

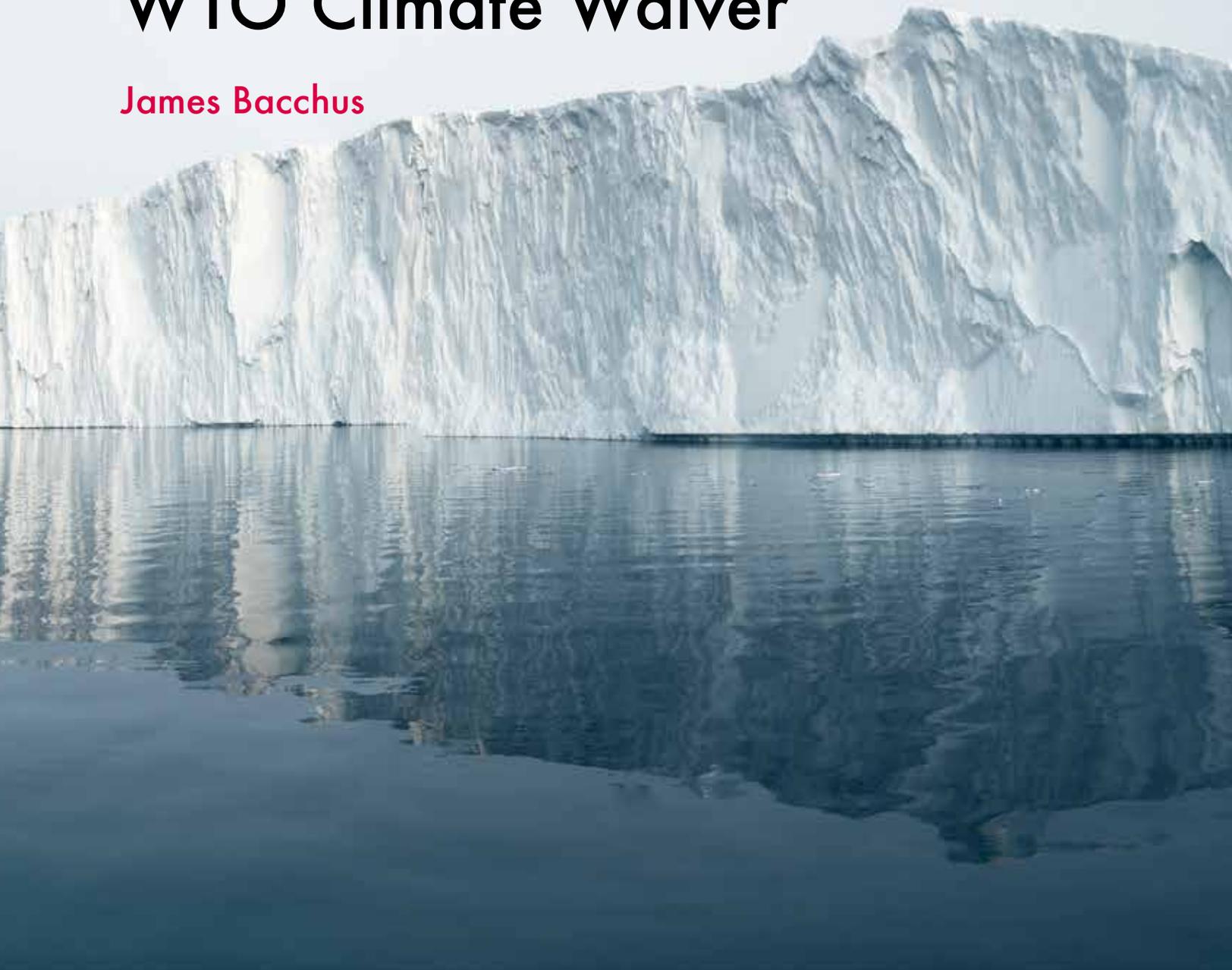
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Centre for International  
Governance Innovation

CIGI Papers No. 204 – December 2018

# The Content of a WTO Climate Waiver

James Bacchus





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## Centre for International Governance Innovation

67 Erb Street West  
Waterloo, ON, Canada N2L 6C2  
[www.cigionline.org](http://www.cigionline.org)

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## About the Author

**James Bacchus** is a senior fellow with CIGI's International Law Research Program, as well as the Distinguished University Professor of Global Affairs and director of the Center for Global Economic and Environmental Opportunity at the University of Central Florida. He was a founding judge and was twice chairman and chief judge of the Appellate Body at the World Trade Organization in Geneva. He served as a member of the United States Congress and as an international trade negotiator for the United States. Currently, he is senior counsellor to the International Centre for Trade and Sustainable Development in Switzerland and an adjunct scholar of the Cato Institute in Washington, DC. He served on the high-level advisory panel to the Conference of the Parties of the United Nations Framework Convention on Climate Change, chairs the Global Commission on Trade and Investment Policy of the International Chamber of Commerce, and chaired the World Economic Forum's Global Agenda Council on Governance for Sustainability. For more than 14 years, he chaired the global practice of a law firm that is the largest in the United States and one of the largest in the world. He is the author of the books *Trade and Freedom* (Cameron May, 2004) and *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge University Press, 2018). He is a frequent writer in leading publications and a frequent speaker on prominent platforms worldwide.

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## About the Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

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## Executive Summary

Neither the trade regime nor the climate regime has so far displayed any willingness to confront the coming clash between climate ambitions and trade rules. To minimize the economic and political risks of such a collision, the members of the World Trade Organization (WTO) should adopt a WTO climate waiver. To further carbon pricing and to facilitate the necessary green transition in the global economy, the core of a WTO climate waiver should be a waiver from the applicable trade rules for national measures that: discriminate on the basis of carbon and other greenhouse gases used or emitted in making a product; fit the definition of a climate response measure as defined by the United Nations Framework Convention on Climate Change (UNFCCC); and do not discriminate in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. A WTO climate waiver should also include support for trade restrictions by carbon markets and climate clubs, trade disciplines on fossil fuel subsidies, and green subsidies that support innovative outcomes rather than particular technologies. Along with a climate waiver, WTO members should also confirm that carbon taxes qualify as border tax adjustments under trade rules.

The adoption of a WTO climate waiver is a central and critical part of the overall reimagining of international trade law that is needed to fulfill the stated WTO goal of engaging in trade and other economic endeavours consistently with the objectives of sustainable development.

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## Introduction

The scorching summer of 2018 offered heated testimony that climate change is no longer approaching; it is already here. In addition to record temperatures in many places, extreme weather events influenced by the global heat — heavier rainstorms, more powerful hurricanes and longer droughts — are increasingly common throughout the world. One research meteorologist at the National Oceanic and Atmospheric Administration in the United States was moved to say of the rising heat, “The old records belong to a world that no longer exists.”<sup>1</sup>

At the same time, the long hot summer of 2018 saw a further unravelling of more than 70 years of international cooperation in constructing and maintaining a rules-based multilateral trading system that provides a legal framework for lowering the barriers to international trade and increasing the global flow of trade and the global gains from trade. As the United States descended into a destructive protectionism and departed from adherence to global trade rules — rules it had helped create and to which it had long agreed — other trading countries struggled to preserve the WTO in the face of a frenetic American opposition to multilateralism.

Meanwhile, the world edged ever closer to a collision between the global rules frameworks of the two separate international institutions that were created and entrusted with supporting trade and addressing climate change. World leaders have given scant attention to this looming collision. Yet the complex connections between trade and climate change must be addressed by the WTO and the UN climate regime, ideally together. If those connections are not addressed, then a clash will soon occur in which the world’s simultaneous endeavours to continue to trade within the global framework of WTO rules, and to progress in the fight against climate change through the framework established by the UNFCCC and the Paris Agreement, will both be put at significant risk.

Neither of these two international regimes has considered the likely consequences of the trade restrictions that will surely be a part of many

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<sup>1</sup> Joel Achenbach & Angela Fritz, “Climate change is supercharging a hot and dangerous summer”, *Washington Post* (26 July 2018).

national measures that will be enacted to address climate change. Yet these consequences will soon become real. Unavoidably, much climate action will restrict or otherwise affect trade. “Trade-related elements feature prominently in climate contributions under the Paris Agreement,” and, by one reckoning, “around 45 percent of all climate contributions include a direct reference to trade or trade measures.”<sup>2</sup> As countries everywhere begin to increase their climate ambitions and add to their national climate pledges, trade-related climate measures will emerge and multiply.

Climate measures affecting trade will fall within the scope of the WTO Agreement<sup>3</sup> and, as these measures begin to impede the flow of trade, they will surely lead to WTO dispute settlement. Some of these trade-restrictive national climate measures will be taken purely for climate reasons and solely in furtherance of national pledges made under the Paris Agreement. Others will result from domestic fears of “carbon leakage” and a loss of national competitiveness if domestic climate actions are not matched with similar climate actions by foreign trading partners. Still other national measures will be motivated by both climate and competitiveness concerns, making it difficult to discern one purpose from the other in assessing their legitimacy as climate actions. WTO disputes resulting from all these types of measures will confront numerous unanswered legal questions due to the absence of relevant WTO jurisprudence and the inadequacy of trade rules written some 70 years ago, long before the emergence of climate change as a global concern.

To minimize the political and economic risks of such a collision to both the WTO and the climate regime, WTO members should adopt a WTO climate waiver. Among the various options available under WTO law, a climate waiver that construes trade rules to permit trade restrictions in specific national measures taken to advance the global struggle against climate change, while not altering those rules generally, would do the most to help slow climate change while posing the least risk to the

indispensable basic rules of non-discrimination that underpin the WTO-based world trading system.<sup>4</sup>

To enact a WTO climate waiver, the following conditions are necessary:

- the separate silos of trade and climate change need to be united by bringing together the negotiators on both topics to discuss the nexus between the two;
- the topic of the relationship between trade and climate change should be high on the WTO agenda;
- a committed group of WTO members should request a collective waiver of the application of certain of the obligations of the multilateral trade agreements to climate measures due to the exceptional circumstances created by climate change;
- a group of WTO members should be tasked by all WTO members with framing and proposing such a WTO climate waiver;
- a draft of a waiver decision should be prepared and submitted by this member group; and
- the waiver decision ought to be adopted by the members of the WTO.<sup>5</sup>

The adoption of a WTO climate waiver alone will not prevent a collision between the trade and climate change regimes. A climate waiver should be accompanied by other WTO actions to clarify and reinforce the consistency of WTO rules with ambitious efforts globally to mitigate and adapt to climate change. Furthermore, a climate waiver should be only the first of many ways in which WTO members revise and realign WTO rules in accordance with the global objectives of sustainable development. A successful conclusion to the negotiations on an agreement to eliminate

2 Clara Brandi, “Trade Elements in Countries’ Climate Contributions under the Paris Agreement” (2017) Geneva: International Centre for Trade and Sustainable Development at vii; see also Rana Elkahwagy, Vandana Gyanchandani & Dario Piselli, “UNFCCC Nationally Determined Contributions: Climate Change and Trade” (2017) Centre for Trade and Economic Integration Working Paper 2017-02 (Trade Lab).

3 *Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994) [Marrakesh Agreement].

4 See James Bacchus, “Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes” (2016) International Centre for Trade and Sustainable Development and World Economic Forum; see also James Bacchus, “Triggering the Trade Transition: The G20’s Role in Reconciling Rules for Trade and Climate Change” (2018) Geneva: International Centre for Trade and Sustainable Development.

5 I have set out the legal and political case for a WTO climate waiver in detail previously in James Bacchus, *The Case for a WTO Climate Waiver*, CIGI, Special Report, 2 November 2017 [Bacchus, Case]. This paper follows on that first paper. I have also made the case for a WTO climate waiver more recently in James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge: Cambridge University Press, 2018) at 236–45 [Bacchus, *Willing World*].

duties on environmental goods would be a good start — but only a start. The objectives of sustainable development include but also extend much beyond the challenge of climate change to encompass all the global economic, environmental and social objectives that have been agreed by the members of the United Nations in the UN Sustainable Development Goals for 2030.<sup>6</sup>

All this said, what should be the content of a WTO climate waiver?

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## The Legal Characteristics of a WTO Waiver

The content of a WTO climate waiver will be shaped according to the legal characteristics of a waiver under WTO rules. Those characteristics are established by article IX:3 of the WTO Agreement, which provides, “In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three-fourths of the Members.”<sup>7</sup> A waiver permits WTO members to take actions that, in the absence of a waiver, could be judged inconsistent with their WTO obligations. A waiver does not change WTO rules that impose WTO obligations. As the treaty word “waiver” suggests, a waiver simply waives certain defined trade obligations in certain defined situations for certain defined kinds of measures. A waiver leaves the rules themselves intact. The trade obligations in the WTO treaty can be changed only by the adoption by WTO members of an amendment to the WTO-covered agreements.<sup>8</sup>

Thus, the adoption of a climate waiver will offer WTO members the opportunity to experiment by realigning relevant trade rules for the sole purpose of addressing climate change without in any way changing those rules. Because a WTO climate waiver will not change the rules, but will only apply them differently in carefully

defined and limited circumstances to certain kinds of measures, a climate waiver is the option available to WTO members that can do the most to help confront climate change while posing the least risk to the rules-based multilateral trading system.<sup>9</sup> With a WTO climate waiver, there is no need to choose trade over climate or climate over trade. The goals of the trade regime and the climate regime alike can be met.

The WTO waiver rules encourage experimentation. Ordinarily, a WTO waiver is temporary. Generally, a waiver is granted for only one year. The WTO Agreement provides that “[a]ny waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates.”<sup>10</sup> The waiver power has been used frequently but almost always temporarily.<sup>11</sup> The temporary nature of almost all past waivers is a reason why some may object that a waiver is not an effective choice for reconciling trade and climate change within the WTO.

But a climate waiver need not be temporary. There is room in the rules for enacting a waiver that is not. There is also precedent. The WTO waiver of some WTO intellectual property (IP) rules to permit compulsory licensing of certain drugs needed to ensure public health, which was adopted in 2003, states that it will terminate only on the date when an amendment to the IP rules replacing the provisions of that waiver takes effect.<sup>12</sup> The same approach should be taken with a WTO climate waiver. If so, a WTO climate waiver would be ongoing — unless and until an amendment is adopted by WTO members, replacing the provisions of the climate waiver with new and revised rules.

An objection may also be that, with only isolated exceptions such as the public health waiver, WTO waivers have generally been granted for limited purposes, and usually to one country involving one discrete trade issue. A WTO climate

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<sup>6</sup> For much more explanation and elaboration on this point, see Bacchus, *Willing World*, *supra* note 5.

<sup>7</sup> *Marrakesh Agreement*, *supra* note 3, art IX:3.

<sup>8</sup> *Ibid*, art X.

<sup>9</sup> I have explained this point at length in Bacchus, *Case*, *supra* note 5, and, in particular as it relates to the notion of like products in Bacchus, *Willing World*, *supra* note 5 at 239–43.

<sup>10</sup> *Marrakesh Agreement*, *supra* note 3, art IX:4.

<sup>11</sup> Bacchus, *Case*, *supra* note 5 at 22.

<sup>12</sup> WTO, General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, Decision of 30 August 2003, WTO Doc WT/L/540 (2 September 2003). An amendment to the TRIPS Agreement entered into force in January 2017 for two-thirds of WTO members, replacing this waiver for those members.

waiver will not be an individual waiver; it will be a collective waiver.<sup>13</sup> And, however carefully it may be circumscribed, a WTO climate waiver will be sweeping in its impact as climate actions spread worldwide. By the terms of the WTO Agreement, waivers are supposed to be granted only “under exceptional circumstances.”<sup>14</sup> These exceptional circumstances to justify the decision must be stated in the WTO decision adopting the waiver.<sup>15</sup> There is no definition in the WTO rules of exceptional circumstances. Whatever the definition, the exceptional circumstances of the unique global challenge of confronting climate change with all its connections to trade and the WTO-based trading system ought to fit.

Another likely source of objection to a WTO climate waiver is the requirement that three-fourths of the WTO members must take the decision to grant the waiver. In practice, a consensus of all WTO members has been sought in support of a waiver, making this hurdle even higher. No doubt it will be no easy task to muster the needed support of the WTO membership to adopt a WTO climate waiver. The considerable political difficulties of doing so must not be underestimated. Yet, this conceded, the current political hurdles to other conceivable legal options under WTO rules for reconciling trade and climate change are much higher. However difficult it may be to enact a climate waiver, it would, for instance, be far more difficult to secure a sweeping amendment of existing WTO rules to align them more with countering climate change. It would be far better to face the hurdles to enactment of a climate waiver than to try to address them through the WTO dispute settlement mechanism.<sup>16</sup> What would the consequences be for the trade and climate regimes alike if a dispute between two WTO members over the legitimacy of a climate measure restricting trade ended up in WTO dispute settlement without WTO judges having first been given guidance on how to resolve the dispute?

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13 *Bacchus, Case*, *supra* note 5 at 23.

14 *Marrakesh Agreement*, *supra* note 3, art IX:3.

15 *Ibid*, art IX:4.

16 For an extended discussion on this point, see *Bacchus, Case*, *supra* note 5 at 20–21.

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## The Content of a Climate Waiver

### Exceptional Circumstances, Terms and Conditions, and Duration

Consistent with the WTO rules for waivers, a WTO climate waiver, at the outset, “shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate.”<sup>17</sup> The exceptional circumstances are those presented by the unique global challenge of climate change that create the unique necessity for realigning trade rules to help confront that challenge. The terms and conditions are the specific trade obligations identified in the waiver that are to be waived for the application of specific national climate measures also identified in the waiver. The date on which the waiver shall terminate will be the date on which an amendment is adopted by two-thirds of WTO members replacing the provisions of the climate waiver with new and revised rules.

### Not a Signal that All Climate-related Trade Restrictions Are Necessarily Illegal

A likely substantive concern about a WTO climate waiver is that the adoption of such a waiver could signal that trade-related climate measures are all illegal in the absence of a waiver, and that this could “narrow down existing flexibility under WTO law.”<sup>18</sup> This concern should be addressed by the language of the climate waiver, which should state that nothing in the waiver may be construed in WTO dispute settlement as suggesting that all climate-related trade restrictions will necessarily be inconsistent with WTO rules in the absence of a waiver. For trade in goods, in particular, it should be emphasized in the content of the climate waiver that the environmental and other defences in article XX of the General Agreement on Tariffs

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17 *Marrakesh Agreement*, *supra* note 3, art IX:4.

18 Kasturi Das et al, *Making the International Trade System Work for Climate Change: Assessing the Options* (London: Climate Strategies, 2018) at 8.

and Trade (GATT)<sup>19</sup> remain in full force and are available to justify climate actions affecting trade.

## Not a Signal that Existing Rules Cannot Already Be Used to Support Climate Actions

Another likely substantive concern is that the adoption of a WTO climate waiver may suggest that existing WTO rules cannot be used to support climate actions. This is not so. For example, fossil fuel subsidies are already covered by WTO subsidies rules. A WTO member is free now to employ existing WTO subsidies rules to challenge the fossil fuel subsidies of another WTO member if those subsidies are specific to a certain industry and if they have adverse effects in the marketplace. No WTO member — so far — has brought such a case. Of course, even if a WTO member brought and won such a case, a ruling could remedy only the one subsidy challenged — not all the rest of the multitude of fossil fuel subsidies in the world. This does not mean, however, that such opportunities for supporting climate actions are not already available under WTO rules. This concern should likewise be eliminated at the outset in the content of a climate waiver with language stating that nothing in the waiver should be construed as suggesting that existing WTO rules cannot be used to support climate actions.

## Arbitrary or Unjustifiable Discrimination and Disguised Restrictions on Trade

Still another likely substantive concern is that adoption of a WTO climate waiver will legitimize and unleash a global wave of “disguised protectionism” by developed countries, directed mainly against the trade of developing countries.<sup>20</sup> To assuage this likely concern, the content of a WTO climate waiver could include an introductory statement that nothing in the waiver should be construed to support disguised trade protection. Moreover, the content of the climate waiver could also include a statement that, notwithstanding what else is included in the waiver, measures must continue to comply with

the *chapeau* of GATT article XX and with article 3.5 of the UNFCCC, which could both then be referenced and quoted in the text of the waiver.

The *chapeau* of GATT article XX, which sets out the general exceptions to the WTO obligations relating to trade in goods, provides that the environmental and other general exceptions listed there are “[s]ubject to the requirement that such measures 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.”<sup>21</sup> In parallel with this key provision in the trade rules, article 3.5 of the UNFCCC states, “Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”<sup>22</sup>

Thus, even if a measure taken by a WTO member is of a kind for which a climate waiver might otherwise be justified, it will not be eligible for the climate waiver if it is applied in a manner that results in arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

## Definition of Climate Response Measures

But which national measures can potentially be justified as climate response measures, and which cannot?

Thus far, no one knows. Climate rules speak of “response measures” but do not define them. Trade rules speak of environmental measures only in terms of technical regulations and of the same long-standing environmental exceptions that have been in the GATT since 1947. Many climate response measures will undoubtedly fit within the roomy bounds of these provisions, but should WTO members leave it to WTO judges to decide on a case-by-case basis whether these measures do or do not fit in WTO dispute settlement? Should WTO judges be the ones to define a climate response measure incrementally through WTO jurisprudence in the context of climate-related trade disputes? Surely it would be better to have the UN climate regime define the term, ideally in consultation with

19 *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153 (entered into force 1 January 1995) [GATT 1994].

20 Das et al, *supra* note 18 at 19.

21 GATT 1994, *supra* note 19, art XX (*chapeau*).

22 UNFCCC, 9 May 1992, 1771 UNTS 107, 31 ILM 849 (entered into force 21 March 1994), art 3.5.

the WTO, and then to have the WTO adopt the definition agreed under the UNFCCC or the Paris Agreement in the content of a WTO climate waiver.

The term “response measure” has been much discussed for decades by the climate regime, but it remains a term that means many things to many people. The importance of its meaning is reflected throughout the Paris Agreement. The preamble of the agreement itself recognizes “that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it.”<sup>23</sup> Article 4.15 of the Paris Agreement urges parties to “take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.”<sup>24</sup> Likewise, the preamble of the decision by the climate COP adopting the Paris Agreement acknowledges “the specific needs and concerns of developing country Parties arising from the impact of the implementation of response measures.”<sup>25</sup>

A forum on response measures was established under the UNFCCC before the Paris Agreement and continues its work now that the agreement is in force. The forum is intended to improve understanding of the impacts of response measures and to increase resilience to them. Some climate negotiators have begun to see the need for an agreed definition of a response measure; yet the forum on response measures is nowhere near to agreeing on a definition of one. Indeed, the climate forum has hardly grappled with this task. This remains so even though it cannot be known precisely which impacts and which resiliency must be considered unless what the impacts and the resiliency result from is identified.

The COP and the WTO should work in concert to secure an agreement on a definition of a climate response measure, and that definition should then be incorporated into the content of a WTO climate waiver.

## Measuring Carbon Emissions

It will be difficult to make trade distinctions based on amounts of carbon and other greenhouse gas emissions if there is no agreement on a common approach for tracking and verifying carbon emissions. It will be doubly difficult to do so if there are competing approaches for measuring those emissions. This issue, too, should be addressed in the content of a WTO climate waiver.

There is no universally agreed way of calculating carbon and other greenhouse gas emissions from production and consumption and, thus, no consensus on how to track national progress toward keeping climate promises and international progress toward reducing carbon and other greenhouse gas emissions under the Paris Agreement. The decision of the climate COP adopting the Paris Agreement requests the elaboration of further guidance to be applied to future national climate pledges to ensure the use of metrics assessed by the UN Intergovernmental Panel on Climate Change and adopted by the national parties to the Paris Agreement and also to ensure a methodological consistency in the process of making and implementing the pledges.<sup>26</sup> Fulfilling this request is on the COP agenda in completing the rulebook for successful implementation of the Paris Agreement by year-end 2018.<sup>27</sup>

The metrics adopted for measuring the amount of carbon and other greenhouse gas emissions by the climate COP should be incorporated by reference in the content of a WTO climate waiver and used by the WTO for all purposes relating to the waiver. If, at the time, a single form of measurement has not yet been agreed by the climate COP, then one will need to be identified by the members of the WTO, ideally in consultations with the climate negotiators.

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23 *The Paris Agreement, Conference of the Parties (COP) to the UNFCCC*, 12 December 2015, art 4.15 (entered into force 4 November 2016), Preamble [*Paris Agreement*].

24 *Ibid*, art 4.15.

25 UNFCCC, *Adoption of the Paris Agreement*, 12 December 2015, Dec CP.21, 21st Sess, UN Doc FCCC/CP/2015/L.9, Preamble.

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26 *Ibid* at para 31.

27 See Neelam Singh, Jared Finnegan & Kelly Levin, “MRV 101: Understanding Measurement, Reporting, and Verification of Climate Change Mitigation” (2016) World Resources Institute Working Paper.

## Waiver for Trade Discrimination Based on Carbon and Other Greenhouse Gas Emissions

To further carbon pricing and to facilitate the necessary green transition in the global economy, the core of the content of a WTO climate waiver should be a waiver from the application of WTO trade rules to trade-restrictive national measures that:

- discriminate based on the amount of carbon and other greenhouse gases used or emitted in making the product;
- fit the definition of a climate response measure as defined by the climate COP; and
- do not discriminate in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The wording of a WTO climate waiver will need to be precise in setting out these requirements so that the availability of the waiver will be confined to true climate response measures. Developed countries may be tempted to employ a climate waiver as a cloak for mere protectionism. Developing countries will be rightly apprehensive about this possibility. With these considerations in mind, if a WTO climate waiver is carefully drafted and limited only to measures that meet these requirements, it will, indeed, do the most toward addressing climate change while risking the least to the trading system. A WTO climate waiver will enable the continuation of the flow of trade while also imposing a price on trade when that trade is fuelled by the emission of carbon and other greenhouse gases.

Such a climate waiver will permit trade restrictions as part of climate actions while avoiding the slippery slope of redefining the pivotal trade concept of like products to allow an untold number of distinctions to be made between traded products on the bases of their different process and production methods.<sup>28</sup> Dealing with carbon emissions by redefining the traditional notion of like products in trade law would open the proverbial Pandora's box to any number of

other trade restrictions justified by any number of other reasons. This would have the effect of undermining the overall foundation of non-discrimination on which the rules-based trading system has been constructed. Dealing with the unique challenge of climate change in a unique way in WTO rules that are confined only to climate measures will keep this from happening.

Such a climate waiver will also give WTO judges the legal tool they will soon need to be able to distinguish a climate measure from any other measure, and a justifiable climate measure from one that is not, in what will likely become a proliferation of trade and climate clashes in WTO dispute settlement. One country might claim that a trade restriction is a WTO violation, while another country insists that it is a legitimate climate measure and therefore justified under the exceptions in article XX of the GATT or the provisions in the Agreement on Technical Barriers to Trade, or both. In the absence of a climate waiver, and in the absence of COP agreement on a definition of climate response measures and a common measurement of carbon and other greenhouse gas emissions, WTO judges will be left to draw the lines between justifiable climate measures and other measures largely by themselves when presented with such disputes.

A WTO climate waiver would apply to trade in goods. To the extent a nexus could be shown between them and carbon emissions (or other greenhouse gas emissions), a climate waiver could also apply to trade in services and to IP. Preferential trade agreements concluded outside the legal scope of the WTO treaty by WTO members can often be proving grounds for new, WTO-plus approaches in international trade. Trade restrictions that meet these requirements in preferential trade agreements among WTO members could also be included within the coverage of a WTO climate waiver.

Because developing countries may fear that too much could be subsumed with the coverage of a WTO climate waiver, some WTO members might want to link the coverage of the climate waiver to actions taken by WTO members within the ambit of their current voluntary "nationally determined contribution"<sup>29</sup> to climate mitigation and adaptation under the Paris Agreement. These initial national pledges of climate action are, however, only the

<sup>28</sup> Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004) at 154–55.

<sup>29</sup> Paris Agreement, *supra* note 23, art 4.2.

beginning of what are foreseen as vastly enhanced national commitments of climate action, starting in 2020 and ratcheting up rapidly in the following years. Countries are already planning and taking climate actions over and above their current climate pledges. They should not be deterred from doing so for fear that trade restrictions that may result from those actions will fall afoul of WTO rules. All climate response measures should be eligible for the WTO climate waiver so long as they are not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

## Support for Trade Restrictions by Carbon Markets and Climate Clubs

A WTO climate waiver should also support carbon pricing by permitting the international linking of carbon markets and the successful operation of “climate clubs” of willing countries that wish to come together to do more to forestall climate change by cutting emissions beyond the extent of their current commitments under the Paris Agreement.

Article 6 of the Paris Agreement supports “voluntary cooperation” in implementing voluntary national climate pledges. Furthermore, article 6 urges “voluntary cooperation” in the pursuit of “higher ambition” through additional national “mitigation and adaptation” actions to counter climate change and “promote sustainable development and environmental integrity.”<sup>30</sup> Significantly, in article 6, the fulfillment of the highest aims of the agreement is seen by the negotiators as occurring “on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes.”<sup>31</sup> This notion of internationally transferred mitigation outcomes is widely understood to mean markets.

To succeed on a scale that can fulfill the urgently needed higher ambition in climate actions, carbon markets must be linked, nationally and internationally. Linkage refers to the formal recognition by one carbon market of carbon emissions reductions undertaken in another carbon market for purposes of compliance with

local emissions reduction obligations. In effect, linkage binds different carbon markets together into one carbon market. In actions in furtherance of climate ambitions, carbon markets in one place are increasingly linking up with markets in other places. Many of these links are transnational. Where they are, they must be supported, and not restrained, by WTO rules on trade.<sup>32</sup>

Linking carbon markets creates more opportunities for more emitters to cut their carbon emissions, making emissions cuts more cost effective and, thus, more extensive. “[T]he broader the base for a given carbon price, the more efficiently it operates and the lower the overall cost of managing emissions to the economies within which it is operating.”<sup>33</sup> The transfer of emissions trading credits between linked carbon markets can also stimulate climate-related investments by directing “large scale financing towards mitigation activities.”<sup>34</sup> Together, these advantages of linkage spur still more emissions reductions in the market. The key to securing these advantages from market linkage is facilitating the trading of carbon emissions allowances back and forth between different carbon markets to enable more successful carbon pricing, which is the crux of countering climate change.

The momentum for putting a price on the climate harms caused by carbon emissions can also be accelerated through the formation of voluntary climate clubs of like-minded emitters willing to work together to do more to cut carbon emissions now than can currently be agreed in a global consensus.<sup>35</sup> Climate clubs could start with ad hoc alliances of those that wish to adopt a common set of rules cutting across legal jurisdictions so as to go ahead now to make deeper cuts in exchange for mutual commercial, technological and other concessions. What is learned from the practical experience of such climate clubs could then be scaled up and linked up over time, eventually culminating in a global consensus.

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32 For more on this point, see Bacchus, *Willing World*, *supra* note 5 at 249–50.

33 International Energy Trading Association (IETA), “A Vision for the Market Provisions of the Paris Agreement” (Geneva: IETA, 2016) at 4.

34 *Ibid.*

35 David G Victor, “Three-Dimensional Climate Clubs: Implications for Climate Cooperation and the G20” (2017) Geneva: International Centre for Trade and Sustainable Development.

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30 *Ibid.*, art 6.1.

31 *Ibid.*, art 6.2.

A club is only a club if members enjoy benefits that are not enjoyed by non-members. Thus, a climate club would necessarily result in discrimination, likely including discrimination in trade. To prevent the enjoyment of the benefits of being in the climate club by those who have not made the additional climate commitments required for membership in the club, there will need to be penalties. Whether as tariffs or in some other form, the use of restrictions on trade as penalties is widely seen as indispensable to the success of climate clubs in advancing carbon pricing.<sup>36</sup>

As it stands, in their nexus with trade, these creative but discriminatory arrangements aimed at furthering carbon pricing to curb climate change are more than likely inconsistent with the rules of the WTO. The prospect of these inconsistencies ought to be eliminated in the content of a WTO climate waiver. This kind of trade discrimination ought to be permitted if trade rules are not to impede progress toward combatting climate change.

First, the content of a WTO climate waiver should address the threshold issue of the legal status of the emissions units of carbon markets. As a legal matter under the WTO trade rules, what are they? The climate waiver should make it clear that emissions units of carbon markets are neither goods nor services under the WTO treaty, and, thus, the mere act of trading emissions units internationally is not subject to the varied array of non-discrimination and other WTO obligations that would apply if those units were goods or services.<sup>37</sup>

Next, the content of a climate waiver should include a waiver of what would otherwise be the illegality under WTO law of the international trade discrimination resulting from any trade benefits provided by a climate club solely to club members and not provided to other members of the WTO, or resulting from any trade penalties imposed by the club members in their pursuit of carbon pricing on any other WTO members. All trade sanctions by carbon markets, by linked carbon markets or by clubs of carbon markets that are based on the amount of carbon emissions resulting from a traded good or service should fall within the scope of a WTO climate waiver.

In addition, the content of a climate waiver should establish the prerequisites for the kinds of carbon markets and climate clubs, and for the kinds of actions by those markets and those clubs, that would be eligible for the waiver. For example, a requirement should be that, to be eligible for the climate waiver, a market or club would have to be open to membership for any outsiders that may wish to become insiders by accepting the obligations and by sharing in the costs of that market or that club. In this respect, the waiver should affirm that, so long as a market or a club is open to new members willing to be bound by its rules and share in its costs, the provision by that market or club of WTO-plus trade benefits exclusively to its members will not be in violation of WTO rules.

Moreover, conditions should be included in the content of a WTO climate waiver to help limit the risks to the trading system while facilitating carbon pricing. As Robert Howse has suggested, a WTO climate waiver could, among other constraining conditions, spell out the specific suitable objectives for eligible carbon markets and climate clubs in seeking climate mitigation, halting environmental harm and supporting the essential global transition to renewable energy. A WTO climate waiver could also be conditioned on the markets and the clubs giving notice to the WTO of the policies that would be imposed, coupled with “a detailed plan about removal of discriminatory aspects within a defined time-frame.”<sup>38</sup>

## Support for Trade Disciplines on Fossil Fuel Subsidies

The climate scientists on the Intergovernmental Panel on Climate Change state that three-fourths of proven fossil fuel reserves must remain in the ground to meet the globally agreed goal of keeping the rise in the global average temperature below 2°C by 2100. We are already halfway to 2°C. The last thing we should be doing is subsidizing the production and consumption of fossil fuels.

A WTO climate waiver should also employ WTO rules to combat climate change by imposing some additional and more specific disciplines on

36 William D Nordhaus, “A New Solution: The Climate Club”, *New York Review of Books* (4 June 2015).

37 For a thorough analysis of this threshold legal issue, see Felicity Deane, *Emissions Trading and WTO Law: A Global Analysis* (Cheltenham, UK, and Northampton, MA: Edward Elgar, 2013) ch 4, 5.

38 Robert Howse, “Securing Policy Space for Clean Energy Under the SCM Agreement: Alternative Approaches” (2013) Bali: International Centre for Trade and Sustainable Development and World Economic Forum at 50, 53.

fossil fuel subsidies. As one target in achieving their goals of countering climate change while ensuring sustainable consumption and production patterns, the 193 members of the United Nations that have agreed on the world's Sustainable Development Goals for 2030 have identified the shared necessity to “[r]ationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions.”<sup>39</sup>

Toward this end, in December 2017, at the WTO Ministerial Conference in Buenos Aires, 12 of the 164 members of the WTO issued a declaration expressing the need for fossil fuel subsidy reforms in the existing WTO rules. These dozen WTO members have since embarked on a diplomatic campaign to enlist 152 more members. Including such reforms in a climate waiver would be a beginning on which the WTO could build in limiting fossil fuel subsidies over time through the experience of learning by doing.

In crafting a provision disciplining fossil fuel subsidies as part of a climate waiver, these 12 ambitious countries can benefit from inviting other countries to consider with them a menu of options. Other WTO members are much more likely to join in supporting a solution they have helped craft than one that has been presented to them in final form. At the same time, WTO members are more likely to find a solution on which they can agree if they can begin with a ready array of possible choices for their consideration.

At the outset, preliminary decisions will be required. To start, what is a fossil fuel subsidy? A WTO climate waiver must include an agreed definition. The estimates made by different international institutions of the annual amount of fossil fuel subsidies globally range from hundreds of billions of dollars to trillions of dollars. These estimates vary because the definitions used by these institutions vary. Should both production and consumption subsidies be counted? Should the extra health costs and other negative externalities resulting from the burning of subsidized fossil fuels be included in the cost? These and other questions must be answered in agreeing on a definition of a fossil fuel subsidy as part of a WTO climate waiver (a definition that should, ideally, be employed in all other international endeavours).

<sup>39</sup> *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015), Target 12.c.

Next, what is an inefficient fossil fuel subsidy? Indeed, can any fossil fuel subsidy ever be efficient, given the harmful climate side effects of such subsidies? Setting aside for the moment the understandable suspicion that the pressures of domestic politics played a major role in the choice of phrasing in this target of the UN Sustainable Development Goals, the fact that the word inefficient modifies fossil fuel subsidies nevertheless presumes that some such subsidies are efficient while others are not. If so, where is the line drawn between efficient and inefficient? This question needs to be answered in a WTO climate waiver if the decision is made to distinguish some fossil fuel subsidies from others on this basis.

Furthermore, once decisions are made defining these terms for WTO purposes, how then should fossil fuel subsidies be measured? As with the calculation of greenhouse gas emissions overall, what metrics should be relied on? Something that cannot be measured cannot be disciplined. The answer to this question is inextricably related to the answers that are agreed to be given to the previous two questions. To provide more effective disciplines for fossil fuel subsidies under WTO rules, there first should be one agreed means of measuring them. At a minimum, this crucial process of ensuring accurate measurement will require prompt and full international transparency for all such subsidies — including timely notification to the WTO.<sup>40</sup>

Once these questions have been answered, what are the options for disciplining fossil fuel subsidies in a climate waiver? One option is to waive certain of the subsidies rules as they relate to fossil fuel subsidies. Disciplines for many subsidies depend on whether they are specific to certain enterprises or industries.<sup>41</sup> The requirement of specificity could be waived. Even where they are specific, many subsidies are subject to WTO disciplines only if they have adverse effects.<sup>42</sup> Given their obvious adverse effects in terms of environmental harm, this requirement could also be waived for fossil fuel subsidies. In effect, this would — without changing any WTO rules

<sup>40</sup> See *Agreement on Subsidies and Countervailing Measures*, Marrakesh Agreement, *supra* note 3 at Annex 1A, art 25 [SCM Agreement]. There are widespread concerns among WTO members about the failure of many WTO members to comply with the notification obligations in article 25.

<sup>41</sup> *Ibid*, art 2.

<sup>42</sup> *Ibid*, art 5.

— transform fossil fuel subsidies into de facto prohibited subsidies, which are automatically illegal under WTO subsidies rules. Another, more direct option having the same practical effect is to provide in the climate waiver that fossil fuel subsidies are to be treated as prohibited subsidies. This will make fossil fuel subsidies automatically illegal under the subsidies rules. Thus, there will be no need to prove either specificity or adverse effects in challenging such subsidies.

It is conceivable that fossil fuel subsidies for production and fossil fuel subsidies for consumption could be treated differently under both these options. Also, a waiver could provide that fossil fuel subsidies not be immediately prohibited but rather be phased out over different lengths of time for WTO members in different stages of development. And, of course, any phase-out must be accompanied by technical international assistance for capacity building to help affected governments ensure that domestically poorer people are aided in other ways and are not harmed by the phase-out and the ultimate prohibition. There are many other ways the poor can be helped without encouraging them to use fossil fuels.

## Support for Green Subsidies

Inspired by a desire to support a swift transition to the low-carbon and eventually no-carbon world of a green and sustainable economy, the governments of many WTO members have subsidized the development of solar, wind and other forms of renewable energy. In a growing number of WTO disputes, these green subsidies have run afoul of WTO rules that discipline market-distorting subsidies.<sup>43</sup> This is the principal example so far of a clash between the goals of the climate and trade regimes. In the absence of a WTO climate waiver, this collision between climate and trade over green subsidies will likely continue and intensify.

Many of those striving to address climate change by speeding a green transition believe that the transition cannot be entrusted to market forces alone. They think that governmental intervention aimed at shaping the choices and the outcomes in the global energy marketplace is needed to reinforce and to supplement market-based actions by providing added incentives for the

investments and innovations urgently needed to accelerate the green transition. They see a need for governmental action to offset the advantage enjoyed by fossil fuel energy in the marketplace because the climate harms fossil fuel energy causes are not included in its market price (and because the production and use of fossil fuel energy is itself often subsidized). So, one remedy to which these climate advocates have turned is the practical expedient of providing governmental subsidies for clean energy alternatives to fossil fuels.

A danger, of course, is that the plea for green subsidies could become simply the latest example of state interference in the market. Yet, if green subsidies are framed correctly, and if they are applied correctly, such subsidies can instead become a productive part of an enabling framework of rules furthering a faster green transition. The challenge in drafting the content of a WTO climate waiver will be to locate the right line legally that provides the waiver for only the right kind of green subsidies. The right kind of green subsidy is one that supports the green transition even though it may distort trade. The wrong kind of green subsidy is one that distorts trade without facilitating and furthering the green transition or, worse, that does so while frustrating the green transition.

One wrong kind of green subsidy is one that includes domestic content requirements. Green subsidies often include requirements that condition the grant of the subsidies on the use of domestic over imported inputs in final production — on domestic content. Sourcing requirements that favour local producers and providers over foreign producers and providers are popular everywhere in the world. Thus, not surprisingly, domestic content requirements are everywhere tempting as expedient political devices to secure domestic support for green subsidies.

But domestic content requirements are not green. Such discriminatory requirements disrupt the market while also frustrating the green transition. They distort trade while denying domestic producers and consumers alike the benefits of the competition, the lower prices and the broader choices of the more effective energy and environmental alternatives offered by being open to foreign trade and to foreign direct investment.

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<sup>43</sup> See e.g. *Canada–Renewable Energy WT/DS412, Canada–Feed-in Tariffs Program WT/DS426*.

Noted Swiss trade scholar Thomas Cottier has observed that “[f]rom the point of view of decarbonisation, a local content requirement does not make sense as it increases costs for hardware and installations. Imported and competitive products are likely to contribute to more rapid deployment of the technology.”<sup>44</sup> According to Howse, “[D]omestic content requirements and other discriminatory measures actually undermine environmental objectives, by shifting production to higher-cost jurisdictions, and therefore making clean energy, or clean energy technologies, more expensive than they need to be.”<sup>45</sup> It follows that the legal line in a WTO climate waiver should be drawn to deny a waiver to domestic content requirements in green subsidies.

Where, then, to draw the legal line in a climate waiver to support the right kind and not the wrong kind of green subsidies? As Michael Trebilcock and James Wilson suggest, the right line in structuring a climate waiver should be to waive WTO subsidies rules only for green subsidies that are “winner-neutral.”<sup>46</sup> Instead of green subsidies that target specific technologies, Trebilcock and Wilson advocate green subsidies that target specific outcomes. However promising specific technologies may seem in concept and at the outset, they may or may not fulfill their initial promise and succeed. Moreover, markets should pick technological winners, not governments. Governments should seek outcomes. Their goal should not be to develop renewable energy simply for the sake of doing so. Their goal should be to reduce emissions of carbon and other greenhouse gases. The content of a WTO climate waiver should draw a legal line that waives green subsidies that produce outcomes that achieve this goal. In addition, this line drawing should include a waiver for subsidies for basic research and development, which is indispensable to innovation in clean energy, as in much else.<sup>47</sup>

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44 Thomas Cottier, “Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?” (2015) Geneva: International Centre for Trade and Sustainable Development.

45 Howse, *supra* note 38 at 50.

46 Michael Trebilcock & James SF Wilson, *Policy Analysis: The Perils of Picking Technological Winners in Renewable Energy Policy* (Toronto: Energy Probe, 2010).

47 See Bacchus, *Willing World*, *supra* note 5 at 254–64.

## Along with a Climate Waiver – Confirmation that Carbon Taxes Are Border Tax Adjustments

To make a WTO climate waiver fully successful, merely waiving certain trade rules to permit certain climate measures that affect trade will not be enough. An agreement on a legal interpretation of one specific trade rule — the rule on border tax adjustments — will also be necessary. This legal interpretation should occur separately but simultaneously with the adoption of a WTO climate waiver to maximize the support provided by the world trading system for ambitious climate action. Essential to ambitious climate action is putting a price on carbon. As it is, there is no disincentive to the continued use of fossil fuels because their environmental costs are not included in pricing.

Basically, there are two ways to put a price on carbon. One is through the market. The other is through governmental regulation. Market approaches are preferable to regulatory approaches in the fight against carbon and other greenhouse gas emissions because they can cost less than regulatory approaches and can also be more environmentally effective.<sup>48</sup> The most direct and therefore the most efficient and effective market approach is a tax.<sup>49</sup> The price signal needed in the market to spark the transition away from carbon and toward a green and sustainable global economy will be the sharpest everywhere in the form of a carbon tax. For this reason, trade rules — at the very least — ought not to be obstacles to the success of carbon taxes. Currently, though, the embrace of carbon taxes by WTO members is constrained by uncertainty about the legal status under WTO rules of the border measures that are often an integral part of carbon taxes.

Legal hindrances to climate action in the form of carbon taxes need not happen under the trade rules. In general, WTO trade rules require that tax measures be applied consistently with obligations of non-discrimination and with the trade concessions made and then listed in each WTO member’s schedule of concessions attached to and incorporated into the WTO treaty. Since the birth of the multilateral trading system in 1947, however, the trade rules have specifically permitted what are called border tax adjustments in international trade law.

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48 See *ibid* at 221–26.

49 *Ibid*.

Under the GATT, a border tax adjustment equivalent to an internal tax is permitted as a charge on imported products. Likewise, a border tax adjustment is permitted also as a remission on exported products.<sup>50</sup> It is clear from the text of the GATT that only indirect taxes on products — such as sales taxes — may be adjusted at the border. In contrast, direct taxes on producers — such as income taxes — may not be. What is not clear is whether a carbon tax is a direct tax on a producer or an indirect tax on a product. Therefore, there is no legal certainty as to whether a carbon tax is a permitted border tax adjustment under WTO rules.

There is no WTO jurisprudence clarifying this legal issue crucial to reconciling trade rules with necessary climate action. Nor is there any agreed statement by the members of the WTO on this issue. As Maria Panezi has found, making matters worse is that there is no WTO case law or other agreed statement as to whether a tax on inputs — such as fossil fuels — that are not physically incorporated into a final product is a tax that can be adjusted at the border consistently with obligations under the GATT.<sup>51</sup> This omission imposes an additional level of legal uncertainty in contemplating climate action. Considered together, these two uncertainties in the meaning of international trade law are powerful disincentives to the enactment by any WTO member of a carbon tax.

So far, the closest the world trading system has come to clarifying any aspect of these legal uncertainties was the report of a working party of the GATT — in 1970.<sup>52</sup> This report was far from definitive. It left much unanswered about the legal dimensions of permissible border tax adjustments. What is more, it occurred decades before the full emergence of climate change as a global concern. The Paris Agreement would not be approved until 45 years later. Yet this report continues to be referenced from time to time in WTO dispute settlement because there is nothing else on the subject.

WTO legal theorists have speculated about any number of ways in which it might be possible to craft a carbon tax in a way that would satisfy the

WTO requirements in applying an offsetting border tax adjustment.<sup>53</sup> Of course, as well, even if a specific carbon tax did not meet the GATT definition of a border tax adjustment, it might nevertheless be excused by one of the environmental exceptions in article XX of the GATT. But such an outcome to a WTO dispute cannot be assumed, and the possibility that a carbon tax might somehow survive WTO legal scrutiny does nothing to eliminate the current uncertainties that contribute to causing WTO members to hesitate before undertaking carbon pricing through adoption of a carbon tax.

The WTO Ministerial Conference and the WTO General Council have the exclusive authority to adopt legal interpretations of WTO obligations either by consensus or, if there is no consensus, by vote of a three-fourths majority of the WTO membership.<sup>54</sup> Here, as well, there is a high political hurdle facing WTO members. To date, no such legal interpretation has ever been adopted, and, without question, adopting one will not be easily achieved. But here, too, a failure to adopt a legal interpretation could, if there is a clash in WTO dispute settlement, have political consequences much more challenging than those posed by the political hurdles to the adoption for the first time of a legal interpretation of WTO obligations.

Accordingly, in concert with the adoption of a WTO climate waiver, the members of the WTO should adopt a formal legal interpretation clarifying that a tax on inputs such as fossil fuels that are not physically incorporated into a final product is a tax that can be adjusted at the border under WTO law and, furthermore, that a carbon tax or any other similar tax based on the amount of carbon emitted in the making of a product is an indirect tax on a product that is eligible for a border tax adjustment.

50 GATT 1994, *supra* note 19, art II:2(a).

51 Maria Panezi, *When CO<sub>2</sub> Goes to Geneva: Taxing Carbon across Borders – Without Violating WTO Obligations* CIGI, CIGI Papers No 83, 27 November 2015.

52 *Report of the Working Party on Border Tax Adjustments* (1970), GATT Doc L3464, BISD 18S/97.

53 For one of the best of these speculations, see Aaron Cosbey et al., *A Guide for the Concerned: Guidance on the Elaboration and Implementation of Border Carbon Adjustment* (Stockholm: Entwined, 2012). See also Jennifer A Hillman, “Changing Climate for Carbon Taxes: Who’s Afraid of the WTO?” (2013) German Marshall Fund, Climate & Energy Papers Series, online: <[www.climateadvisers.com/wp-content/uploads/2014/01/2013-07-Changing-Climate-for-Carbon-Taxes.pdf](http://www.climateadvisers.com/wp-content/uploads/2014/01/2013-07-Changing-Climate-for-Carbon-Taxes.pdf)>; Joel P Trachtman, “WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes” (2016), Resources for the Future Discussion Paper 16-03, online: <[www.rff.org/files/document/file/RFF-DP-16-03.pdf](http://www.rff.org/files/document/file/RFF-DP-16-03.pdf)>; Panezi, *supra* note 51.

54 Marrakesh Agreement, *supra* note 3, art IX:2.

## A Waiver Is Not a Substitute for Needed Rules Clarifications and Changes that Are Not Part of a Waiver

The adoption along with a WTO climate waiver of a legal interpretation that a carbon tax is eligible for a border tax adjustment should be a prelude to further WTO actions to support national and international climate actions. The adoption of such a legal interpretation together with the adoption of a climate waiver is only the beginning of all that must be done to reconcile trade rules with the reality of climate change. A climate waiver is not a substitute for needed rules clarifications and changes that are not part of the waiver.

For example, now, under the WTO subsidies rules, the serious prejudice showing adverse effects from a subsidy can consist only of economic effects.<sup>55</sup> The current rules do not contemplate adverse effects as including environmental effects. Thus, there is nothing to be waived in the current rules that would have the consequence of incorporating environmental effects into a determination of whether there are adverse effects causing serious prejudice and therefore justifying countermeasures. For this reason, the current WTO subsidies rules should be changed to expand the current concept of adverse effects from subsidies to include environmental as well as economic effects. An additional category of adverse effects for causing climate or other environmental harm should be added.

As another example, with respect to fossil fuel subsidies, WTO members could take a variety of actions that would not involve waiving current rules. They could do the following:

- emulate the parties to the Paris Agreement by making pledges to reduce and eventually eliminate their fossil fuel subsidies and require WTO members to report their progress and submit to reviews regularly;
- negotiate a WTO understanding clarifying the application of WTO subsidies rules to fossil fuel subsidies;
- include progress in reforming fossil fuel subsidies in periodic WTO trade policy reviews;

- add references to, and disciplines on, fossil fuel subsidies in regional trade agreements as a precursor to full WTO disciplines;
- negotiate a legal framework within the WTO specifically aimed at reducing fossil fuel subsidies; and
- include new fossil fuel subsidy disciplines in a comprehensive sectoral trade agreement on sustainable energy, which could begin by covering some WTO members and eventually include all of them.

Still another needed clarification that should be made — but would not involve a waiver — is whether the general exceptions to obligations on trade in goods under article XX of the GATT can provide a defence to what would otherwise be an illegal subsidy under the WTO rules on subsidies. The legal question is the extent to which the obligations in the WTO subsidies agreement should be viewed as elaborations of subsidies rules in the GATT and therefore as a legal part of the GATT for the purposes of GATT article XX. This is an unresolved issue in WTO jurisprudence. Providing for such a defence in the content of a WTO climate waiver would imply that the defence does not already exist under current WTO rules. It would be better to have the members of the WTO clarify that this defence already exists through the adoption of a legal interpretation that would be binding in WTO dispute settlement.<sup>56</sup>

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## A Sustainable Energy Trade Agreement

The experience derived by the members of the WTO from the adoption of a WTO climate waiver could be useful in the construction of yet another trade tool for supporting ambitious climate action — a sustainable energy trade agreement. At the outset, a sustainable energy trade agreement could bind only those WTO members that choose to be a part of it. Over time, more countries could adhere to the agreement, and it could evolve, first, into a plurilateral agreement within the

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<sup>55</sup> SCM Agreement, *supra* note 40, art 6.3.

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<sup>56</sup> Bacchus, Case, *supra* note 5 at 10–11.

legal framework of the WTO and, ultimately, into a fully multilateral WTO trade agreement.<sup>57</sup>

Global energy governance is limited and fragmented, and there are no energy-specific rules or commitments in the WTO. Yet there is urgent need today for global governance that helps enable the shift in energy production and use toward renewable energy sources. One of the answers to this need can be a plurilateral and eventually multilateral WTO agreement focused on the energy sector. Such an agreement could build on long years of negotiations by including a WTO accord eliminating tariff and non-tariff barriers to trade in clean energy and energy-efficient technologies. Added to this could be the freeing of the extensive trade in environmental services. Mutual recognition and, in some instances, harmonization of the standards and technical regulations that are often the biggest hurdles to international trade should also be included in a sustainable energy trade agreement.

Likewise, such an agreement should address long-standing concerns over technology transfer and development, where promises made to developing countries when the WTO was established have not been kept. In addition, such an innovative new trade agreement could include sectoral and transitional arrangements for emissions-intensive and export-sensitive industries such as cement and steel — including on best practices on emissions and sustainability. Among the provisions included in a sustainable energy trade agreement could be the repeal and discipline of government purchasing restrictions that distort clean energy trade and the addition of provisions that promote foreign investment and ensure foreign competition in sustainable energy.<sup>58</sup>

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## Conclusion

Additional examples abound throughout the WTO treaty of how trade rules must be reimagined to reflect the intertwining and inescapable relationship between economy and environment and to support climate actions and other actions to achieve internationally agreed goals for global sustainable development.<sup>59</sup> The truth is the economy and environment are one and the same, and they must be treated as one and the same in all international rules for global governance. The economic future cannot be separated from the environmental future, and vice versa. An understanding of this basic truth must become central to all that is done by the WTO. Thus, any truly relevant discussion of bringing the WTO fully into the twenty-first century must begin with a reimagining of the trade rules to support sustainable development. The members of the WTO are likely to be much more inclined to engage in this reimagining if they first have the experience of adopting and benefiting from a WTO climate waiver.

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57 “The WTO Ministerial Conference, upon the request of Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4,” the list of plurilateral agreements in the WTO Agreement. *Marrakesh Agreement*, *supra* note 3, art X:9.

58 Bacchus, *Willing World*, *supra* note 5 at 264–70.

59 For numerous specific examples, see *ibid* at 185–403.

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**Centre for International  
Governance Innovation**

67 Erb Street West  
Waterloo, ON, Canada N2L 6C2  
[www.cigionline.org](http://www.cigionline.org)

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