanced manner' (UN, 2002a: para. 121(b)).

Mutual reinforcement suggests that the pillars are inherently in agreement, and that there is a possibility for finding ways to achieve all three goals simultaneously. If this is the case, the integration of the goals represented by each of the three pillars should be fairly effortless. On the other hand, the goal of balancing suggests that it will be necessary to make tradeoffs. Complicating the metaphor, each pillar is not necessarily supporting the same goals, or they could be in opposition.

Critics that are more radical charge that the goals sustainable development attempts to reconcile are fundamentally opposed. In *Deciphering Sustainable Development*, C.D. Stone points out sustainable development's contradictions, with a Marxist slant:

> The term sustainable development is not merely vague – a masker of failed consensus – the way terms in the US Constitution are vague and require case-by-case elaboration. 'Sustainable development' functions to gloss over not only failed consensus, but a latent collision course. The chasm is less a failure of language. . .than a poignant tussle between, roughly, Rich and Poor. (Stone, 1994: 977)

This is a social critique: fault lines are drawn between rich and poor. In this reading, the term itself is simply a convenient fiction. Yet a similar critique could be made along environmental lines: sustainability, with its implication of limited resource consumption, is the enemy of development, which requires an ever-accelerating use of resources.

By contrasting sustainable development with the US Constitution, the quote also implicitly underlines the difference between hard and soft law, and provides a reason why sustainable development resists acting as the former. Rather than simply vagueness, it is the controversy underlying its interpretation that makes it difficult to apply coherently as a legal principle.

The WTO interpretation of sustainable development

The WTO consists of Member States whose interpretations of sustainable development inevitably differ; however, the consensual version of the WTO interpretation can be discerned through close reading of the term's principal uses. WTO Agreements emphasize that the relationship between trade liberalisation and sustainable development is mutually supportive. Therefore, while an embrace of sustainable development implies a more prominent role for environmental and

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social goals in the WTO, it also represents a positive reading of the relationship between these goals and the WTO's primary aim of trade liberalization.

The *Doha Declaration* states that:

> It is the potential impact of economic growth and poverty alleviation that makes trade a powerful ally of sustainable development. The multilateral trading system is an important tool to carry forward international efforts aimed at achieving this goal. The purpose of trade liberalization and the WTO's key principle of non-discrimination is a more efficient allocation of resources, which should be positive for the environment. (WTO, 2001b: para. 6)

The Decision on Trade and Environment, from the WTO founding agreement, confirms that:

> Considering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other . . . (WTO, 1994)

Along these lines, the Preamble of the *Doha Declaration* states:

> We strongly reaffirm our commitment to the objective of sustainable development . . . we are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development, can and must be *mutually supportive* [emphasis added]. (WTO, 2001b: Preamble)

UN treaties on sustainable development echo these conceptions. During the 1992 Earth Summit, environment ministers suggested that the only contribution GATT should make to sustainable development was to conclude the Uruguay Round successfully (UN, 1992a: Chapter 1, Objectives 2.9(a) 3). A similar understanding resulted from the World Summit on Sustainable Development. Environmental ministers called 'to promote open, equitable, rules-based, predictable and non-discriminatory multilateral trading and financial systems that benefit all countries in pursuit of sustainable development [and] support the successful completion of the work programme contained in the *Doha Ministerial Declaration*' (WTO, 2002).

There is an important conceptual difference between declaring overall mutual supportiveness between trade and sustainable development, and selecting specific areas in which it can be attained through the WTO system. A subtle tension between these two conceptions can be detected throughout the above statements. For example, the *Marrakech Agreement* declared that there 'should not be, or need not be' any policy contradiction between trade opening and sustainable development (WTO, 1994). The *Doha Declaration* stated that these goals 'can and must be mutually supportive' (WTO, 2001). Both are interesting constructions, as they simultaneously affirm an optimistic reading of the relationship between trade and sustainable development, and also suggest that there is work to be done.

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An attempt to reconcile these two sentiments can also be traced through Lamy's forward to Gary Sampson's book on sustainable development in the WTO. Lamy cites the support of the World Summit on Sustainable Development in affirming that the conclusion of the Doha round will further the achievement of sustainable development. He then states:

> Although the promotion of economic development and the contribution it can make to providing the resources necessary to improve environmental and social issues have long been recognized, multilateralism is now confronted by new issues that the GATT never had to tackle. Many of these come from the trade and sustainable development relationship. (Sampson, 2005: ix)

Lamy then sets out the means to improve the WTO relationship with sustainable development. This includes objectives such as reinforcing efficiency and legitimacy, being 'more interested in practical questions of organization and implementation', and 'assuring better coherence with other international institutions' (Sampson, 2005: x). In other words, improvement of WTO functionality will be synonymous with the success of sustainable development.

Lamy then addresses the potential conflict between trade liberalization and other sustainable development goals, and proposes a solution: 'Nonetheless, trade opening is neither natural nor automatically beneficial, in and of itself. It needs a system based on rules coupled with adequate domestic polices' (Sampson, 2005: x). The 'system based on rules' implies the WTO; the emphasis on 'adequate domestic policies' suggests the importance of national governments to help steer sustainable development's course.

On this topic, Sampson wrote:

> Those promoting the virtues of trade liberalization would not deny that trade liberalization and growth can be harmful to the environment, or that trade liberalization per se will not necessarily achieve sustainable development. . . . The WTO response is that, for benefits to be realised and for trade-induced growth to be sustainable, national environmental, income distribution and social policies should be put in place. (Sampson, 2005: x)

Crucially, then, for mutual supportiveness to be achieved, the WTO system must respect national sovereignty to set such regulations, provided they do not clash with WTO obligations, and are 'compatible with an open and non-discriminatory nature of the multilateral trading system' (Sampson, 2005: 55). In this sense, the best role of the WTO is one of non-interference.

This brings the focus onto the relationship between national sustainable development regulations and WTO law. To paraphrase the above statements, national governments must put in place appropriate policies for social welfare and environmental conservation. However, these policies must also be consistent with WTO rules. This formulation sidesteps the possibility that such policies might at times be inconsistent with WTO rules. Indeed, by the WTO's own logic of mutual

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supportiveness, such a clash would signify inconsistency between the principles of trade liberalization and sustainable development.

However, regulations to achieve sustainable development may indeed have negative impacts on trade liberalization, by restricting market access of other WTO Members. The WTO's employment of 'mutual supportiveness' thus contains inherent contradictions. In the above situation, the need would arise to balance the regulatory autonomy of Member States to achieve non-trade objectives and their trade-related obligations under WTO law. Thus, balancing is a more pragmatic and conceptually coherent approach to sustainable development.

In the context of dispute settlement, the legal concept of balancing has provoked debate about the authority of the WTO, as a trade organization, to rule upon issues outside its immediate mandate. Nonetheless, it is inevitable that the dispute settlement system will preside over situations in which it is necessary to make tradeoffs between trade liberalization and other goals. This inevitability is brought about by the overlap between trade liberalization and sustainable development, and the fact that the relationship is not mutually supportive in every regulatory scenario.

Sustainable development as an international legal principle

WTO interpretations of the relationship between trade liberalization and sustainable development align with the major treaties of sustainable development. A critique of mutual supportiveness applies to the international legal treaties which have given legitimacy to the term. Analysing the adoption of the term is instructive, as it reveals that the potential conflict between environment and development is at its foundation. In fact, it arose in response to international law's need to address this relationship. The Bruntland Report states:

> attempts to defend [the environment] in isolation from human concerns have given the very word 'environment' a connotation of naivety in some political circles. . . . But the 'environment' is where we all live; and 'development' is what we all do in attempting to improve our lot within that abode. The two are inseparable. (UN, 1987, Chairman's Foreword)

This statement reveals political resistance to foregrounding the environment as an international priority, and justifies its importance on the basis of human welfare.

Even before the Brundtland Commission proposed 'sustainable development' as a construction of the relationship between environment and development, this relationship was a topic of debate in international law. The website for the Earth Summit reports that 'the relationship between economic development and environmental degradation was first placed on the international agenda in 1972, at the UN Conference on the *Human Environment*, held in Stockholm' [emphasis added] (UN, 1992b). UNEP has as its motto 'environment for development'.[4]

4 Available at the UNEP website <www.unep.org>.

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This motto, as well as the Conference title, also reveal resistance to embracing the environment as a stand-alone goal. Both make plain that the intention of the relevant international law is not to subjugate development goals to environmental commitments.

Thus, sustainable development provides a conceptual tool to resolve a potential conflict; namely, trying to identify a role for the environment without compromising economic development. The term affirms fundamental values, such as the responsibility to future generations and dependence on the natural environment, without alienating supporters of progress and technology. Thus, it strikes a middle ground between business as usual and radical environmental approaches (Reid, 1995).

The term does not suggest the conflicts, commitments or costs associated with achieving the goal. Instead, it works as an ethical guiding principle. For this reason, its vagueness may in fact be a key to its success. The term's range of interpretations and applications has likely contributed to its global prevalence. It can be incorporated within distinct and even conflicting contexts. Sustainable development's vagueness reflects the depth and complexity of its duty: a positive construction of tensions between environmental, development-related, and economic goals. The divisive question is whether this is a given assumption, a goal worth striving for, or a fiction. From an international law perspective, it certainly requires less political will to conclude that its goals are mutually supportive.

Sustainable development and public legitimacy

As well as international and national applications, sustainable development has also emerged as one of the household terms of the environmental movement. As much as the term forms a building block of international law, it also belongs to the ethical commons. Beyond its formal adoption in treaties, it is in common use among politicians, national and local governments, community groups, grassroots organizers, development agencies, environmental agencies, academics from many different fields, corporations, NGOs, the media, etc. To the extent that the WTO seeks favourable public opinion, this popular embrace of the term is significant. Sustainable development should be seen not only as a component of the internal WTO framework, but also as a feature of its role as a public institution.

Public perceptions of the WTO became increasingly important in the wake of unexpected protest regarding the WTO's perceived indifference to social justice and environmental preservation. The infamous 2000 'Battle in Seattle' was a low point in WTO public legitimacy. In a 2002 article, Esty reflected on the protesting and riots that continued to contribute to the breakdown of negotiations at Ministerial conferences. In response to this, he argued that the organization needed to demonstrate sensitivity and responsiveness to non-economic goals such as poverty alleviation, environmental protection, and the promotion of public health (Esty, 2002).

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While *Doha Declaration* negotiations commenced before the Battle in Seattle, public protest formed a significant backdrop to its 2001 conclusion. The role of sustainable development in the *Doha Declaration* should be seen in this context. It reassures the public that the WTO is committed to considering goals besides trade liberalization as a central part of its institutional obligations.

4. Sustainable development in WTO negotiations and dispute settlement

The Committee on Trade and Development (CTD)[5]

Paragraph 51 of the *Doha Declaration* (WTO, 2001b) identifies the CTD as the forum to identify and debate development issues related to sustainable development. In practice, the CTD work has been synonymous with furthering the economic development of developing countries, and ensuring that they benefit from trade liberalization and their WTO commitments. Developing countries represent two thirds of WTO Members. The successful conclusion of the round relies upon their satisfaction that their strategic goals, such as the liberalization of agriculture and textiles, have been met.

In the CTD, the objective of appropriately reflecting sustainable development reveals a contradiction. By definition, development is one of the objectives of sustainable development. However, developing countries have been resistant to the inclusion of the concept in the WTO. They fear that empowering sustainable development as a WTO legal principle will interfere with their development. The core concern is that developed countries will put in place protectionist regulation in the name of the environment.

The resistance suggests that sustainable development's environment pillar (and its perceived protectionist implications) conflicts with its development pillar (and its promise of more market access for developing countries). This demonstrates what might be seen as an example of a lack of mutual supportiveness between environment and development.

Sustainable development can reflect the goals of both environment and development only inasmuch as it represents more market access for developing countries' goods and services. This scenario involves developed countries removing market distortions, such as subsidies and price supports. This is the goal of both the CTD in general and also some of the work of the CTE, summarized below. The example of developing countries illustrates why focusing on areas of mutual supportiveness is the most pragmatic approach. However, it does not testify to mutual supportiveness as an absolute principle: there may be instances in which environmental goals would be better served through trade-restrictive regulation.

5 See the WTO website on development www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm.

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The Committee on Trade and Environment (CTE)[6]

Paragraph 51 (WTO, 2001b) also identifies the CTE as the forum to identify and debate environmental aspects of sustainable development. The *Doha Declaration* also includes paragraphs 31–33 (WTO, 2001b), negotiated by the CTE, which address the trade and environment relationship. The overall approach contains an explicit emphasis on triple wins: areas in which market access can be improved while at the same time incorporating environment and development goals. Paragraph 31(iii) (WTO, 2001b) calls for 'the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services', identified as a triple win. These goods and services contribute to environmentally preferable practices; the argument is that the removal of trade barriers will increase these practices.[7] Paragraph 31 also calls attention to fisheries subsidies (though this negotiation is taking place under the Committee on Rules).[8] The WTO website identifies the removal of fisheries subsidies as an example of a triple-win,[9] as they lead to overfishing and privilege developed countries over developing; therefore, the liberalization of fisheries could have positive environment and development outcomes.

Paragraph 32(i) (WTO, 2001b) calls for attention to 'situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development'. While it has not led to as active a negotiating process, this subparagraph also deals with triple-wins.

Paragraph 31(i) (WTO, 2001b) deals with institutional linkages between the WTO and other Multilateral Environmental Agreements. It calls for more examination of the relationship between the Multilateral Environmental Agreements and the WTO, with 'a view toward enhancing mutual supportiveness'. This suggests that mutual supportiveness exists but must be improved, an ambiguous concept that echoes statements previously quoted from the *Doha Declaration* (there 'should not be, or need not be' policy contradiction between trade opening and sustainable development; these goals 'can and must be mutually supportive').

Overall, the CTE takes a somewhat tautological approach to demonstrating mutual supportiveness between trade liberalization and the social welfare and environmental goals of sustainable development, by focusing only on areas in which the achievement of these goals seems to be a side effect of trade liberalization. This limits the institutional influence of the term in the negotiations. Again, as a pragmatic approach, given the WTO mandate and resistance from WTO Members,

6 See the WTO website on the CTE, http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm.

7 See the WTO website: www.wto.org/english/tratop_e/envir_e/envir_neg_serv_e.htm.

8 See the WTO website on the Rules Negotiations: http://www.wto.org/english/tratop_e/rulesneg_e/rulesneg_e.htm.

9 See the WTO website: www.wto.org/english/tratop_e/envir_e/win_e.htm.

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this may well be appropriate. However, it also highlights the contradiction at the core of the WTO's relationship with sustainable development in principle: the simultaneous affirmation of mutual supportiveness and proclamation that it must be achieved. In practice, the analogous behavior in the context of negotiations is to declare that sustainable development should be implemented across the board, but only to focus on its application in selected areas of least resistance.

Dispute settlement

With negotiations stalled, the dispute settlement system has taken on increasing importance as a *de-facto* decision maker (Shaffer, 2003: 11). This system has been called 'in all probability, the most effective area of adjudicative dispute settlement in the entire area of public international law' (Palmeter and Mavroidis, 2004: 234). For this reason, dispute settlement is a particularly influential, and relatively active, area of consideration regarding the WTO's relationship with sustainable development. In general, dispute settlement also provides an important source of clarity regarding the precise applications of WTO law.

With regard to dispute settlement, the concept of mutual supportiveness does not have much utility. The concept of balancing, on the other hand, has been relevant and controversial. It applies to the need to determine the appropriate level of regulatory autonomy governments should be afforded, and on what basis regulations should be maintained even if they do not conform to WTO law. Balancing has formed a legal concept in disputes under GATT Article XX, which outlines negotiated exceptions to the GATT, established on ethical grounds (Desmedt, 2001; Trachtman, 1997).

Though past WTO disputes have addressed environmental and social issues, there has not been a dispute about regulations with 'sustainable development' as their explicit and primary goal. While a thorough analysis is beyond the scope of this paper, it is possible to highlight in very general terms why it might be difficult for the dispute settlement bodies to tip the balance toward sustainable development as a pure legal concept, while bearing in mind that a dispute would turn on individual details of the parties' submissions. The context for this analysis is the question of balancing: what types of regulations may be considered necessary to support the goal of sustainable development? On what basis can a Member be empowered to make this determination, if it intrudes heavily on the domestic production scenarios of foreign countries?

The more vague a norm, the more subjective, and therefore controversial, value judgments of its importance will appear (Vranes, 2009: 155). The term's vagueness and breadth, coupled with uncertainty about its legal weight, suggest that it may not seem a particularly important value, if negative trade impacts are its result. The international standards that justify sustainable development's importance are not very targeted, when compared with some of the other goals represented by Article XX exceptions. For example, in *EC–Asbestos*, the Appellate Body cited specific language in the World Health Organisation about the product in dispute, asbestos

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(WTO, 2001c: para. 62). It may be difficult to justify the importance of the value of sustainable development, when it hinders trade liberalization, based upon such broad international standards. The *World Summit on Sustainable Development: Plan of Implementation* (UN, 2002a), for example, states both that sustainable development should be implemented, and also that unilateral trade measures should be avoided.

Also, despite the fact that sustainable development is broad in principle, in practice it seems likely that associated regulations would be complex, when compared with many other types of environmental regulations. For example, *US–Shrimp* (WTO, 2001a) focused on only one specific regulation: a requirement that Turtle Excluder Devices be installed on shrimp fishing nets. Sustainable development, as a regulatory goal, implies a broad emphasis on the process of production, rather than product characteristics. This suggests that sustainable development regulations may be cumbersome and expensive for producers to apply, and prove they've applied. These issues suggest that pure 'sustainable development' regulations, if they act as unilateral trade measures, will be controversial in a WTO context.

5. Conclusion

Only an excessively compromise-driven interpretation of sustainable development would state that it is simply a by-product of the WTO's primary mandate of trade liberalization. A more robust interpretation must recognize that the goals represented by trade liberalization, on the one hand, and environment and social welfare regulation, on the other, sometimes clash, necessitating that the validity of the norms represented by each be compared, and a determination be made about which will prevail. Rather than mutual supportiveness between the pillars, this approach can be represented by the conceptual structure of balancing. Balancing does not suggest a solution, but merely formulates a problem of central importance to the WTO when dealing with the relationship between trade and non-trade priorities.

In the context of the Doha negotiations, the emphasis on areas of mutual supportiveness has, to some extent, ring-fenced the term's influence. In the event of a trade dispute on sustainable development regulations, however, the more unbounded challenge of balancing sustainable development with trade liberalization may arise. Lamy has pointed to domestic policies as crucial to achieving sustainable development, and ensuring its mutually supportive relationship with trade liberalization. Thus, a dispute would provide an important test of national sovereignty to pursue the goal of sustainable development. From a public relations perspective, this would likely put not only the parties in dispute, but also the concept of sustainable development in the WTO, on trial.

While this has not occurred, it is certainly not impossible, or even unlikely. Indeed, the European Union has recently introduced biofuels sustainability criteria,

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which also apply to imports, with the potential to impede, or complicate, trade. Though it is uncertain whether there will be the political will for a trade dispute, the criteria have attracted criticism from trading partners and biofuels producers who claim that they violate WTO law (ICTSD, 2010; American Soybean Association, 2011). With regard to the concept of sustainable development, a dispute about these or analogous regulations would in fact be useful. It would help to clarify the precise definition and legal weight of the term in the WTO context. It would also prompt soul searching on the exact contours of the challenge of implementing sustainable development in the WTO framework, and how it can be met.

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