

# INTERNATIONAL TRADE, POLAR ENVIRONMENTS AND SUSTAINABLE DEVELOPMENT

WYGENE CHONG\*

*The debate on the interaction between trade and the environment continues. However, the two areas do not have to exist separately. Sustainable development is one principle that can unite the two. To do so, it needs to carry more weight at the World Trade Organisation (WTO), and particularly in its dispute settlement bodies. This article explains how the status of sustainable development at the WTO is insufficient for it to play a central role in guiding interactions between trade and the environment. It draws on Polar Law to illustrate and, in doing so, builds bridges between that body of law and international trade. Additionally, it points to the Paris Agreement and 2030 Agenda for Sustainable Development as signs that political consensus for more consideration of the environment in International Trade Law is on the rise. Using polar circumstances, this article charts out relevant legal issues and pathways for sustainable development at the WTO.*

## Contents

I	Introduction .....	91
II	Trade and the Polar Regions .....	93
	A Polar Trade .....	93
	B Polar Circumstances and Common Interests .....	97
	C Sustainable Development as a WTO Legal Principle .....	100
	D Origins, Meanings and Application in the Polar Regions .....	100
	E WTO Law Principles .....	104
	F The Principle of Sustainable Development .....	106
III	Pathways for Sustainable Development in WTO Law .....	111
	A Recent Developments .....	111
	B Pathways for a Stronger Principle .....	112
IV	Conclusion .....	114

---

\* Honorary Research Fellow at the University of Western Australia Law School. The author wishes to thank Dr Juan He, Dr Philipp Kastner and the two reviewers for their thoughtful and thorough comments on earlier drafts of this article.

## I INTRODUCTION

Human exploitation of the natural world is well documented. The expansion of international trade can contribute to this exploitation, particularly when it involves sectors or markets that overuse finite resources. Some have argued that the World Trade Organisation (WTO), the central entity of the global trade system, should take further consideration of the environment in its work.<sup>1</sup> However, trade advancement and environmental protection do not have to be mutually exclusive goals. Sustainable development is one concept that has the potential to bring the two goals together.<sup>2</sup> Nowhere is this more apparent than in the polar regions: the Arctic and the Antarctic. Using polar environments as examples, and referring to major recent developments in international environmental law and policy, this article demonstrates the increasing importance of sustainable development as a principle or even a rule of international trade law.

The idea that trade and the environment can live harmoniously is not new. However, two considerations distinguish this article. First, polar environments have not yet been used as primary illustrations for this point in scholarly literature. Polar environments are relatively unspoiled in comparison to other regions, which has proved a catalyst for sustainable development as a means of protecting the environment while advancing local economies. For many in the poles, the environment is the reason they remain. Polar Law itself is still nascent, and this article attempts to establish bridges between that body of literature and the literature associated with WTO Law. The second distinguishing consideration is the recent series of breakthroughs for the environment on the international stage, especially, the *Paris Agreement* and the 2030 Agenda for Sustainable Development. These political developments will likely reinforce the presence of environmental considerations in WTO negotiations and disputes.

This is where Polar Law may be able to offer insights. The polar regions possess unique features which encourage a focus on sustainable development. It is well established that the poles have the capacity, environmentally-speaking, to

---

<sup>1</sup> For a progressive introduction to the debate, see Kent Jones, 'Trade Policy and the Environment' in Kent Jones, *Who's Afraid of the WTO?* (Oxford University Press, 2004); Gregory Shaffer, 'The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters' (2001) 25 *Harvard Environmental Law Review* 1; John Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?' (1992) 49 *Washington and Lee Law Review* 1227; Erich Vranes, *Trade and the Environment* (Oxford University Press, 2009).

<sup>2</sup> See, generally, Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Brill, 2009); Emily Lydgate, 'Sustainable Development in the WTO: From Mutual Supportiveness to Balancing' (2012) 11(4) *World Trade Review* 621; Niccolò Pietro Castagno, 'Sustainable Development and International Trade Law Paradigm: A Relationship to be Denounced?' (2014) 13(2) *Journal of International Trade Law and Policy* 136.

affect the rest of the world.<sup>3</sup> This has made them magnets for environmentalists who wish to preserve polar environments, thereby reducing negative effects from polar environmental degradation elsewhere in the world.<sup>4</sup> At the same time, however, it must be recognised that humans have long established interactions with these regions. The Arctic is home for millions of people, while the Antarctic possesses a wealth of scientific, exploration and tourism opportunities. This has necessitated a focus on sustainable development to align environmental and development goals more closely than many other regions of the world. The creativity of the polar regions could be harnessed to inspire other regions of the world in their effort to develop sustainably, as well as to inspire the similar developments in the global multilateral trading system. As one author put it:

I do not think there is any keyword that is more prominent and frequently mentioned in the whole discussion about the Arctic than sustainability. It has turned into a guiding star and a pronounced ambition of everyone concerned with the Arctic, whoever and wherever they are.<sup>5</sup>

The article begins with a discussion of trade in the context of the Arctic and the Antarctic. This provides the background for the use of polar examples in later sections by explaining the aspects of the polar regions that render them favourable to sustainable development as a unifying concept. This is noted through the language of ‘polar circumstances’: conditions which if reflected on the global stage could make sustainable development more palatable for international trade law. The article also rebuts the potential argument that the polar regions are *too unique*; ideas derived from Polar Law can and should be modified to suit other localities and issues.

The second part of the article deals with sustainable development as it currently exists in WTO Law. The concept is already enshrined in WTO legal texts, albeit more as a ‘weak’ principle rather than a legal rule. If sustainable development could be more universally accepted as either a ‘strong’ principle or rule of WTO Law, trade and the environment would be ever closer entwined. The

---

<sup>3</sup> See, for example, Jean Jouzel, Dominique Raynaud and Claude Lorius, *The White Planet: The Evolution and Future of Our Frozen World* (Princeton University Press, 2013); TA McClimans et al, ‘Interaction with the Global Climate System’ in Peter Lemke and Hans-Werner Jacobi (eds), *Arctic Climate Change: The ACSYS Decade and Beyond* (Springer, 2012); OM Johannessen, RD Muench and JE Overland (eds), *The Polar Oceans and Their Role in Shaping the Global Environment: The Nansen Centennial Volume* (American Geophysical Union, 1994).

<sup>4</sup> Among, of course, other more altruistic reasons for conserving polar environments.

<sup>5</sup> Peter Sköld, ‘Foreword’ in Gail Fondahl and Gary Wilson (eds), *Northern Sustainabilities: Understanding and Addressing Change in the Circumpolar World* (Springer, 2017) v. This book is an excellent overview of the status, challenges and future of sustainable development in the Arctic.

article points to examples in Polar Law where sustainable development can be likened to a strong principle. The reason for this strength lies in the acceptance – by officials, political leaders, judicial officers and the general population – of the importance of the concept. Polar Law is the product of polar circumstances, especially the political will to achieve prosperity in harmony with nature, which is such a dominant theme in the polar regions.

The final section of the article takes note of the *Paris Agreement* and United Nations' 2030 Agenda for Sustainable Development. Respectively, these legal and political advances provide greater impetus for a strong sustainable development principle at the WTO. They are a development of the circumstances which lay the groundwork for legal change. They are therefore steps towards a reading of sustainable development in WTO Law which matches the importance of that concept in Polar Law. In so doing, it makes suggestions on how this could occur in WTO Law. It must be repeated that Polar Law is not necessarily useful of itself to international trade. Instead, it is a combination of the circumstances behind the law, and the way the law has subsequently responded, which make it an interesting reference for other regions of the world.

## II TRADE AND THE POLAR REGIONS

### A *Polar Trade*

It is pertinent to begin with a discussion of trade in the polar regions, which will establish some of the reasons for which sustainable development could be a unifying concept for trade and the environment. The words 'polar trade' are not frequently seen in one sentence, especially for those who have little involvement with the Arctic and the Antarctic. Harsh climate, sparse population and general remoteness are some defining features of the polar regions, which this article will demarcate as the states having jurisdiction over territories north and south of the Arctic and Antarctic Circles respectively. Despite the practical difficulties associated with doing business in these environments, polar trade is on a long-term rise.

According to a recent report, as of 2013, around four million people live in the Arctic.<sup>6</sup> The population spans the full suite of economic activity, from aquaculture to agriculture, tourism, technology, financial services, the arts, and research and education.<sup>7</sup> Local businesses are seeking ways to cooperate with

---

<sup>6</sup> Joan Nymand Larsen and Gail Fondahl (eds), *Arctic Human Development Report* (Nordic Council of Ministers, 2014) 53.

<sup>7</sup> *Ibid* 154-68.

each other<sup>8</sup> and further integrate into the global economy. Integration runs both ways. For example, soy produced in Brazil is used in salmon farming in Norway;<sup>9</sup> while Norwegian tracking stations service US meteorological satellites on polar orbits.<sup>10</sup> Climate change is also revealing new opportunities in the High Arctic, with shipping routes that were once barred by ice now opening up.<sup>11</sup> Meanwhile in Antarctica, human activities remain primarily in science and tourism.<sup>12</sup> The resident population is made up of scientists and support staff. Nevertheless, science and tourism are also economic activities, both for the continent's international 'economy' and for the economies of the states whose governments and nationals are involved in Antarctica.<sup>13</sup> By way of example, Australia's Antarctic Strategy includes investments in an icebreaker, research and aeronautical infrastructure in Tasmania and Antarctica, and an ongoing programme tackling illegal, unreported and unregulated fishing in the Southern Ocean.<sup>14</sup> These are highly collaborative activities that involve trade in both goods and services.

Common to both the Arctic and the Antarctic is the question of natural resource exploitation, which has received much scholarly attention.<sup>15</sup> This includes extracting oil and gas from the seas<sup>16</sup> and minerals from the earth.<sup>17</sup> Exploiting resources could be seen as running against the need to protect the environment because such activities remove non-renewable substances and

---

<sup>8</sup> Arctic Economic Council, 'Strategic Planning Document 2016-2018' (27 April 2016).

<sup>9</sup> Karianne Askeland, 'Mitigating Environmental Problems across Borders: The Case of Soy from Brazil Used in Norway' (Master's Thesis, University of Oslo, 2016).

<sup>10</sup> Kongsberg Gruppen [Kongsberg Group], 'Kongsberg Satellite Services Will Deliver Services to NASA' (Media Release, 18 August 2017).

<sup>11</sup> Donald Rothwell, 'International Straits and Trans-Arctic Navigation' (2012) 43(3) *Ocean Development and International Law* 267; Thomas Nilsen, "'MV Nordic Barents" makes historic voyage', *Barents Observer*, 26 August 2010; Sandra Kilhof, 'Global Warming Opens Arctic to Polar Trade Routes and Tourism', *The New Economy* (online), 29 September 2014 <<https://www.theneweconomy.com/business/global-warming-opens-arctic-to-polar-trade-routes-and-tourism>>.

<sup>12</sup> Kees Bastmeijer, Machiel Lamers and Juan Harcha, 'Permanent Land-Based Facilities for Tourism in Antarctica: The Need for Regulation' (2008) 17(1) *Review of European Community and International Environmental Law* 84. For a near comprehensive analysis, see Tina Tin et al (eds), *Antarctic Futures: Human Engagement with the Antarctic Environment* (Springer, 2014).

<sup>13</sup> A general overview of Antarctica's present and futures from a multidisciplinary perspective is in Daniela Liggett et al, 'Is It All Going South? Four Future Scenarios for Antarctica' (2017) *Polar Record* <<https://doi.org/10.1017/S0032247417000390>>.

<sup>14</sup> Australian Government, *Australian Antarctic Strategy and 20 Year Action Plan* (Commonwealth of Australia, 2016) 22.

<sup>15</sup> For an introduction, see Natalia Loukacheva (ed), *Polar Law and Resources* (Nordic Council of Ministers, 2015).

<sup>16</sup> Graham McDowell and James Ford, 'The Socio-ecological Dimensions of Hydrocarbon Development in the Disko Bay Region of Greenland: Opportunities, Risks, and Tradeoffs' (2014) 46 *Applied Geography* 98; Quirin Schiermeier, 'The Great Arctic Oil Race Begins' (2012) 482 *Nature* 13.

<sup>17</sup> P Miles and NJR Wright, 'An Outline of Mineral Extraction in the Arctic' (1978) 19 *Polar Record* 11.

potentially contribute to harming the environment. For example, the first paragraph of the most recent Arctic Council ministerial declaration spoke of the impacts of climate change on the marine environment;<sup>18</sup> and it is common knowledge that the use of oil and gas for energy production and related activities contributes to climate change. Indeed, the Arctic Council, which is the preeminent forum of discussion among Arctic states, itself developed out of the earlier Arctic Environmental Protection Strategy,<sup>19</sup> which, as the name suggests, focused on protecting the environment. Nevertheless, the Council has not halted natural resource exploitation. That is because it is a vital economic activity for many of the Arctic states. Instead, it has sought ways of minimising potential harmful environmental impact of these activities and their products, such as through the *Marine Oil Pollution Preparedness and Response Agreement* of 2013,<sup>20</sup> which deals with oil spills, the Oil and Gas Guidelines,<sup>21</sup> and the Polar Code,<sup>22</sup> which deals with maritime safety and avoidance and mitigation of environmental impact.<sup>23</sup>

The Antarctic has a more developed international legal framework regulating conduct than the Arctic. However, save for brief mentions,<sup>24</sup> its foundational instrument, the *Antarctic Treaty*, did not place special emphasis on the environment. This is mostly a product of historical priorities on mitigating conflict and providing for scientific discovery.<sup>25</sup> Instead, environmental protection provisions are found in the treaty's *Madrid Protocol*.<sup>26</sup> Articles 2 and 3 declare:

The Parties commit themselves to the *comprehensive protection of the Antarctic environment* and dependent and associated ecosystems and hereby *designate Antarctica as a natural reserve*, devoted to peace and science.

---

<sup>18</sup> *Fairbanks Declaration* (Tenth Ministerial Meeting of the Arctic Council, 11 May 2017) para 1.

<sup>19</sup> *Ottawa Declaration* (Declaration on the Establishment of the Arctic Council, 19 September 1996).

<sup>20</sup> *Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic*, signed 15 May 2013, CTS 2016/4 (entered into force 25 March 2016).

<sup>21</sup> Arctic Council, 'Arctic Offshore Oil and Gas Guidelines' (Protection of the Arctic Marine Environment Working Group, 29 April 2009) <[http://www.pame.is/images/03\\_Projects/Offshore\\_Oil\\_and\\_Gas/Offshore\\_Oil\\_and\\_Gas/Arctic-Guidelines-2009-13th-Mar2009.pdf](http://www.pame.is/images/03_Projects/Offshore_Oil_and_Gas/Offshore_Oil_and_Gas/Arctic-Guidelines-2009-13th-Mar2009.pdf)>.

<sup>22</sup> *International Code for Ships Operating in Polar Waters*, IMO Doc MEPC 68/21/Add.1 (May 2015) annex 10.

<sup>23</sup> The Polar Code is an instrument of the International Maritime Organisation but has had significant input from the Arctic Council. See Protection of the Arctic Marine Environment Working Group, 'The Polar Code' (2018) <<https://pame.is/index.php/projects/arctic-marine-shipping/the-polar-code>>.

<sup>24</sup> *Antarctic Treaty*, signed 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) arts V, IX(1)(f).

<sup>25</sup> Wygene Chong, 'Thawing the Ice: A Contemporary Solution to Antarctic Sovereignty' (2017) 53(4) *Polar Record* 436, 437; Ben Saul and Tim Stephens (eds), *Antarctica in International Law* (Hart Publishing, 2015) xxvii-xxxvii.

<sup>26</sup> *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1455 (entered into force 14 January 1998).

The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, *shall be fundamental considerations in the planning and conduct of all activities* in the Antarctic Treaty area (emphasis added).

Notably, it is science that is the focus of Antarctic economic activity, rather than the broader range of concerns in the Arctic Council. The *Madrid Protocol* recently celebrated its thirtieth anniversary and is complemented by other instruments in the Antarctic Treaty System that protect living resources.<sup>27</sup> The Antarctic framework is an instance of an established legal framework that has expanded to embrace the environmental protection, while retaining its original concerns of science and non-militarisation. This protection is more than just a principle; being a commitment expressed in mandatory language in an article of a treaty.<sup>28</sup>

Therefore, polar communities are challenged to balance two competing interests: the need to preserve fragile environments and the need to develop in a competitive global setting. This combination of interests is a result of circumstances that are particularly apparent in the polar regions, which are characterised by fragile environments, harsh climates and sparse population. The product of these circumstances is a stronger role for sustainable development in law and policy circles. National governments capitalise on this in their external engagement; an example is Iceland's leadership on geothermal energy, where it is cooperating multilaterally through the United Nations and the World Bank,<sup>29</sup> *inter alia*. Other, non-polar regions of the world, particularly those that are more urban, are perhaps more likely to prioritise economic growth over environmental protection. This 'spectrum approach' further confirms the balancing act that is central to the trade-environment nexus. The polar regions provide examples of the balance in favour of the environment, or indeed harmony between trade and the

---

<sup>27</sup> *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 48 (entered into force 7 April 1982); *Convention for the Conservation of Antarctic Seals*, signed 1 June 1972, 1080 UNTS 176 (entered into force 11 March 1978).

<sup>28</sup> Compared with, say, aspirational language in a preamble of a treaty.

<sup>29</sup> See, for example, Utanríkisráðuneytið Íslands [Icelandic Ministry of Foreign Affairs], 'Iceland is Key Partner in Extensive Development Project on Geothermal Energy' (Media Release, 9 November 2012); María Mjöll Jónsdóttir, 'Statement of Iceland on Sustainable Development in 2nd Committee of the 70th Session of the General Assembly' (Speech delivered at the United Nations, New York, 20 October 2015).

environment, because, '[i]n essence natural and environmental resources provide the *raison d'être for remaining in this harsh environment*'<sup>30</sup> of the poles.

### B *Polar Circumstances and Common Interests*

It is timely to address a potential counter-argument against the influence of the polar regions on WTO Law, namely, that they are *too* different. This article proceeds on the basis that the poles are unique. One could respond thus with the contention that the special circumstances of the poles merit different treatment to the rest of the world; treatment which should not be imitated. That is a valid point. It can, nevertheless, be met with a response.

As expounded earlier, the aims of this article are, firstly, to build bridges between two bodies of scholarly literature – Polar Law and WTO Law – and, secondly, to incorporate recent developments in international environmental law into this analysis by likening them to the circumstances that exist in the polar regions. There is no doubt that solutions crafted for the polar regions cannot be applied directly to other bodies of law. However, with some modification, it could be applied, or could be inspiration for further development. Scholars of comparative law will know this in the context of comparisons of domestic law.<sup>31</sup> While comparisons of international law are not quite the same because they lack the underlying societal and cultural values that inform domestic law, similar principles can apply.

This article could be seen as an exercise in comparative international law. Insights may be drawn from Polar Law to inform WTO legal developments. But they do not have to be applied as they are, most likely because of differing political interests. Observers of the polar regions will note that cooperation among polar states is very strong, even if bilateral relations are weak between the same states in other international arena. That said, these polar circumstances might be able to be replicated elsewhere, if similarly common interests can be found.

Northern states have forged cooperative partnerships despite strains on their bilateral relations elsewhere in the world. While relations between the Russian Federation and the United States of America are somewhat frosty at the time of

---

<sup>30</sup> Umut Riza Ozkan and Stephan Scott, 'Sustainable Development and Capabilities for the Polar Region' (2013) 114(3) *Social Indicators Research* 1259, 1280 [emphasis added].

<sup>31</sup> See, for an introduction, George Mousourakis, 'Transplanting Legal Models across Culturally Diverse Societies: A Comparative Law Perspective' (2010) 57 *Osaka University Law Review* 87.

writing,<sup>32</sup> their Arctic relationship is more productive. The two nations both led a task force in the Arctic Council that worked on the regional search and rescue agreement.<sup>33</sup> It must be emphasised that there is a distinction between productive cooperation and growth in military assets; the latter does not necessarily imply impending conflict.<sup>34</sup> Consider, too, the good cooperation between the United States and China in the Arctic, even though China is not a member of the Arctic Council.<sup>35</sup> This regional relationship is productive in spite of tensions in the South China Sea.<sup>36</sup> As a prominent scholar noted in 2009:

Much of the current flap in the media about the importance of the Arctic and the prospect of jurisdictional conflicts and even armed clashes over control of the region's reserves of oil and gas and other non-renewable resources is more alarmist than alarming.<sup>37</sup>

The same applies to relationships at the south of our planet. For example, Antarctic cooperation between the United Kingdom and Argentina is very much alive, thanks to the frozen sovereignty mechanism of the *Antarctic Treaty*, which freezes territorial claims without dispelling them, encouraging focus on science and the environment.<sup>38</sup> The continual development of Antarctic cooperation, as mentioned in a joint communiqué in 2016,<sup>39</sup> is despite ongoing tension between the two states over the Falkland Islands (Las Malvinas) over which they went to war in 1982. However, the Antarctic relationship is not immune from dispute, especially when the sensitive issue of territorial sovereignty is brought to the fore.<sup>40</sup> This highlights the need to concentrate on issues of common concern.

---

<sup>32</sup> Jack Maidment, 'Relationship between Russia and US Most 'Dangerous' Since Cold War, Says Former UK Ambassador to Moscow', *The Telegraph* [online], 7 July 2017 <<http://www.telegraph.co.uk/news/2017/07/07/relationship-russia-us-dangerous-since-cold-war-says-former/>>.

<sup>33</sup> Anton Vasiliev, 'The Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic – A New Chapter in Polar Law' in Natalia Loukacheva (ed), *Polar Law Textbook II* (Nordic Council of Ministers, 2013) 55-6.

<sup>34</sup> Njord Wegge, 'The Political Order in the Arctic: Power Structures, Regimes and Influence' (2011) 47 *Polar Record* 165, 167-8.

<sup>35</sup> Ingrid Lundestad and Øystein Tunsjø, 'The United States and China in the Arctic' (2015) 51(4) *Polar Record* 392.

<sup>36</sup> Jane Norman, 'South China Sea: Australia Is Worried About China's activities — Here's Why', *Australian Broadcasting Corporation News* [online], 1 December 2017 <<http://www.abc.net.au/news/2017-11-29/south-china-sea-why-is-australia-worried-about-chinas-stance/9206998>>.

<sup>37</sup> Oran Young, 'Whither the Arctic? Conflict or cooperation in the Circumpolar North' (2009) 45(1) *Polar Record* 73, 81.

<sup>38</sup> For more, see Wygene Chong, 'Thawing the Ice: A Contemporary Solution to Antarctic Sovereignty' (2017) 53(4) *Polar Record* 436.

<sup>39</sup> 'UK and Argentina Joint Communiqué' (United Kingdom Foreign and Commonwealth Office, 13 September 2016).

<sup>40</sup> 'Argentina Strongly Protests UK's Naming Queen Elizabeth Land in Antarctica', *Merco Press* [online], 22 December 2012 <<http://en.mercopress.com/2012/12/22/argentina-strongly-protests-uk-naming-queen-elizabeth-land-in-antarctica>>.

The recent multilateral agreement to finalise a Central Arctic Ocean fisheries treaty<sup>41</sup> is further evidence of cooperation on common interests.<sup>42</sup> The instrument, which has not yet been adopted, would bring together Canada, China, the Faroe Islands and Greenland, the European Union (comprising 28 member states), Iceland, Japan, South Korea, Norway, Russia and the United States.<sup>43</sup> According to the Chairman's Statement:<sup>44</sup>

The Agreement will prevent unregulated commercial fishing in the high seas portion of the central Arctic Ocean, an area that is roughly 2.8 million square kilometers in size, roughly the size of the Mediterranean Sea. Commercial fishing has never been known to occur in this area, nor is it likely to occur in the near future. However, given the changing conditions of the Arctic Ocean, the governments in question developed this Agreement in accordance with the precautionary approach to fisheries management.

The Agreement will establish and operate a Joint Program of Scientific Research and Monitoring with the aim of improving the understanding of the ecosystem(s) of this area and, in particular, of determining whether fish stocks might exist in this area that could be harvested on a sustainable basis. The Agreement envisions the possibility that one or more additional regional fisheries management organizations or arrangements may be established for this area in the future.

The draft Central Arctic Ocean treaty places the environment above an economic activity, applying the precautionary principle from international environmental law.<sup>45</sup> While it is fundamentally concerned with fish stocks, it will also affect polar trade in fish and associated supply chain industries. The agreement thus not only demonstrates how multilateral cooperation can occur when there are common interests, but also shows how closely linked environmental and trade interests are becoming.

Parallels can therefore be drawn between delicate geopolitical balances in the polar regions and other global geopolitics. There is a very strong focus in the polar regions on common interests despite disagreements on other topics. The aim of this article is to illustrate how this can be done when the circumstances are favourable to a particular common interest: promotion of sustainable development. This in turn is intended to connect polar ideas with those in the

---

<sup>41</sup> The full title is the draft *Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean*.

<sup>42</sup> 'Meeting on High Seas Fisheries in the Central Arctic Ocean: Chairman's Statement' (Washington DC, 28-30 November 2017).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> See, generally, Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 3<sup>rd</sup> ed, 2012) 217-27.

general literature on international trade. As will be discussed in the subsequent sections, WTO Law is advanced in its goal of having sustainable development as a guiding principle, but rather as a ‘soft’ than as a ‘hard’ principle. It may benefit from ideas from regions which have already had to tackle similar problems in the past. After all, sustainable development is quickly becoming a common interest for the world-at-large.

### C *Sustainable Development as a WTO Legal Principle*

Sustainable development is a concept that could transform the balancing act into one where trade and environmental goals are aligned. To do this, it should encourage trade in sustainable goods and services and discourage trade in unsustainable goods and services. It should do this in concert with fundamental principles in the WTO system. Essentially, it should serve as a kind of artificial market regulation that promotes sustainability in trade activities. In a similar fashion, in the economic context, intellectual property rights are an artificial market regulation that balance the need to reward innovation with the need to avoid an overwhelming intellectual monopoly on a market. This section will briefly trace the history of sustainable development and its current status in WTO Law. It notes that sustainable development is not yet a central WTO principle but that it may become one over time. Relevantly, it highlights how polar circumstances have either been directly involved in the development of the concept or would be useful models for its further development.

### D *Origins, Meanings and Application in the Polar Regions*

Sustainable development is a term that is perhaps overused in international discourse. The common meanings of its constituent words refer to ‘[capability] of being maintained or continued at a certain rate or level’<sup>46</sup> and a number of ‘[s]enses relating to growth or becoming more advanced or elaborate’.<sup>47</sup> However, it has come to encapsulate a sophisticated set of meanings, both positivist and normative.<sup>48</sup> It is beyond the reach of this article to undertake a detailed analysis of the term. What follows is only enough history to support the article’s aim of demonstrating the utility of Polar Law to WTO Law.<sup>49</sup> It will explain how the meaning of sustainable development in the polar regions is broader than the nexus

---

<sup>46</sup> *Oxford English Dictionary* (Oxford University Press, 3<sup>rd</sup> ed, 2012) ‘sustainable, *adj.*’.

<sup>47</sup> *Ibid* ‘development, *n.*’.

<sup>48</sup> This article has used both. The term is both a reflection of reality and an aspirational goal.

<sup>49</sup> For an extended analysis, see Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Brill, 2008).

between the environment and trade, although that nexus is still at the heart of the definition. It will also become clear that the practical effect of the concept is as important as its theoretical meaning.

Sustainable development is generally recognised as having arisen out of the so-called *Brundtland Report* of the World Commission on Environment and Development.<sup>50</sup> It was named for its chair, Gro Harlem Brundtland, a former Prime Minister of Norway. The report was a comprehensive study of the intersection between the environment and both economic and social development. The opening lines noted:

Our report, Our Common Future, is not a prediction of ever increasing environmental decay, poverty, and hardship in an ever more polluted world among ever decreasing resources. We see instead the possibility for a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base. And we believe such growth to be absolutely essential to relieve the great poverty that is deepening in much of the developing world.<sup>51</sup>

This indicates that sustainable development concerns the cooperation between environmental and economic goals. It reconciles economic growth with the need to protect the environment by focusing on economic policies that grow the ‘environmental resource base’, rather than reduce it. However, the Commission did not leave it at that, approaching the definition in a more sophisticated manner later in the report:

Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>52</sup>

This view of sustainable development renders its effect broader than the commerce-environment interface. It captures the idea of inter-generational equity. By going beyond the duality, the concept is able to incorporate other societal interests such as socio-cultural and scientific issues. Further, as one author notes, the concept should be applied to the whole rather than individual measures, which may be unsustainable on their own:

Sustainable development as a guiding concept for international law does not and cannot (necessarily and under all circumstances) mean giving equal weight to all (economic, social) concerns. Sustainable development is eventually about making compromises. But these compromises have to be sustainable and—even more

---

<sup>50</sup> Gro Harlem Brundtland et al, *Report of the World Commission on Environment and Development*, UN GAOR, 42<sup>nd</sup> sess, Agenda Item 83(e), UN Doc A/42/427 (4 August 1987) annex.

<sup>51</sup> *Ibid* 18 [3] (emphasis in original).

<sup>52</sup> *Ibid* 24 [27].

crucially—the sum of the compromises has to be sustainable. Because it will be the sum of all measures that gives an indication of their sustainability.<sup>53</sup>

The multifaceted version of sustainable development is the most relevant to Polar Law. It is possible that the urge to protect and study polar environments is partially responsible for this; sustainable development must include scientific interests at both poles. Additionally, in the Arctic, more anthropological considerations are pertinent, such as socio-cultural and indigenous matters. While these do exist elsewhere in the world, there is a peculiar blend of these considerations in the polar regions due to the pristine and vulnerable nature of their environments, and awareness of this among officials and the general population.

For the Arctic, the broad definition of sustainable development has been noted as still the most useful.<sup>54</sup> However, it has been acknowledged that there are many unanswered questions about sustainable development in the Arctic,<sup>55</sup> even though it theoretically permeates through research and policy. In particular, how does it intersect with disciplines in the humanities, rather than just the social, physical and natural sciences, which have received much academic attention? These questions are being addressed through further research,<sup>56</sup> the results of which should improve our understanding of the circumstances that make the polar regions a useful reference point for sustainable development activities.

The importance of a holistic and integrated understanding of the Antarctic has also been mentioned in scholarly literature.<sup>57</sup> New unmanned aerial vehicle (drone) technologies could have potential impact not only on the environment and wildlife,<sup>58</sup> but also on the legal framework freezing sovereignty<sup>59</sup> and even philosophical questions such as, ‘Can one really have a wilderness if drones buzz overhead?’<sup>60</sup> At the same time, drones can be of great utility to science<sup>61</sup> and, ironically, environmental management such as dealing with illegal, unreported

---

<sup>53</sup> Christina Voigt, ‘Environmentally Sustainable Development and Peace: The Role of International Law?’ in Cecilia Bailliet and Kjetil Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press, 2015) 175-6.

<sup>54</sup> Andrey Petrov et al, ‘Arctic Sustainability Research: Toward a New Agenda’ (2016) 39(3) *Polar Geography* 165, 166.

<sup>55</sup> *Ibid* 170-3.

<sup>56</sup> *Ibid* 173-6.

<sup>57</sup> See, generally and by way of example, MC Kennicutt et al, ‘Delivering 21<sup>st</sup> Century Antarctic and Southern Ocean Science’ (2016) 28(6) *Antarctic Science* 407.

<sup>58</sup> See, generally, David Leary, ‘Drones on Ice: An Assessment of the Legal Implications of the Use of Unmanned Aerial Vehicles in Scientific Research and by the Tourist Industry in Antarctica’ (2017) 53(4) *Polar Record* 343.

<sup>59</sup> *Ibid* 355.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* 344.

and unregulated fishing.<sup>62</sup> They are, of course, popular for tourism promotion and among tourists themselves. These issues need to be analysed through multidisciplinary lenses that transcend the economic-environmental interface, even though this interface lies at the heart of the lay meaning of sustainable development.

Notwithstanding difficulties in theoretical meaning, there are many polar case studies that can be considered as activities using sustainable development in practice. These can be drawn upon to demonstrate the ‘practical meaning’ of the concept and, as will be seen, they do not necessarily involve hard law. One author points to the Oil and Gas Guidelines<sup>63</sup> of the Arctic Council as an example of soft law done well.<sup>64</sup> The document is neither a form of hard law nor an aspirational principle. Rather it is a practical set of guidelines for an activity that will have both environmental impact and economic benefit. Importantly, the guidelines are being ‘embraced by key actors’ and were developed by both governments and indigenous groups:<sup>65</sup> parties that are often in direct conflict in other situations. The system allowing for indigenous groups to share the same table as member states of the Arctic Council is unique in international law and a thought-provoking model for engaging local groups.<sup>66</sup>

The use of common interests to achieve sustainable development in practice has also occurred on the non-legal plane. A scenario played out in the Greenlandic extractive industry, where a smaller company was awarded a contract over a larger company partly on the basis of its close engagement with the local community.<sup>67</sup> As the author writes:

---

<sup>62</sup> Ibid.

<sup>63</sup> Arctic Council, ‘Arctic Offshore Oil and Gas Guidelines’ (Protection of the Arctic Marine Environment Working Group, 29 April 2009) <[http://www.pame.is/images/03\\_Projects/Offshore\\_Oil\\_and\\_Gas/Offshore\\_Oil\\_and\\_Gas/Arctic-Guidelines-2009-13th-Mar2009.pdf](http://www.pame.is/images/03_Projects/Offshore_Oil_and_Gas/Offshore_Oil_and_Gas/Arctic-Guidelines-2009-13th-Mar2009.pdf)>.

<sup>64</sup> Rebecca Bratspies, ‘Sustainability: Can Law Meet the Challenge?’ (2011) 34 *Suffolk Transnational Law Review* 283, 307-10.

<sup>65</sup> Ibid.

<sup>66</sup> There are, however, practical issues, especially with regard to funding, which impede their participation at lower level meetings. See, for example, Sebastian Knecht, ‘The Politics of Arctic International Cooperation: Introducing a Dataset on Stakeholder Participation in Arctic Council Meetings, 1998-2015’ (2017) 52(2) *Cooperation and Conflict* 203, 219-20. It should be noted that the Council is changing and suggestions for its reform have been made, but these do not advocate for removal of the permanent participation of indigenous peoples. On this see, generally, Margherita Paola Polo and Lara Fornabaio, ‘Participation as the Essence of Good Governance: Some General Reflections and a Case Study on the Arctic Council’ (2017) 8 *Arctic Review on Law and Politics* 139; Timo Koivurova, ‘How to Improve Arctic International Governance’ (2016) 6 *University of California Irvine Law Review* 83.

<sup>67</sup> Pernille Moeller, ‘Thriving in the Cold – The Challenge of Sustainable Development in the Arctic’, *Bath Business and Society* [blog], 19 July 2017 <<http://blogs.bath.ac.uk/business-and-society/2017/07/19/thriving-in-the-cold/>>.

On paper, the large multinational seemed so much more capable than the smaller company. It was the smaller company, however, that successfully entered the market, while the multinational's bid failed. Both companies sought partnership, but did so in significantly different ways. The multinational went in with a state ambassador and negotiated hard for favourable conditions with politicians and high level officials. The smaller project also sought partnerships but on a much more local level. Its strongest advocate in the permit process became the small settlement which now hosts the mine. It also chose to establish a local office early in the process, which enhanced the perceived legitimacy of the project.<sup>68</sup>

Close ties to government can be tricky, not least when you seek to extract natural resources in developing economies. There is risk of corruption, and the reputational risk from that may outweigh the initial benefits. Buy-in from local government certainly helped both projects, however it was the real partnership with the local settlement that secured the smaller company a steady supply of workers and the necessary licence to operate. Time, an essential component of social capital, was a vital ingredient.

Thus, the lesson of using sustainable development as a common interest that transcends external disagreement is an important one that appears in the state-to-state relationship,<sup>69</sup> the state-to-community relationship and the company-to-community relationship in the Arctic. The WTO should capitalise on the growing common interest in sustainable development to advance the status of the concept in WTO Law. The weight that the term sustainable development carries when it is called upon is as important as its theoretical existence and meaning.

### *E WTO Law Principles*

There is a lot to be said for sustainable development being a general principle of international law that could be applied by WTO bodies.<sup>70</sup> It is true that the concept has found roots in treaties and state practice, some in existence before the *Brundtland Report*.<sup>71</sup> However, the term 'principle' is slippery to define as it can encapsulate many ideas. Indeed, this article has referred to 'fundamental', 'central', 'strong' and 'weak' principles, indicating that the legal weight of a principle is a matter of degree.

---

<sup>68</sup> Ibid.

<sup>69</sup> Discussed earlier.

<sup>70</sup> See, generally, Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Brill, 2008).

<sup>71</sup> Ibid ch IV.

It should be acknowledged that the analysis in this section concentrates on secondary sources. The focus of this article entails not engaging in a comprehensive examination of legal interpretations of sustainable development or other principles in WTO cases. This understanding is sufficient to understand what Polar Law can offer WTO Law and how, broadly speaking, this could be progressed.

A good starting point is this paragraph from Andrew Mitchell's seminal work on WTO legal principles:

A common feature of legal principles is that they are uncertain in scope and meaning. This problem is compounded by the fact that principles are often described in imprecise and conflicting ways in the relevant literature and decisions of the WTO Tribunals and other international tribunals.<sup>72</sup>

There are many principles that operate in WTO Law. Mitchell's subsequent analysis runs the gamut of international legal principles, including general principles of law and principles of international custom. The application of non-WTO Law principles in WTO Law will depend on a number of factors, such as whether *lex specialis* should apply, or whether the principle is being used for interpretation or application. For present purposes, the focus will be on fundamental principles within WTO Law, of which Mitchell identifies three: trade liberalisation, non-discrimination and reciprocity.<sup>73</sup> The names are self-explanatory. It is obvious that the WTO seeks to liberalise trade, which historically had been quite restrictive. In order to do so, states should avoid discriminating between goods and services on the basis of nationality. Finally, any specific treatment should be reciprocated, which encourages favourable treatment rather than non-favourable treatment. Of the three principles, non-discrimination is perhaps the most evident through its appearance in articles I and III of the *General Agreement on Tariffs and Trade* (GATT),<sup>74</sup> *inter alia*. Trade liberalisation and reciprocity are more discreet but also manifest themselves in perambulatory text. For example: 'develop an integrated, more viable and durable multilateral trading system encompassing... the results of past trade liberalization

---

<sup>72</sup> Andrew Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008) 31. For an earlier and slightly different perspective, see Meinhard Hilf, 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?' (2001) 4(1) *Journal of International Economic Law* 111.

<sup>73</sup> Andrew Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008) 37-43.

<sup>74</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A arts I, III ('*General Agreement on Tariffs and Trade 1994*').

efforts,<sup>75</sup> and ‘... contributing to these objectives by entering into reciprocal and mutually advantageous arrangements...’<sup>76</sup>

### F *The Principle of Sustainable Development*

Sustainable development is not listed in the above three ‘fundamental principles’. This may be due to a combination of four factors. Unlike non-discrimination, sustainable development does not appear directly in any article of any WTO treaty. It exists only in perambulatory text of the *Marrakesh Agreement*: ‘... allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development’.<sup>77</sup> Unlike trade liberalisation, sustainability is not an immediately apparent goal of a world trade organisation. Thirdly, sustainable development does not enjoy the long-standing recognition accorded to reciprocity, which features throughout international law and stretches as far back as the law on diplomatic immunities.<sup>78</sup> Finally, as the author noted, it was not possible to list all principles exhaustively.<sup>79</sup> However:

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.’ 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.<sup>80</sup>

It should be noted that the existence of sustainable development in the perambulatory text of the *Marrakesh Agreement* could be seen as evidence of a principle in itself.<sup>81</sup> This article proceeds on the basis that the principle’s weight matters; and sustainable development does not yet carry the weight of more fundamental principles.

None of Mitchell’s three identified WTO Law principles cannot coexist with sustainable development, even if they disagree on occasion. On trade

---

<sup>75</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) preamble.

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

<sup>77</sup> *Ibid.*

<sup>78</sup> Wygene Chong, ‘Harmonisation in Comparative Law: Lessons in Diplomatic Immunities’ (2017) 2 *Perth International Law Journal* 1.

<sup>79</sup> Andrew Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008) 37.

<sup>80</sup> Emily Lydgate, ‘Sustainable Development in the WTO: From Mutual Supportiveness to Balancing’ (2012) 11(4) *World Trade Review* 621.

<sup>81</sup> Meinhard Hilf, ‘Power, Rules and Principles – Which Orientation for WTO/GATT Law?’ (2001) 4(1) *Journal of International Economic Law* 111, 112, 118-9.

advancement, it is possible for trade in sustainable goods and services to be liberalised while unsustainability is discouraged. An obvious solution is to ban trade in unsustainable goods. One such example is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*,<sup>82</sup> more commonly known by its abbreviation CITES. The Convention does not mention sustainable development but is clearly linked to the principle; it would be unsustainable to continue to trade in endangered species thereby contributing further to their loss. CITES is an indication of the importance of sustainable development to the international and WTO community – they are virtually the same – and there is close cooperation between CITES’ Secretariat and the WTO.<sup>83</sup> However, as a standalone treaty, CITES lacks the comprehensiveness that a WTO sustainable development principle could offer to the multilateral trading system.

Another method is the tweaking of market regulations to encourage sustainability, such as through carbon pricing or laws on public morals. The seal products dispute is a key case in this regard, being the first report in which the Appellate Body expressly recognised animal welfare as justification for a breach of non-discrimination.<sup>84</sup> It is also essentially a polar dispute, with much of the argument centred on practices in Denmark (via Greenland), Canada, Norway, Sweden and Finland; all are members of the Arctic Council. The dispute concerned European Union regulations that banned the import of products derived from seals, except insofar as they come from hunts by indigenous communities or for marine resource management purposes, or if they were being carried by travellers in specific situations. These were held to breach non-discrimination in GATT articles I and III, but be justified by the public morals exception in article XX(a). The regulations did fail on a rather technical note by not meeting the special ‘arbitrary discrimination’ requirement of the *chapeau* to article XX(a) but this was rectified in modified regulations released about a year later.<sup>85</sup>

---

<sup>82</sup> Opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

<sup>83</sup> Marceil Yeater and Juan Vasquez, ‘Demystifying the Relationship between CITES and the WTO’ (2001) 10(3) *Review of European, Comparative and International Environmental Law* 271.

<sup>84</sup> Appellate Body Report, *European Communities – Seal Products*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014).

<sup>85</sup> *Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 Amending Regulation (EC) No 1007/2009 on Trade in Seal Products and Repealing Commission Regulation (EU) No 737/2010* [2015] OJ L 262/1.

The seal products case demonstrates many things and much has been written on it.<sup>86</sup> However, for sustainable development, it offers one lesson: that the Appellate Body is willing to extend the reach of article XX to keep up with developments outside WTO Law. This has occurred in the past, but in circumstances more obviously attuned to sustainability. For instance, the ‘shrimps case’ of 1998 interpreted article XX(g) on exhaustible natural resources in line with the principle of sustainable development, with the Appellate Body referring to the preamble of the *Marrakesh Agreement* as its source.<sup>87</sup> Sustainability, intuitively, connotes an attempt to avoid loss of some resource. That is, it aims to find a way of life that maintains the resource at present levels, to allow for future generations. Thus, previous interpretations of article XX, although being generous in their reference to sustainable development, do not go beyond the intuitive link between sustainability and the resource loss.

In this respect, the seal products case goes further by targeting public morals rather than scientific loss or endangerment. The concept of public morals is fluid and appears to allow individual states to define it ‘according to their own systems and scales of values.’<sup>88</sup> This distinguishes the seal products case from the shrimp case, which centred on the link between resource loss and sustainability, and CITES, where bans are justified purely because of the endangered status of species. Given that most states have committed to UN sustainable development goals and combat climate change through the *Paris Agreement*, it is foreseeable that these objects could be raised as examples of public morals to which they are bound. This would accord with a general trend observed in international environmental law that is moving from binding uniform rules to a more voluntary, non-interventionist approach to governance.<sup>89</sup> It is telling that this advancement in WTO Law has come about in a case set in the polar regions. This underscores the importance of having the correct circumstances to justify legal change, even if it amounts to a change in interpretation. The polar regions, as a result of their

---

<sup>86</sup> See, for example, Nikolas Sellheim, *Legislating the Blind Spot: The EU Seal Regime and the Newfoundland Seal Hunt* (PhD Thesis, Lapin Yliopisto [University of Lapland], 2016); Gabrielle Marceau, ‘A Comment on the Appellate Body Report in *EC-Seal Products* in the Context of the Trade and Environment Debate’ (2014) 23(2) *Review of European Community and International Environmental Law* 318; Ming Du, ‘Treatment No Less Favorable’ and the Future of National Treatment Obligation in GATT Article III:4 after *EC-Seal Products*’ (2016) 15(1) *World Trade Review* 139; Paola Conconi and Tania Voon, ‘*EC-Seal Products*: The Tension between Public Morals and International Trade Agreements’ (2016) 15(2) *World Trade Review* 211.

<sup>87</sup> Appellate Body Report, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) 48 [129], 50 [131].

<sup>88</sup> Paola Conconi and Tania Voon, ‘*EC-Seal Products*: The Tension between Public Morals and International Trade Agreements’ (2016) 15(2) *World Trade Review* 211, 220.

<sup>89</sup> See, generally, Jeffrey McGee and Jens Steffek, ‘The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law’ (2016) 28 *Journal of Environmental Law* 37.

characteristics, more readily produce circumstances more favourable to sustainable development.

Mitchell's second and third principles are non-discrimination and reciprocity, on which Polar Law offers an illustration. The principles of non-discrimination, and to an extent reciprocity, exists in the 1920 *Svalbard Treaty*.<sup>90</sup> By that treaty, Norway was granted sovereignty over the Arctic archipelago of Svalbard, but simultaneously was bound to grant nationals of other signatories equal access and rights in enunciated areas.<sup>91</sup> This is a simultaneous application of national treatment and most-favoured-nation treatment, albeit for only 45 parties versus the 164 members of the WTO. It is also an instance of reciprocity in that each state is to treat each other state's nationals in the same fashion, although Norway, being the host state, has some advantages in laying down regulations. The primary activity on Svalbard has been resource exploitation, specifically of coal. These other activities are a focus for the Norwegian Government, as exemplified in its 2016 Svalbard White Paper.<sup>92</sup> While the White Paper does not rule out resource exploitation, it recognises that the coal industry is reducing in importance. In its stead, higher education, research,<sup>93</sup> tourism, space-related activities and other industries are developing.<sup>94</sup>

For the WTO, Svalbard is a model of international law the practical application of which has changed to suit developing circumstances. The *Svalbard Treaty* is not a trade instrument. Its primary goal was to settle an emerging sovereignty disagreement, a feature it shares with its more famous southern cousin, the *Antarctic Treaty*.<sup>95</sup> Nonetheless, the treaty has accommodated a blend of economic and environmental interests, which numerous countries have peacefully exploited, especially the sovereign state Norway and the nearby Russian Federation. This blend has tilted more to environmentally friendly causes over time, responding to changing political interests as well as a wearing down of coal reserves. Cooperative ventures such as the Svalbard Global Seed Vault show

---

<sup>90</sup> *Traité concernant le Spitzberg*, signed 9 February 1920, [1925] Overenskomster med fremmede stater 511 (entered into force 14 August 1925) art 3. A comprehensive analysis of the treaty is available in the seminal work of Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (Scandinavian University Press, 1995).

<sup>91</sup> *Traité concernant le Spitzberg*, signed 9 February 1920, [1925] Overenskomster med fremmede stater 511 (entered into force 14 August 1925) arts 2, 3, 7.

<sup>92</sup> Det Kongelige Justis- og Beredskapsdepartement [Norwegian Ministry of Justice and Public Security], *Svalbard* (White Paper, Meld. St. 32, 2016).

<sup>93</sup> On research and education, see Ole Misund et al, 'A Norwegian Pillar in Svalbard: The Development of the University Centre in Svalbard' (2017) 53(3) *Polar Record* 233.

<sup>94</sup> Det Kongelige Justis- og Beredskapsdepartement [Norwegian Ministry of Justice and Public Security], *Svalbard* (White Paper, Meld. St. 32, 2016) 5.

<sup>95</sup> *Antarctic Treaty*, signed 1 December 1959, [1961] ATS 12 (entered into force 23 June 1961).

sustainable development working in concert with non-discrimination, while the University Centre in Svalbard shows the same in relation to advancement of trade in services. These changes were not orchestrated through dramatic modification of the law. Rather, they developed over time under the existing legal framework. Similarly, sustainable development could further develop under the WTO legal system as political interests shift towards environmental goals while simultaneously acknowledging the need for economic growth.

Finally, it is important to address the idea of sustainable development as an objective of WTO Law. This section has referred to ‘environmental goals’ and this could be seen as a way of understanding the position of sustainable development in WTO Law, namely, as an objective based on a principle taken from other international legal domains. This reasoning is sound but not fatal to the investigation in this section. It is plain even from the WTO website that the organisation strives to achieve sustainable development and recognises it as an objective:<sup>96</sup>

Sustainable development and protection and preservation of the environment are *fundamental goals* of the WTO. They are enshrined in the Marrakesh Agreement, which established the WTO, and complement the *WTO’s objective* to reduce trade barriers and eliminate discriminatory treatment in international trade relations...

The WTO contributes to protection and preservation of the environment through *its objective* of trade openness, through its rules and enforcement mechanism, through work in different WTO bodies, and through ongoing efforts under the Doha Development Agenda.

However, this article concentrates on the ‘rules and enforcement mechanism’ and associated matters such as soft law and practical applications of the rules. Sustainable development is undoubtedly an objective in polar, trade and many other domains, but the effect of a principle – especially a strong one – is quite different to the pursuit of an objective. It goes to the distinction between the aspirational (objective) and the substantive (principle or rule).

The preceding has established that sustainable development is probably a principle of WTO Law. It has been acknowledged by the WTO secretariat as a principle, and features in the perambulatory text of the *Marrakesh Agreement, inter alia*. The seal products dispute at the WTO, which is set in the polar regions, has laid a potential pathway for sustainable development to become more than just a principle. Further, the case of Svalbard has shown how legal frameworks

---

<sup>96</sup> World Trade Organization, *Trade and Environment* <[https://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envir_e.htm)> (emphasis added).

can adapt over time to changing societal and political interests. That is, it demonstrates the situation at the end of the pathway laid down by the seal products case. It is to changing global political interests in the context of sustainable development that the article now turns.

### III PATHWAYS FOR SUSTAINABLE DEVELOPMENT IN WTO LAW

National political interests are generally informed by a broad range of societal concerns, irrespective of the particular governance arrangements of a country.<sup>97</sup> Thanks to the wonders of modern technology, these societal concerns are increasingly shared across borders. One such concern is the need to protect the environment, which has seen recognition in both the *Paris Agreement* and the 2030 sustainable development goals. This section analyses how these recent developments could signal a shift towards sustainable development as a stronger principle for international trade and how this transition could be managed. It highlights how these developments are akin to the conditions that exist in the polar regions which make sustainable development so fundamental to Polar Law.

#### A *Recent Developments*

2015 was a remarkable year for the environment. First, the 2015 *Paris Agreement*<sup>98</sup> acknowledges the threat of climate change and humanity's ability to address it. The Agreement specifically considers sustainable development and the twin goals of 'climate resilience and low greenhouse gas emissions development...'.<sup>99</sup> Thus, an instrument whose primary purposes are environmental protection and restoration also weaves development into its objectives. Indeed, the phrase 'sustainable development' is mentioned nine times in total in the Agreement. Its direct influence in this and other treaties is strengthening its authority as an international legal principle, which could be applied in WTO Law.

---

<sup>97</sup> There are, of course, exceptions to this statement.

<sup>98</sup> *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).

<sup>99</sup> *Ibid* art 2(1)(b).

The *Paris Agreement* came in the wake of the 2030 Agenda for Sustainable Development, to which the UN General Assembly also gave its assent in 2015.<sup>100</sup> Contrary to its title, the Agenda is not focused solely on the trade-environment nexus. It covers a much broader range of issues within five areas: people, planet, prosperity, peace and partnership.<sup>101</sup> Crudely speaking, sustainable development in the traditional sense involves only ‘planet’ and ‘prosperity’. The Agenda reflects a widening of meaning which has been occurring over time.<sup>102</sup> This is a double-edged sword. On the one hand, it exemplifies the ‘principle of integration’ which is also present in WTO Law; that trade issues cannot be considered in isolation from other related issues.<sup>103</sup> On the other hand, broad meaning can lead to confusion on how to apply the principle. It is important therefore, in the WTO context, that a ‘trade-centric’ interpretation of sustainable development be adopted, lest the organisation lose focus of its *raison d’être*. Of course, this is not to ignore social or cultural aspects of the principle;<sup>104</sup> it is simply an acknowledgement that the WTO ought to take one step at a time in integrating traditionally external concepts into its system. The important point is that these two developments are an indication of sustainable development becoming a common interest for the entire planet, not just particular regions or particular sectors. Being a common interest makes it easier for states to rally around the principle, which can strengthen it in spite of concurrent external disagreements, as explained earlier in section 2.2.

### B Pathways for a Stronger Principle

There are several pathways for sustainable development to mature in the WTO Law context. This article does not profess to have the answer nor does it tackle the issue in any comprehensive manner. The aim is to simply outline the issues while noting that the conditions exist for the pathways to be pursued. These pathways for a stronger WTO principle include a new instrument, treaty modification, ministerial declaration and a decision of the Appellate Body. As discussed earlier, this article does not believe a standalone instrument to be achievable or worthwhile, given existing difficulties with negotiations on the Doha round.<sup>105</sup> Treaty modification is likely to run into similar political problems,

---

<sup>100</sup> *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN GAOR, GA Res 70/1, 70<sup>th</sup> sess, 4<sup>th</sup> plen mtg, Agenda Items 15 and 116, UN Doc A/RES/70/1 (25 September 2015).

<sup>101</sup> *Ibid* 2.

<sup>102</sup> Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Brill, 2008) 208.

<sup>103</sup> *Ibid* 216.

<sup>104</sup> Cf Umut Riza Ozkan and Stephan Scott, ‘Sustainable Development and Capabilities for the Polar Region’ (2013) 114(3) *Social Indicators Research* 1259, 1260.

<sup>105</sup> Or indeed, an entirely new round. See John Dell, ‘How Should the WTO Launch and Negotiate a Future Round?’ (2015) 14(1) *World Trade Review* 117.

with the most ideal scenario being an additional paragraph in article XX of GATT, and its equivalents, that provides for ‘targeted measures in support of sustainable development’ as a general exception to breaches of the agreement.

Ministerial declaration and judicial decision are thus the most probable alternatives. Sustainable development was mentioned in the 2001 Doha Ministerial Declaration at paragraph 6:

We strongly reaffirm our commitment to the objective of sustainable development... We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.

This is really a recitation of GATT article XX and does not expressly provide for sustainable development as an excuse. More promising is paragraph 31, reiterated in paragraphs 30-31 of the 2005 Hong Kong Ministerial Declaration, which refers to negotiations on aligning the goals of multilateral environmental agreements, such as the *Paris Agreement*, and those of the WTO. It is conceivable that, in the years to come, WTO member states could agree on an interpretive ministerial declaration that regards reduction of greenhouse gas emissions and other environmentally friendly measures as permissible or otherwise in accordance with WTO Law. Interpretive guidance issued from WTO member states could have similar impact to treaty modification in that it would guide the application of WTO Law by the Appellate Body. Otherwise, there may be suspicions that the Appellate Body is acting beyond its mandate; there are always limits to the freedom of judicial officers to interpret the law. Interpretative guidance could also be more comprehensive and detailed than an Appellate Body decision that focuses on the particular subject at hand. Moreover, it would spur the development of soft law and non-legal initiatives like the Arctic examples discussed at the end of section 3.1.

There are essentially two faces to sustainable development in hard WTO Law: encouragement of trade in sustainable goods and services, and restrictions on trade (of anything) on grounds of sustainability. It is the second aspect that has received relatively little attention from the WTO. With guidance from the WTO Ministerial Conference in mind, the Appellate Body could well interpret existing exceptions under GATT article XX and its siblings as including targeted measures in support of sustainable development. The seal products decision, *inter alia*, lays

a foundation for this expansion in meaning. In other words, it creates a situation with the favourable circumstances for improving the status of sustainable development in WTO Law, just as Polar Law derives its strong focus on sustainable development from its characteristic circumstances. Exactly how WTO Law should change is for other articles to examine.

#### IV CONCLUSION

Construction of international law is largely dependent on prevailing political interests and circumstances. The WTO's involvement with environmental interests is no exception. Trade and the environment lie on a spectrum and where the balance is struck will vary over time. This article has outlined how the position is tilting towards environmental concerns. It has proffered examples from Polar Law as illustrations, the polar regions being more inclined towards environmental concerns even before the *Paris Agreement* and 2030 Agenda for Sustainable Development. This is in large part due to the special circumstances that exist in the polar regions, namely, their environments and history. The poles are also exceptional instances of states rallying around common interests, something which sustainable development is becoming at an international level, and they offer case studies of how to approach these common interests to ensure they are effectively carried out.

As such, the article aimed to provide a bridge between Polar Law and WTO Law, as well as a bridge between the environmental law and policy events of 2015 and WTO Law. Both bridges could be insightful for WTO member states in their negotiations on the trade-environment nexus, and may influence the elaboration of sustainable development as a unifying principle or rule in WTO Law. Beyond the use of the principle in disputes, polar examples may also guide practical economic, socio-cultural, scientific and other matters that intersect with international trade. Indeed, this is already occurring to an extent, as the WTO emphasises sustainable development as an important objective for its work.

Looking even further, it is worthwhile exploring other areas of cooperation between the polar regions and the rest of the world. The uniqueness of the poles has acted as a catalyst for innovation in sustainability. From germ-zapping wastewater treatment technology<sup>106</sup> to the world's largest green data centre

---

<sup>106</sup> James Dunlevie, 'Davis Antarctic Station Set For New 'Germ-Zapping' Wastewater Treatment Technology', *Australian Broadcasting Corporation News* [online], 22 August 2017 <<http://www.abc.net.au/news/2017-08-22/davis-antarctica-wastewater-treatment-plant-set-for-2018-launch/8831080>>.

powered entirely by renewable energy<sup>107</sup> and everything in-between, the Arctic and the Antarctic are fertile grounds for new ideas that exemplify the breadth and depth of sustainable development.

---

<sup>107</sup> Phoebe Weston, 'World's largest 'fortress for data' that is fully powered by hydropower and wind is being built in the Arctic', *Daily Mail* [online], 18 August 2017 <<http://www.dailymail.co.uk/sciencetech/article-4802264/Incredible-fortress-data-built-Arctic.html>>.