



Using the WTO to Facilitate the Paris Agreement: A Tripartite Approach

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ABSTRACT

Climate change is the greatest threat humanity has faced, and its challenges can only be addressed through multilateral means. Lacking in accountability and enforcement mechanisms, however, the Paris Agreement requires additional support to achieve its full effect. Although not perfectly aligned with the goals of the Paris Agreement, the WTO's multilateral framework could provide the necessary flexibilities to work toward meeting the Paris Agreement's targets. This Article proposes a novel three-pronged approach for refocusing the multilateral trading system and facilitating the Paris Agreement.

First, the preamble to the Agreement Establishing the World Trade Organization explicitly recognizes sustainable development as a goal, seeking to protect and preserve the environment. It also recognizes the need for developing countries to share in the growth of international trade. Giving meaning and effect to sustainable development is key to facilitating the Paris Agreement. The second prong recognizes that certain types

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of climate change mitigation measures may require violating WTO rules. In such circumstances, limited carve-outs in the mold of the public stockpiling exception relating to food security, with additional built-in sunset provisions, would provide support for countries working to meet their targets. Finally, the third prong envisions the negotiation of a multilateral or plurilateral agreement to help give effect to the Paris Agreement. Key to this agreement would be special and differential treatment (S&DT) provisions. The Trade Facilitation Agreement contains next-generation S&DT provisions, which could be leveraged in the context of a future plurilateral or multilateral agreement to help give effect to the Paris Agreement.

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The Anthropocene is a series of metabolic rifts, where one molecule after another is extracted by labor and technique to make things for humans, but the waste products don't return so that the cycle can renew itself. The soils deplete, the seas recede, the climate alters, the gyre widens: a world on fire.

—McKenzie Wark¹

Precarity is the condition of being vulnerable to others. Unpredictable encounters transform us; we are not in control, even of ourselves. Unable to rely on a stable structure of community, we are thrown into shifting assemblages, which remake us as well as our others. We can't rely on the status quo; everything is in flux, including our ability to survive. Thinking through precarity changes social analysis. A precarious world is a world without teleology. Indeterminacy, the unplanned nature of time, is frightening, but thinking through precarity makes it evident that indeterminacy also makes life possible.

—Anna Lowenhaupt Tsing²

1. MCKENZIE WARK, *MOLECULAR RED: THEORY FOR THE ANTHROPOCENE* xiv (2016).

2. ANNA LOWENHAUPT TSING, *THE MUSHROOM AT THE END OF THE WORLD: ON THE POSSIBILITY OF LIFE IN CAPITALIST RUINS* 20 (2015).

I. INTRODUCTION

The world in which humankind lives today is one indelibly changed by human activity, so much so that scientists have designated a new geological epoch that began with the advent of the Industrial Revolution: the Anthropocene.³ Climate change, which is the greatest threat humanity has ever faced, is a result of human activity in the Anthropocene, particularly by countries of the Global North. From rising ocean levels to temperature increases and more frequent extreme weather events, its effects can be seen across the globe.⁴ Scientists have been ringing alarm bells for decades, but only in the past few years has the international legal community given the issue the attention it deserves. With the conclusion of the Paris Agreement in December 2015, the world came together for the first time to address the effects of climate change, with all countries recognizing the necessity of taking measures to mitigate and adapt to the effects of climate change.⁵

The challenges posed by climate change can only be addressed through multilateral means, as climate change is a *global* issue in the most immediate sense of the word. Lacking in accountability and enforcement mechanisms, the Paris Agreement requires additional support to achieve its full effect. In light of the trend toward regionalism and protectionism, as well as the backlash against globalization as income inequality continues to grow, there is a need to find common multilateral ground.⁶ Regional trade agreements between large economies threaten to marginalize developing countries by keeping them at the periphery of innovation either by ignoring

3. Will Steffen et al., *The Anthropocene: Conceptual and Historical Perspectives*, 369 PHIL. TRANSACTIONS. ROYAL. SOC'Y. A 842, 847–48 (2011).

4. See, e.g., Matthew Ranson, Lisa Tarquinio, & Audrey Lew, *Modeling the Impact of Climate Change on Extreme Weather Losses* (Nat'l Ctr. Env'tl. Econ., Working Paper No. 16-02, May 2016) (evaluating the economic impact of climate change); Kristine Phillips, *As the eastern U.S. freezes, Sydney bakes at 117 degrees—the hottest in eight decades*, WASH. POST (Jan. 6, 2018), https://www.washingtonpost.com/news/capital-weather-gang/wp/2018/01/06/as-the-bomb-cyclone-freezes-the-eastern-u-s-a-heat-wave-is-melting-asphalt-in-southern-australia/?utm_term=.09a7cf166e98 [<https://perma.cc/JFF3-4ESL>] (archived Feb. 24, 2019).

5. Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), <https://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html> [<https://perma.cc/TL32-K9KW>] (archived Feb. 13, 2019).

6. Larry Elliott, *World's 26 richest people own as much as poorest 50%, says Oxfam*, THE GUARDIAN (Jan. 20, 2019), <https://www.theguardian.com/business/2019/jan/21/world-26-richest-people-own-as-much-as-poorest-50-per-cent-oxfam-report> [<https://perma.cc/KAK4-NS3A>] (archived Feb. 13, 2019). The 2018 Oxfam report noted that the wealth of the over 2,200 billionaires increased by \$900 billion in 2018, which amounted to a 12 percent increase. In contrast, the wealth of the poorest half of the world's population fell by 11 percent. *Id.*

capacity-building issues faced by these smaller economies or by keeping membership to such agreements closed.

At a time when multilateralism is under threat, the future of international institutions like the World Trade Organization (WTO) is in question. Critics point to the failures of the Doha Round and the rise in megaregional agreements as indicative of the WTO's imminent demise.⁷ Obstruction on the part of the United States to the reappointment of WTO Appellate Body (Appellate Body) members is jeopardizing the WTO's ability to function as a dispute-settlement body.⁸ The WTO, however, is far from being irrelevant. The WTO's multilateral framework offers a vehicle for effecting significant progress on climate change. Besides possessing a dispute-settlement system that is more effective than that of any other international judicial body, despite efforts to undermine it, the WTO provides rules and exceptions that allow for the liberalization of international trade while leaving space for regulatory autonomy.

This Article proposes a novel approach for refocusing the multilateral trading system and facilitating the Paris Agreement. Although not perfectly aligned with the goals of the Paris Agreement, the WTO's multilateral framework could provide the necessary flexibilities to work toward meeting the Paris Agreement's targets. At the same time, such flexibilities could help address some of the concerns regarding labor and manufacturing. There are three prongs to using the WTO as a vehicle to achieve progress on climate change.

First, the preamble to the Agreement Establishing the World Trade Organization (WTO Agreement) explicitly recognizes sustainable development as a goal, seeking to protect and preserve the environment.⁹ It also recognizes the need for developing countries to share in the growth in international trade. Developing countries will be disproportionately affected by the effects of climate change, yet lack resources to adapt to and to mitigate them. Giving meaning and effect to sustainable development is key to facilitating the Paris Agreement.

The second prong recognizes that certain types of climate change mitigation measures may require violating WTO rules. In such circumstances, limited carve-outs in the mold of the public stockpiling exception relating to food security, with additional built-in sunset provisions, would provide support for countries working to meet their targets, allowing them the ability to break from WTO rules to support domestic industries.

Finally, the third prong envisions the negotiation of a multilateral or plurilateral agreement to help give effect to the Paris Agreement,

7. See generally, e.g., Antoine Martin & Bryan Mercurio, *Doha Dead and Buried in Nairobi: Lessons for the WTO*, 16 J. INT'L TRADE L. & POL'Y 49 (2017).

8. See TETYANA PAYOSOVA, GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, PETERSON INST. INT'L ECON., *THE DISPUTE SETTLEMENT CRISIS IN THE WORLD TRADE ORGANIZATION: CAUSES AND CURES* 1 (2018).

9. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

much as the WTO already works in tandem with the World Intellectual Property Organization (WIPO) in relation to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and with the World Customs Organization in relation to the Trade Facilitation Agreement (TFA).¹⁰ Key to this agreement would be special and differential treatment (S&DT) provisions. The TFA contains next-generation S&DT provisions, which could be leveraged in the context of a future plurilateral or multilateral agreement to help give effect to the Paris Agreement. These provisions include measures relating to capacity building, centered on partnerships between developed and developing countries, and conditional obligations, the timeframe for implementation of which depends on the developing country's self-designation.¹¹

Mitigating and adapting to climate change involve costly infrastructural investments, including shifting from fossil fuel-run power plants to clean energy ones. Such measures are disproportionately costly and difficult for developing countries to implement. With climate change mitigation measures, and arguably even with climate change adaptation measures, every country in the world benefits from each individual measure taken by each country. Cooperative mechanisms are as such essential to ensure that progress is made in meeting the goals of the Paris Agreement.

Part II of this Article provides a brief background to the Anthropocene, sustainability, and the Paris Agreement. Part III addresses sustainable development both in the multilateral trade context and in interdisciplinary contexts to arrive at a workable construct that equips the language in the WTO Agreement's preamble with real meaning. Part IV looks at carve-outs from the WTO's rules and posits how they could best be applied to climate change mitigation and adaptation measures. Part V provides a framework for the application of S&DT measures such as those found in the TFA to climate change-related measures. Part VI briefly addresses some of the challenges to the proposed tripartite approach. Finally, Part VII offers suggestions for a broader way forward on climate change and trade, challenging some of the status quo notions regarding free trade and the position of trade in the global economy.

10. Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 *WORLD TRADE REV.* 643, 647–48 (2015).

11. *Id.* at 659.

II. BACKGROUND

A. *The Anthropocene*

The Anthropocene in the context of international trade and environmental law, and the legal regime surrounding climate change in particular, can be best understood as arising as a product of technologies used by Global North countries that enabled them to exploit Global South countries.¹² As Angela Harris writes,

[t]he technologies associated with the Industrial Revolution and reliance on fossil fuel energy over human and animal somatic energy gave colonizing nations an edge over colonized nations, intensifying the socioeconomic inequalities between them. Far from being over and done with, the economic, environmental, and social effects of these global relations of domination continue today.¹³

Thus, the current geological epoch finds itself intimately intertwined with notions of environmental sustainability as well as economic development, with exploitation and dominance on the one hand and a perpetuation of poverty on the other.

Harris frames the relationship between humans and their environment through the lens of vulnerability, arguing that “[a] healthy adult human can only be considered separate from her environment by willfully forgetting this interdependency.”¹⁴ Using the idea of vulnerability as a starting point, where humans and nature are “now locked in an ever-tightening feedback loop,”¹⁵ the limitations of international agreements that fail to address this dynamic become clear. Julian Agyeman, writing about sustainability and environmental justice, notes that “[t]here is great (and underresearched) potential for the notions of environmental justice, human rights and sustainability to permeate environmental regimes and international policy agreements.”¹⁶ Crucially, Agyeman points out that “sustainability as a policy approach can be understood as a more exclusive, ‘top-down’ phenomenon. Paradoxically, however, the

12. Outside of the legal realm, anthropologists and other scholars offer helpful alternative framings of the Anthropocene. Donna Haraway in particular writes that “[t]he Anthropocene marks severe discontinuities; what comes after will not be like what came before. I think our job is to make the Anthropocene as short/thin as possible and to cultivate with each other in every way imaginable epochs to come that can replenish refuge.” DONNA J. HARAWAY, *STAYING WITH THE TROUBLE: MAKING KIN IN THE CHTHULUCENE* 100 (2016). A lot can be learned from these more intersectional approaches to understanding the epoch in which we live.

13. Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY CLIMATE & ENV'T 98, 103 (2014).

14. *Id.* at 114.

15. *Id.* at 127.

16. Julian Agyeman, Robert D. Bullard & Bob Evans, *Exploring the Nexus: Bringing Together Sustainability, Environmental Justice and Equity*, 6 SPACE & POLITY 77, 86–87 (2002).

implementation of sustainability is generally seen as being through local action.”¹⁷

While it is not within the scope of this Article to discuss how sustainability can move from the local to the global, it is important to bear this in mind throughout the discussion that follows concerning the application of the WTO’s multilateral framework to questions of climate change. The approach posited herein is undoubtedly limited and alone cannot provide all of the solutions to the systemic problems created by humans in the Anthropocene. Throughout, vulnerability of individuals and communities must be remembered, since they are the ones primarily affected by climate change adaptation measures in particular.¹⁸

B. *The Paris Agreement*

The negotiation of multilateral environmental agreements has been challenging, in part due to the intersection of public and private law in areas covered by environmental regulation,¹⁹ but also because of differing concerns on the part of Global South and Global North countries. In an area increasingly marked by regional or sectoral agreements, the Paris Agreement stands in sharp contrast as a truly global agreement, in the mold of the 1992 United Nations Framework Convention on Climate Change (UNFCCC).²⁰

The Paris Agreement was negotiated under the UNFCCC and is the first major climate change agreement to include commitments from both developed and developing countries. With a goal of keeping the global temperature increase to “well below 2°C,”²¹ the Paris Agreement recognizes the need for countries to take both climate change adaptation and mitigation measures.²² The binding obligations of the agreement are focused on the conduct of the parties in pursuing national measures and ensuring that they maintain contributions to the climate change mitigation regime.²³ The agreement does not

17. *Id.* at 88.

18. SUMUDU ATAPATTU, HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE: CHALLENGES AND OPPORTUNITIES 143 (2016).

19. Veerle Heyvaert, *The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation*, 6 TRANSNAT’L ENVTL. L. 205, 217 (2017) (“[T]he position of much of transnational environmental activity at the crossroads of public and private law presents a taxing intellectual puzzle, although the challenges run more deeply. This position calls into question the very usefulness of organizing the discipline of law into demarcated public and private spheres.”).

20. *See id.* at 233.

21. Paris Agreement, art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.

22. *Id.* arts. 4(2), 5(2), 7(1).

23. *Id.* art. 4(2); Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT’L & COMP. L.Q. 493, 497 (2016).

require parties to actually meet these objectives, but merely requires them to “aim” to achieve those goals.²⁴

The Paris Agreement does not define either climate change mitigation or adaptation. The 2012 Intergovernmental Panel on Climate Change Special Report on Renewable Energy Sources and Climate Change Mitigation defines climate change mitigation as “implementing policies to reduce greenhouse gas emissions and enhance sinks.”²⁵ Mitigation measures include emissions trading schemes, subsidies for renewable energy development, carbon taxes, and domestic content requirements for renewable energy. Adaptation, on the other hand, refers to “human-driven adjustments in ecological, social or economic systems or policy processes, in response to actual or expected climate stimuli and their effects or impacts.”²⁶ Climate change adaptation measures include food security (stockpiling), policies requiring use of certain water-resistant materials in construction, and agricultural subsidies to switch to climate-adapted crops.²⁷

In addition to adaptation and mitigation, there is a third category of response to climate change, which is not addressed in the Paris Agreement—climate engineering, or geoengineering, which “consists of intentional, engineered measures to actively change the global climate system and so reduce the realized climate changes that result from elevated GHGs.”²⁸ Currently, there is no international legal regime to control national climate engineering measures.²⁹

For purposes of this discussion, there are two particularly salient points in relation to the Paris Agreement and how the WTO might interact with national climate change measures undertaken to meet the obligations set under the Paris Agreement:

First, in its preamble, the Paris Agreement explicitly recognizes the need for differential treatment, in particular “the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.”³⁰ This goal is further enshrined in Article 2(2), which provides that the Paris Agreement “will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national

24. Paris Agreement, *supra* note 21, art. 4(2); *see* Rajamani, *supra* note 23, at 498.

25. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, RENEWABLE ENERGY SOURCES AND CLIMATE CHANGE MITIGATION 962 (Ottmar Edenhofer et al. eds., 2012).

26. *Glossary of Key Terms*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://www4.unfccc.int/sites/NAPC/Pages/glossary.aspx> (last visited Mar. 22, 2019) [<https://perma.cc/K2KW-FQ4T>] (archived Mar. 22, 2019).

27. *See generally* U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, TECHNOLOGIES FOR ADAPTATION TO CLIMATE CHANGE (2006).

28. Edward A. Parson, *Climate Engineering in Global Climate Governance: Implications for Participation and Linkage*, 3 TRANSNAT'L ENVTL. L. 89, 90 (2014).

29. *Id.* at 95.

30. Paris Agreement, *supra* note 21, pmb1.

circumstances.”³¹ This mirrors the S&DT provisions in the WTO Agreements, which suggests a natural synergy between the WTO and the Paris Agreement.³²

Second, the Paris Agreement, like the Kyoto Protocol, unfortunately lacks enforcement mechanisms, which has been a focal point of much of the criticism of the agreement.³³ Without enforcement capabilities, despite the best intentions of countries, possibilities of success are more limited. The WTO has a robust dispute-settlement system, despite current challenges to the system. In this respect, it is well positioned to step in and make sure that the commitments by countries under the Paris Agreement are properly adhered to, at least to the extent that such measures are covered by existing or future WTO rules. This is not to suggest that the WTO should be used as a vehicle for imposing retaliatory measures, such as the suspension of concessions, through the dispute-settlement process against member states that fail to adhere to their commitments. Rather, the flexibilities of the WTO system could be used by member states to lawfully discriminate against such countries in their domestic regulations or to support domestic industry in developing clean technology.

One of the biggest hurdles to achieving the targets set in the Paris Agreement is the required capacity building.³⁴ Implementing the goals of the Paris Agreement will require considerable capacity building on the part of both developing and developed countries. Switching to clean energy from traditional sources, such as coal, is costly and time consuming. At the same time, it offers the prospect of a new sector of employment, providing manufacturing jobs in renewable energy to offset the loss of jobs in other sectors, including coal and steel.³⁵ Particularly for countries of the Global South, achieving the necessary capacity will be challenging. The Paris Agreement’s provisions on common but differentiated responsibilities, however, go beyond those found in earlier multilateral environmental agreements, such as the Montreal Protocol.³⁶ Also key to the success of the Paris Agreement is

31. *Id.* art. 2(2).

32. *See, e.g.*, World Trade Organization, Ministerial Declaration of 14 November 2001, para. 44, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) (reaffirming that the special and differential treatment provisions are an integral part of the WTO agreements).

33. *See, e.g.*, Michael O. Moore, *Carbon Safeguard? Managing the Friction Between Trade Rules and Climate Policy*, 51 J. WORLD TRADE 43, 44 (2017).

34. RALPH BODLE, LENA DONAT & MATTHIAS DUWE, UMWELT BUNDESAMT, THE PARIS AGREEMENT: ANALYSIS, ASSESSMENT AND OUTLOOK 20 (2016) [hereinafter BODLE, DONAT & DUWE].

35. Chris Mooney, *Study: Coal industry lost nearly 50,000 jobs in just five years*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/04/01/the-decline-in-coal-jobs-in-one-chart/?utm_term=.1e11bf652e0b [https://perma.cc/MMB3-3SVB] (archived Feb. 15, 2019).

36. BODLE, DONAT & DUWE, *supra* note 34, at 25.

a meaningful application of the principle of sustainable development in a way that offers the Global South the opportunity to develop economically.

III. SUSTAINABLE DEVELOPMENT

In the area of trade and labor, the International Labor Organization (ILO) is a long-standing international organization with a plethora of rules, despite the lack of effectiveness of certain of these rules and resistance by the trade community of the linkage between the General Agreement on Tariffs and Trade (GATT)/WTO and ILO rules.³⁷ There is no equivalent international institutional framework to help address climate change in a unified fashion. Instead, much of the discussion on climate change prior to the Paris Agreement arose in the context of sustainable development. There is perhaps no concept more fraught with tension in the context of trade law and the environment than the notion of sustainable development. What sustainable development means and for whose benefit it is to be interpreted lie at the center of a debate between the Global South and the Global North concerning industrialization, economic development, and colonialist exploitation.

Sustainable development found some of its earliest concrete articulation in the World Commission on Environment and Development's 1987 report *Our Common Future* (also known as the Brundtland Report). The report stated that

[s]ustainable global development requires that those who are more affluent adopt life-styles within the planet's ecological means—in their use of energy, for example. Further, rapidly growing populations can increase the pressure on resources and slow any rise in living standards; thus sustainable development can only be pursued if population size and growth are in harmony with the changing productive potential of the ecosystem.³⁸

The report went on to note that sustainable development “is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs.”³⁹

There are other articulations of sustainable development. The economist Herman Daly took a different approach to defining sustainable development, finding that it “necessarily means a radical shift from a growth economy and all it entails to a steady-state

37. See, e.g., Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 9–10 (1999).

38. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* para. 29 (1987).

39. *Id.* para. 30.

economy, certainly in the North, and eventually in the South as well.”⁴⁰ Whether sustainable development is viewed through the lens of population size and energy usage or through the perspective of economic growth, there are some basic principles that underlie the concept.

One common approach to understanding sustainable development views it as having three pillars: social, environmental, and economic, which must be used together to achieve real change.⁴¹ Some scholars have argued, however, that this structure is inherently unsustainable, finding instead that the key foundation for sustainable development is the ecological sustainability component, with social justice and economic development playing secondary roles.⁴² This perspective recognizes that developing countries are to be treated differently as a result of the principle of common but differentiated responsibilities that threads throughout the multilateral environmental treaties.⁴³ The burden is on developed countries to ensure that their usage of natural resources is sustainable.

For centuries, the Global South has experienced exploitation of its resources by the countries of the Global North, who have used these resources to drive their own economic growth.⁴⁴ Conservation measures and efforts to limit greenhouse gas emissions on the part of Global North countries are at odds with the social and economic development goals of the Global South.⁴⁵ As Ruth Gordon has argued, “[s]ustainable development appears to address what is essentially an enigma without meaningfully challenging existing power structures or the impact that the modern quest for a higher material standard of living has had on the natural world.”⁴⁶ The Global North continues to consume the vast majority of global goods, resulting in “unsustainable development” on the part of the Global North.⁴⁷

Recent literature on international trade has grappled with the concept of the “greening” of the WTO and industrial policy more

40. HERMAN E. DALY, *BEYOND GROWTH* 31 (1996).

41. Shawkat Alam, Natalie Klein & Juliette Overland, *Achieving Social and Environmental Justice Through the Many Dimensions of Globalisation: An Elusive or Achievable Quest?*, in *GLOBALISATION AND THE QUEST FOR SOCIAL AND ENVIRONMENTAL JUSTICE: THE RELEVANCE OF INTERNATIONAL LAW IN AN EVOLVING WORLD ORDER* 1, 3 (2011).

42. See, e.g., Klaus Bosselmann, *Sustainable Development and International Environmental Law*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 667, 671 (2012).

43. *Id.* at 679.

44. Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH* 1, 6 (2015).

45. *Id.* at 10.

46. Ruth Gordon, *Unsustainable Development*, in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH*, *supra* note 44, at 50, 63.

47. *Id.* at 68.

generally in the context of sustainable development.⁴⁸ This raises its own concerns, for instance with respect to biofuels, on the part of nongovernmental organizations (NGOs) in the Global South who have expressed skepticism that this will benefit the Global South.⁴⁹ As Shawkat Alam has aptly put it,

[n]orthern countries have largely shaped the sustainable development agenda. Because the North has already achieved an acceptable standard of living and has, historically, been the site of large-scale pollution, sustainable development has taken on a green hue. Meanwhile, the South is set to become the next area of global economic growth and population expansion, while remaining highly vulnerable to anthropogenic climate change. The need to re-invigorate the concept of sustainable development is a pressing concern.⁵⁰

In the midst of this discussion, positioning the WTO to be a leader in thoughtful reinvigoration of the sustainable development discourse seems not only beneficial but also both possible and necessary for the future of the international trading regime, particularly given the framing of the WTO Agreement and WTO jurisprudence surrounding Article XX of the GATT.

A. Preamble to the GATT and the Agreement Establishing the WTO

The preamble to the GATT famously establishes the social welfare principles that underpin trade liberalization—“raising standards of living, ensuring full employment and a large and steadily volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.”⁵¹ The preamble to the WTO Agreement builds on this, speaking of the objective of sustainable development, seeking to protect and

48. See generally, e.g., Sadeq Z. Bigdeli, *Clash of Rationalities: Revisiting the Trade and Environmental Debate in Light of WTO Disputes over Green Industrial Policy*, 6 TRADE L. & DEV. 177 (2014); Aaron Cosbey & Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17 J. INT'L ECON. L. 11 (2014); Susanne Droege et al., *The Trade System and Climate Action: Ways Forward under the Paris Agreement*, 13 S.C. J. INT'L L. & BUS. 195, (2017); Gregory Messenger, *Sustainable Development and the Commodities Challenge: The Eventual 'Greening' of the World Trade Organization?*, 9 TRADE L. & DEV. 54 (2017); Martin Khor, Preliminary Notes on the Green Economy, in the Context of Sustainable Development, Inter-Sessional Session on Rio Plus 20 (Jan. 10, 2010), <https://sustainabledevelopment.un.org/content/documents/18725southcentre.pdf> [<https://perma.cc/M63D-78MD>] (archived Feb. 17, 2019).

49. Chidi Oguamanam, *Sustainable Development in the Era of Bioenergy and Agricultural Land Grab*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 44, at 237–39.

50. Shawkat Alam, *Trade and the Environment: Perspectives from the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 44, at 297–98.

51. General Agreement on Tariffs and Trade, pmbl., Oct. 30, 1947, 55 U.N.T.S. 154, 61 Stat. A-11 [hereinafter GATT].

preserve the environment.⁵² It also recognizes the need for developing countries to share in the growth in international trade. These goals, together with the social welfare promises originally enshrined in the preamble to the GATT, are at the center of the success of the international trading system, and despite subsequent failure to give substantive effect to some of these goals, offer hope for its future.

The preamble of the WTO Agreement provides support for the premise that not only does the scope of the WTO extend to environmental protection, but also that environmental protection is actually a key goal of the WTO and part of its core mission. In practice, however, what is meant by sustainable development in the context of the WTO has been a sticking point between Global North and Global South countries. Furthermore, the weight to be accorded to the preambular language is limited. In the aftermath of the 1999 Seattle Ministerial Conference, Mark Halle wrote that it was clear that

the WTO's commitment to sustainable development remains almost wholly theoretical. A dedication to the notion is carried in the preamble to the agreements closing out the Uruguay Round, but preambular language in a binding and enforceable legal agreement carries no more weight than such language would in a contract setting out the terms of a merger between two giant corporations. What counts is what is enforceable. The rest is for public consumption.⁵³

As many scholars have observed, while promoting sustainable development and ensuring that developing countries obtain a fair share of global trade growth are part of the main objectives of the WTO, in practice the development aspect has often been ignored at the expense of the Global South countries.⁵⁴ This has resulted in conflict dating back to the GATT days between the Global South and the Global North on environmental priorities, with many Global South

52. WTO Agreement, *supra* note 9, pmbl. The preamble reads in relevant part: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

53. MARK HALLE, INT'L INST. FOR SUSTAINABLE DEV., SEATTLE AND SUSTAINABLE DEVELOPMENT 6 (2000), <https://www.iisd.org/sites/default/files/publications/seattleandsd.pdf> [<https://perma.cc/K72G-UXNJ>] (archived Feb. 15, 2019). The WTO's preambular language has been described by other scholars as "essentially hollow." Adil Najam & Nick Robins, *Seizing the Future: The South, Sustainable Development and International Trade*, 77 INT'L AFF. 49, 50 (2001).

54. *See, e.g.*, Martin Khor & José Antonio Ocampo, *The Global Trade Architecture and the Developing World 3* (June 2009) (unpublished working paper) (on file with Initiative for Policy Dialogue Working Paper Series).

contracting parties of the GATT viewing efforts by the Global North to curb emissions and conserve resources as paternalistic and hypocritical.⁵⁵

More recently, near-global recognition of the perils of climate change has led to something of a shift in the orientation of the WTO from a traditional trade perspective to a growing awareness that sustainable development must be given teeth as a real objective of the organization, particularly with respect to the 2030 United Nations Sustainable Development Goals.⁵⁶ As Gregory Messenger argues, while the WTO “is customarily identified as a body concerned with tariff and non-tariff barriers, which is most notable for its comparatively effective dispute settlement system and formally egalitarian (if deadlocked) negotiating arm,” post-Doha the WTO has had some of its greatest success “through its network of developed Committees functioning as soft-law creators and informal dispute settlement forums,” which has relied on institutional transparency to be effective.⁵⁷

While these initiatives indicate some shift in the WTO’s approach to sustainable development, they do not fully address the conflict between how the Global South and the Global North view sustainable development. Fundamentally, the main beneficiaries of the neoliberal trading order have been multinational corporations that have been able to operate in the unregulated spaces created by international trade and investment rules that restrict the ability of states to regulate their own economies.⁵⁸ These corporations have exploited countries of the Global South for resources, shifting the pollution burden to places that do not benefit from the end products of the corporations. This neocolonial resource exploitation combined with efforts by Global North countries to require all countries to curb emissions has been viewed with skepticism by Global South countries, who see such efforts as a means of perpetuating Global South poverty by limiting their access to industrial technologies.⁵⁹

How then should one accord weight to the language in the WTO Agreement preamble in a way that accounts for the concerns of the Global South? The WTO’s Committee on Trade and Development already considers development issues and, together with the Committee on Trade and the Environment, could be tasked with providing an ongoing evaluation of sustainable development in the

55. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 185 (1994).

56. Messenger, *supra* note 48, at 56.

57. *Id.* at 83.

58. Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 42, at 77, 83.

59. *Id.* at 89.

context of trade and climate change.⁶⁰ Full transparency with respect to reports or other documents prepared by these committees would be a necessary step in providing local constituents with clarity regarding the WTO's position on this matter. The WTO has already made significant progress both in transparency and in giving serious consideration to developing country issues; however, more progress is always possible. Much of the WTO's focus has been on the infrastructural and supply-side issues faced by developing countries. Take the 2017 joint report from the WTO Committee on Trade and Development and the Organisation for Economic Co-operation and Development on the Aid for Trade project, for instance, which particularly addresses the UN's 2030 Agenda for Sustainable Development.⁶¹ Much of the focus on sustainable development in that report involves improving physical as well as digital connectivity.⁶² While there is no question that trade facilitation and digital infrastructure are important components to improving trade with the Global South, sustainable development is a concept that must encompass more than just trade, even as understood within the WTO's institutional framework. After all, the main beneficiaries of improved digital and physical infrastructure are Global North countries whose industries and individuals consume the resources and products of the Global South.

Fossil fuel subsidies are an area where the goals of sustainable development and the rules of the international trading regime can successfully operate in harmony. In the December 2017 WTO Ministerial Conference, twelve WTO members issued a declaration on fossil fuel subsidy reform, calling for the phasing out of fossil fuel subsidies.⁶³ According to the statement, fossil fuel subsidies were estimated at USD \$425 billion in 2015, and phasing them out would not only significantly reduce emissions but would also constitute progress toward sustainable development.⁶⁴ The challenge rests in the limitations inherent in the WTO's Subsidies and Countervailing Measures (SCM) Agreement, which only address subsidies that distort trade and consequently affect competition.⁶⁵ Without incentives to

60. WTO Committee on Trade and Development, *Decisions by the General Council on 31 January 1995*, WTO Doc. WT/L/46 (Feb. 23, 1995).

61. World Trade Org. & Org. for Econ. Cooperation & Dev., *Aid for Trade at a Glance 2017: Promoting Trade, Inclusiveness and Connectivity for Sustainable Development* 23 (2017).

62. *Id.*

63. World Trade Organization, Fossil Fuel Subsidies Reform Ministerial Statement, 12 December 2017, WT/MIN(17)/54. The twelve countries behind this statement are Chile, Costa Rica, Iceland, Liechtenstein, Mexico, Moldova, New Zealand, Norway, Samoa, Switzerland, Taiwan, and Uruguay.

64. *Id.*

65. INT'L CTR. TRADE SUSTAINABLE DEV., REFORMING FOSSIL FUEL SUBSIDIES THROUGH THE TRADE SYSTEM 3 (2018).

phase such subsidies out, countries are unlikely to do so *sua sponte*, being instead more likely to focus on capacity building and technical assistance initiatives that again, push the onus for change onto the Global South countries, who continue to be minor participants in the fossil fuel subsidy regime.

Sustainable development as presented in this Article is primarily an environmental concept, and does not operate in isolation. Within the WTO framework, sustainable development in the preamble of the WTO Agreement must be read together with the Article XX exceptions that may apply to environmental trade rules and policies.

B. Article XX and the Environment

The environment is mentioned elsewhere in the WTO agreements besides the preambles to the GATT and the WTO Agreement. That the WTO is meant to extend to environmental measures is clear from the interpretation of Article XX(g) in the post-GATT era. Article XX(g) of the GATT allows for member states to pass measures “relating to the conservation of exhaustible natural resources.”⁶⁶ In the early WTO case *United States—Standards for Reformulated and Conventional Gasoline*, the panel found that clean air was an exhaustible natural resource, opening the door to an interpretation of “exhaustible” that included matters relating to environmental conservation.⁶⁷ Also in relation to Article XX(g), the Appellate Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* famously found that it allowed for member states to pass measures to protect the environment (even though in that case, the measure in question failed to meet the requirements under the *chapeau* of Article XX).⁶⁸

Article XX(b) also offers a strong basis for environmental protection and may permit measures designed to promote sustainable development, providing as it does for measures that are “necessary to protect human, animal or plant life or health.”⁶⁹ The panel and Appellate Body in *Brazil—Measures Affecting Imports of Retreaded Tyres* upheld Brazil’s argument that, although the import ban did not meet the requirements of Article XX’s *chapeau*, it could be considered necessary to protect human, animal, and plant life or health, given the potential environmental hazards caused by the burning of waste tires and the subsequent contamination of soil and water.⁷⁰

66. GATT, *supra* note 51, art. XX(g).

67. Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, para. 6.37, WTO Doc. WT/DS2/R (Jan. 29, 1996).

68. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para. 185–86, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

69. GATT, *supra* note 51, art. XX(b).

70. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007); Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.87–7.100, WTO Doc. WT/DS332/R (June 12, 2007).

The Appellate Body in *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* endorsed an approach of animal protection on the basis of Article XX(a) and its objective of allowing the adoption of measures that are necessary to protect public morals.⁷¹ In so doing, the WTO has helped to advance international animal law and global norms relating to animals.⁷² This offers some hope that Article XX(a) could provide another avenue for countries that wish to pass environmental regulations that might otherwise violate WTO rules—for instance, rules restricting the production and importation of products with a certain nondegradable plastic content. Such restrictions could possibly be justified under a public morals argument, given the long-term environmental impact of nondegradable plastic on wildlife.

Article XX, it must be remembered, only applies to goods. The analogous General Agreement on Trade in Services (GATS) provision, Article XIV, also provides potential justifications for environmental measures, particularly through XIV(a) and XIV(b), the analogous subsections on public morals and the protection of human, animal, or plant life or health.⁷³ The environmental focus of the WTO established in the preamble goes beyond Article XX of the GATT and Article XIV of the GATS, however, and permeates all of the agreements. As preambular language, it provides the first line of justification for using the WTO, both as a rule-making organization and as a dispute-settlement body, in helping to ensure effective implementation of climate change mitigation and adaptation measures by WTO members.

IV. EXCEPTIONS AND WAIVERS

Despite the preamble of the WTO Agreement and the GATT and GATS exceptions, which allow for environmental measures that violate WTO rules to be taken, in the clean and renewable energy sectors the WTO, as a line of cases demonstrates, has not been favorable to domestic measures.⁷⁴ While the merits of each of those cases can be debated, it is clear that future climate change measures taken by

71. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.194–5.201, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).

72. Katie Sykes, *Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection*, 5 *TRANSNAT'L ENVTL. L.* 55, 57 (2016).

73. General Agreement on Trade in Services, art. 14, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 ILM 1167 [hereinafter GATS].

74. Christian Häberli, *WTO Rules Can Prevent Climate Change Mitigation for Agriculture*, *Society of International Economic Law* 11 (World Trade Institute, Working Paper No. 2016/06). These cases range from *India—Solar Cells* to *Canada—Feed-in Tariff Program*.

countries to meet their self-imposed targets under the Paris Agreement are likely to run afoul of WTO rules. Countries will want to incentivize private-sector action through prohibited means, including subsidies and domestic content requirements. This is already evident from the cases the WTO has heard, whether on renewable energy or on biofuels.⁷⁵

Sustainable development goals that actually benefit countries of the Global South may require certain types of industrial policy to be effective.⁷⁶ Even in the Global North, policies that encourage local investment into renewable and clean energy may be required to achieve the climate change mitigation and adaptation goals of the Paris Agreement. This is likely to give rise to problems within the WTO system. As Sadeq Bigdeli writes,

[t]oday, most of the dominant trade legal discourses do not draw a line between “protectionism” and “industrial policy.” Many, if not most, trade lawyers consider protectionism to include any domestic regulation intended to promote national industry at the expense of foreign competition, regardless of its potential merits.⁷⁷

Bigdeli argues that as the benefits of a green industrial policy become more evident, “it is most reasonable to accommodate a green industrial ‘policy space’ as part of country’s ‘right to regulate.’”⁷⁸ While Bigdeli suggests that there might be some possibility for justification of such policies under the auspices of Article XX(b) (based on the Appellate Body’s finding in *Brazil—Retreaded Tyres*),⁷⁹ certain forms of industrial policy may violate WTO rules, even if a broad interpretation of Article XX(b) is applied.

Subsidies are at the center of many discussions on industrial policy and the green economy. Robert Howse has proposed reviving the concept of nonactionable subsidies as a means of enabling climate change subsidies within the framework of the SCM Agreement.⁸⁰ Aaron Cosbey and Petros Mavroidis, in writing about green subsidies and renewable energy, have made the case for redrafting the WTO SCM Agreement so as to permit subsidies as instruments of industrial policy.⁸¹ Their justification, similar to Bigdeli’s, focuses on the idea that industrial policy in the area of renewable energy would be beneficial, with climate change-related measures creating “global public goods.”⁸² They argue against the use of exceptions to trade rules in these situations, since this would result in “not so much a slippery

75. Droege, *supra* note 48, at 221–23.

76. Bigdeli, *supra* note 48, at 182–83.

77. *Id.* at 181.

78. *Id.* at 202.

79. *Id.* at 203.

80. See ROBERT HOWSE, INT’L INST. FOR SUSTAINABLE DEV., CLIMATE MITIGATION SUBSIDIES AND THE WTO LEGAL FRAMEWORK: A POLICY ANALYSIS 20 (2010).

81. Cosbey & Mayroidis, *supra* note 48, at 1.

82. *Id.* at 30.

slope as a sudden cliff,” given the political popularity of protectionist measures.⁸³ While their argument is largely convincing, particularly given the widespread critique of the WTO’s subsidies rules by economists and trade lawyers alike, there is still room for the application of exceptions and waivers in addressing questions of climate change within the WTO structure.

In certain rare cases, it may be possible that the existing rules of the WTO Agreement are inadequate in allowing for national measures required to protect a sensitive area of national concern. In “exceptional circumstances,” Article IX of the WTO Agreement authorizes the WTO Ministerial Conference to waive an obligation imposed on a member under any of the WTO agreements, effectively carving out a space outside of the WTO rules.⁸⁴ This language mirrors that of Article XXV(5) of the GATT, which similarly allows parties “in exceptional circumstances” to waive obligations imposed on certain parties.⁸⁵

Waivers have most frequently been used with respect to special and differential treatment. The 1979 Enabling Clause is an example of one such exception under Article XXV(5) of the GATT.⁸⁶ The Enabling Clause, which remains in force, allows derogations from most favored nation treatment to be applied by developed countries toward developing countries.⁸⁷ Similarly, the WTO General Council approved a waiver in 1999 allowing the grant of preferential tariff treatment to products from least developed countries.⁸⁸ A 2011 waiver further allows WTO members to provide preferential treatment to services and service suppliers from least developed countries.⁸⁹ All of these waivers permit derogations from most favored nation treatment to favor developing or least developed countries.

More recently, in 2014, India temporarily vetoed the newly negotiated Trade Facilitation Agreement over lack of assurances concerning its food stockholding program.⁹⁰ Concerned that the WTO’s Agreement on Agriculture would prohibit measures needed to protect food security, India had pushed for an exception expressly permitting

83. *Id.* at 33.

84. WTO Agreement, *supra* note 9, art. IX(3).

85. GATT, *supra* note 51, art. XXV(5). For a detailed study of WTO waivers, see generally ISABEL FEICHTNER, *THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW* (2012).

86. Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903 (Nov. 28, 1979), GATT BISD [hereinafter Enabling Clause].

87. *Id.*

88. WTO General Council, *Preferential Tariff Treatment for Least-Developed Countries*, WTO Doc. WTL/304 (June 17, 1999).

89. WTO General Council, *Preferential Treatment to Services and Service Suppliers of Least-Developed Countries*, WTO Doc. WTL/847 (Dec. 17, 2011).

90. Eliason, *supra* note 10, at 643–44.

food stockholding.⁹¹ The WTO members came to a temporary agreement in December 2013, permitting a public stockholding exemption for food security purposes,⁹² which was amended and extended in 2014 until a permanent solution can be reached.⁹³

It is important to reiterate that this type of exception to WTO commitments is very rare. Within a system built on rules and exceptions, these are effectively the exceptions to those exceptions. The Appellate Body, in interpreting the Lomé Waiver in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, found that although there has been little guidance on the interpretation of waivers, the language of the GATT and the WTO Agreement on waivers “stress[es] the exceptional nature of waivers and subject waivers to strict disciplines,” finding that they “should be interpreted with great care.”⁹⁴ Nevertheless, a handful of waivers are granted each year, indicating that they are less infrequent than they might first appear.⁹⁵ Consensus is generally required for a waiver to be adopted, however if consensus cannot be reached or if a member requests a vote, voting will take place.⁹⁶ John Jackson, writing about waivers in the GATT, suggested that there is a fine line between “new obligations that are conditions to exceptions to GATT and general new obligations that ought to be imposed only through amendment.”⁹⁷ This applies equally to waivers under the WTO Agreement and must be taken into account when suggesting waivers as policy instruments. In his treatise, Jackson described waivers as “[p]erhaps the most important single power” of the GATT contracting parties.⁹⁸ Arguably, and particularly in the context of climate change, this is still true with respect to the WTO members.

Waivers offer considerable flexibility for countries to remain a part of the WTO while being exempted from adherence to certain WTO rules. Given the historical usage of waivers under both the GATT and the WTO in relation to developing countries, expanding the use of waivers to climate change mitigation or adaptation efforts by countries of the Global South seems logical. Where special and differential treatment measures are insufficient to allow countries to take the

91. CUTS INT’L: GENEVA, PUBLIC STOCKHOLDING FOR FOOD SECURITY: OPTIONS FOR SMALL DEVELOPING COUNTRIES AND LDCS TOWARDS A PERMANENT SOLUTION 4 (2017).

92. World Trade Organization, Ministerial Decision, Public Stockholding for Food Security Purposes, WTO Doc. WT/MIND(13)/38, WT/L/913 (Dec. 7, 2013).

93. WTO General Council, *Public Stockholding for Food Security Purposes, Draft Decisions*, WT/GC/W/688 (Nov. 24, 2014).

94. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 185 WTO Doc. WT/DS27/AB/R (Sept. 9, 1997).

95. See, e.g., WORLD TRADE ORG., ANNUAL REPORT 2017 at 47–48.

96. Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate*, 20 EUR. J. INT’L L. 615, 621 (2009) (noting that certain waivers are granted to individual members, while others are in the form of collective waivers, which “suspend obligations for (potentially) all or groups of members”).

97. JOHN JACKSON, WORLD TRADE AND THE LAW OF THE GATT 139 (1969).

98. *Id.* at 541.

measures necessary to mitigate climate change, the best approach would be for the WTO Ministerial Conference to adopt one or more carefully drafted and limited exceptions from the WTO rules. The public stockholding exception on food security was motivated in part by concerns on the part of developing countries arising from climate change–related weather events that threaten crops.⁹⁹ Similar exceptions could arise to allow for particular types of otherwise actionable or prohibited subsidies or domestic content measures to encourage domestic economic development of the clean energy sector. Other exceptions might arise in relation to carbon adjustment measures that fall afoul of WTO rules.¹⁰⁰

Waivers need not only apply to Global South countries; however, the overzealous use of exceptions has the potential to undermine the effectiveness of the WTO's rules-based regime. Any climate change–related waiver would require sunset provisions to ensure that the waivers would expire once climate change mitigation or adaptation targets were met, or once a specified period of time elapsed. In this discussion, it is also worth querying if a different standard should apply to mitigation as opposed to adaptation. Adaptation measures pose additional challenges to the Global South countries, who are at once the most vulnerable to climate change geographically and who also face the greatest capacity-building and infrastructural challenges in financing expensive adaptation measures.¹⁰¹ While it could be argued that there is more room to carve out exceptions in relation to the implementation of mitigation measures than in relation to adaptation measures, since mitigation has an impact on every country and every individual, adaptation measures must receive equal attention to ensure that the previously discussed goals of sustainable development are met in a way that does not overly burden countries of the Global South.

99. RAUL MONTEMAYOR, INT'L CTR. FOR TRADE & SUSTAINABLE DEV., PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES: SCENARIOS AND OPTIONS FOR A PERMANENT SOLUTION 37 (2014).

100. JAMES BACCHUS, CTR. FOR INT'L GOVERNANCE INNOVATION, THE CASE FOR A WTO CLIMATE WAIVER 20 (2017). For an overview of the legality of various measures to combat climate change, see Robert Howse & Antonia Eliason, *Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues*, in INTERNATIONAL TRADE REGULATION AND THE MITIGATION OF CLIMATE CHANGE 48–93 (2009).

101. See, e.g., INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK OCTOBER 2017 at 117–83 (2017). See generally M. Monirul Qader Mirza, *Climate Change and Extreme Weather Events: Can Developing Countries Adapt?*, 3 CLIMATE POL'Y 233 (2003).

V. SPECIAL & DIFFERENTIAL TREATMENT

The final layer of support found in the WTO for addressing national climate change measures is the special and differential treatment (S&DT) provisions found across the WTO Agreements. Since the inception of the GATT in 1947, treatment for developing countries has developed significantly.¹⁰² During the early GATT years, this included a combination of *ad hoc* measures, as well as GATT Article XVIII concerning governmental assistance for economic development, in particular balance of payment measures, and GATT Article XXXVII, which explicitly addressed the need for developed countries to reduce or eliminate trade barriers to products from developing countries.¹⁰³ The 1979 Enabling Clause gave permanent legal protection to the Generalized System of Preferences, an exception to the GATT rules that allowed special treatment to be afforded to developing countries and least developed countries by participating developed countries.¹⁰⁴ With the establishment of the WTO in 1995, S&DT provisions became formalized into the various agreements in the WTO. Most of these provisions were relatively limited, allowing developing countries extended phase-in periods for new obligations, such as Article 66 of the TRIPS Agreement.¹⁰⁵ They also provided for provisions of technical assistance (Article 67 of TRIPS) and for restrictions of trade in services for balance-of-payment difficulties (GATS Article XII).¹⁰⁶

These are the traditional S&DT provisions in the WTO. The recent Trade Facilitation Agreement contains novel S&DT provisions that expand significantly upon the more traditional and limited provisions. Rather than include such provisions as an afterthought to the main agreement, merely providing for some extended timeframes for implementation, Section II of the TFA provides a series of rules on S&DT. These include measures relating to capacity building, centered around partnerships between developed and developing countries. The rules also include conditional obligations, the timeframe for implementation of which depends on the self-designation by the developing countries of the provisions that fall under each of the categories laid out in the agreement.¹⁰⁷

Trade facilitation measures, which center on customs and border administration, are often costly to implement, requiring a level of

102. Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When and How?* 1–7 (WTO: Econ. Research & Statistics Div., Staff Working Paper ERSD-2004-03, 2004).

103. GATT, *supra* note 51, arts. XVIII, XXXVII.

104. Keck & Low, *supra* note 102.

105. *Id.* at 7.

106. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 67, Jan. 1995, 2017, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 401 [hereinafter TRIPS]; GATS, *supra* note 73, art. XII.

107. For an overview of the TFA and its S&DT provisions, see Eliason, *supra* note 10, at 659–62.

technological capacity that developing countries may struggle to achieve, particularly where other, more pressing, infrastructural and developmental challenges exist.¹⁰⁸ The benefits to implementing these trade facilitation measures accrue to developed as well as developing countries, making the capacity-building arrangements in the TFA particularly apt in the context of climate change, since developed countries are providing support to developing countries to meet the obligations.¹⁰⁹ By supporting developing countries in meeting the goals of the TFA through capacity building, developed countries benefit from reduced cost and improved access to the developing country markets. Consumers in developed countries stand to benefit from trade facilitation measures that reduce the cost of goods imported from developing countries.

Climate change measures are not dissimilar. Climate adaptation and mitigation measures are disproportionately costly and difficult for developing countries to implement.¹¹⁰ Even for Global North countries, such initiatives require considerable infrastructural investment. As with trade facilitation measures, it is the developed as well as the developing countries that benefit from climate mitigation measures taken by other countries. In fact, with climate change mitigation measures, every country in the world benefits from each individual measure taken by each country. Combating climate change is a global challenge that requires global participation.

While S&DT measures can exist in the form of waivers, building such measures into multilateral or plurilateral agreements gives them greater legitimacy, as permanent, negotiated provisions that form part of the WTO's key legal texts. Contemplating how such measures might work in the context of a potential climate change-related agreement is necessary to completing the three-pronged approach to facilitating the Paris Agreement through the framework of the WTO.

A. A Trade and Climate Change Agreement

The Paris Agreement is based on a bottom-up structure, wherein countries have the flexibility to determine their own targets. The S&DT provisions of the TFA have similar flexibilities, suggesting that such provisions might offer a means of using the WTO's dispute-

108. *Id.* at 658.

109. *Id.* at 660.

110. *Climate Change is Driving Debt for Developing Countries*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (July 3, 2018), <https://unfccc.int/news/climate-change-is-driving-debt-for-developing-countries> [https://perma.cc/4GDN-SCFG] (archived Feb. 24, 2019); Megan Rowling, *How much will climate change cost developing nations?*, WORLD ECON. FORUM (Nov. 26, 2015) <https://www.weforum.org/agenda/2015/11/how-much-will-climate-change-cost-developing-nations/> [https://perma.cc/AA5A-24QY] (archived Feb. 24, 2019).

settlement system as a way of enforcing obligations under the Paris Agreement. The challenge here rests in finding a way to apply special and differential treatment measures like those in the TFA to climate change-related measures.

Much as the WTO already works in tandem with WIPO in relation to TRIPS and with the World Customs Organization in relation to the TFA, the WTO here could operate as a partner to the Paris Agreement in providing structure and enforcement via a new multilateral agreement.¹¹¹ The success in negotiating the TFA indicates that multilateral agreements under the WTO umbrella are still possible, at least where narrowly defined and focused on issues that are broadly agreed upon by the WTO members. Like trade facilitation, climate change is an issue that almost all WTO members agree on, as evidenced by the broad international support for the Paris Agreement.

Even absent the consensus necessary for a multilateral agreement, there would likely be support for a climate change-related plurilateral agreement under the auspices of the WTO. The WTO Environmental Goods Agreement (EGA) is one example of a plurilateral trade agreement that could help focus efforts on the basis of a common set of rules, although a targeted agreement that directly aims to facilitate the Paris Agreement would be more effective.¹¹² Failure to date to reach agreement on the EGA highlights some of the problems that are likely to arise in any climate change-related trade negotiations. The negotiation of the EGA began in July 2014, with a goal of promoting trade with respect to certain environmental products, including wind turbines and solar panels as well as energy saving products.¹¹³ With seventeen countries and the EU taking part in negotiations, the failure to reach agreement in December 2016 and subsequent end to negotiations were due in part to disagreement concerning what constituted environmental goods.¹¹⁴ Environmental goods lack a universally agreed-upon definition, which poses challenges, as their categorization can become politically fraught.¹¹⁵ With any climate change and trade agreement, balancing political tensions with environmental goals will be the greatest challenge to negotiators.

111. Eliason, *supra* note 10, at 648.

112. Droege, *supra* note 48, at 205.

113. *Report from the 14th round of negotiations for an Environmental Goods Agreement (EGA)* (July 8, 2016), http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154784.pdf [<https://perma.cc/4PPS-8E8V>] (archived Feb. 24, 2019) [hereinafter EGA Report].

114. *Ministerial Talks to Clinch Environmental Goods Agreement Hit Stumbling Block*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (Dec. 8, 2016), <https://www.ictsd.org/bridges-news/bridges/news/ministerial-talks-to-clinch-environmental-goods-agreement-hit-stumbling> [<https://perma.cc/MJS3-6QR3>] (archived Mar. 22, 2019).

115. *See id.* (stating that bicycles and their categorization became a particular area of difficulty during the December 2016 Environmental Goods Agreement negotiations, with the EU resisting China's efforts to have bicycles classified as environmental goods).

One aspect of the EGA that could provide guidance for a plurilateral agreement designed to facilitate the Paris Agreement is the planned extension of most favored nation treatment under the agreement to all WTO members and not just those participating in the agreement.¹¹⁶ This approach, which the EGA negotiations viewed as being conditional on the EGA members representing a “critical mass of global trade in environmental goods,” would result in a *de facto* multilateralization of reduced or zero tariffs on environmental goods, thus facilitating the adoption of clean technologies and encouraging climate mitigation actions.¹¹⁷

How, then, might a plurilateral WTO agreement on trade and climate change be structured so as to maximize the ability of countries to meet the targets set in the Paris Agreement? Taking the TFA as a model, some of the preambular language offers guidance for how the priorities of a trade and climate change agreement might be laid out. The TFA highlights developing country needs and capacity building as well as the need for effective cooperation on trade facilitation and customs compliance issues in its preamble.¹¹⁸ With climate change, the developing country needs and capacity-building requirements are just as important, if not more so, than with trade facilitation. Furthermore, cooperation is crucial to achieving the goals of the Paris Agreement, since, as previously discussed, climate change cannot be effectively addressed in any fashion other than globally.

The S&DT provisions of the TFA can largely be exported to a trade and climate change agreement. Developing countries should be able to self-designate provisions that they can implement soonest, those that they require additional time to implement, and those that require assistance and capacity-building support from developed countries.¹¹⁹ The TFA recognizes that least developed country members require additional support, providing that they “will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.”¹²⁰ It is important to understand that even in the context of climate change, mitigation and adaptation efforts

116. EGA Report, *supra* note 113.

117. *Id.*

118. General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, WTO Doc. WT/L/940 (Nov. 27, 2014) [hereinafter Trade Facility Agreement]. The preamble states, in part: “Recognizing the particular needs of developing and especially least-developed country Members and desiring to enhance assistance and support for capacity building in this area; Recognizing the need for effective cooperation among Members on trade facilitation and customs compliance issues.” *Id.* pmb1.

119. *Id.* art. 14 (setting out Categories A, B, and C for developing country Members or LDC Members to designate each of the TFA’s general provisions as Category C are the measures that will require the most time and capacity building help to implement).

120. *Id.* art. 13(3).

cannot be forced upon Global South countries, since that would in effect serve to impose costs upon those countries that are largely a result of Global North countries exploiting the planet's resources for their economic gain.

Nevertheless, there is an immediacy to the climate change crisis that requires quick action. A trade and climate change agreement would need to go beyond the commitments in the TFA by developed countries to assist with capacity building. It would also need to extract recognition on the part of the Global North countries that, as they are to a much larger degree responsible for the environmental destruction that has given rise to climate change, they will be required to commit to building capacity in the Global South to enact climate change mitigation and adaptation measures. Even though such an admission of responsibility might be difficult to negotiate, having firm obligations regarding how cooperative capacity building will operate that strengthen the soft law language in Article 21 of the TFA might serve as an acceptable middle ground.¹²¹

The TFA created a Committee on Trade Facilitation to help oversee assistance and support for capacity building.¹²² Similarly, a committee on trade and climate change would need to be created in relation to a potential trade and climate change agreement, since the existing Committee on Trade and Environment and Committee on Trade and Development already have significant agendas. It would be important for a committee on trade and climate change to liaise regularly with the UNFCCC in relation to the Paris Agreement targets.

A detailed discussion of what substantive provisions a trade and climate change agreement would contain is beyond the scope of this Article. However, it is clear that it would need to go beyond the envisioned scope of the EGA, which is largely a tariff classification and reduction exercise. Including services and intellectual property along with goods in the trade and climate change agreement would be necessary to provide the broadest support for facilitating the Paris Agreement. If a multilateral agreement were possible, a concurrent amendment of the SCM Agreement would be particularly beneficial to allow for greater domestic industry support.

121. *Id.* art. 21. The TFA provides for assistance and support for capacity building, noting that donor Members “agree to facilitate the provision” of such support “on mutually agreed terms either bilaterally or through the appropriate international organizations.” In laying out the principles for assistance and support for capacity building, the TFA states that “[m]embers shall endeavor to apply” these principles. *Id.* The capacity building language as written can thus be viewed, at least in part, as soft law obligations.

122. *Id.* art. 23.

VI. CHALLENGES TO THIS APPROACH

There are three major challenges to using the WTO to help facilitate the implementation of the Paris Agreement that must be addressed.

First, there is the political challenge. With the United States currently refusing to participate in the international system and withdrawing from the Paris Agreement, does this foreclose a multilateral approach? Unless a carrot-and-stick approach is available such that there is something in it for the United States to bring them on board, making any progress in a multilateral institution like the WTO seems unlikely. Combined with the United States' negative approach to the Appellate Body, this could be detrimental to the multilateral future of the WTO. Unfortunately, climate change will not wait until a more reasonable US administration comes into power, and as such, progress must be attempted even where a certain degree of optimism and faith in the strength of multilateralism is required. Even if a multilateral approach were to fail, a plurilateral agreement could offer a means of overcoming the reluctance of the United States to play ball internationally.

The second challenge relates more broadly to the worldwide backlash against globalization. An obvious question is whether this is the moment to use the WTO to accomplish even more than is already set out in its agreements. When so many countries seem to be moving away from the WTO toward regionalism,¹²³ perhaps this is an inopportune time to look to expanding the WTO's capabilities. Nevertheless, the alternative would be to do nothing, seeing as creating a new multilateral enforcement body specifically designed to address climate change measures seems far less likely to succeed than does leveraging the existing structures of the WTO. While the WTO is a neoliberal institution that is inherently problematic and that has at times served to uphold entrenched power structures in the Global North to the detriment of the Global South, it has recently taken a more proactive role in addressing development and environmental issues.¹²⁴ With Global South countries increasingly vocal in the WTO, there is hope for at least some degree of reform to the international trading system.

Finally, WTO rules may make it difficult to allow for climate change mitigation measures to be taken in some situations, for instance in relation to agriculture.¹²⁵ Many agricultural support

123. Antonia Eliason, *Development and Regional Trade Agreements: Entrenching Structural Inequities*, 46 GA. J. INT'L & COMP. L. 635, 635 (2018) [hereinafter Eliason *Development*].

124. *Id.* at 647.

125. Häberli, *supra* note 74.

mechanisms designed to encourage green agriculture could constitute violations of WTO rules, whether through trade restrictions that conflict with national treatment obligations under GATT Article III or subsidies that constitute violations of the SCM Agreement.¹²⁶ In particular, the ability to differentiate between locally grown and imported products may run afoul of WTO rules despite offering a simple and effective mechanism to support green agriculture. This Article would argue that, precisely for the reason that WTO rules may make taking climate mitigation measures more challenging, it is important to think through the use of the WTO and make it a vehicle for positive change rather than an obstacle for implementation of climate change. Waivers, as previously discussed, can be used to create exceptions to the rules that prevent climate change mitigation measures from being taken. Renegotiating agreements, while not currently a possibility, could again be possible in the future, at which point waivers could be transitioned into provisions of key WTO agreements.

As an alternative to rules imposed by multilateral institutions, some would suggest that market-based measures offer a more efficient way to address climate change issues. It is clear, however, that as they stand, such measures are inadequate, as they are often voluntary in nature and may include accommodations that undermine the efficacy of the rules.¹²⁷ Where the private sector is in charge of setting its own restrictions and imposing measures that may decrease its profits, real change is unlikely to be achieved. Capitalism does not incentivize behavior that contravenes profit seeking.

Another alternative to multilateralism, and one that is increasingly being adopted by countries around the world, is the inclusion of climate change and environmental provisions in regional trade agreements.¹²⁸ Writing broadly about the life cycle of multilateralism, Harlan Cohen argues that “as multilateral institutions deepen, the best strategies to achieve global solutions may be ones that encourage competition rather than foster cooperation. Regional, club, and national strategies may need to pick up where multilateralism leaves off.”¹²⁹ Cohen recognizes, however, that narrowly focused multilateral agreements could be valuable in advancing future negotiations.¹³⁰ This tendency toward regionalism poses a particular challenge in the context of climate change, where environmental chapters in regional trade agreements are rather scant

126. *Id.* at 15.

127. *See, e.g.,* Ruwantissa Abeyratne, *Carbon Offsetting as a Trade Related Market Based Measure for Aircraft Engine Emissions*, 51 J. WORLD TRADE 425, 425–43 (2017) (discussing the inefficacy of the Resolution adopted by the International Civil Aviation Organization in 2016 to reduce emissions by civil aircraft).

128. Droege, *supra* note 48, at 197.

129. Harlan G. Cohen, *Multilateralism’s Life-Cycle*, 112 AM. J. INT’L L. 47, 50 (2018).

130. *Id.* at 65.

in terms of obligations and act more as feel-good placeholders than as substantive requirements for parties to these agreements.¹³¹ They cannot act as a substitute for global action.

There are three main types of environmental and climate protections in regional trade agreements: (1) general environmental provisions that do not mention climate change but instruct parties to maintain a high level of environmental protection; (2) provisions that aim to promote or facilitate trade and investment in “climate-relevant sectors”; and (3) provisions “aimed at deepening cooperation on climate change between the parties to the agreement.”¹³² Given how exhortative most of these provisions are, it seems unlikely that even a network of regional trade agreements all with robust environmental protection chapters would succeed in achieving the global commitment to climate change mitigation and adaptation required under the Paris Agreement.

VII. GOING BEYOND: ADDRESSING CLIMATE CHANGE

Free trade is in many ways at odds with the fight against climate change. In increasing the amount of trade that flows from the Global South to the Global North, negative externalities arising from emissions and other forms of pollution are ignored in favor of the relative cheapness of the goods, itself a product of the low wages in the Global South countries.¹³³ Land grabs by multinational corporations and investors from the Global North and China are taking place throughout the Global South, with much of that land being converted into intensive monoculture, which goes against the principle of sustainable development.¹³⁴

At the heart of any potential success by a multilateral environmental treaty lies sustainable development. Without giving teeth to the concept that in particular balances the need for Global South countries to experience economic development with the need to conserve natural resources and reduce emissions, any measures to mitigate climate change are doomed to failure. This requires accounting for issues of poverty and wealth inequality in a way that brings together the Global South and the Global North and that

131. Eliason *Development*, *supra* note 123, at 645.

132. Droege, *supra* note 48, at 227.

133. Olivier De Schutter, *Linking Trade and Climate Change: What Room for Human Rights?*, in *CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE* 201, 203–18 (2016).

134. Oguamanam, *supra* note 49, at 249–50.

includes marginalized communities as key stakeholders in the process.¹³⁵

Multilateral institutions cannot accomplish this work alone. Grassroots efforts to bring global concepts to local communities are crucial for obtaining stakeholder buy-in and appropriately educating populations regarding environmental choices that they make. In India, the National Green Tribunal operates as a specialized body with scientific expertise necessary to hear environmental disputes.¹³⁶ This tribunal, which has made scientific expertise central to the process, has resulted in a significant shift in how India treats environmental cases, including through the open acceptance and promotion of key international environmental law principles, in particular sustainable development, the precautionary principle, and the polluter pays principles.¹³⁷ Such efforts, if adopted by other countries, could go a long way in localizing the global and in internationalizing domestic environmental concerns.

As Global North countries move to mitigate and adapt to climate change, the “green economy” becomes the catchphrase of the hour. There are risks to embracing the phrase “green economy” without clearly articulating what it is meant to express. To the Global North, the “green economy” may become definitionally and operationally separated from the crucial element of sustainable development, with potential negative consequences for countries of the Global South.¹³⁸ This leads to a risk that Global South countries will find their requests for aid or for debt relief to be conditioned on adopting environmental measures that fail to account for sustainable development needs.¹³⁹ Sustainable development must remain at the heart of any climate change regime.

Global poverty raises additional challenges to successfully implementing the goals of the Paris Agreement. Yet such poverty is not inevitable. A paper by Chris Hoy and Andy Sumner argues that up to three quarters of global poverty could be eliminated via redistribution of nationally available resources.¹⁴⁰ It is here that the insidious nature of the transnational capitalist class can be seen, through their influence on the global economy and on institutions of trade and finance, as well as through their domestic influence. As long as late-stage capitalism continues unabated, global poverty will continue to grow together with wealth inequality, making environmental concerns

135. Shawkat Alam & Jona Razzaque, *Sustainable Development versus Green Economy: The Way Forward?*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 44, at 609–23.

136. Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal and Expert Members*, 5 TRANSNAT'L ENVTL. L. 175, 177 (2016).

137. *Id.* at 177, 184.

138. Khor, *supra* note 48.

139. *Id.* at 3.

140. Chris Hoy & Andy Sumner, *Global Poverty and Inequality: Is There New Capacity for Redistribution in Developing Countries?*, 7 J. GLOBALIZATION & DEV. 117, 117–18 (2016).

of lower priority, even where failure to act may have catastrophic consequences for our planet and for humanity.

VIII. CONCLUSION

This Article does not wish to suggest that violating WTO rules is an ideal solution, nor that this should become the way forward, thus diluting the multilateral rules-based system in some last-ditch effort to rescue it. Rather, this Article aims to offer ways that the existing structures can be used to ensure that in the area of climate change, countries have as much flexibility as necessary to meet their targets and to fight the biggest challenge they have ever collectively faced.

In particular, building on the focus on sustainable development and environmental protection in the preamble to the WTO, the WTO can potentially position itself as a facilitator and enforcer of environmental rules and measures in tandem with the Paris Agreement. Developing countries will be disproportionately affected by the effects of climate change, yet lack resources to adapt to and to mitigate them. Developed countries will also face significant challenges. The solution to these challenges lies in the novel S&DT provisions of the TFA and the possibility of incorporating those into a new trade and climate change agreement, and in the application of waivers adopted by the WTO General Council.

Without enforcement mechanisms, the success of the Paris Agreement seems doubtful. Negotiating an international body to oversee the implementation of national climate change mitigation and adaptation measures would be daunting, even in an international climate less hostile to cooperation. The least intrusive, most effective solution to the enforcement issue rests with the mechanisms already available in the WTO. The future of the WTO may lie in expanding its scope and continuing to develop the S&DT provisions that made the Trade Facilitation Agreement such a powerful new tool.

The WTO's S&DT provisions together with the social welfare goals enshrined in the GATT and the WTO Agreement provide support for both environmental and labor activism. Rather than being viewed as a bulwark of neoliberalism, the WTO, with a proper rearrangement of priorities, could serve as a beacon of progress. But for that to happen, a rethinking of what sustainable development means must occur.