

CIGI Papers No. 220 – July 2019

What Is a Climate Response Measure?

Breaking the Trade Taboo in Confronting Climate Change

James Bacchus



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CIGI Masthead

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Centre for International Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
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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 the chairman and chief judge of the Appellate Body of the World Trade Organization in Geneva. He also served as a member of the United States Congress and as an international trade negotiator for the United States. James is the Pao Yue-Kong Chair Professor at Zhejiang University in Hangzhou, China, and an adjunct scholar of the Cato Institute in Washington, D.C. He is a member of the board of advisers to the United States chapter of the United Nations Sustainable Development Solutions Network. 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 Global Sustainability Council of the World Economic Forum. 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.

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.

Executive Summary

Trade has become a taboo topic in climate negotiations on the implementation of the Paris climate agreement. This must change. The nexus between trade and climate change must be addressed in the climate regime. In particular, a definition is needed that will clarify the meaning of a climate “response measure.” Without a definition provided by climate negotiators, the task of defining which national climate measures are permissible and which are not when they restrict trade while pursuing climate mitigation and adaptation will be left to the judges of the World Trade Organization (WTO). To avoid a collision between the climate and trade regimes that will potentially be harmful to both, the ongoing deliberation on response measures in the climate regime must be reframed by ending the climate taboo on trade. In the line-drawing that will be unavoidable in securing a consensus among developed and developing countries on a definition of a response measure, several crucial questions must be asked and answered. To support more ambitious climate actions, the national measures included within the definition of a response measure should not be limited only to those measures taken in furtherance of the fulfilment of countries’ current voluntary “nationally determined contributions” (NDCs) to climate mitigation and adaptation under the Paris Agreement. For the same reason, the kinds of national measures included within the definition of a response measure must not be limited to a specific list, but rather could be identified in an illustrative and non-exhaustive list that would allow for unforeseen innovation in national responses to climate change. National measures that address climate change but also restrict trade should not be excluded from the definition of a response measure if they are truly intended to address climate change. Certain kinds of discriminatory trade effects should be permitted in a response measure if those effects are indeed part of a national measure to mitigate climate change. However, trade protection in the guise of climate mitigation should not be included within the definition of a response measure if the climate mitigation in the measure is only a guise — if it is cloaked in a climate disguise and if the genuine aim of the measure is only trade protection. In exchange for their agreement to a definition of a response measure that includes measures that

apply restrictions on trade, developing countries apprehensive of “green protectionism” should be offered increased and accelerated climate finance, technology transfer, and capacity building for mitigating and adapting to climate change, and also additional concessions in agricultural and other sectors of trade that will enable them to maximize their gains from their comparative advantages in the global marketplace. The best approach to reframing climate work on response measures would be for the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) to work in concert with the members of the WTO in crafting a definition of a response measure that could be agreed by the COP. The WTO could then recognize and use that definition in the trade regime through reliance in dispute settlement, adoption of an amendment to the trade rules, a legal interpretation of trade rules or, ideally, incorporation of the definition in a WTO climate waiver. Reaching agreement on the definition of a climate response measure must be placed at the top of the agenda of the climate forum entrusted with dealing with the impacts of national measures taken in response to climate change.

Introduction

Speaking at the twenty-fourth Conference of the Parties (COP24) in Katowice, Poland, in December 2018, Senior Economic Officer Alexey Vikhlyaev of the United Nations Conference on Trade and Development (UNCTAD) summed up succinctly a global challenge confronting both the international climate and trade regimes that has been largely ignored in international deliberations: “Both trade and climate are central to the 2030 Agenda of the United Nations. But trade has become a taboo subject when talking about climate change. This should not be the case.”¹

National measures taken to mitigate climate change can have impacts that cross national borders. These impacts can be “social, economic or environmental,” and they can have “a strong

1 UNCTAD, “Tackling trade in trying times” (19 December 2018), online: <<https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1966>>.

connection to sustainable development.”² These transnational consequences of national efforts to combat climate change can be desirable, providing such “co-benefits” from addressing climate change as cleaner air, improved health, enhanced technology and green growth in productivity. They can be part of the green transition urgently needed to shift the world away from a global economy heavily dependent on the fossil fuels that are causing global warming and toward sustainable energy sources.

These impacts can also be undesirable. In particular, because of the interconnected nature of the global economy, national measures that regulate, restrict or prohibit certain economic actions and that encourage or support others, for the purpose of mitigating climate change, can have negative economic effects on other countries and especially on the developing countries that are much in need of sustainable development. National measures that alter the mix of energy that goes into the making of products by imposing a price on the use of carbon will also alter the relative prices of those products in global markets. This change in relative prices will have negative effects on the international competitiveness of those countries that have put either a lower price or no price on the use of carbon in production. These negative effects may also frustrate access for developing countries to foreign markets and, as a result, affect trade.

Producers in developed countries are reluctant to support national climate action, in part, because they fear they will be disadvantaged in trade by “carbon leakage.” They fear that if a price is put domestically on the use of carbon in making their products, then their products will be displaced both at home and abroad by cheaper products from countries that have not done so. Developed countries worry that both domestic and foreign sales of their products may be displaced by lower-priced, higher-carbon products from other, mostly developing, countries.

This concern is especially widespread among “energy-intensive, trade exposed” industries such as steel, aluminium, cement, pulp and paper, metal casting, glass and chemicals. These heavy-manufacturing industries use energy-intensive production processes and compete

with foreign products at home and abroad. So, they are apprehensive about the displacement of their carbon-priced exports in other markets and the competition from cheaper, higher-carbon imports in their home markets.

This fear of carbon leakage in developed countries can influence the character and the content of national measures enacted and implemented by those countries under the rubric of confronting climate change. The political price for securing the necessary domestic support to enact such measures may sometimes be a concession to domestic interests fearful of carbon leakage in the form of trade restrictions that have the effect of discriminating against foreign products in the domestic market. Thus, national measures ostensibly taken in response to climate change may also sometimes contain elements of protectionism.

Producers in developing countries fear the impacts on the competitiveness of their products from actions taken in developed countries to prevent carbon leakage. Many developing countries are concerned that measures ostensibly taken by developed countries to reduce greenhouse gas emissions will instead be protectionist measures taken to restrict imports. Thus, for some time, “most developing countries...have been voicing their concern in relevant multilateral fora about the possible implementation of response measures linked to trade that may be detrimental to their exports.”³ In the view of many developing countries, when developed countries enact climate measures that contain trade restrictions, they “seek...to transfer the costs of implementing their environmental obligations... to developing countries, and thereby not lose competitiveness vis-à-vis these countries. In this context, these measures have a greater impact on exports from developing countries.”⁴ For this reason, developing countries see these actions by developed countries as green protectionism.⁵

2 Andrei Marcu & Wijnand Stoefs, *The Role of Response Measures in Ensuring the Sustainable Transition to a Low-GHG Economy* (Geneva: International Centre for Trade and Sustainable Development, 2017) at 3.

3 María Victoria Lottici, Carlos Galperin & Julia Hoppstock, “‘Green Trade Protectionism’: An Analysis of Three New Issues that Affect Developing Countries” (2014) 2:2 *Chinese J Urban & Envtl Stud* 1 at 13.

4 *Ibid* at 2.

5 *Ibid*.

The Coming Collision of Trade and Climate Change

In the climate regime, the discussion of climate response measures has generally been limited to the narrow context of the adverse extraterritorial effects of domestic climate policies adopted by developed countries. Although this discussion has continued for many years, it has not yet led to any agreed resolution. Furthermore, although the topic of trade has often been a part of this climate discussion, there has long been a hesitancy among climate negotiators to grapple more broadly with the international legal implications of the connections between national responses to climate change and trade and trade law.

But international trade law exists, it applies to much that is likely to happen in climate action and, without any change in the current rules of the multilateral trading system based in the WTO, the contrasting views of developed and developing countries on the merits of the trade effects of national measures that are labelled as climate response measures will soon become legal arguments in international trade disputes in WTO dispute settlement. For example, where national measures restrict or otherwise affect trade while attempting to mitigate climate change, they fall within the jurisdictional scope of the WTO treaty and they raise some fundamental questions under international trade law.

As Peter Govindasamy writes, “The inter-linkages between response measures and the WTO will become more pronounced as parties implement their pre-2020 climate actions and post-2020 nationally determined contributions” under the Paris climate agreement.⁶ “Trade disputes are more likely in a world of uncoordinated and conflicting national responses to climate challenges.”⁷ Foreseeing the coming collision between the international trade and climate change regimes, climate scientists on the Intergovernmental Panel on Climate Change

(IPCC), in their Fifth Assessment Report in 2014, called for “pre-emptive cooperation” between the trade and climate regimes, noting that “there are numerous and diverse explored opportunities for greater international cooperation in trade-climate interactions. While mutually destructive conflicts between the two systems have thus far been largely avoided, pre-emptive cooperation could protect against such developments in the future.”⁸

Trade restrictions that are claimed to relate to climate concerns may take many forms, touching on many different WTO rules. They may be in the form of carbon taxes, other border carbon adjustments, cap-and-trade systems, technical regulations, standards, labelling requirements, import emissions allowances and more. An analysis of the current national climate pledges under the Paris Agreement shows that, already, 18 refer to regulating trade based on climate grounds, 17 anticipate using standards or labelling requirements, 10 refer to fossil fuel subsidy reform and one mentions the possibility of introducing border carbon adjustments.⁹ As Clara Brandi reported, “[t]rade-related elements feature prominently in climate contributions under the Paris Agreement,” and “around 45 percent of all climate contributions include a direct reference to trade or trade measures.”¹⁰ With climate change accelerating, countries are being urged to increase their climate ambitions. Many are preparing to “ratchet up” their climate contributions by 2020 and in the following years. As they do so, the scope for climate-trade interactions will likely broaden. Without further clarification of the climate-trade relationship or the issue of response measures, a collision between the climate and trade regimes will occur sooner than many expect.¹¹

The climate regime does not provide a dispute settlement system to deal with this approaching collision. Article 14 of the UNFCCC contemplates the resolution of disputes through negotiation, submission to the International Court of Justice,

6 Peter Govindasamy, “Economic Development and Climate Protection: Coloring, Texturing and Shading of Response Measures in Sustainable Development” (2015) 2:2 Chinese J Urban & Envtl Stud 1 at 5.

7 *Ibid.*

8 IPCC, *Climate Change 2014: Mitigation of Climate Change*, Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (New York: Cambridge University Press, 2014), ch 13 (International Cooperation: Agreements & Instruments).

9 Clara Brandi, “Trade Elements in Countries’ Climate Contributions under the Paris Agreement” (2017) Geneva: International Centre for Trade and Sustainable Development at vii.

10 *Ibid.*

11 James Bacchus, “The Case for a WTO Climate Waiver” CIGI, Special Report, 2 November 2017 at 1–4 [Bacchus, “The Case”].

arbitration or conciliation.¹² Article 14.2(b) of the UNFCCC envisages “[a]rbitration with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration.”¹³ However, nearly three decades after the agreement on the UNFCCC in 1992, an annex on arbitration has yet to be adopted by the COP.

Article 24 of the Paris Agreement specifies, “The provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement.”¹⁴ Because the COP has taken no action to give effect to article 14, this article in the Paris Agreement is, at least for now, rendered meaningless. With all else that was on the table in Paris, the negotiation of a separate climate dispute settlement system under the Paris Agreement was widely seen as reaching too high. Instead, the Paris climate regime has been “lightly legalized” and has “generally adopted a managerial rather than an enforcement approach to compliance.”¹⁵

Specifically, the implementation of and compliance with the Paris Agreement by parties to the agreement is to be assured by a “facilitative” and “non-punitive” committee. This will be done in a non-adversarial setting that will little resemble the adversarial litigation in the WTO.¹⁶ Thus, should a conflict arise between parties to the Paris Agreement about the impacts of the implementation of domestic climate policies on trade, there is no binding enforcement mechanism within the UNFCCC to resolve such a dispute.

Such a dispute would therefore most likely be resolved in the WTO. After all, 164 of the 195 parties to the UNFCCC are also members of the WTO. Therefore, when a dispute arises between a party implementing a trade-restrictive climate measure and a party suffering from the trade restriction, the WTO will have jurisdiction over the dispute if both

parties are also WTO members.¹⁷ In such a dispute, WTO judges will doubtless rely on a definition by the climate regime of a legitimate climate response measure — if there is one. If, however, there is not an agreed definition, then, to do their job of resolving the dispute before them, the WTO judges will have to decide for themselves, based on the case before them at the time, whether a challenged measure is in fact a climate response measure. Thus, one of the principal tasks of the climate regime will be fulfilled by the trade regime — a less than ideal result for both climate and trade governance.

Climate Negotiations on Response Measures

The UNFCCC of 1992, the 1997 Kyoto Protocol to the UNFCCC and the Paris Agreement concluded at COP21 in 2015 all contain some general provisions on the cross-border impacts of so-called climate response measures, including on trade. But these international agreements are all silent on the definition of a climate response measure. They do little to delineate the relationship between climate measures and trade in anything approaching definitive terms.

Despite the absence of legal clarification, there is, among the parties to the Paris Agreement, a broad recognition that climate measures should not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. Moreover, there is broad agreement that countries should aim to reduce any negative economic and social impacts of climate measures as much as possible. These views have existed and persisted since the outset of the climate regime at the Rio Earth Summit in 1992.

Yet, for more than a quarter century since, climate deliberations on the impacts of climate response measures have been highly contentious, controversial and even more politicized than most other divisive climate issues. Also, these deliberations have long been more procedural than substantive. They have yet to delve deeply into the complex substantive nuances of the nexus between trade and climate change. Although there has been

12 UNFCCC, 9 May 1992, 1771 UNTS 107, 31 ILM 849, art 14 (entered into force 21 March 1994).

13 *Ibid.*, art 14.2(b).

14 *Paris Agreement*, Dec CP.21, UNFCCC, 21st Sess, UN Doc FCCC/CP/2015/L.9 (2015), art 24.

15 The author owes this phrasing and this observation to his CIGI colleague Géraud de Lassus Saint-Geniès. For an examination of the cultural reasons in the climate regime as to why such an approach has been preferred, see Daniel Bodansky, “The role of the ICJ in addressing climate change: some preliminary reflections” (2017) 49 *Ariz St LJ* 689.

16 *Paris Agreement*, *supra* note 14, art 15.

17 Bacchus, “The Case”, *supra* note 11 at 1–4.

a growing recognition of the connections between climate response measures and international trade, the questions of the inclusion of trade restrictions in measures taken to mitigate climate change, and of the legitimacy and legality of such restrictions, have not been answered in the climate talks.

The tendency in the ongoing deliberations on response measures has been to defer the hard decisions that must be made on the question of trade restrictions in national climate measures. As an example, at COP18 in Doha in 2012, some developing countries suggested the inclusion of the following language in the conference outcome document: “Decides that developed country Parties shall not resort to any form of unilateral measures against goods and services from developing country Parties on any grounds related to climate change, including protection and stabilization of the climate, emissions leakage and/or the cost of environmental compliance.”¹⁸

This language was rejected by developed countries as going beyond the terms of the UNFCCC and, in the absence of a consensus, it was not included in the COP18 outcome document. Yet the divide over this issue lingers between developed and developing countries, lurking just below the surface of the continuing climate deliberations on response measures. The countries in the COP remain perfectly free to raise the issue of the impact of unilateral trade measures as part of national climate measures, but the taboo on trade in climate talks has taken hold.

In no small part, this is due to the uncertainty of climate negotiators on the jurisdictional issue of whether the nexus between trade and climate change — including the issue of trade restrictions in climate response measures — is the legal terrain of the climate regime or the trade regime. National climate negotiators have tried to steer clear of any discussions that might give pause to their trade ministries or to their delegates to the WTO. Meanwhile, trade negotiators have been waiting for the climate regime to answer the difficult questions they would rather not have to answer themselves about the connections between trade and climate change. Generally overlooked by both international regimes has been the possibility that the two of them could work together to resolve these issues.

18 Ad Hoc Working Group on Long-term Cooperative Action under the Convention, *Informal Overview Text by the Chair*, UNFCCC, 15th Sess, UN Doc FCCC/AWG/LCA/2012/CRP.3 (2012) at 23.

Yet, difficult as it may be to achieve after nearly three decades of failure, the potential for mutual resolution of these issues exists. As Nicholas Chan put it, “the dominance of this dichotomous deadlock — an either/or choice between the UNFCCC and the WTO — does not mean that subtler options do not exist to harmonize action and carefully delineate responsibilities and competencies between the two regimes. Rather, these have been drowned out by efforts that favour one outright over another.”¹⁹

In the first two decades of the climate regime following the establishment of the UNFCCC in 1992, the issue of climate response measures was driven mainly by major oil-exporting developing countries seeking compensation for lost economic opportunities anticipated from prospective climate measures by developed countries that threatened to reduce their oil exports. Over time, a larger group of developing countries became interested in the topic and, in 2010, COP set up a dedicated forum to discuss the impacts of the implementation of response measures. Deliberations in the forum, however, have largely centred on the adverse impacts of climate change on developing countries. They have focused much less on the impacts of the implementation of climate response measures. As seen at COP18 in 2012, attempts to broaden the scope of the forum to include substantive consideration of the overall nexus between climate response measures and trade have had limited success.

Due to divisions between developed and developing countries about the purpose and function of the forum, parties were unable to renew the forum’s mandate after it lapsed at the end of 2013. But, given the importance of the issue of response measures to many countries, breaking the two-year stalemate became critical to securing the conclusion of the Paris Agreement in 2015. In the run-up to the Paris climate conference, the issue of response measures became a key priority for many developing countries, and its ultimate inclusion

19 Nicholas Chan, “The ‘New’ Impacts of the Implementation of Climate Change Response Measures” (2016) 25:2 RECIEL 228 at 233. Chan cites James Bacchus, *Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes*, E15 Expert Group on Measures to Address Climate Change and the Trade System – Policy Options Paper (Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, 2016).

in the new climate accord was critical in forging a consensus in favour of the overall agreement.²⁰

In Paris, the parties agreed to continue the forum and to improve it by having it serve the Paris Agreement. For the forum's work program running from 2016 to 2018, the parties decided to focus on two items — economic diversification and transformation — and a just transition of the workforce and the creation of decent work and quality jobs.²¹ These continue to be the two priorities of the forum following COP24 in Poland in December 2018. A committee of experts was charged at COP24 with developing and recommending a six-year work plan on response measures to the subsidiary bodies of the UNFCCC at their session in Bonn in June 2019.

These two themes show how much the issue of response measures has evolved during the past two decades. Gradually, the emphasis has shifted from the compensation argument advanced by oil-rich developing countries to dealing instead with the economic and social impacts of the transition toward a low-carbon economy. Parties are looking at the issue much more now through the lens of sustainable development. The debate is no longer driven primarily by oil-exporting developing countries or developing countries more generally. Rather, the debate is among all countries over issues facing both developed and developing countries, albeit in different ways. Developed countries have become primarily concerned with the impacts that climate measures could have on their international competitiveness. Equally, competitiveness is a consideration for developing countries, but they are generally more focused on the effects of response measures on their vulnerability, resilience, economic transformation and standards of living.²²

To advance work on the technical aspects of these two items on the work program of the improved forum in the context of sustainable development, parties agreed at COP22 in Marrakesh in 2016

to establish an ad hoc technical expert group.²³ The work of this expert group is under way, but attempts to make the group permanent have not, thus far, been successful. Efforts at getting the technical expert group going continued at COP24 in Poland in December 2018. Also, among the lengthy list of topics identified for future consideration by the forum at COP24 was the “impacts of the implementation of response measures on economic development in relation to trade.”²⁴ This general statement, however, was as far as the forum would go in official actions of the latest global climate conference.

In the past few years, there have been several discussions and workshops on the two areas of the work program of the improved climate response forum, as well as deliberations on the ways in which the forum will best serve the purposes of the Paris Agreement. These discussions have demonstrated the growing importance of the issue of response measures as part of the overall effort to forestall and fight back against climate change.

And yet, although parties have increasingly engaged on the issue of response measures, and the tacit meaning of the term has evolved to focus on achieving a sustainable transition for all countries, no attempt has been made by the UNFCCC to define a climate response measure. The absence of an agreement on the definition of a response measure poses a real risk to the success of the Paris climate regime, as a growing number of countries begin to implement increasingly ambitious and diverse response measures to climate change, including measures that will affect international trade.

The sum of countries' current self-declared climate targets falls significantly short of the emissions cuts needed to reach the 2°C goal. According to the UN Environment Programme (UNEP), even full implementation of current NDCs (countries' individual climate action pledges) will deliver only one-third of the emissions cuts needed to keep global warming below the 2°C limit. Without deeper emissions

20 Chan, *supra* note 19 at 232–35.

21 *Improved forum and work programme: Revised draft conclusions proposed by the Chairs*, UNFCCC, 44th Sess, UN Doc FCCC/SB/2016/L.2/Rev. 1 (2016).

22 Marcu & Stoefs, *supra* note 2 at 20.

23 *Report of the Subsidiary Body for Scientific and Technical Advice on its forty-fifth session, held in Marrakesh from 7 to 15 November 2016*, UNFCCC, 45th Sess, UN Doc FCCC/SBSTA/2016/4 (2017) at para 61.

24 “Summary of the Katowice Climate Change Conference: 2–15 December 2018” (2018) 12:747 *Earth Negotiations Bull* 1 at 27.

cuts, this puts the world on a path toward a 3°C increase from pre-industrial levels by 2100.²⁵

Meanwhile, climate scientists are now saying that limiting temperature increases by 2100 to 2°C above pre-industrial levels will not be enough to avoid the worst effects of climate change. Rather, we should be aiming for the loftier Paris goal of limiting temperature increases by the end of the century to 1.5°C.²⁶ Already, the IPCC is reporting with high confidence that “[h]uman activities are estimated to have caused approximately 1.0C of global warming above pre-industrial levels, with a likely range of 0.8C to 1.2C. Global warming is likely to reach 1.5C between 2030 and 2052 if it continues to increase at the current rate.”²⁷ Thus, urgently needed are real transformational changes driven by impactful climate measures that will help speed up the necessary transition to a low-carbon and eventually a no-carbon world.

But when these response measures restrict trade and therefore challenge existing trade rules, how can it be determined if they are legitimate measures that truly are intended to address climate change when there is no agreed definition of a climate response measure? And without a definition of a response measure, how can countries be given adequate policy space and enough legal certainty to implement ambitious climate measures that may restrict trade without undermining more than 70 years of success in building a global trading system that has helped lift hundreds of millions of people out of poverty?

Climate Law on Response Measures

Although climate negotiators have long largely avoided the taboo of trade in climate deliberations, the potential of climate measures to affect trade has been acknowledged by the climate regime since its beginning in 1992 in the treaty text of the UNFCCC.

25 UNEP, *Emissions Gap Report 2018* (Nairobi, Kenya: UNEP, 2018).

26 IPCC, “Summary for Policymakers” in *Global Warming of 1.5°C* (2018).

27 *Ibid* at 10 [emphasis in original].

In conscious echo of the language in article XX of the General Agreement on Tariffs and Trade (GATT) that sets out the conditions that can justify environmental and other general exceptions to compliance with international trade rules, article 3.5 of the UNFCCC provides: “The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable growth and development in all Parties, particularly developing country parties, thus enabling them better to address the problems of climate change. 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.”²⁸

Among the commitments in the UNFCCC are several that relate to the nexus of response measures and trade.

Article 4.8 of the UNFCCC states that, in implementing their convention commitments, “Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures.”²⁹

According to Farhama Yahmin and Joanna Depledge, the expression “impact of climate measures” generally refers in the climate vernacular to “the negative economic impacts resulting from the implementation of climate mitigation policies.”³⁰ The language in article 4.8 of the UNFCCC clearly reflects a call by developing countries for help to cope not only with the adverse effects of climate change, but also with any negative impacts arising from the implementation of climate measures. It seems clear that climate mitigation policies can include trade restrictions and that the negative economic impact of such policies can include the harms caused by trade restrictions.

28 UNFCCC, *supra* note 12, art 3.6.

29 *Ibid*, art 4.8.

30 Farhama Yahmin & Joanna Depledge, *The International Climate Regime: A Guide to Rules, Institutions and Procedures* (Cambridge, UK: Cambridge University Press, 2004) at 247.

As Chan has explained, “What is crucial about Article 4.8...is the linked recognition of giving consideration to the needs and concerns of developing countries for both the ‘adverse effects of climate change’ and the ‘impact of the implementation of response measures.’ The former addresses the consequences of climate change for developing countries, normally expressed as climate impacts and hence requiring adaptation action; the latter address the consequences of countries’ responses to climate change, hence requiring remedy to these responses. In practical terms, these two themes concern very different substantive matters.”³¹

In 1992, article 4.8 was, in part, a bargaining chip to secure the participation of fossil fuel-producing developing countries that otherwise may not have agreed then to become parties to the UNFCCC. The provision was largely incorporated due to the concerns of those countries about prospective disruptions to their trade and, thus, their economies, that could be caused by climate mitigation measures by developed countries. This is stated specifically in article 4.8(h), which notes the importance of considering “[c]ountries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products.”³²

Article 4.10 of the convention reiterates this point, underscoring the need for parties to “take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change,” thus stressing again the potential of adverse impacts arising from response measures. The same article further emphasizes that “[t]his applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.”³³

³¹ Chan, *supra* note 19 at 229.

³² UNFCCC, *supra* note 12, art 4.8.

³³ *Ibid*, art 4.10.

Yet article 4.8 is in no way limited to the concerns of fossil fuel-producing developing countries. More broadly, it states that the consideration of the “adverse effects of climate change and/or the implementation of response measures” must include:

- small island countries;
- countries with low-lying coastal areas;
- countries with arid and semi-arid areas, forested areas and areas liable to forest decay;
- countries with areas prone to natural disasters;
- countries with areas liable to drought and desertification;
- countries with areas of high urban atmospheric pollution;
- countries with areas of fragile ecosystems, including mountainous ecosystems;
- countries whose economies are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products; and
- landlocked and transit countries.³⁴

As Chan has noted, this long list is “broad enough to conceivably include any developing country.”³⁵

What is more, it is emphasized in article 4.9 of the UNFCCC that, in fulfilling their commitments, “The Parties shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology.”³⁶ Presumably, this obligation to stress the needs of the least developed countries applies also in the context of climate response measures.

Climate response measures were addressed next in the Kyoto Protocol to the UNFCCC³⁷ (the 1997 agreement that set emissions reduction

³⁴ *Ibid*, art 4.8(a)-(i).

³⁵ Chan, *supra* note 19 at 229, n 5.

³⁶ UNFCCC, *supra* note 12, art 4.9.

³⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 148, 37 ILM 22 (1998), art 2.3 [entered into force 16 February 2005] [Kyoto Protocol].

targets for developed countries that were parties to the protocol, but required no emissions cuts by developing countries). Article 2.3 of the Kyoto Protocol stipulates that, in implementing climate policies and measures, parties should “minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties.”³⁸

There is no specific mention of trade in the Paris Agreement concluded at COP21 in 2015. Moreover, there is no consensus on whether the underlying obligation on trade in article 3.5 of the UNFCCC continues to apply with respect to all actions taken under the Paris Agreement, including those relating to response measures. This lack of consensus is due to the lack of consensus also on the question of the legal relationship between the UNFCCC and the Paris Agreement. The nature of the legal relationship between the UNFCCC and the Paris Agreement and, thus, the extent to which the principles in the UNFCCC apply to the Paris Agreement, are controversial questions left unresolved by the climate negotiators at COP21.

The decision adopting the Paris Agreement states that the parties to it have decided to “adopt the Paris Agreement *under* the United Nations Framework Convention on Climate Change.”³⁹ The preamble to the Paris Agreement notes that the parties to the agreement are also parties to the UNFCCC and that they are acting “*in pursuit of* the objective of the Convention” and are “*guided by* its principles.”⁴⁰ Article 21 of the Paris Agreement characterizes it as “*enhancing the implementation of* the Convention, including its objective.”⁴¹ But those who negotiated it stopped short of identifying and characterizing the Paris Agreement as a formal legal protocol of the UNFCCC. Thus, the legal relationship between the Paris Agreement and the UNFCCC remains a matter for legal debate.

As a result, so too does the relationship between the trade provisions in article 3.5 of the UNFCCC and the Paris Agreement. Accordingly, so also does the question raised by developing countries at COP18 in 2012 of the legality of unilateral

restrictions on imports that may be imposed by developed countries for climate reasons. If article 3.5 of the UNFCCC applies to the Paris Agreement, then “[m]easures 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.”⁴² However, if article 3.5 of the UNFCCC does *not* apply to the Paris Agreement, then it can be argued that measures taken by countries “to combat climate change, including unilateral ones,” can “constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”

If viewed solely from a climate perspective, this may not seem like a significant concern. From an exclusively climate perspective, addressing climate change is a transcending concern, and precisely how it may be addressed in any given national measure is less so. The means are less important than the transcending end. But if seen also from a trade perspective, the notion that unilateral climate measures that limit trade can “constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade” is a significant concern indeed. Given the uncertainty about the legal relationship between the UNFCCC and the Paris Agreement, a climate measure that is imposed in a way that constitutes “arbitrary or unjustifiable discrimination or a disguised restriction on international trade” may or may not be illegal because of the application of article 3.5 of the UNFCCC to the Paris Agreement.

However, for the 164 parties to the Paris Agreement that are also members of the WTO, this may not matter. The language in article 3.5 of the UNFCCC constraining the application of trade restrictions is borrowed from the WTO treaty, and all WTO members are bound by their obligations in the WTO treaty. In the absence of any action by the climate regime defining what is a legitimate climate response measure, the legal uncertainty about the relationship between the UNFCCC and the Paris Agreement may well turn out to be one of the contributing causes of a collision between the trade and climate regimes.

Despite the omission of trade from the text of the Paris Agreement, the importance of response measures, including those that may affect trade, is reflected in several places in the agreement. It is

38 *Ibid.*

39 *Adoption of the Paris Agreement*, Dec 1/CP.21, UNFCCC, UN Doc FCCC/CP/2015/10/Add. 1 (2016), Preamble [emphasis added].

40 *Paris Agreement*, *supra* note 14, Preamble [emphasis added].

41 *Ibid.*, art 21 [emphasis added].

42 UNFCCC, *supra* note 12, art 3.5.

acknowledged in the preamble to the agreement “that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it.”⁴³ Article 4.2 of the agreement provides, “Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of” their NDCs.⁴⁴ Article 4.15 of the Paris accord 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.”⁴⁵ Reinforcing these treaty provisions, the preamble of the decision adopting the Paris Agreement also refers to the issue of response measures, “acknowledging the specific needs and concerns of developing country Parties arising from the impact of the implementation of response measures.”⁴⁶

In the decision accompanying adoption of the treaty, the parties agreed also to continue the response measures forum and to have it serve the Paris Agreement, thus anchoring the forum in the new climate regime.⁴⁷ More specifically, they concurred that the forum shall enhance “cooperation amongst Parties on understanding the impacts of mitigation actions under the Agreement and the exchange of information, experiences, and best practices amongst Parties to raise their resilience to these impacts.”⁴⁸ The forum on response measures is therefore intended to improve countries’ understanding of the impacts of response measures and increase their resilience to them. In addition, the Paris decision requests parties to consider “[i]nformation on the social and economic impact of response measures” when developing the accounting modalities under the transparency framework.⁴⁹

The issue of response measures is therefore firmly integrated into the new climate regime under the Paris Agreement. Parties to the climate agreement clearly have recognized the growing importance of dealing with the impacts of the implementation

of response measures to ensure a sustainable transition to a low-carbon global economy.

And yet, despite the continued application of the term “response measures” throughout the UNFCCC agreements, and the expansion of the scope of the term to underscore the need for a transition to global sustainable development, in the absence of a definition of a climate response measure, it remains unclear which consequences of countries’ actions taken in response to climate change must be accepted, given the overriding urgency of national climate responses and, in particular, which such governmental actions can be considered legitimate climate measures if they restrict or otherwise affect trade.

Overlap with Trade Law

Without efforts to find solutions to reconcile the climate and trade regimes, the absence of a definition of a response measure in climate law risks causing not only a confrontation between the two regimes, but also a “chilling effect” on the enactment of the ambitious national climate measures that are needed immediately. Uncertain of whether climate measures that may restrict trade will pass muster in WTO dispute settlement or, instead, expose them to expensive trade sanctions by the WTO, some parties to the Paris Agreement may choose to rein in their climate ambitions. Constraints on climate ambitions, including those due to legal uncertainty, are in no one’s interest at a time of climate urgency.

Where parties to the Paris Agreement do enact climate measures that restrict or otherwise affect trade, the measures may be inconsistent with the current WTO rules. As previously noted, of the 195 countries that are parties to the Paris Agreement, 164 are members of the WTO and thus are parties to the WTO Agreement.⁵⁰ In the dispute settlement understanding that is part of this agreement, WTO members have agreed to take all their disputes with other members relating to matters falling within the scope of the agreement to WTO

43 *Paris Agreement*, *supra* note 14, Preamble.

44 *Ibid*, art 4.2.

45 *Ibid*, art 4.15.

46 *Adoption of the Paris Agreement*, *supra* note 39, Preamble.

47 *Ibid* at para 33.

48 *Ibid* at para 34.

49 *Ibid* at para 95(f).

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

dispute settlement for resolution.⁵¹ Generally, all measures affecting trade, including any restrictions on trade, are within the jurisdictional scope of the WTO Agreement and thus subject to mandatory and binding WTO dispute settlement.

Post-Paris-Agreement, in pursuit of their climate goals, countries will implement increasingly ambitious and diverse climate measures, ranging from carbon taxes, cap-and-trade programs, import emissions allowances, performance standards, and technical regulations to border measures and product bans. Some of these response measures may be taken not only to pursue national climate goals but also to address domestic fears about loss of competitiveness or carbon leakage — a situation where emissions simply move to countries with less ambitious climate measures and hence global emissions are not reduced but simply shifted somewhere else. Such measures may restrict trade and thus be subject to WTO dispute settlement, and the trade restrictions in these measures may be suspect under the current trade rules of the WTO.

How can countries justify such measures as legitimate climate response measures that should not be ruled inconsistent with their WTO obligations if climate response measures have not been defined by the COP to clarify their meaning?

In the run-up to COP21 and the conclusion of the Paris Agreement in 2015, developing countries, reminiscent of their rejected proposal at COP18 in 2012, tried to protect themselves against unilateral measures from developed countries that may affect trade. However, a provision in a preliminary draft of the agreement that “developed country parties shall not resort to any form of unilateral measures against goods and services from developing country parties on any grounds related to climate change” was ultimately seen as too restrictive and so was dropped from the final text. China, India, Pakistan, Saudi Arabia and Sudan were among the parties that supported the language; the United States and the European Union were among those that opposed it.⁵²

The omission from the final text of the more restrictive draft paragraph on the use of unilateral trade-restrictive climate measures can be viewed

as indicating a tacit recognition by the parties that the Paris Agreement will likely result in some forms of trade-restrictive unilateral climate response measures. The still unanswered question is: what forms must such climate response measures take to be regarded as legitimate national actions enacted and applied to mitigate or adapt to climate change?

In answering this question, it will be necessary to reframe the debate over response measures. No longer should the topic of trade be taboo in climate negotiations over how best to respond to climate change. Starting now, trade must be at the centre of the debate about response measures, and trade must especially be at the centre of the debate about how to define response measures.

What Should Be Included in the Definition of a Climate Response Measure?

The task of defining a response measure in ongoing climate negotiations will necessarily require a legal line that will include some measures, but not others, within the definition. The location of this line will be determined by the outcome of a debate between developed and developing countries. Unavoidably, this debate will be driven on both sides by competitiveness concerns as much as by climate concerns. A consensus will be reached on the definition of a response measure only if the competitiveness concerns of both sides are sufficiently addressed. In achieving this consensus, a line “in between” must be identified that will do the most to mitigate climate change while doing the least to hinder the continuing endeavour to liberalize trade that is fundamental to the hopes of all those in the world searching for sustainable global prosperity.

In this line-drawing, several crucial questions will have to be asked and answered by the parties to the COP.

⁵¹ *Ibid*, Annex 2, art 23 (Understanding on Rules and Procedures Governing the Settlement of Disputes).

⁵² “Summary of the Bonn Climate Change Talks: 10–14 August 2009” (2009) 12:427 *Earth Negotiations Bull.*

Should the national measures included within the definition of a response measure be limited only to measures taken in furtherance of the fulfilment of countries' current voluntary NDCs to climate mitigation and adaptation under the Paris Agreement?⁵³

Because of their apprehension about how green protectionism could affect their trade and their overall economies, many developing countries may be of the view that the definition of a response measure should be limited to measures taken in fulfilment of countries' NDCs. The current NDCs are, however, merely the start of what must become vastly more ambitious national commitments of climate action. Even assuming they are kept, the existing national climate pledges will fall far short of achieving the emissions reductions needed to meet the goals of the Paris Agreement for limiting global warming. As of December 2018, “[t]he unconditional pledges and targets that governments have made...would limit warming to about 3.0C above pre-industrial levels”⁵⁴ — about twice as much warming as the 1.5°C increase in global temperatures since the beginning of industrialization that climate scientists are now saying should be our priority goal.⁵⁵

Clearly, considerably more aggressive national climate actions are essential to combatting climate change. Under the Paris Agreement, additional climate commitments to reduce greenhouse gas emissions are anticipated in 2020 and are supposed to ratchet up rapidly afterwards.⁵⁶ In the face of ever more dire warnings from climate scientists, countries are already being urged to pursue more ambitious actions over and above their existing national climate pledges. They should not be deterred from doing so for fear that trade restrictions that may result from those actions will run afoul of WTO rules. For these reasons, the national measures included within the definition of a response measure should *not* be limited only to those measures relating to current national climate pledges.

Narrowly, response measures could be viewed as equivalent to “domestic mitigation

measures” taken with the aim of pursuing the objectives of NDCs under article 4.2 of the Paris Agreement. More broadly, response measures could be seen as equivalent to “measures... to combat climate change” in article 3.5 of the UNFCCC. The broader view will accomplish the most in achieving climate ambitions.

Should the kinds of national measures included within the definition of a response measure be limited to a specific list?

In defining a response measure, most developed countries are likely to seek a broad scope for acceptable measures, while most developing countries are likely to seek a narrow scope. Thus, most developed countries will likely favour a non-exhaustive and open-ended list of permitted measures, while most developing countries are likely to favour an exhaustive and closed list.

To do the most to counter climate change, a list of the kinds of measures falling within the definition of a response measure must not be exhaustive; it must not be closed. Having a closed list will not account for the fact that the future cannot be foreseen. National measures not yet envisaged may prove to be the most effective kinds of response measures to climate change. A closed list will inhibit legislative and regulatory innovation. It will perpetuate the chilling effect that already exists due to legal uncertainty.

A model may be the “Illustrative List of Export Subsidies” in Annex I to the WTO Agreement on Subsidies and Countervailing Measures.⁵⁷ Because it is “illustrative,” this list of the export subsidies that are prohibited under the WTO subsidies rules is non-exhaustive and open-ended. Thus, subsidies that are not on the list can nevertheless be export subsidies so long as they are “contingent, in law and in fact, whether solely or as one of several other conditions, upon export performance.”⁵⁸ In the WTO subsidies rules, WTO members have agreed on a list of *some* of the kinds of export subsidies that are prohibited, but they have not tried to identify *all* the kinds of prohibited export subsidies. They have not attempted to foresee the future.

The same approach could be used in defining a response measure. An illustrative list of the

53 Paris Agreement, *supra* note 14, art 4.2.

54 Climate Action Tracker, “Temperatures” (December 2018), online: <<https://climateactiontracker.org/global/temperatures/>>.

55 IPCC, “Global Warming of 1.5°C” (2018), online: <www.ipcc.ch/sr15/>.

56 Paris Agreement, *supra* note 14, art 4.

57 WTO, *Agreement on Subsidies and Countervailing Measures*, Annex I (Illustrative List of Export Subsidies).

58 *Ibid*, art 3.1(a).

kinds of national measures included within the definition of a response measure could be agreed. Conceivably, this list could include carbon taxes, other border carbon adjustments, cap-and-trade systems, technical regulations, standards, labelling requirements, import emission allowances and more. And it could be made clear in agreeing on such a list that it would not be exhaustive or closed. The definition of a response measure should not preclude the future. It should include the creative approaches to mitigating climate change through legislation and regulation that have not yet been conceived or devised but that may become keys to reducing greenhouse gas emissions and to meeting “the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures.”⁵⁹

Should the intent of countries in enacting national measures that address climate change but also restrict trade be considered in crafting the definition of a response measure?

Countries often have many reasons for what they do. There is not always only one aim of a national measure. This is likely to be true of many national measures taken under the rubric of addressing climate change. If one motivation of a national climate measure is to keep domestic products from being disadvantaged in competition with like foreign products because of the added costs of compliance with domestic emissions reduction requirements imposed by the measure, should that competitiveness motivation prevent that measure from falling within the definition of a response measure if the measure is also truly intended to address climate change?

No, it should not — not if the measure truly is intended also to address climate change. Certain kinds of discriminatory trade effects should be permitted in response measures if those effects are indeed part of a national measure to mitigate climate change. However, trade protection in the guise of climate mitigation should not be included within the definition of a response measure if the climate mitigation in the measure is only a guise — if it is cloaked in a climate disguise and if the genuine aim of the measure is only trade protection.

To survive legal scrutiny when disputes arise about their trade impacts in the WTO, climate response measures, including unilateral measures, must not “constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”⁶⁰ This is a legal commitment in identical words in both article 3.5 of the UNFCCC and in the chapeau of article XX of the GATT. There is an abundance of WTO jurisprudence clarifying what this phrase means with respect to other kinds of national measures affecting trade. There is, however, no WTO jurisprudence to date clarifying what this phrase means with respect to national climate measures that affect trade.

In defining a climate response measure, the meaning of this obligation in both the UNFCCC and the GATT should be clarified for measures taken to address climate change. Discrimination between and among traded products should be permitted unless that discrimination is “arbitrary or unjustifiable” — a disqualifying phrase that has been the subject of much jurisprudence in WTO dispute settlement and depends on a case-by-case analysis of the specific national measures, legal claims and proven facts in each individual case. Trade discrimination that is part of a measure that is genuinely taken for the purpose of mitigating climate change should not be seen as “unjustifiable.” And so long as there is a rational basis for the distinctions made between and among trade products resulting from the trade discrimination in a genuine climate measure, that discrimination should not be seen as “arbitrary.” Equally, a climate response measure must not be merely “a disguised restriction on international trade.” It must, in fact, be a measure enacted to address climate change and not merely an act of protectionism.

In the definition of a climate response measure, should a distinction be made between measures taken by developed countries and measures taken by developing countries?

No. There should not be one definition of a climate response measure for measures taken by developed countries and another definition for measures taken by developing countries. It is certainly the case that almost all the focus of the climate regime so far has been on the impact on developing

⁵⁹ UNFCCC, *supra* note 12, art 4.8.

⁶⁰ GATT, 30 October 1947, 55 UNTS 194, TIAS 1700, art XX (entered into force 1 January 1948); UNFCCC, *supra* note 12, art 3.5.

countries of response measures taken by developed countries. It is also reasonable to anticipate that, in the near term, most of the response measures containing trade restrictions will be applied by developed countries to imports from developing countries. But the shape of the world is changing for both trade and climate change.

Increasingly, developing countries are not interested only in ensuring access for their products to the markets of developed countries; increasingly, they are interested also in maintaining domestic markets for their domestic production in the face of growing competition from the products of *other developing countries*. And some of these other developing countries will have lower climate ambitions and thus their traded products may have lower prices and therefore a competitive advantage in the marketplace. For these reasons, one of the changes likely to emerge sooner or later in the realms of both trade and climate change will be some developing countries imposing trade restrictions on imports from other developing countries as a feature of their climate response measures.

Increasingly, too, developed countries may be imposing trade restrictions on imports from other developed countries as part of climate response measures. (How will the European Union respond if US President Donald Trump fulfills his announced intention of pulling the United States out of the Paris Agreement and halts all national action to reduce carbon and other greenhouse gas emissions?) Soon, too, developing countries may be imposing trade restrictions on imports from developed countries as part of climate response measures. (How will China respond if the United States continues with all of President Trump's plans for abandoning climate action while China continues to enhance its own climate action?)

In sum, the long-entrenched battle lines between developed and developing countries over trade restrictions as a part of climate response measures will likely soon be blurred and may be eventually erased. The definition of a climate response measure must reflect this sea change in terms of the global struggle to confront climate change.

Should developing countries apprehensive of green protectionism be offered something in exchange for their agreement to a definition of a response measure that includes measures that apply restrictions on trade?

Yes. Unquestionably, something should be offered to developing countries in exchange for their agreement on a definition of a response measure that is broad enough to include measures that apply restrictions on international trade.

First, justice demands it. Unfair trade barriers abound as obstacles to the pursuit by developing countries of their comparative advantages in many parts of the global economy. In agriculture and all too many other sectors, developing countries are still denied non-discriminatory access to the markets of developed countries. Climate-related trade restrictions will add to the trade barriers they already face. Developing countries are right to expect something in return for their agreement to a broad definition of a response measure that sanctions climate-related trade restrictions.

In addition, while some developing countries are now major producers of greenhouse gases, this has not always been so. Developed countries were the first to employ fossil fuels on a significant and ever-increasing scale in fuelling industrialization for higher production in advanced economies. This history is not erased by the fact that some developing countries have now caught up and even surpassed many developed countries in the extent of their emissions.

Furthermore, while all countries are now confronting the arrival and acceleration of climate change, many of the developing countries that have contributed the least to causing climate change are the countries that are suffering the most from it. The small island countries and subtropical coastal and inland countries that have been the sources of only small amounts of emissions are now on the frontlines in the fight against climate change. Some islands are being inundated by rising sea levels. Some coastlines are shrinking. With increased frequency and intensity, storms worsened by climate change batter millions of people who have the fewest means of saving their homes, their livelihoods and their very lives.

Second, as a practical matter, there will be no agreement on a definition of a response measure unless developing countries are offered something

in exchange for agreeing to a definition. The UNFCCC climate regime moves forward only by consensus. Developing countries will not join in a consensus on a broad definition of a response measure that will do the most to counter climate change unless they are offered something in return. This is a simple and inescapable matter of global climate politics. A consensus can be forged only when all joining in the consensus feel they are getting something in return.

What, then, should developing countries be offered in return for agreeing to a definition of a climate response measure that includes restrictions on trade?

What they should be offered is mainly what they have already been promised in the outcome of the climate negotiations culminating in the conclusion of the Paris Agreement. At COP16 in Cancun in 2010, an agreed statement on response measures urged developed countries to “implement policies and measures to respond to climate change in such a way as to avoid negative social and economic consequences for developing country Parties...and to assist these Parties to address such consequences by providing support, including financial resources, transfer of technology and capacity-building.”⁶¹ If we are now to sanction in a definition of response measures trade restrictions that could have “social and economic consequences” for developing countries, then there is all the more reason for developed countries to provide those developing countries with climate finance, technology transfer and capacity building.

On *climate finance*, the Paris Agreement provides that “[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.”⁶² Moreover, under the agreement, although “developed country Parties should continue to take the lead in mobilizing climate finance,”⁶³ “[o]ther Parties are encouraged to provide or continue to provide such support voluntarily.”⁶⁴ (On this

last provision, read “China.”) No specific sum of climate finance to assist developing countries with climate mitigation and adaptation is mentioned in the text of the Paris Agreement itself. However, in the decision accompanying the agreement, the COP “*decides that...prior to 2025, the Conference of Parties serving as the meeting of the Parties to the Paris Agreement shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries.*”⁶⁵

The “floor” of \$100 billion annually in climate finance is a reiteration of a commitment first made by developed countries at COP15 in Copenhagen in 2009, with the aim then of achieving the \$100 billion annual goal by 2020. Now, on the eve of 2020, the fulfilment of this commitment of financial assistance to developing countries by developed countries in addressing climate change is nowhere on the horizon. For example, with respect to the United States, the Obama administration pledged to commit \$3 billion over four years to the Green Climate Fund in November 2014. The United States then made two contributions of \$500 million each to the fund: the first on March 18, 2016, and the second on January 17, 2017 — just a few days before Donald Trump was inaugurated as president. No additional contributions have been made since then by the United States, and President Trump has vowed not to make any more.⁶⁶

At COP24 in Katowice in December 2018, developed countries were urged to scale up their thus far meagre financial support and provide a concrete road map to achieve the goal of mobilizing \$100 billion by 2020. In the meantime, the costs to developing countries of combatting and adjusting to climate change are rapidly mounting. In exchange for the agreement by developing countries to a definition of a response measure that would include unilateral restrictions on trade, developed countries should provide the promised \$100 billion annually and should move forward toward early agreement on this sum as merely the “floor” of much more in an annual commitment of climate finance to assist developing countries with climate mitigation and climate adaptation in furtherance of the goals of the Paris Agreement.

61 *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, Dec 1/CP.16, UNFCCC, UN Doc FCCC/CP/2010/7/Add.1 (2011) at para 89.

62 *Paris Agreement*, *supra* note 14, art 9.1.

63 *Ibid*, art 9.3.

64 *Ibid*, art 9.2.

65 *Adoption of the Paris Agreement*, *supra* note 39 at para 54.

66 Richard K Lattanzio, *Paris Agreement: U.S. Climate Finance Commitments* (Congressional Research Service, 2017), online: <<https://fas.org/sgp/crs/row/R44870.pdf>>.

On *technology transfer*, in the Paris Agreement, the parties state that they “share a long-term vision on the importance of fully realizing technology development and transfer to improve resilience to climate change and to reduce greenhouse gas emissions.”⁶⁷ Toward this end, the technology mechanism under the UNFCCC is to serve the Paris Agreement,⁶⁸ and a “technology framework” has been established under the Paris Agreement to guide the technology mechanism “in promoting and facilitating enhanced action on technology development and transfer.”⁶⁹ The decision accompanying the Paris Agreement reinforces this commitment by endorsing further work on “[t]he enhancement of enabling environments for and the addressing of barriers to the development and transfer of socially and environmentally sound technologies.”⁷⁰ Implementation of these provisions of the Paris Agreement is under way. At COP24, parties proceeded on several fronts on technology issues. Making early technology transfer an even higher priority in the ongoing implementation of the Paris Agreement should be part of what developing countries are offered in exchange for their support of including trade restrictions within the definition of a response measure.

The Paris Agreement states that *capacity building* under the agreement “should enhance the capacity and ability of developing-country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action, including, inter alia, to implement adaptation and mitigation actions, and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information.”⁷¹

In addition, the Paris Agreement goes on to say of capacity building, “All Parties should cooperate to enhance the capacity of developing country Parties to implement this Agreement. Developed country

Parties should enhance support for capacity-building actions in developing country Parties.”⁷² These capacity-building efforts “shall be enhanced through appropriate institutional arrangements to support the implementation of this Agreement.”⁷³ At COP24 in Katowice, a focus of the discussions was on framing a decision at COP25 in November 2019 in Chile on the initial institutional arrangements for capacity building under the agreement. In exchange for agreement by developing countries on a definition of response measures that will include trade restrictions, these capacity-building endeavours under the Paris Agreement should be accelerated and significantly enhanced.

While the climate regime is fulfilling these unfulfilled commitments to developing countries, the trade regime could also make *trade concessions* to developing countries on matters where they have long been denied the benefits of their comparative advantages. Foremost among these matters is agricultural trade, where markets for developing countries have been distorted by the agricultural subsidies granted by developed countries to their farm producers and by other market barriers to free agricultural trade. Also, developed countries could address the increasing concern of developing countries that supposedly voluntary standards are being employed as if they were binding governmental regulations in ways that raise unfair barriers to developing country trade. Further, on technology transfer, with respect to the least developed countries, developed country members should keep their mandatory obligation under the WTO intellectual property rules to “provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”⁷⁴

What approaches are available as options for agreeing on a definition of a response measure?

Once these critical questions in the line-drawing of defining a response measure are asked and answered, several policy options are available for adopting a definition of a response measure to

67 Paris Agreement, *supra* note 14, art 10.1.

68 *Ibid*, art 10.3.

69 *Ibid*, art 10.4.

70 *Adoption of the Paris Agreement*, *supra* note 39 at para 68(d).

71 Paris Agreement, *supra* note 14, art 11.1.

72 *Ibid*, art 11.3.

73 *Ibid*, art 11.5.

74 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, art 66.2 (entered into force 1 January 1995).

help prevent a collision between the international trade and climate rules and regimes. In considering possible approaches, it must be conceded upfront that, apart from simply relying on the WTO Appellate Body to get it right, none of the available options is currently achievable in the prevailing political context. Indeed, even in relying on the sound judgment of the Appellate Body, it is assumed that there will continue to be an Appellate Body. Also assumed is the continued viability of the Paris climate regime. Both of these assumptions are being challenged by President Trump, who seems bent on destroying the Appellate Body by stonewalling the appointment of new judges and thereby shrinking the tribunal out of existence, and who has pledged to pull the United States out of the Paris Agreement. Yet, all this conceded, those who seek a better world have a duty of optimism — a duty that includes identifying how a better world can be achieved if sufficient political willingness is summoned to achieve it.⁷⁵

The first question is: what policy options are available for defining a climate response measure?

Option one: the status quo (no definition)

One option is simply to continue with the current work of the UNFCCC forum on response measures without focusing on the need for a definition of a response measure. This will minimize controversy and contention within the forum, but it will leave it to WTO judges to define a response measure when they are confronted with the need to do so to resolve a dispute pitting climate against trade concerns in WTO dispute settlement. Based on their record, during the more than two decades of WTO dispute settlement, of not automatically putting trade before environmental concerns, the WTO judges may well be up to this task. But the interim of a year or two between when they are presented with such a dispute and when they produce final recommendations and rulings to resolve it will be fraught with tensions within both the trade and climate regimes. Furthermore, in a world of “alternative facts,” the disinformation throughout the world about what the WTO is doing in dispute settlement, and what it is not, is likely to feed no end of political and societal confrontation. In addition, even if the WTO judges render a judgment that accords due respect in defining

a response measure to the task of addressing climate change, that judgment will, technically, apply only to that one measure in that one dispute. There will be only the most circumscribed of definitions, so the legal uncertainty will continue.

Option two: definition by the climate COP

A second option is for the UNFCCC forum on response measures to get serious about defining them and to do so on its own. The climate COP could agree on a definition of a response measure and then present it to the WTO. Politically, it is of course much easier for the climate negotiators *not* to do so. It is much easier for them to continue with their current course, on which no definition appears up ahead. Yet it is difficult to see how even their current agenda can be negotiated without their knowing, first, what it is they are negotiating about. The impacts of response measures cannot be understood or reacted to appropriately without an agreement on what the response measures are. Defining a climate response measure should not only be placed on the agenda of the UNFCCC forum; it should be placed at the top of the list. A downside of the COP defining a response measure on its own, however, would be that it would do so without the benefit of the insight and the input of the WTO, which could have unfortunate consequences later in trying to reconcile the climate and trade regimes in a way that would best help to achieve the goals of both.

Option three: definition by the climate COP in consultation with the WTO

Certainly, the UNFCCC forum on response measures and the COP are fully capable of defining climate response measures if they set their minds to it. And, certainly, WTO judges would rely on that definition if the COP agreed on one. Yet, where response measures affect trade, they fall within the scope of the WTO treaty and thus the jurisdiction of WTO dispute settlement. Also, irrespective of whether, strictly speaking, it applies as a legal obligation of the Paris Agreement, article 3.5 of the UNFCCC cautions the COP about taking unilateral and other measures to combat climate change that affect trade. For these reasons, the best approach would be for the parties to the COP to work in concert with the members of the WTO toward a definition of a response measure by the COP. This international institutional cooperation would more clearly identify the nexus between trade and climate concerns and would therefore help the

75 The phrase “duty of optimism” is, of course, that of Sir Karl Popper.

drafters of the definition to draw the right legal line addressing both. Several alternatives are available. The COP and the WTO could jointly agree on a definition. The COP could consult with the WTO and then agree on a definition and present it to the WTO. Or the COP could craft the outlines of a potential definition of a response measure, consult with the WTO on that potential definition, take the views received from the WTO into account in turning the potential definition into a final agreed definition, and then present the final definition to the WTO. Of these three alternatives, the last seems the best because it gives full consideration to the views of the trade regime while leaving the ultimate decision about the meaning of a crucial climate term to the climate regime.

The second question is: what procedural options are available to the trade regime for recognizing and using a definition of a response measure agreed by the climate regime?

Once the climate COP has agreed on a definition of a response measure, the next question will be: what procedural options will be available to the WTO for recognizing and using that definition?

Option one: no rule making by the WTO

One option would be for the members of the WTO to refrain from making any changes or other accommodations in WTO rules to acknowledge the many connections between trade and climate change. Instead, the members of the WTO could wait and, as legislators often do, “let the judges decide.” They could wait until a collision occurs between trade and climate change in WTO dispute settlement and rely on WTO judges to find a way within the existing rules to soften the impact. This approach has the always appealing advantage of avoiding any real engagement by the members of the WTO on what is a highly contentious trade issue. Yet it has the disadvantage of being a procrastination that only postpones an inevitable trade reckoning with the reality of climate change, and that amounts to a high-stakes wager betting on the ability of WTO judges somehow to find a solution satisfying to all somewhere within the lines of the current trade rules. WTO judges will undoubtedly rely in their judgments on a COP definition of a response measure. But will this be sufficient to further both climate and trade ambitions without additional action by the WTO to adjust the operation of WTO rules at the nexus of trade and climate change?

Option two: an amendment by the members of the WTO

A second option would be for the members of the WTO to incorporate the COP definition of a climate response measure into an amendment to the WTO treaty, providing an exception from what would otherwise be the illegal application of trade-restrictive national measures for national measures that:

- discriminate based on the amount of carbon and other greenhouse gases consumed or emitted in making a 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.⁷⁶

A process exists for amendments to the trade rules to be adopted by a two-thirds majority of the members of the WTO.⁷⁷ Given, however, that after more than a decade of trying, the members of the WTO were unable to conclude any of the amendments contemplated in the Doha Development Round of multilateral trade negotiations, they are unlikely at this time to summon the requisite support for amendments to the existing WTO rules to respond to the urgency of assisting in enabling action to address climate change. In the long term, adopting amendments to the WTO rules to reimagine trade rules in the light of climate change and other aspects of sustainable development is the best option; in the short term, however, it is not a practical political option.

Option three: a legal interpretation by the members of the WTO

A third option would be for the members of the WTO to incorporate the COP definition of a climate response measure by adopting the same provision as a legal interpretation of relevant rules in the WTO treaty. The exclusive authority to adopt interpretations of the existing trade rules resides in the Ministerial Conference of the General Council of the WTO, which can adopt

⁷⁶ James Bacchus, “The Content of a WTO Climate Waiver” CIGI, CIGI Papers No 204, 4 December 2018 at 7 [Bacchus, “The Content”].

⁷⁷ Marrakesh Agreement, *supra* note 50, art X.

an interpretation by decision of a three-fourths majority of the WTO members. But, if it will be difficult at this time to muster a two-thirds majority of the WTO membership to amend WTO rules to reconcile trade with climate change, it will be even more difficult to assemble a three-fourths majority to interpret existing WTO rules to do so. Like an amendment, an interpretation is not now a practical political option.

Despite the difficulty, however, in order to facilitate the carbon pricing needed to spur the needed transition away from a carbon economy, WTO members should approve a legal interpretation now that would eliminate the current uncertainty about whether carbon taxes are eligible for a border tax adjustment under the current WTO rules.⁷⁸ A legal interpretation should clarify that a tax on inputs — such as fossil fuels — that are not incorporated physically into a final product is a tax *on a product* that is eligible for a border tax adjustment. The same legal interpretation should also clarify that a tax on the greenhouse gases consumed or emitted in making a product is an *indirect* tax that may be adjusted at the border.⁷⁹

Option four: incorporation by reference in a WTO climate waiver

A fourth option would be for the members of the WTO to incorporate the COP definition of a climate response measure by adopting the same provision as part of a WTO climate waiver.⁸⁰ Waivers are permissible under WTO rules,⁸¹ and they have frequently been granted by WTO members. Although most waivers have been for narrow purposes, waivers can be granted for broad purposes in “exceptional circumstances,” as has been done with compulsory licensing of medicines and the suppression of trade in conflict diamonds.⁸² Moreover, although most waivers have waived the obligations of just one WTO member, collective waivers for groups of WTO members or for all WTO members are permissible.⁸³ The

rules provide that a decision to grant a waiver shall be taken by three-fourths of the WTO members.⁸⁴ In practice, however, although a vote was taken on a handful of waivers soon after the establishment of the WTO in 1995, all WTO waivers since then have been adopted by consensus.

At first glance, the process for adopting a climate waiver may seem to present as imposing a hurdle as the processes for adopting an interpretation or an amendment. However, a waiver may be more palatable to WTO members than an amendment or an interpretation of existing WTO rules. A waiver does not change WTO rules; it only waives the application of WTO rules for certain kinds of carefully described and delimited measures. Moreover, a waiver is not permanent. It is temporary and subject to annual review. A climate waiver could be structured in the same way as the waiver for compulsory licensing of medicines, which states that it will terminate only on the date when an amendment replacing the provisions of the waiver takes effect. Even then, a waiver would be more politically appealing than other available options for reconciling trade rules with climate necessities in that it would provide an opportunity for practical experimentation within the overlap of trade and climate change. The members of the WTO are inclined toward practical experimentation.

Conclusion

Again, if agreeing on the definition of a response measure were easy, it would already have been done. It is a sad commentary on the history of the climate regime that, so far, it has not been done. But past failures need not prevent future successes. Rather, learning from failure can lead to success. Nearly three decades of climate negotiations should have revealed by now that the debate over climate response measures can only be resolved if the legitimate concerns of developed and developing countries alike are acknowledged and addressed. That is the only way the climate regime can ever agree on a definition of a response measure. Furthermore, the lesson should have been learned by now that, no matter how much the topic of trade is considered a taboo in climate negotiations,

78 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, art II:2(a) (entered into force 1 January 1948).

79 For a more extensive discussion of this issue, see Bacchus, “The Content”, *supra* note 76 at 12–13.

80 *Ibid.*

81 *Marrakesh Agreement*, *supra* note 50, art IX:3.

82 *Ibid.*, art IX:4.

83 Bacchus, “The Case”, *supra* note 11 at 23.

84 *Marrakesh Agreement*, *supra* note 50, art IX:3.

the nexus of trade and climate change can only be ignored at the world's peril. For even more difficult than agreeing on a definition of a response measure will be agreeing on how to deal with the ultimate consequences for both the trade and climate regimes if there is no agreement on a definition.

Some in the climate regime may worry that defining a response measure may disrupt the delicate balance reflected in the Paris Agreement. It was possible to conclude the Paris Agreement only because wide latitude was given to the parties to the agreement in crafting their NDCs and in deciding how to make those contributions to the common global challenge of cutting carbon and other greenhouse gas emissions. Will not the act of defining a response measure reduce the discretion of the parties to the agreement in deciding how to keep the promises they have made in furtherance of the agreement? Does not defining what actions are permissible also imply that some actions are not permissible?

The answer to both questions is “yes.” But national discretion under the Paris Agreement need not be total, and some actions should not be permissible, even if those taking them claim that these actions are pursuant to the Paris Agreement. What is more, these answers and these questions must be considered in light of the alternative for both the climate and trade regimes. If the climate regime does not define a response measure, then the trade regime will, sooner or later, provide its own definition. Trade jurists may or may not get the definition right, but this much is clear: the definition will not be written by the climate regime. The chances of reconciling the legal frameworks of the two regimes will disappear. The trade and climate regimes will collide — with no good outcome in sight for either one.

Agreement on the definition of a climate response measure is only one of the tasks confronting climate negotiators in implementing and fulfilling the objectives of the Paris Agreement. It is, however, a central task. Without a definition, it will be impossible to know which measures taken by parties to the climate agreement are legitimate climate measures and which are not. Without a definition, it will be impossible to know when restrictions on trade are permissible for climate reasons and when they are not. And, without a definition, it will be more difficult to avoid a coming collision between the trade and climate regimes over the borderline

between acceptable and unacceptable trade-restricting national climate measures. Achieving a definition of a climate response measure by the climate regime must therefore be at the top of both the climate and trade agendas.

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**Centre for International
Governance Innovation**

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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