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Centre for International
Governance Innovation

Special Report

The Case for a WTO Climate Waiver

James Bacchus



Special Report

The Case for a WTO Climate Waiver

James Bacchus

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About the Author

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

About the International Law Research 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

There is a looming collision between the rules frameworks of the two separate international institutions that have been created and entrusted with addressing trade and climate change. Links between trade and climate change can no longer be ignored by either the World Trade Organization (WTO) or the Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC). Neither of the two regimes has considered the consequences of the trade restrictions that are likely to be part of many national measures enacted to address climate change, which will fall within the scope of the WTO Agreement and will surely lead to a lengthy WTO dispute settlement process. Such trade-restrictive national measures will be fed by domestic fears of “carbon leakage” and a loss of national competitiveness, and WTO disputes resulting from such measures will confront numerous unanswered legal questions due to an absence of relevant WTO jurisprudence. To minimize the political risks of such a collision to both the WTO and the COP, and to combine the most benefit for the climate with the least risk to trade, a WTO climate waiver is urgently needed. To secure such a legal waiver, a number of steps are required: WTO members must be persuaded that a multilateral effort to frame a WTO climate waiver is far better for the world trading system than waiting for the approaching legal collision that may topple it; the separate silos of trade and climate change must be united by bringing together the negotiators on both topics to discuss the nexus between the two; the topic of the relationship between trade and climate change must be placed on the WTO agenda; a group of WTO members must request a collective waiver of the Multilateral Trade Agreements due to the “exceptional circumstances” created by climate change; a WTO working party must be tasked with framing and proposing such a WTO climate waiver; a draft waiver decision must be prepared by the working party; and the waiver decision must be adopted by the members of the WTO. The adoption of a WTO climate waiver should be only the first of the ways in which WTO members revise and realign WTO rules in accordance with the objectives of sustainable development.

The Approaching Collision between Trade and Climate Change

A common inclination of many politicians — as with many people generally — is to procrastinate. If a vote can be postponed, then postpone it. If a decision need not be made today, then make it tomorrow. If a decision can be left to the courts, then let the courts decide. Seize not the day but the delay and, if possible, arrange the dispatch of a decision to someone else.

Diplomats are only politicians in a different guise. They share the same inclinations. They engage in the same rationalizations. They tell themselves, “Perhaps if we refrain from making a decision, then the need for making a decision will eventually disappear. Or perhaps someone else will make the decision for us, and we will not be made to pay the price personally of the uncertain and unforeseen impacts of the decision making.” It is always better, if possible, not to vote at all than to cast the wrong vote, or even the right vote, if the right vote is diplomatically — that is to say, politically — difficult.

These inclinations are much on display in the prevailing diplomatic disengagement from the crucial question of the intricate links between trade and climate change, and in the looming collision between the enabling rules frameworks of the separate international institutions we have created and entrusted with acting on each of these two urgent global concerns. The continued delay of both the trade and the climate regimes in confronting these links, and in devising cooperative ways to deal with them that will further the flow of trade while also fighting climate change, is hastening that collision and is heightening the global stakes of its rapidly approaching impact.

On climate change, 195 countries have concluded the Paris Agreement, which establishes a global legal framework for facilitating voluntary national climate pledges to cut carbon emissions and deals with most of the many dimensions of climate change — but includes no binding

dispute settlement system.¹ Nearly two years on from reaching their success in Paris, these 195 countries, under the mantle of the COP, are busy working to fill in the missing spaces in the new climate framework, with sturdy rules to speed the fulfillment of national climate pledges and spur additional and more ambitious climate action. The climate negotiators have, however, for the most part skipped the missing space in their rulebook on the connections between trade and climate change.

On trade, 164 of the 195 countries that are parties to the Paris Agreement are also members of the WTO, and thus are parties to the WTO Agreement,² which includes binding trade obligations and a mandatory and enforceable trade dispute settlement system. Nearly two years on from the climate celebration in Paris, the 164 members of the WTO have still barely acknowledged that the climate agreement and the nascent climate regime exist. The trade negotiators have not even put on their agenda for formal discussion the question of the many connections between trade and climate change.

The links between trade and climate change cannot be ignored much longer by either the climate or the trade regimes. Current global economic and political circumstances are hurrying us toward a legal showdown between these two frameworks for global governance. With global warming intensifying, and with the predictions of climate scientists on further warming becoming more and more dire, the global pressures are quickly increasing on individual countries to speed up the implementation of their voluntary national climate pledges and to “ratchet up” their promises and plans for limiting carbon and other greenhouse gas emissions.

Counter to, and in reaction to, these intensifying global pressures for more climate actions, ever-rising waves of domestic pressures are flowing in the other direction. Fearful of a consequent

loss of competitiveness due to new climate-related constraints, domestic interests of many kinds are pushing to include and to impose trade restrictions as part of national measures to address climate change and as a condition to enacting and applying them. Already, as Clara Brandi has 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.”³ Soon, some of these measures will be applied. Soon, too, there will be more such measures, as countries struggle to balance the need to address climate change with a variety of domestic apprehensions.

Many of these measures are likely to include trade restrictions, and many of these restrictions are likely to be based on the process and production methods — the PPMs — used in making end products. What has long been a touchy issue in trade will at last be brought to the forefront, as countries grapple with making distinctions between and among traded products based on the carbon emitted in making them. WTO delegates and WTO judges will likely be confronted squarely with a divisive issue that, thus far, has been addressed only occasionally and obliquely.

Neither the climate regime nor the trade regime has yet begun to consider at all seriously the likely consequences of these looming climate-related national measures that will affect trade and that will also, in many instances, restrict trade. The climate regime awaits action by the trade regime. The trade regime awaits action by the climate regime. In the meantime, very little is done in either regime even to discuss the issue. In their solipsism, the two regimes remain separate silos, each largely blind to the proceedings and the concerns of the other. They each prolong their evasion on this issue, seemingly in the implicit hope that the coming collision between trade and climate change will not occur, that the other regime will somehow prevent the collision, or that some as yet undefined but decisive action to prevent it will be taken elsewhere and higher up the diplomatic

1 Aviation and maritime emissions are not dealt with by the Paris Agreement but rather by the International Civil Aviation Organization and the International Maritime Organization, respectively. Agriculture is dealt with in the Paris Agreement largely in connection with food security. Separate efforts on these issues are proceeding in parallel with the implementation of the Paris Agreement by the COP. There are debates about the effects of international trade associated with transport and agriculture on the extent and impact of climate change, but those debates are beyond the scope of this brief report.

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

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

ladder, perhaps by a handful of “major players” or by the G20 group of leading economies.

To some extent, this mutual procrastination is understandable. It follows from distraction, for both the climate and the trade regimes have existential crises they must confront. Sadly, these international institutional crises have been sparked by the recent retreat by the United States under a new president. From a longstanding bipartisan American policy of encouraging and supporting international cooperation to resolve common concerns, the United States has moved toward a new and disruptive policy of globally opposing much of what it has long led the way in establishing. President Donald Trump has announced the pending US withdrawal from the Paris Agreement. He has threatened at times that the United States will also withdraw from the WTO, if the WTO is not soon reshaped as he sees fit. These disruptions make it difficult for either the trade or the climate regime to focus on much more than mere survival.

Understandable or not, the failure thus far of the two regimes to define and delineate the links between trade rules and climate rules adds to the likelihood that a legal clash between the two regimes will happen, and that it will happen first in the form of a highly contentious international dispute over the impact of trade restrictions imposed by a national measure purportedly taken in response to climate change. This dispute will likely be resolved by the trade regime in the WTO dispute settlement system, ultimately by the WTO Appellate Body. And it will be resolved only after several years of heated hue and cry in the wider world about both the supposed encroachment of trade obligations on climate actions, and the supposed undermining of trade obligations by climate actions.

Here is how such a WTO dispute about the links between trade and climate change could unfold.

Suppose Country A decides to impose a trade restriction as part of what it says is a measure taken in response to climate change. This measure restricts the trade of Country B. Both Country A and Country B are members of the WTO and also parties to the Paris Agreement. Because there is no climate dispute settlement system, there is no established way for the dispute between the two countries over the nexus between trade and climate change to be settled by the climate regime. Instead, under the specific terms of the

WTO Agreement, because the measure affects trade, the two countries must take their dispute for resolution to the WTO dispute settlement system.⁴

In this WTO dispute, Country B will present legal claims that the trade restrictions in Country A's measure are inconsistent with its obligations in the WTO-covered agreements. In reply, Country A will say that any such inconsistencies, if they exist, are excused because the national measure in dispute is a climate “response measure” taken in furtherance of the Paris Agreement and of the underlying United Nations Framework Convention on Climate Change.⁵ Because there is no definition of what constitutes a climate response measure in these two climate agreements, it will be left to the WTO trade judges to begin to define a climate response measure in order to determine whether the challenged measure can potentially be justified in the WTO dispute. If the measure in dispute is found to be a measure potentially eligible for a defence that would excuse what would otherwise be a WTO violation, then it will be left for those same trade judges to determine next whether that measure has been applied in a manner that qualifies for such a defence.⁶

Based on the legal rulings in the first two decades and more of WTO dispute settlement relating to trade and the environment, there is no reason to assume that WTO panels and the WTO Appellate Body will automatically give precedence to trade concerns over those relating to climate change. And there is every reason to think that, on a case-by-case basis, and based on the discrete facts as proven in each case, WTO judges will, as always, uphold the current WTO rules in their attempts to clarify the legal lines between trade-affecting climate measures that are permissible and those that are not.

But are the current rules sufficient to the necessary task of reconciling the competing demands of advancing trade and confronting climate change

4 Understanding on Rules and Procedures Governing the Settlement of Disputes, *Marrakesh Agreement*, *supra* note 2 at Annex 2, art 23.1 [DSU].

5 See *The Paris Agreement*, Conference of the Parties to the United Nations Framework Convention on Climate Change, 12 December 2015, art 4.15 (entered into force 4 November 2016) [*Paris Agreement*] and *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, 31 ILM 849, art 4.8 (entered into force 21 March 1994) [UNFCCC].

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

in ways that will support essential climate action? The Appellate Body can wrest meaning from the current rules, but it cannot clarify rules that are not there. Nor can it supplement insufficient WTO rules with rulings that, however beneficial they may be in drawing the right lines between trade and climate change, “add to or diminish the rights and obligations provided in the covered agreements” of the WTO.⁷ Nor, in the face of the urgent global imperative of confronting climate change, does the world have a decade or two to await an incremental solution through the usual gradual revelation of the lines of legal clarification in WTO dispute settlement from the accumulation of edifying jurisprudence on a case-by-case basis.

As it stands, under the current WTO rules, a panel or the Appellate Body may reach the right result *legally* in a dispute along the fault lines of trade and climate change, but that result might not be the right result for addressing climate change and broader concerns of sustainability. Precedence must be given by the WTO to addressing climate change and to achieving the other objectives of sustainable development — but this may not happen under the current rules in WTO dispute settlement. It is, for example, overwhelmingly in the common interest of the world that countries be permitted to make distinctions on traded products according to the carbon emissions resulting from the making of those products. Depending, however, on how such distinctions are made by a WTO member, the measures implementing them may not be consistent with current WTO obligations.

What is more, in the several years between the legal collision of the trade and climate regimes in the filing of the first WTO case on the nexus between trade and climate change and the adoption of the final rulings and recommendations of a WTO panel as amended by the Appellate Body, the systemic and public shock of that collision will threaten the legitimacy and longevity of both the climate and trade regimes. Whatever the eventual legal outcome of that first case, in the prolonged time while the world awaits a verdict, the climate regime will be criticized as inadequate and ineffective, and the trade regime — as so often — will be widely accused of interfering in climate change mitigation attempts with the dark intention of placing commercial over climate concerns.

In these circumstances, procrastination is not an option. Procrastination must end. Whatever political perils the climate negotiators and trade negotiators may fear they will face in immediately confronting the complicated nexus between trade and climate change, those perils will surely be much greater if they postpone confronting this critical issue until later. The always-appealing political and diplomatic procrastination of letting the courts decide must yield now to political and diplomatic action. Climate rules and trade rules must be reconciled to achieve both climate and trade aims. The effort to attain this necessary reconciliation must begin immediately. But, to begin, the best legal means of accomplishing this reconciliation must first be identified, especially as they relate to possible measures on carbon adjustment.

The Rationale for Carbon Adjustments

The intensifying pressures for climate-related trade restrictions have their origins in domestic worries about competition and about climate change. Many economists (and not a few climate and trade scholars) would agree that the “first-best” solution for drawing the right line between advancing trade and addressing climate change would be a global carbon tax. To their minds, the ideal solution would be “a uniform worldwide greenhouse gas...tax at the level that would induce the desired reduction of carbon emissions.”⁸ As Joel Trachtman has observed, however, “There are formidable political barriers to reaching an agreement toward this worldwide response, so it is useful to evaluate a plausible alternative involving unilateral national action.”⁹ Given the parlous state of current politics, nationally and internationally, this is an understatement.

Presumably, these plausible alternative unilateral national climate actions will be taken pursuant to the Paris Agreement and applied under the

7 DSU, *supra* note 4, art 3.2.

8 Joel P Trachtman, “WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes” (2016), Resources for the Future Discussion Paper 16-03 at 2.

9 *Ibid.*

overarching legal framework of that agreement, which is now being constructed by climate negotiators. The unilateral national measures to be taken in fulfillment of the national climate pledges — the “intended nationally determined contributions” that were made voluntarily under the Paris Agreement — are only the start.¹⁰ As national climate actions continue and as they accelerate worldwide, the national commercial concerns that can lead to trade restrictions and the climate concerns that question whether a potpourri of national climate actions can in fact be a substitute for uniform global actions in reducing global greenhouse gas emissions, will intensify.

Kateryna Holzer has summarized these domestic commercial concerns and these climate concerns well. With regard to commerce, she explains: “The unilateral introduction of carbon constraints creates unequal conditions of competition between domestic and foreign markets. This happens because foreign producers in countries with no, or lax, carbon legislation in place do not pay carbon charges and then go on to sell their products in the market of a country with carbon restrictions and in the markets of other countries tax-free. At the same time, domestic producers are obliged to bear emissions costs and are not compensated for these costs on exportation.”¹¹ Thus, there is domestic pressure to, in the tired but universal phrase, “level the playing field” between domestic producers paying a carbon price and foreign producers that are not.

With regard to the climate, Holzer elaborates: “The unfair price competition might force domestic firms to relocate their carbon-intensive production to countries with no emissions constraints and no carbon charges in place, i.e. to ‘pollution havens’, while domestic consumers increase consumption of cheaper imported carbon-intensive products. Consequently, an emissions reduction by one country with a strict climate policy in place would lead to an increase in emissions in another country with no carbon constraints, in the end making no difference in the fight against climate change.”¹² Through this net shift in emissions offshore, the emissions-reduction goal of the domestic climate policy measure is defeated.

In common parlance, this is known as carbon leakage. Such leakage may result from either the displacement of exports by the lower-priced, high-carbon products of other countries, or the import from other countries and local consumption of high-carbon products. Carbon leakage is widely feared, in particular by producers in developed economies. It is feared especially by “energy-intensive, trade exposed” industries such as cement, steel, pulp and paper, metal casting, aluminum, chemicals and glass. These manufacturing industries employ energy-intensive production processes and compete with foreign products at home and abroad, and are thus apprehensive about the displacement of their carbon-priced exports in other markets and the competition from cheaper imports in their home markets.

Because of the significant contributions these heavy industries make to local economies, they often have substantial local political clout. The local political pressure is often magnified “against a backdrop in which heavy industries in many countries have for a long time been under pressure from more competitive producers, mainly in emerging economies, resulting in declining market shares and losses in employment.”¹³ In many cases, these industries have long sought protection from this increasing foreign competition, some of it legitimate, some not. Now the global climate crisis has added a new and unnerving dimension to their competitiveness dilemma by compelling them to reduce their carbon footprint when others in other countries may not.

Understandably, anxieties arise about a loss of competitiveness when a price is put on carbon here at home but not “over there” in some other country. The prices of the products produced in countries that put a price on carbon will be higher. The prices of products produced in countries that do not put a price on carbon will be lower. As a result, the products of those countries that put a price on carbon may be displaced both at home and abroad by cheaper products from countries that have not done so. And the producers in countries that choose higher environmental standards as a form of climate action may suffer a loss of competitiveness, both domestically and internationally.

¹⁰ See *Paris Agreement*, *supra* note 5, art 4.

¹¹ Kateryna Holzer, *Carbon-Related Border Adjustment and WTO Law* (Cheltenham, UK, and Northampton, MA: Edward Elgar, 2014) at 42.

¹² *Ibid* at 42–43.

¹³ Ingrid Jegou, “Competitiveness and Climate Policies: Is There a Case for Restrictive Unilateral Trade Measures?” (2009) International Centre for Trade and Sustainable Development at 6.

Economists disagree about the reality and the likely extent of the carbon leakage that could cause such results. Despite the widespread anxieties about the competitive impact of added regulation, the Organisation for Economic Co-operation and Development (OECD) tells us that, generally, “more stringent environmental policies...have had no negative effect on overall productivity growth.”¹⁴ Developmental economists for the World Bank state, “Evidence from developed countries suggests that there are no discernible impacts on productivity and jobs from introducing cost-increasing environmental regulations or pricing schemes.”¹⁵ Similarly, the advocates of a “new climate economy” assure us, “There is substantial evidence suggesting that the direct competitiveness impacts are small for a country which is an early mover in legislating climate policy.”¹⁶

Furthermore, early movers may benefit from increased technological innovation encouraged by climate regulation. Thus, the competitiveness of early movers may not only be *unharm*ed by climate regulation; it may actually be *enhanced*. Even in the carbon-intensive industries that are most apprehensive about leaking carbon, “most studies fail to find evidence that [climate actions] have had a significant effect on business competitiveness.”¹⁷ Thus, the empirical evidence suggests that, while carbon leakage can be a real concern, there may not always be as much of all the varied kinds of carbon leakage as feared.¹⁸

All the same, no politician anywhere in the world is going to vote knowingly for a national measure that may reduce national competitiveness, or that may require their voters to take noble actions locally to reduce carbon emissions while other countries are

permitted to prance along as “free riders” making few or no cuts to their own emissions. Thus, as a practical matter, it is not possible in much of the world to take national climate actions that do not try to address these widespread apprehensions about the commercial and climate impacts of carbon leakage. So the call is louder and louder from business and climate advocates alike for the imposition of carbon adjustment measures.

Such measures can be included in or can accompany broader domestic climate actions. The basic distinction is between market-based and non-market-based approaches to climate solutions that aim to internalize the harmful externalities of carbon use by putting a price on carbon. Two leading market-based approaches are carbon taxes and cap-and-trade systems, both of which come in a vast variety of versions. The leading non-market-based approach is governmental regulation, which likewise comes in many variations. Each of these different approaches to climate solutions poses different legal issues for the WTO-based world trading system, when they are taken along with carbon adjustment measures.

The Relevant WTO Obligations

While the expert analysts continue to debate whether carbon leakage is truly happening and, if so, the extent of it,¹⁹ the prevailing political perception is that carbon leakage is most certainly happening, and that more of it will happen if local climate actions are not accompanied by carbon adjustments. The virtually unchallenged political assumption in the United States, Europe and other developed countries is that carbon leakage — in the form of either competition from lower-priced, high-carbon imports in the domestic market or export displacement by lower-priced, high-carbon products in foreign markets — will undermine the positive climate effects of national climate measures, as well as the needed domestic political support for such

14 “Environmental policies don’t have to hurt productivity” (2014) OECD Observer No 301 Q4 at 9.

15 Marianne Fay, Stephane Hallegatte, Adrien Vogt-Schilb, Julie Rozenberg, Ulf Narloch & Tom Kerr, “Decarbonizing Development: Three Steps to a Zero-Carbon Future” (2015) World Bank Climate Change and Development at 17.

16 “Better Growth, Better Climate: The New Climate Economy Report” (2014) Global Commission on the Economy and the Climate at 187, citing S Bassi & D Zenghelis, “Burden or Opportunity? How UK emissions reduction policies affect the competitiveness of business” (2014) Grantham Growth Research Institute on Climate Change and the Environment, London School of Economics, Policy Paper.

17 *Ibid*, citing the same study.

18 US, Congress of the United States Congressional Budget Office, *Border Adjustments for Economywide Policies That Impose a Price on Greenhouse Gas Emissions* (Washington, DC: CBO, 2013). See the text of page 9 and the empirical studies listed in footnote 9.

19 See e.g. World Bank, *International Trade and Climate Change: Economic, Legal, and Institutional Perspectives* (Washington, DC: World Bank, 2008) at 29–34.

measures, if they are not accompanied by carbon adjustment measures. In politics, perception is often reality. Thus, carbon adjustment measures will be included in local climate actions.

Carbon adjustment measures relating to imports are intended to level the playing field between domestic and foreign firms in the domestic market by imposing on imported products the same costs imposed on domestic products by domestic climate legislation. Carbon adjustment measures relating to exports are meant to erase competitive disadvantages faced by domestic firms in foreign markets by reimbursing their carbon costs from domestic climate legislation when they export their products. Different WTO legal obligations are relevant, depending on how such carbon adjustments are framed and on how they affect imports and exports of traded products.

As for Imports

Two basic rules of non-discrimination are generally considered to be the foundation of the WTO-based world trading system: the obligation of most-favoured-nation treatment and the obligation of national treatment. Under the most-favoured-nation obligation, a WTO member is not permitted to discriminate between or among the like imported products of other WTO members. A WTO member must give to the like imported products of all other WTO members the same treatment that it gives to the like imported products of the most-favoured of all WTO members. The most-favoured-nation obligation is in article I:1 of the General Agreement on Tariffs and Trade 1994 (GATT),²⁰ which is one of the covered agreements in the Agreement Establishing the World Trade Organization (known as the Marrakesh Agreement or the WTO Agreement).²¹

The national treatment obligation in article III of the GATT generally forbids discrimination by a WTO member in favour of domestic products over like imported products. Article III:2 relates to taxes and provides that imported products “shall not be subject, directly or indirectly, to internal taxes or other charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”²² Article III:4 relates to internal regulations and

provides that imported products “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”²³

In addition to these two fundamental rules of non-discrimination, another cornerstone of the WTO trading system is the multitude of mutual trade concessions that have been made through the decades by all WTO members. These thousands upon thousands of trade concessions by the 164 WTO members, involving thousands upon thousands of traded goods and services, have been listed in the “schedules of concessions” for each WTO member, and these schedules have been annexed to and made a part of the WTO Agreement.

GATT article II:1(a) imposes an obligation on every WTO member to “provide the commerce of the other [WTO members] treatment no less favourable than that provided for” in that WTO member’s schedule of concessions.²⁴ GATT article II:1(b) provides that the products described in a WTO member’s schedule of concessions “shall, on their importation...be exempt from ordinary customs duties in excess of those set forth” in that schedule, and that “such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed” on the date of the WTO Agreement or thereafter by legislation of that WTO member.²⁵

Of relevance in determining which GATT obligation may apply in the case of a particular measure is interpretive note GATT ad article III, which provides: “Any internal tax or other internal charge, or any law, regulation or requirement of any kind referred to in paragraph 1 [of article III] which applies to any imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.”²⁶

²⁰ GATT 1994, *supra* note 6, art I:1.

²¹ Marrakesh Agreement, *supra* note 2, Annex 1A.

²² GATT 1994, *supra* note 6, art III:2.

²³ *Ibid*, art III:4.

²⁴ *Ibid*, art II:1(a).

²⁵ *Ibid*, art II:1(b).

²⁶ *Ibid*, Annex I, ad art III.

GATT article III:1 defines the scope of coverage of the entirety of GATT article III by referring to “internal taxes and other internal charges, and laws, regulations and requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions.”²⁷

Relating to taxation, an exception to these obligations in GATT articles II:1(a) and (b) is made in GATT article II:2(a), which specifies, “Nothing in this Article shall prevent any [WTO member] from imposing at any time on the importation of any product...a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part.”²⁸ Worthy of emphasis here is that this exception is available for an indirect tax imposed on a “product,” and not for a direct tax imposed on a producer.

GATT article XI:1 requires the “general elimination of quantitative restrictions” on imports, including import quotas and import bans. GATT article XI:1 provides, “No prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, import or export license or other measures, shall be instituted or maintained by any [WTO member] on the importation of any product of the territory of any other [WTO member] or on the exportation or sale for export of any product destined for the territory of any other [WTO member].”²⁹

Should a national measure be found in WTO dispute settlement to be inconsistent with any of these GATT obligations, a defence excusing the inconsistency is potentially available under the “general exceptions” in GATT article XX. Of potential relevance to national carbon adjustment measures that address climate change, article XX(b) provides a potential exception for measures “necessary to protect human, animal or plant life or health,”³⁰ and

article XX(g) provides a potential exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”³¹

However, even if a measure is determined to be of a kind fitting within the scope of either article XX(b) or article XX(g), that measure will be eligible for an exception from what would otherwise be a WTO inconsistency only if it satisfies the requirement of the introductory paragraph — the *chapeau* — of article XX that it is “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”³²

In addition to the GATT, questions of the consistency of carbon adjustment measures other than tax measures with obligations of a WTO member may arise under another of the covered agreements in the WTO Agreement, the Agreement on Technical Barriers to Trade (TBT). The two WTO agreements are not exclusive. Claims may be made by a WTO member simultaneously in WTO dispute settlement under the GATT and the TBT Agreement, if the challenged measure falls within the scope of both.

To fall within the legal scope of the TBT Agreement, a measure must fit within the definition of a “technical regulation” in Annex 1.1 of the TBT Agreement, which is a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labelling requirements as they apply to a product, process or production method.”³³

If a measure meets this definition, then the obligations in the TBT Agreement apply. TBT article 2.1 provides: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded no less favourable treatment than that accorded

²⁷ *Ibid*, art III:1.

²⁸ GATT 1994, *supra* note 6, art II:2(a).

²⁹ *Ibid*, art XI:1.

³⁰ *Ibid*, art XX(b).

³¹ *Ibid*, art XX(g).

³² *Ibid*, art XX(chapeau).

³³ Agreement on Technical Barriers to Trade, Marrakesh Agreement, *supra* note 2, Annex 1.1 [TBT Agreement].

to like products of national origin and to like products originating from any country.”³⁴ Thus, independent of the GATT, the TBT Agreement includes both a national treatment obligation and a most-favoured-nation treatment obligation.

TBT article 2.2 sets out an additional obligation: “Measures shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”³⁵

In contrast to the GATT, there is no article such as GATT article XX in the TBT Agreement that lists “general exceptions” to TBT obligations. There is, however, language in the sixth recital in the preamble to the TBT Agreement that echoes word for word the *chapeau* of GATT article XX on the appropriate application of measures. The WTO Appellate Body has relied on this language as relevant context in shedding light on the meaning and reach of the obligation in TBT article 2.1 and has thus, to some extent, clarified this obligation as including this requirement. Had the WTO jurists not done so, certain measures would be legal under one of the agreements but not the other. This possibility has been narrowed, if not eliminated, by the current jurisprudence.

Under the legal test established by the WTO Appellate Body for determining compliance with TBT article 2.1, “if a WTO panel determines that a measure has modified the conditions of competition to the detriment of imported products *vis-a-vis* like products of domestic origin and/or like products originating in any other country, then the panel must proceed to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory

distinction rather than reflecting discrimination against the group of imported products.”³⁶

As for Exports

Producer subsidies are exempt from the national treatment obligations in article III by the terms of GATT article III:8(b), but they are not thereby exempt from other WTO rules.³⁷ Among the WTO covered agreements is the Agreement on Subsidies and Countervailing Measures (SCM), which interprets article VI:3 and article XVI of the GATT relating to subsidies and countervailing duties against subsidies.³⁸ Article 32 of the SCM Agreement states, “No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.”³⁹ As with the GATT and the TBT Agreement, legal claims can be brought under both the GATT and the SCM Agreement at the same time, and in the same action, in WTO dispute settlement.

The SCM Agreement consists of disciplines on the use of subsidies by governments and on the countervailing duties intended to offset such subsidies. A threshold issue under the SCM Agreement is whether “a subsidy shall be deemed to exist.”⁴⁰ There are endless legal twists and turns to establishing the existence of a subsidy, many of which have been explored in considerable depth in GATT and WTO jurisprudence. A subsidy falling within the scope of the SCM Agreement can assume many guises. In general, though, it can be said that a subsidy will be deemed to exist where there is a “financial contribution” by a government that confers a “benefit” to a recipient in the form of an advantage in the marketplace.⁴¹

Where a subsidy does exist, it will be inconsistent with the SCM Agreement if it is “specific” to

36 WTO, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by the United States and Second Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381 (2017) at para 7.80, citing the earlier Appellate Body Report in the same dispute, article 21.5, WTO Doc WT/DS381 (2015) at para 7.26.

37 GATT 1994, *supra* note 6, art III:8(b).

38 *Ibid*, arts VI.3 and XVI.

39 Agreement on Subsidies and Countervailing Measures, *Marrakesh Agreement*, *supra* note 2 at Annex 1A, art 32.1 [SCM Agreement].

40 *Ibid*, art 1.1.

41 *Ibid*.

34 *Ibid*, art 2.1.

35 *Ibid*, art 2.2.

“certain enterprises,”⁴² and if it also has “adverse effects” on the interests of another WTO member.⁴³ Significantly, certain kinds of subsidies are deemed to be specific and are “prohibited” and thus illegal *per se* under the SCM Agreement. These automatically illegal subsidies are those “contingent...upon export performance”⁴⁴ and those “contingent...upon the use of domestic over imported goods.”⁴⁵ Thus, governmental subsidies that are conditioned on exporting (export subsidies) or on containing domestic content (import substitution subsidies) are always inconsistent with WTO subsidies rules.

One category of “financial contribution” that can result in the existence of a subsidy is where “government revenue that is otherwise due is foregone or not collected.”⁴⁶ The forbearance of a government from collecting revenue that is otherwise due clearly provides a benefit in the market, as measured by the amount of the forbearance. However, where there is such a “financial contribution,” footnote 1 to article 1.1(a)(1) (ii) of the SCM Agreement (which expands on article XVI:4 of the GATT) provides that “the exemption of an *exported product* from duties or taxes *borne by the like product* when destined for domestic consumption, or the remission of such taxes or duties in amounts not in excess of those which have accrued, shall *not* be deemed a subsidy.”⁴⁷

Annex I to the SCM Agreement is an “Illustrative List of Export Subsidies.”⁴⁸ This list is illustrative, not exhaustive. Potentially relevant to carbon adjustment measures are items (e), (g) and (h) of this illustrative list and the ad note to article XVI of the GATT.⁴⁹ Under these WTO provisions, exempting or remitting *indirect* taxes on exported products in an amount that does not exceed the amount of the taxes levied on the domestic production and distribution of like products does *not* constitute an export subsidy.

The SCM Agreement includes definitions of indirect and direct taxes. Footnote 58 of the SCM Agreement states that, for the purpose of that agreement, indirect taxes “shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges.”⁵⁰ The same footnote states that direct taxes “shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property.”⁵¹ Strictly speaking, these definitions apply only “for the purpose of” the SCM Agreement,⁵² yet it is unlikely the WTO judges will find the need to apply other definitions to these terms for the purpose of the GATT.

Potentially relevant to determining whether there are export subsidies under items (h) and (i) in Annex I of the SCM Agreement, which both make reference to “inputs that are consumed in the production of the exported product,” is Annex II of the SCM Agreement, which sets out “Guidelines on Consumption of Inputs in the Production Process.”⁵³ Annex II is, however, largely unexplored in WTO jurisprudence.

As with the TBT Agreement, there are no general exceptions in the SCM Agreement akin to those in article XX of the GATT. An open question in WTO jurisprudence, however, is whether article XX of the GATT can provide a defence to what would otherwise be an illegal subsidy under the SCM Agreement. The question turns on the extent to which the obligations in the SCM Agreement can be seen legally as elaborations of obligations relating to subsidies and to the application of countervailing duties under the GATT and therefore as a legal part of the GATT Agreement for the purposes of GATT article XX. The Appellate Body has touched on this unresolved legal issue obliquely, but, to date, this

42 *Ibid*, art 2.1.

43 *Ibid*, art 5.

44 *Ibid*, art 3.1(a).

45 *Ibid*, art 3.1(b).

46 *Ibid*, art 1.1(a)(1)(ii).

47 *Ibid*, n 1 [emphasis added].

48 *Ibid* at Annex 1.

49 *Ibid* at Annex 1(e)(g)(h); GATT 1994, *supra* note 6 at ad art XVI.

50 SCM Agreement, *supra* note 39, n 58.

51 *Ibid*.

52 *Ibid*.

53 *Ibid* at Annex II.

legal issue has not been raised squarely on appeal, and thus there is no definitive WTO ruling.⁵⁴

The WTO Consistency of Carbon Adjustment Measures

There is no end to the unanswered questions in WTO jurisprudence on the legality or illegality of carbon adjustment measures. In foreseeing the likely answers to these legal questions, it does not help that no carbon adjustment measure has yet been scrutinized in WTO dispute settlement. Thus, all is conjecture. In the abstract, an ideal carbon adjustment measure can be imagined that could conceivably thread the needle of legality through the current WTO rules. Numerous WTO scholars and attorneys have opined on the right contortions of such needle threading.⁵⁵ But when the collision occurs between trade and climate change in WTO dispute settlement, WTO judges will not be judging some ideal measure in the abstract.

When the clash comes, a WTO panel and the WTO Appellate Body will be judging a real national measure that has run the gauntlet of a messy domestic political process before entering into effect and application. That measure will

not have been crafted in impeccable fashion by WTO scholars and other WTO experts who may know how to thread the legal needle of the WTO Agreement. It will have been written by politicians in the midst of the give-and-take of the political fray. The judicial outcome of this as-yet-unknown (but likely fast-approaching) dispute will turn on the nature of the measure itself, on the facts found relating to its genesis and to its application, and, not least, on how the WTO judges answer those still unanswered legal questions that may be determinative to that outcome.

The challenged carbon adjustment measure could come in any number of shapes and sizes, and it could bear any number of labels. It could be a carbon tax. It could be a carbon tariff or a border tax adjustment. It could be a demand that emissions allowances be purchased for imports as one part of a domestic cap-and-trade program. It could be the free allocation of emissions allowances to domestic industries as a part of such a program. It could be subsidies or state aid, an import quota or an import ban. It could be a labelling requirement, a carbon-intensity standard extended to imports, or some other kind of non-fiscal regulation posing a trade restriction. The choice of the legal instrument for making a carbon adjustment and the way in which that instrument is applied will affect its legality and will shape the eventual WTO judgment. Depending on the measure and on the facts, a few — *but only a few* — of the hard questions on the long list of unanswered legal questions that may be raised in a WTO dispute over one of these varieties of carbon adjustment measures are as follows.

Where the challenged measure is a carbon tax, does it fall under GATT article II:1 or GATT article III?

The answer to this question depends on whether the measure is a border measure imposed on or in connection with importation, or an internal tax or charge collected at the time of importation. As a practical matter, this is an important distinction. GATT article II:1 establishes a quantitative limit on a carbon tax by generally prohibiting countries from imposing “ordinary customs duties” and “all other duties or charges of any kind” on or in connection with importation “in excess of” the duties and charges agreed in that country’s schedule of concessions. In contrast, GATT article III does not impose any quantitative limit. An internal tax or

54 See *United States—Measures Relating to Shrimp from Thailand/United States—Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties* (2008), WTO Doc WT/DS343/AB/R, WT/DS345/AB/R (Appellate Body Report) [US–Thai Shrimp]; *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2010), WTO Doc WT/DS363/AB/R at para 229 (Appellate Body Report) [China–Audiovisual Products]; *China—Measures Relating to the Exportation of Rare Earths, Tungsten, and Molybdenum* (2014), WTO Doc WT/DS431, 432, 433/AB/R at paras 5.53–5.55 (Appellate Body Report), citing *Argentina—Safeguard Measures on Imports of Footwear* (2000), WTO Doc WT/DS121/AB/R (2000) at para 97 (Appellate Body Report).

55 See, for example, these excellent studies on various aspects of carbon adjustment by leading WTO authorities: Patrick Low & Gabrielle Marceau, “The Interface between the Trade and Climate Change Regimes: Scoping the Issues” (2011) WTO Staff Working Paper ERSD-2011-1; Jennifer Hillman, “Changing Climate for Carbon Taxes: Who’s Afraid of the WTO?” (2013) German Marshall Fund, Climate & Energy Papers Series; Joost Pauwelyn, “Carbon Leakage Measures and Border Tax Adjustments under WTO Law” in Geert Van Calster & Denise Prevost, eds, *Research Handbook on Environment, Health and the WTO* (Edward Elgar, 2012) 448; Maria Panezi, “When CO₂ Goes to Geneva: Taxing Carbon Across Borders – Without Violating WTO Obligations” CIGI, CIGI Papers No 83, November 2015; and Trachtman, *supra* note 8.

charge of any amount is permitted under GATT article III:2 so long as it is not discriminatory.

A carbon tax is quite likely to exceed the limits on duties and charges set out in a WTO member's schedule of concessions. Thus, a carbon tax is more likely to run afoul of WTO rules because of the quantity of the tax if it is judged under article II:1 instead of article III:2. Furthermore, a WTO member may want to increase a carbon tax over time, which is much more likely to be permissible under article III — again, so long as it does not discriminate.

Based on current WTO jurisprudence, the legal line has not yet been drawn by WTO members in the GATT between border adjustment measures that are subject to article II:1 and taxes or other internal measures that are subject to article III. There is some suggestive jurisprudence, but it is far from definitive as to a number of the questions most likely to arise in a trade and climate collision in WTO dispute settlement.

On the difference between ordinary customs duties under the first sentence of article II:1(b) and internal measures applied to imports under article III, the Appellate Body clarified in the *China-Auto Parts* dispute in 2009 that the question turns on what triggers the obligation to pay the charge.⁵⁶ If the obligation to pay the charge accrues at the moment of and “by virtue of the event of importation,” then the charge is an import charge that falls under article II.⁵⁷ If the obligation to pay accrues because of an internal factor (such as because the product was re-sold internally or because the product was used internally), then it falls under article III.⁵⁸

In addition, the difference between border measures that can qualify as ordinary customs duties under article II:1(b) and border measures that can qualify as border tax adjustments under article II:2(a) was addressed in the *India-Additional Import Duties* dispute in 2008, where the Appellate Body concluded that, because there was no “equivalent” internal tax, the Indian measures challenged by the United States in that dispute did not fall within the scope of article II:2(a) as

border tax adjustments but instead were ordinary customs duties subject to article II:1(b).⁵⁹

Still missing, however, is any clarification in WTO jurisprudence of the difference between border adjustment measures (apart from ordinary customs duties) that are governed by article II:1 and internal measures that are governed by article III. Included in this absence of clarification is any consideration in WTO dispute settlement of border adjustment measures that are *carbon* adjustment measures. There is nothing in WTO jurisprudence to say if they are legal or not.

Given the Appellate Body rulings in *China-Auto Parts* and in *India-Additional Import Duties*, both Joel Trachtman and Joost Pauwelyn have advised that, to fall within the scope of article III instead of article II, and thereby to have the legal elbow room to impose quantities of carbon adjustments in excess of bound tariffs, carbon taxes or other comparable carbon adjustment charges on imported products should be designed so that they are triggered, not by the act of importation as such, but by the sale, offering for sale, distribution or use of imported products.⁶⁰

More broadly, Jennifer Hillman, a distinguished former member of the Appellate Body, has said that, for a carbon tax, “the simplest and most likely WTO-consistent path would be to impose a carbon tax on *products* — both domestic and imported — at the time of their sale, distribution, or transfer. The tax could be applied to any set of consumers, ranging from a tax on fossil fuel producers based on the carbon content of their products to a tax on all businesses and consumers based on the carbon content of the goods they buy or sell, assessed when the goods are sold.”⁶¹

Hillman adds that “[t]he more the tax is described as and calculated based on the goods themselves and the less it sounds like a tax on income or ownership, the more likely the tax is to be considered an ‘indirect tax.’ While the amount of the tax would reflect the amount of carbon dioxide emitted during production, because it would be assessed on the product itself, the

56 *China—Measures Affecting Imports of Automobile Parts* (2009), WTO Doc WT/DS339/AB/R (Appellate Body Report) [*China—Auto Parts*].

57 *Ibid* at paras 158, 161.

58 *Ibid* at para 164.

59 *India—Additional and Extra-Additional Duties on Imports from the United States* (2008), WTO Doc WT/DS360/AB/R (Appellate Body Report) [*India—Additional Import Duties*].

60 Trachtman, *supra* note 8 at 7; Joost Pauwelyn, *supra* note 55 at 475.

61 Hillman, *supra* note 55 at 6.

tax should be considered an indirect tax fully eligible for border adjustment for imports.”⁶²

All this is sound advice. This approach will no doubt help a challenged carbon adjustment measure to survive scrutiny in WTO dispute settlement. It will not, however, assure survival. Many reasons lurk in many unanswered legal questions. One reason is that even if carbon taxes are within the scope of article III, we do not know if they are eligible for a border tax adjustment under article II:2(a).

Do WTO rules permit border tax adjustments on imports for carbon taxes?

To be eligible for a border tax adjustment, “a charge equivalent to an internal tax” must be “imposed consistently with the provisions of paragraph 2 of Article III.”⁶³ Article III:2, which covers the application of internal taxes to imports, including border adjustments, relates to taxes “applied, directly or indirectly, to like domestic products.”⁶⁴ This requirement has been read to mean that there must be a reasonably close nexus between the tax and the product. The Appellate Body ruled in the *Mexico–Soft Drinks* dispute in 2006 that article III:2 “requires some connection, even if indirect, between the respective taxes or other internal charges, on the one hand, and the taxed product on the other.”⁶⁵

Thus, an important question in dispute settlement will be: Is there a sufficient connection between the carbon tax and the taxed product? Ingrid Jegou has concluded, “In the sense that a carbon tax is imposed in relation to the production — or at least the process or method of production — of a good, there appears to be a reasonably close nexus between the tax and the product; further, given that a carbon tax is imposed at the border and ‘border taxes’ are classified as indirect taxes, it seems logical to classify a carbon tax as an indirect tax.”⁶⁶ This makes sense; but, as she knows, additional unanswered

questions remain as hurdles to reaching this sensible conclusion in WTO dispute settlement.

Based on the consistent and exclusive reference to measures imposed on products in GATT article II:2(a), it has long been settled in the WTO that only *indirect* taxes on *products* are eligible for a border tax adjustment. *Direct* taxes on *producers* are not.⁶⁷ A carbon tax seems to be an indirect tax, in part for the reasons Jegou gives. Yet, as she acknowledges, this leaves the still unanswered legal question of whether a carbon tax is in fact a tax *on a product*. Specifically, the legal question is whether taxes on inputs that are not physically incorporated into the final product can be adjusted on imports at the border under the exception provided for border tax adjustments by GATT article II:2(a).

In 1987, in the *US–Superfund* dispute, a GATT panel found that a border tax adjustment imposed by the United States on chemical inputs that were used “as materials in the manufacture or production” of imported chemical products was consistent with GATT obligations.⁶⁸ Although this GATT panel finding, which preceded the establishment of the WTO, is not automatically legally binding in WTO dispute settlement under the WTO Agreement, it is based on sound reasoning and, therefore, seems likely to be followed by WTO jurists in WTO dispute settlement.

Importantly, the GATT *US–Superfund* panel found that it is the type of tax (direct or indirect) that matters for purposes of determining eligibility for a border tax adjustment and not the purpose of the tax. The panel said that whether a tax “is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is...not relevant for the determination of the eligibility of a tax for border tax adjustment.”⁶⁹

However, in that GATT dispute, the inputs that were taxed were physically incorporated into the final product. In its ruling, the GATT panel in the *US–Superfund* dispute did not specify whether the chemicals considered there had to be physically present in the imported product. It left open the legal question of whether inputs that are not

⁶² *Ibid.*

⁶³ GATT 1994, *supra* note 6, art II:2(a).

⁶⁴ *Ibid.*, art III:2.

⁶⁵ WTO, Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R (2006) at para 8.42 [Mexico–Soft Drinks].

⁶⁶ Jegou, *supra* note 13 at 9.

⁶⁷ See Report of the Working Party on Border Tax Adjustments (1970), GATT Doc L3464, BISD 18S/97 at para 14.

⁶⁸ *United States–Taxes on Petroleum and Certain Imported Substances* (1987), GATT Doc L6175, BISD 34S/136 at paras 2.5, 5.2.4 [US–Superfund].

⁶⁹ *Ibid* at para 5.2.4.

physically incorporated into the final product can be the basis for a border tax adjustment.

A carbon tax is a tax on carbon emissions. It is not a tax on an input that is physically incorporated into the final product. It is a tax on the carbon emissions released from the process of producing the product. In providing an exception from what would otherwise be WTO obligations for border tax adjustments, GATT article II:2(a) speaks of internal taxes “in respect of an *article* from which the imported product has been manufactured or produced in whole or in part.”⁷⁰ A chemical that is an input into the making of a final product and is a physical part of the final product is clearly an “article.” But what about carbon-emitting energy that is used in making a product but is not physically present in the final product? Is that an article? We can only speculate on how the WTO judges will answer this unanswered question.

Necessarily, this leads to a brief consideration of the many unanswered WTO legal questions about process and production methods. The endless permutations of PPMs in the context of trade law will not be repeated here.⁷¹ Suffice it here to explain: PPMs are of two kinds, product related and non-product-related. Product-related PPMs leave physical traces in the end product. Non-product-related PPMs leave no physical traces in the end product. Carbon taxes and other carbon adjustment measures treat products differently based on the amount of carbon and other greenhouse gases emitted during their production in another country. Such measures are therefore non-product-related PPMs. How WTO judges view non-product-related PPMs in clarifying WTO obligations will thus be pivotal to the outcome of any coming legal collision between trade and climate change.

The relevant GATT provisions involve comparisons of the treatment of “like” products. The term “like products” also appears elsewhere in the covered agreements. The basic obligations against non-discrimination between and among traded products can work only if we have some way of identifying which particular products are to be compared when determining whether these obligations are being fulfilled. For this reason, trade rules have long

stated that the comparison must be made between like products. The concept of the “likeness” of products is at the core of the world trading system.

There is no definition of like products in the WTO Agreement. Indeed, the jurisprudence indicates that likeness means different things in different places in the WTO Agreement.⁷² The traditional GATT and WTO criteria for identifying whether traded products are like or not have been: the properties, nature, and quality of the products; the end-uses of the products; consumers’ tastes and habits in respect of the products; and tariff classification of the products.⁷³ These four criteria for determining likeness do not specifically take into account the process and production methods of traded products.

True, the Appellate Body may have cracked open the legal door in the *EC-Asbestos* dispute to distinctions made on the basis of consumers’ tastes and habits. The WTO judges observed, in that case, that “evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are — or would be — willing to choose one product instead of another to perform those end-uses, is highly relevant in assessing the ‘likeness’ of those products under Article III:4 of the GATT 1994.”⁷⁴ The same logic could apply also to other “like product” provisions in the covered agreements.

Reinforcing this possibility, the Appellate Body observed in the *Canada-Feed-in Tariffs* dispute that, “What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product.”⁷⁵ Thus, conceivably, if it can be proven to the satisfaction of a WTO panel, on the basis of the facts found in a particular dispute, that local consumers draw a distinction in their purchasing in the market based on a PPM and that therefore the products being compared

⁷⁰ GATT 1994, *supra* note 6, art II:2(a) [emphasis added].

⁷¹ The papers and books written on this topic are too many to cite. One excellent overview of this critical issue is Christiane R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge, UK: Cambridge University Press, 2011).

⁷² Early on in WTO dispute settlement the Appellate Body made this point by comparing “likeness” to an accordion. See *Japan-Taxes on Alcoholic Beverages* (1996), WTO Doc WT/DS11/AB/R at 114 (Appellate Body Report).

⁷³ See *European Communities-Measures Affecting Asbestos and Asbestos Containing Products* (2001), WTO Doc WT/DS135/AB/R at paras 90–122 and especially para 101 (Appellate Body Report) [*EC-Asbestos*].

⁷⁴ *Ibid* at para 117.

⁷⁵ *Canada-Feed-in Tariffs Program* (2013), WTO Doc WT/DS426/AB/R at para 5.63 (Appellate Body Report).

are not in a competitive relationship, then those products might not be deemed to be like.

Instead of relying on the difficulties of trying to prove such a possible local distinction in consumer preferences, the temptation for climate advocates is simply to assert that products produced with low carbon emissions and products produced with high carbon emissions are *not* like products. If this assertion is legally correct, then the WTO rules limiting tax amounts and prohibiting trade discrimination do not apply because those rules apply only to like products. A WTO ruling to this effect would thus provide a legal “permission slip” for carbon taxes and other kinds of carbon adjustment measures that restrict or otherwise affect trade.

But such a ruling could also open a Pandora’s box of increasing trade duties and discriminations extending far beyond the nexus of trade and climate change. The perfectly understandable fear of trade advocates is that declaring products to be “unlike” because of their process and production methods — especially when the PPMs are non-product-related — could unleash such a vast array of supposedly legitimate trade discrimination that it would undermine the basic principles of non-discrimination and mutually binding trade concessions that are the core of the WTO-based world trading system.

This fear dates back at least to 1952, when a GATT panel ruled against a Belgian law that imposed a charge on foreign goods that originated in a country whose system of family allowances did not live up to Belgian requirements.⁷⁶ If the WTO judges declare that products are not like because of the different amounts of carbon emissions released when making them, then where will the discrimination stop? What other environmental, economic or societal considerations will be permitted for making such distinctions in determinations of likeness? It may be for this reason that the WTO Appellate Body has preferred, thus far, to deal with such distinctions not as part of a like product determination, but as part of an evaluation of whether a disputed measure is entitled to one of the general exceptions available in GATT article XX.

Are carbon adjustment measures eligible for a defence under GATT article XX?

Even if a carbon adjustment measure is found to be inconsistent with one or more of the obligations in the GATT, it may be excused from those inconsistencies if it can be justified under one of the general exceptions in GATT article XX. To be justified in WTO dispute settlement — as two of a number of possible defences under article XX — a national carbon adjustment measure could be defended by the WTO member applying the measure as one “necessary to protect human, animal or plant life or health” under article XX(b) or as one “relating to the conservation of exhaustible natural resources” under article XX(g).⁷⁷ If it were found by the WTO judges to fit within either of those categories, it would then need to be proven by the WTO member applying the measure that it was “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade.”⁷⁸

Clearly, the air we breathe is an “exhaustible natural resource.” Clearly, too, there is an abundance of scientific evidence demonstrating that climate change affects “human, animal or plant life or health.” But to be eligible for either or both of these defences, a challenged measure must be “relating to” conservation of exhaustible natural resources to be potentially eligible for the defence under article XX(g), or it must be “necessary” to protect human, animal or plant life or health under article XX(b).

There are established legal tests for both. To be relating to under article XX(g), there must be an examination of whether there is a “genuine relationship of means and ends” in the measure.⁷⁹ To be necessary under article XX(b), there must be an examination of whether the measure contributes to the achievement of a policy objective, is proportional to the importance of the values protected by the measures, and alternative measures exist that are less

⁷⁷ GATT 1994, *supra* note 6, arts XX(b), XX(g).

⁷⁸ *Ibid*, art XX(chapeau).

⁷⁹ *United States–Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R, at para 136 (Appellate Body Report) [US–Shrimp].

⁷⁶ *Belgian Family Allowances* (1952), GATT Doc G/32, BISD 1S, at 59.

trade-restrictive but can equally contribute to achieving the pursued objectives.⁸⁰

There are endless subtle nuances to each of the elements of these legal tests. Some of these subtle nuances have been the subject already of some WTO case law. Others have not. These nuances will be explored within the context of the facts found in the dispute at hand. There is no sure way of foreseeing precisely how, when faced with a specific measure, with specific facts about that measure, and with specific arguments about that measure, the WTO judges will rule on the legal nexus between trade and climate change under WTO law.

Given these tests, it is especially worth noting that, to the extent that the evidence in dispute settlement shows that the measure was adopted for *competitiveness* reasons rather than solely for *environmental* reasons serving these stated purposes, it will become more difficult to justify a measure under article XX(g) and exceedingly difficult to justify a measure under article XX(g). Evidence in the revealing architecture of the challenged measure that it was taken for competitiveness reasons is virtually tantamount to a confession in WTO dispute settlement that the measure is not entitled to a defence under article XX(b) or article XX(g). Once again, academics and other trade law gurus can craft a measure in the abstract that makes no reference whatsoever to competitiveness and meets these tests. But how many measures crafted by the deliberative bodies of national governments are likely to omit competitiveness considerations from their deliberations?

To secure the needed votes to pass legislation, it is often necessary to include assertions in the legislation responding to the particular concerns of those casting the votes and of those who support them. A particular concern driving the enactment of carbon adjustment measures is the widespread concern in many countries about the competitiveness effects of carbon leakage. It is hard to believe that this concern will not have to be given voice in legislation in order to help pass it. In qualifying for an article XX defence, economic motivations for purported environmental or health measures just will not do under WTO law.

As for PPMs, the WTO Appellate Body has long since ventured into the murky waters of that legal Rubicon, but it has done so, not in making a determination of likeness leading to a decision of whether there is a WTO violation, but instead in a determination of whether the requirements of article XX have been fulfilled so as to justify a defence to what would otherwise be a WTO violation. In 1998, in the *US-Shrimp* dispute, commonly known as the “shrimp-turtle” dispute, the Appellate Body ruled that, in principle, a non-product-related PPM can be justified under article XX.⁸¹

However, to be justified, a challenged carbon adjustment measure will not only have to be a potentially eligible measure fitting into one of the categories of general exceptions, it will also have to meet the requirements of the article XX *chapeau* setting out how a measure must not be applied. For a variety of reasons, the United States measure in *US-Shrimp* failed this test. The same or similar failings could doom a challenged carbon adjustment measure in WTO dispute settlement.

It should be noted here, of course, that the United States ultimately prevailed in the *US-Shrimp* dispute after correcting for its arbitrary actions in implementing the original Appellate Body ruling by pursuing multilateral action. The US measure requiring the use of turtle-excluder devices in shrimp fishing remains in effect to this day — with the legal seal of approval of the WTO dispute settlement system. At the least, this should give encouragement to climate advocates and other environmentalists skeptical of the trading system that WTO judges will protect legitimate environmental interests by upholding environmental measures that affect trade.

Looking ahead to future disputes between trade and climate change: has a multilateral approach been attempted before taking unilateral action? Has due process been afforded to the other countries whose traded products have been affected? Have different conditions in different countries been taken sufficiently into account? Does any discrimination in the measure bear a rational connection to the objective of the measure? How does the rationale for the discrimination look in light of the contribution of the discrimination to achieving the legitimate objective provisionally found to justify

80 See especially *Brazil—Measures Affecting Imports of Retreaded Tyres* (2007), WTO Doc WT/DS332/AB/R (Appellate Body Report) [*Brazil—Retreaded Tyres*] and *EC—Asbestos*, *supra* note 73.

81 *US—Shrimp*, *supra* note 79.

the measure? Is the measure a “disguised restriction on international trade”? These are some, but by no means all, of the nuances that may affect the ultimate WTO judgment. As the Appellate Body observed in the *Brazil–Retreaded Tyres* dispute, “We do not assume...that exactly the same elements will necessarily be determinative in every situation.”⁸²

One key question left unanswered by the *US–Shrimp* dispute is the geographical scope of article XX. The Appellate Body did not rule in that dispute on whether unilateral measures taken to address environmental harms can be justified under article XX where there is no territorial connection between the country applying the measure and the country causing the harm. It did not have to do so in order to resolve the shrimp-turtle dispute because the facts showed that the highly migratory sea turtles there were known to swim in and through US waters. The Appellate Body decided that this constituted a “sufficient nexus” to the United States in that dispute. So the WTO judges reserved the question of whether there is an implied jurisdictional limitation in article XX(g).⁸³

In *US–Shrimp*, the Appellate Body gave due recognition to a multilateral agreement outside the scope of the WTO legal framework — the Convention on International Trade in Endangered Species of Wild Flora and Fauna. The WTO judges would likely give similar recognition to the Paris Agreement as a multilateral articulation that climate change transcends territorial limits. Yet, while it may seem obvious to climate advocates (as it does to me) that climate change is a challenge that knows no political boundaries, and that national measures to combat climate change should not be limited by political boundaries, this conclusion is not obvious to all. Nearly 20 years after the Appellate Body ruling in *US–Shrimp*, this critical question remains unanswered in WTO law.

The uncertainty of how these and other questions will be answered in the specific assessment of one specific — but as yet unknown — measure in an article XX determination is reason enough not to rely too much on article XX to provide a ready defence for all carbon adjustment measures. It would also be a mistake to depend too much on *US–Shrimp* as “precedent” or to think that all the issues that might arise in a WTO dispute over

the bounds between trade and climate change have been resolved by that dispute. As Christiane Conrad has rightly noted, “[T]here is no doctrine of *stare decisis* under WTO law, and even though the *Shrimp Turtle* dispute as *quasi de facto* precedent is a strong case for future acceptance of unilateral trade measures, it is possible that the Appellate Body might change or adjust its rulings.”⁸⁴

Are carbon adjustment measures illegal export subsidies?

Export rebates of carbon taxes or emission allowances can indeed help level the playing field with foreign competitors by, in effect, exporting and imposing domestic climate policies on the countries of those foreign competitors. Such rebates can also be consistent with climate goals by eliminating the cost advantage in importing cheaper high-carbon products as consumer substitutes for higher-priced low-carbon domestic products. There are enticing remedies everywhere to the spectre of carbon leakage. All the same, an unanswered question under WTO law is: are such export rebates illegal subsidies?

In a clash in WTO dispute settlement between trade obligations and climate actions, some of the same legal issues involving carbon adjustment measures for exports will need to be confronted as with carbon adjustment measures for imports, albeit in some slightly different ways. Before asking whether a subsidy is illegal, it will first be necessary to establish that there is in fact a subsidy. Depending on the nature and the structure of the measure, this question of whether there is a subsidy may be answered in different ways, using different obligations in the SCM Agreement.

A key question in establishing the existence of a subsidy will be determining whether there is a “financial contribution.”⁸⁵ For many carbon adjustment measures, the answer to this question will turn on whether “government revenue that is otherwise due is foregone or not collected.”⁸⁶ With respect to this kind of financial contribution, the determinative consideration may well be whether an exception is provided for the challenged measure by the language in footnote 1 to the SCM Agreement stating that “the exemption of

⁸² *Brazil–Retreaded Tyres*, *supra* note 80 at para 7.262.

⁸³ *US–Shrimp*, *supra* note 79 at para 133.

⁸⁴ Conrad, *supra* note 71 at 30.

⁸⁵ SCM Agreement, *supra* note 39, art 1.1(a)(1).

⁸⁶ *Ibid*, art 1.1(a)(1)(ii).

an exported product from duties or taxes *borne by the like product* when destined for domestic consumption or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.”⁸⁷

The exception afforded by footnote 1 is for the exemption from or remission to “exported products” of duties or taxes “borne by the like product” when destined for domestic consumption.⁸⁸ Thus, as with carbon adjustment measures for imports, with such measures for exports there must be an indirect tax that is “borne by” the “product.” The challenged measure will not be eligible for a border adjustment under footnote 1 of the SCM Agreement unless it satisfies the definition of an indirect tax in footnote 58 of the SCM Agreement.

Even if the challenged measure is an indirect tax, it may nevertheless be judged to be a prohibited export subsidy if it is conditioned “upon export performance.”⁸⁹ As just one example, item (g) on the “Illustrative List of Export Subsidies” in Annex I to the SCM Agreement includes as an export subsidy “[t]he exemption or remission, in respect of the production and distribution of exported product, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.” Accordingly, if the carbon adjustment measure provides a tax exemption or a tax remission for exports totalling more than the taxes charged when like products are sold for consumption domestically, it will be a prohibited export subsidy and illegal *per se*.

Furthermore, even if the subsidy granted by a challenged measure is not a prohibited subsidy, it will be an actionable subsidy. If an actionable subsidy has “adverse effects” on the interests of other WTO members by causing injury to the domestic industry of another WTO member, nullifying or impairing the benefits accruing to another WTO member under the GATT, or “serious prejudice” to another WTO member, it will be inconsistent with WTO obligations.⁹⁰ WTO judgments are always rendered on a case-by-case basis. Whether there are adverse effects of subsidies depends heavily on the facts of a

particular dispute and is perhaps the paramount example of the penchant of the WTO for ruling case by case. This only adds, of course, to the number of uncertainties in predicting the outcome.

An interesting legal question is raised by the free emissions allowances that are often handed out to favoured domestic industries as a part of national carbon cap-and-trade systems: is the granting of free emissions allowances a subsidy? It will be judged to be a subsidy if the granting of the free allowances is seen by the judges as constituting government revenue “otherwise due” that has been “foregone” by virtue of the free grant. No WTO member has yet challenged the granting of free emissions allowances as a part of a cap-and-trade scheme, so we do not know how the WTO judges will view this increasingly common carbon adjustment measure, which is widely believed by many climate advocates and many politicians alike to be a practical political prerequisite to taking such climate action.

From a climate perspective, of course, it makes no real sense to offset domestic costs intended to be imposed on carbon emissions by national climate legislation through the granting of free emissions allowances or export rebates. Doing so eliminates the incentive provided by such measures for reducing domestic carbon emissions. Instead of “internalizing” the cost of carbon, such an offset keeps the cost of carbon “externalized.” Hence it also offsets the climate gains. Holzer laments, “It is sheer nonsense to rebate the costs of emissions if the whole purpose of an emissions reduction system is to create such costs for selected firms or industries in order to reduce emissions. Rebates of the costs of allowances on exportation would undermine the efficiency of climate policy.”⁹¹

Insightfully, she points out: “Moreover, it would disarm a country making such rebates of the last argument that carbon restrictions on imports are imposed with the sole purpose of climate protection.”⁹² For, if a government is doling out free emissions allowances to trade-exposed and energy-intensive industries fearful of foreign competition due to the expectation of carbon leakage, how can that same government say with a straight face to WTO judges that any carbon adjustment

⁸⁷ *Ibid* at n 1 [emphasis added].

⁸⁸ *Ibid* [emphasis added].

⁸⁹ *Ibid*, art 3.1(a).

⁹⁰ *Ibid*, art 5.

⁹¹ Kateryna Holzer, “Proposals on Carbon-related Border Adjustments: Prospects for WTO Compliance” (2010) 1 Carbon & Climate L Rev 51 at 63.

⁹² *Ibid*.

measures on imports that have been imposed in parallel with free domestic emissions allowances or, equally, with emissions rebates on exports have been applied solely for climate reasons?

Lurking in any judicial scrutiny of a carbon adjustment measure on exports is also the ubiquitous legal question of the meaning of like products. As with the GATT, the product comparisons made in assessing the compliance of a challenged measure with obligations under the SCM Agreement must be between like products. Once more we confront the issues of non-product-related PPMs and whether distinctions of likeness can be made on the basis of non-product-related PPMs in clarifying the SCM Agreement. And once more there is the need to strike the right balance between supporting essential climate action and keeping the WTO from sliding down a slippery slope into an abyss of unrestrained trade discrimination.

Here we reach the unanswered question of whether a defence to violations of the SCM Agreement is provided by article XX of the GATT. Article XX has proven a convenient safety valve for the Appellate Body in keeping the proverbial Pandora's box of likeness shut tight while also upholding, in principle, distinctions made on the basis of non-product-related PPMs under the GATT. But whether article XX can be a similar safety valve under the SCM Agreement remains, so far, unanswered.

In *US–Thai Shrimp* in 2008, the Appellate Body entertained in *arguendo* — for the sake of argument — a submission that article XX could be used against allegations of inconsistencies with the WTO Anti-Dumping Agreement.⁹³ In *China–Audiovisual Products* in 2009, the Appellate Body ruled that article XX was a defence to claims under paragraph 5.1 of China's Accession Protocol.⁹⁴ To date, though, there is no definitive ruling in WTO dispute settlement establishing that article XX can be used as a defence to violations of the SCM Agreement. If article XX is not available as a defence to violations of the SCM Agreement, then what will be the legal safety valve, or will there not be one?

Alas, there is all too little WTO case law on any of these questions as they may relate to border carbon adjustments. So, apart from awaiting the inevitable announcement of a WTO dispute pitting

trade obligations against climate concerns, apart from hoping that the Appellate Body will — as it so often does — adroitly clarify trade obligations in ways that will work for trade and climate alike, and apart, too, from hoping that the trade and climate regimes will both survive the global clamour that will greet such a dispute and will rise in a crescendo throughout its legal duration, what should be done?

The Practical Political Hurdles to Enacting and Applying Legal Carbon Adjustment Measures

To reiterate, there are numerous other as-yet-unanswered questions about the legality of carbon adjustment measures under WTO law. Those that have been discussed here are only a few. But these few should be sufficient to demonstrate the difficulties that will face a WTO member in securing a judgment in WTO dispute settlement that a carbon tax or some other carbon adjustment measure is not inconsistent with its treaty obligations under the WTO Agreement. As many WTO experts have concluded, ideally, we may indeed be able to thread the needle. But we do not live in an ideal world.

If my past experience as a member of the Congress of the United States is any indication, there will be no pristine purity in any foreseeable carbon adjustment measure. The measure will not be drafted by attorneys skilled in WTO law and lore. The measure will emerge from the usual “process and production methods” of politics. Thus, the political struggle to enact a carbon adjustment measure will be politically messy for any WTO member. To construct the majority of legislative votes needed to enact the measure, compromises and concessions will be made.

Businesses and workers will be accommodated. Certain industries will be targeted for emissions cuts and, in all probability, also for emissions allowances. Stirring speeches will be made about the urgency of including carbon adjustments in the measure for reasons of preserving national competitiveness. Some of these stirring words

⁹³ *US–Thai Shrimp*, *supra* note 54 at paras 308–310, 319.

⁹⁴ *China–Audio Visual Products*, *supra* note 54 at paras 205–233.

about sustaining competitiveness will seep into the language of the measure itself. These professed concerns about national competitiveness will likely inspire, as well, the inclusion of provisions that condition governmental financial support in complying with the measure on the use of domestic goods and services and on export performance.

All of this will be done in the search for the requisite votes to pass the measure. In the event, even those among the national legislators who know of the awaiting legal risks in the WTO of making some of these compromises and concessions will nevertheless find it expedient to make them. As a political matter, they will see these actions as unavoidable. Politically, these actions may well be unavoidable. But they will not help a WTO member win a case challenging its carbon adjustment measure in WTO dispute settlement.

The Need for a WTO Climate Waiver

To help avoid the prolonged political pain and the largely unforeseeable outcome of WTO dispute settlement over a national carbon adjustment measure, or, if not that, at least help shape the outcome of dispute settlement by providing WTO judges with some much needed guidance on how they should clarify the legal line between climate action and trade obligation, the members of the WTO should adopt a carefully crafted and clearly delineated WTO climate waiver. Specifically, the members of the WTO should agree on a waiver from WTO obligations for all trade-restrictive climate response measures that are based on the amount of carbon used or emitted in making a product, and that are taken in furtherance of and in compliance with the Paris Agreement and the UNFCCC.⁹⁵

Trade restrictions of some kind are virtually unavoidable in national climate actions. As I have

said often since completing my eight years on the WTO Appellate Body, on platforms worldwide, and as I have written elsewhere, given the sheer unavoidability of at least some trade restrictions in the form of carbon adjustments in national climate response measures, the question for climate and for trade negotiators alike is not whether such trade restrictions should exist. The question is instead: which restrictions should exist and should therefore be permitted under WTO law?

In answering this question, we must ask such other questions as: how can we make certain that any trade restrictions are truly being imposed for legitimate climate reasons as part of legitimate climate response measures? How can we keep any legitimate trade restrictions imposed for climate reasons from morphing into a multitude of illegitimate trade restrictions imposed for a host of other reasons — such as economically motivated protections for national competitiveness? And, not least, how can we keep necessary climate actions from undermining a global trading system more than half a century in the making, a trading system that continues to reduce global poverty and increase global prosperity by lowering barriers to international trade?⁹⁶

Many other concerns of the world — including many noble global aspirations that are set out in the Sustainable Development Goals of the United Nations — are prominent and pressing and deserving of much more significant worldwide attention.⁹⁷ As with climate change, other human encroachments are pushing up against the limits of the planetary boundaries of the earth's imperilled ecosystems. But climate change is unique as a matter of public policy in the experience thus far of the world. In a singular surge of nature in response to humanity's reckless and heedless ways, climate change threatens the fate of human civilization and the future of the planet. It threatens, too, our collective ability to address all other global concerns. Therefore, the right trade restrictions in national carbon adjustment measures will be those that address climate change *uniquely*.

The risks to the trading system from carbon adjustment and other climate-related trade

95 This recommendation has also been made by the E15 Expert Group on Measures to Address Climate Change and the Trade System. See policy option 9 in the paper prepared on behalf of the group: James Bacchus, "Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes" (2016) International Centre for Trade and Sustainable Development and World Economic Forum at 15. (It should be noted that I chaired this E15 group.)

96 I am largely paraphrasing what I said, along with my E15 colleagues, *ibid* at 9.

97 See United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (2015), online: <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>.

restrictions as a part of national climate actions cannot be eliminated without a unique trade solution. Relying on WTO dispute settlement for the solution is not the answer. I am confident that the members of the Appellate Body are up to the task and will do their very best to render the right judgment. But there are numerous constraints and other considerations that would make even the right judgment a decidedly difficult judgment in its impact on the stability and the sustainability of the trade and climate regimes.

Under WTO rules on dispute settlement, the members of the Appellate Body are asked to resolve one particular dispute at a time. They hear appeals to resolve disputes because they must; unlike many other tribunals, they have no discretion not to take an appeal when a notice of appeal is filed in a WTO dispute. They have no say over which dispute they will hear, over which measure or measures will be challenged, over which claims will be made, over which of the claims made will be addressed in a panel's exercise of its discretion of "judicial economy," or over which legal issues will be raised on appeal. What is more, they are presented with and confined to a discrete set of facts as found by the panel in a dispute. All these factors, and more, will shape the case that reaches the Appellate Body, and thus the decision made by the Appellate Body in the appeal in the first WTO "trade and climate" dispute.

Thus, in the end, whatever our educated guesses may be, and no matter who is making those guesses and however well considered those guesses may be, there is simply no guarantee of what the Appellate Body will decide in the first "trade and climate" dispute. Furthermore, there is no guarantee that what the Appellate Body decides will be a climate-sensitive outcome that will advance the cause of addressing climate change. Bound as they are by the rules as they are, the members of the Appellate Body may be legally constrained from ruling in favour of trade-related measures that combat climate change. And — quite rightly — they have no authority to alter the existing rules. That is the exclusive prerogative of the WTO members themselves.

In addition, it would be a mistake to think that the Appellate Body's decision in that first trade and climate dispute would resolve all future WTO legal issues relating to the nexus between trade and climate change — any more than the decision in the shrimp-turtle dispute decided all the WTO

legal issues relating to the broader nexus of trade and environment. Necessarily, the jurisprudence of the WTO accumulates incrementally, case by case. Panels and the Appellate Body cannot answer an unanswered legal question unless they are required to do so to resolve a trade dispute.

The risks of leaving the delineation of the lines between trade and climate change to WTO dispute settlement could become manifest in any number of ways. For example, no matter how well reasoned, a decision by the WTO judges to unravel the traditional criteria of determining likeness would be fraught with unforeseeable peril for the WTO and for all world trade. Likewise, a decision by the WTO judges that, for whatever legitimate legal reason, a carbon adjustment measure was not entitled to the shelter of a general exception under GATT article XX would be equally perilous. And so on.

The precise nature of the risk will not be known until the particulars of the first trade and climate dispute are known. In the absence of a consensus by WTO members on a unique solution for dealing with the unique challenge of climate change that will provide clear guidance for the WTO judges in striking the balance needed between trade and climate change, these risks will remain, potentially undermining the progress of the emerging multilateral climate system and the "security and predictability" of the multilateral trading system.⁹⁸

Unable, after long travail, to conclude the Doha round, the members of the WTO are unlikely to be able to summon the requisite support at this time for amendments to the existing WTO rules to respond to the necessity of assisting in enabling action to address climate change.⁹⁹ The exclusive authority of the members of the WTO to adopt legal "interpretations" of the WTO Agreement and Multilateral Trade Agreements has never been used and thus has never been tested.¹⁰⁰ Far more familiar to the members of the WTO, and thus more fit for the purpose of beginning to address climate change, is the power they have under the WTO Agreement to adopt a waiver. A WTO climate waiver would combine the most benefit for the climate with the least risk to trade.

A WTO climate waiver is urgently needed.

⁹⁸ DSU, *supra* note 4, art 3.2.

⁹⁹ Marrakesh Agreement, *supra* note 2, art X.

¹⁰⁰ *Ibid*, art IX:2.

The Requirements for a WTO Climate Waiver

The late John H. Jackson, preeminent among all WTO scholars, once described the waiver power as “[p]erhaps the most important single power” of the contracting parties of the GATT, now the members of the WTO.¹⁰¹ The waiver power has been used often during the 70-year history of the GATT and the WTO, usually in situations involving individual countries seeking respite from a discrete WTO legal obligation. Only on a handful of occasions has the waiver power been used to seek legal redress for groups of WTO members (or for all WTO members) from what would otherwise be WTO obligations.¹⁰² But the potential for more such collective action clearly exists under current WTO rules.

As Isabel Feichtner, the leading authority on WTO waivers, has explained: “The significance of the waiver power is that it allows the main political organs (of the WTO) — the Ministerial Conference and the General Council — to suspend upon request of a WTO member any obligation of WTO law, thus limiting the reach of WTO law. The legality of measures for which a waiver is in effect cannot be assessed against the suspended WTO norm. And, in case of a dispute between WTO members concerning the respective measure, the WTO dispute-settlement system organs will not apply the waived norm. A waiver thus enables members to lawfully take measures that, without the waiver, might be found by the dispute-settlement organs (or other law interpreters and adjudicators) to violate WTO law.”¹⁰³

The WTO’s waiver power is set out in article IX:3 of the WTO Agreement, which empowers the WTO Ministerial Conference “[i]n exceptional circumstances...to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that such

decision shall be taken by three-fourths of the Members.”¹⁰⁴ The three-fourths requirement seems to require a vote. Votes of the GATT contracting parties were often conducted for waivers under the GATT. In practice, however, since votes were cast by the members of the WTO on the first eight waiver decisions in 1995,¹⁰⁵ all WTO waivers have been adopted in the WTO by consensus.¹⁰⁶ Usually this has occurred in the WTO General Council, which meets regularly, and which has acted on behalf of the Ministerial Conference, which convenes only once every two years.

Article IX:4 of the WTO Agreement underscores that WTO waivers shall be granted only “under exceptional circumstances” by providing that “[a] decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate.”¹⁰⁷ Waivers must be reviewed annually, and, “[i]n each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met.”¹⁰⁸ On the basis of this review, the Ministerial Conference “may extend, modify, or terminate the waiver.”¹⁰⁹

No definition is given in the treaty text of “exceptional circumstances.” Jackson, in his classic 1969 treatise on the GATT, observed, “One could argue that ‘exceptional circumstances’ impose a substantive prerequisite to use of the waiver power, i.e., that a finding of exceptional circumstances is necessary and that waivers are not authorized in ‘ordinary’ or ‘normal’ circumstances. No attempt to formulate a definition of ‘exceptional circumstances’ has been made in GATT practice, however. On the contrary, the practice seems to support a view that a waiver can be granted in all

101 John H. Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969) at 541.

102 The ins and outs of WTO waivers are explored thoroughly and ably by Isabel Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* (Cambridge, UK: Cambridge University Press, 2011) [Feichtner, *Law and Politics of WTO Waivers*].

103 Isabel Feichtner, “Subsidiarity in the World Trade Organization: The Promise of Waivers” (2016) 79:2 *Law & Contemp Probs* 75 at 75–76 [Feichtner, “Subsidiarity”].

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

105 WTO, General Council, *Minutes of Meeting* (held on 31 July 1995), WTO Doc WT/GC/M/6 at 5 (20 September 1995).

106 WTO, *Statement by the Chairman, Decision-Making Procedures under Article IX and XII of the WTO Agreement*, WTO Doc WT/DL/93 (4 November 1995).

107 *Marrakesh Agreement*, *supra* note 2 at art IX:4.

108 *Ibid.*

109 *Ibid.*

cases where the necessary votes are obtained.”¹¹⁰ This continues to be the practice with waivers under the WTO — although the WTO has, despite the treaty language, dropped the requirement of a vote in favour of obtaining a consensus.

Adding to the procedural requirements for requesting a waiver is the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, which is one of the understandings that constitutes part of the GATT 1994.¹¹¹ Paragraph 1 of this understanding provides: “A request for a waiver or for an extension of an existing waiver shall describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.”¹¹²

There are two kinds of WTO waivers: individual waivers and collective waivers. Most waivers thus far have been individual waivers, which suspend obligations for one WTO member. Usually they serve “the function of a safety valve when individual members are unable to perform their obligations.”¹¹³ As Feichtner points out, though, “the waiver power is used much more broadly,” and individual “[w]aivers have been granted *inter alia* to allow for regional economic integration, to justify non-reciprocal trade preferences for products from developing countries, or to enable members to adapt their goods schedules to (changes in) the Harmonized System, the product nomenclature of the World Customs Organization.”¹¹⁴

In contrast, *collective* waivers suspend the obligations, not just for one WTO member, but for groups of WTO members or potentially for all WTO members. Collective waivers have been granted by the WTO for a variety of policy reasons, including the reconciliation of trade obligations with other societal values and the coordination of WTO rules with the rules of other international regimes. Notable is the “TRIPS Waiver” granted by

the WTO in 2003, which, as to intellectual property rights, clarifies that the compulsory licensing of medicines is permitted without the permission of the patent holder if affordable medicines are not otherwise available during a health crisis of another WTO member.¹¹⁵ Notable, as well, is the “Kimberley Waiver” granted by the WTO that same year to clarify that trade actions taken against non-participant WTO members to help suppress trade in so-called “conflict” or “blood” diamonds under the Kimberley Process Certification Scheme for Rough Diamonds are justified under the GATT.¹¹⁶

In the *EC-Bananas III* dispute in 1997, the Appellate Body was called upon to address the legal scope of the Lomé Waiver, which provides preferential trade treatment for developing countries that are former European colonies in their trade with the European Union. In that appeal, the WTO judges declined to conclude that the waiver from the obligations in GATT article I (on most-favoured-nation treatment) also implies a waiver from the obligations in GATT article XIII (on quantitative restrictions). Article XIII is not mentioned in the Lomé Waiver.

In the appeal in that dispute, the Appellate Body declared, “Although the WTO Agreement does not provide any specific rules on the interpretation of waivers, Article IX of the WTO Agreement and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care.”¹¹⁷

Elaborating in similar terms in a later iteration of the same dispute, in 2008, the Appellate Body stated, “In our view, the function of a waiver is to relieve a member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision.

110 Jackson, *supra* note 101 at 544.

111 Understanding in Respect of Waivers of Obligations, GATT 1994, *supra* note 6.

112 *Ibid* at para 1.

113 Isabel Feichtner, “The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests” (2009) 20:3 Eur J Intl L 615 at 620 [Feichtner, “Waiver Power of the WTO”].

114 *Ibid*.

115 WTO, General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of 30 August 2003, WTO Doc WT/L/540 (2 September 2003).

116 WTO, General Council, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 May 2003, WTO Doc WT/L/518 (27 May 2003).

117 European Communities—Regime for the Importation, Sale and Distribution of Bananas (1997), WTO Doc WT/DS27/AB/R at para 185 (Appellate Body Report) [EC-Bananas III].

Its purpose is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care.”¹¹⁸

As Feichtner tells us, these two Appellate Body statements are reminders of “the exceptional nature of waiver decisions.”¹¹⁹ Some may also be inclined to see these statements as indications of a narrow scope of the waiver power of the WTO. The Appellate Body rulings in the *EC–Bananas III* dispute, however, address the *interpretation* of waivers *after they have been adopted*. Although the Appellate Body stated that the “function” and “purpose” of a waiver “is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule,” these two *EC–Bananas* rulings do not address the scope of the treaty authority of the WTO to adopt waivers.

By the terms of the WTO Agreement, the scope of the WTO authority to adopt waivers is bounded by the requirement to do so only “in exceptional circumstances.” It is the determination — whether by three-fourths vote or by consensus — by the members of the WTO of the existence of “exceptional circumstances” that, as the Appellate Body has pointed out, justifies a waiver decision. As in the *EC–Bananas III* dispute, the Appellate Body will not ask whether “exceptional circumstances” exist to justify a waiver. That is a decision entirely for the members of the WTO. The Appellate Body will ask whether a particular measure falls within the scope of the waiver. That is a task for dispute settlement.

Feichtner maintains that the pronouncements thus far of WTO panels and the Appellate Body on the interpretation of waivers focus too much on considerations relating to individual waivers and do “not take account of collective waiver decisions.”¹²⁰ She contends that the statement by the Appellate Body about waivers not modifying obligations or creating new ones has “been contradicted by the

waiver practice” of the GATT and the WTO.¹²¹ In her estimation, “The waiver practice...reveals that the exceptional circumstances requirement has not led to a substantive restriction of the waiver power.”¹²² Rather, in practice, the waiver power is a broad power with dimensions that have not yet been fully employed by the members of the WTO.

Collective waivers, she explains, “are adopted which relieve all members or groups of members from the burdens of compliance. Some of them address structural deficits which render compliance difficult for all countries or groups of countries. Others generally modify legal rules to take account of a changed consensus with respect to the objectives of law or coordinate WTO law with other legal regimes. None of these collective waiver decisions conform to the narrow interpretation. Due to this long-standing practice, in which all members have joined over time, it can be said that to date no substantive meaning can be ascribed to the term ‘exceptional circumstances’ in the waiver competence.”¹²³

In truth, based on decades of GATT and WTO practice, the meaning of the treaty term “exceptional circumstances” seems to have been left to the members of the WTO to define as they choose and as the need arises. Whenever the members of the WTO agree that there are exceptional circumstances that justify a waiver, the WTO judges will be bound by the members’ decision as to the existence and the scope of those exceptional circumstances in WTO dispute settlement. The questions for the WTO judges in dispute settlement may turn out to be, as in the *EC–Bananas III* dispute, clarifying the precise boundaries of the granted waiver, and determining whether the particular measure at issue is one that responds to and has a sufficient connection with the exceptional circumstances that the members of the WTO have identified.

If there were, for instance, a WTO climate waiver, the legal issue raised before the Appellate Body in an appeal might be: is the challenged measure truly a climate response measure, or is it instead a “disguised restriction on international trade”? This is a judgment that can only be made on a case-by-case basis. The absence of a definition of a

118 *Ibid*, art 21.5; DSU, WTO Doc WT/DS27/AB/RW2/ECU; WTO Doc WT/DS27/AB/RW/USA (2008) at para 382. See also *US–Sugar Waiver* (1990), BISD 37S/228 at para 5.9 (Panel Report).

119 Feichtner, “Waiver Power of the WTO”, *supra* note 113 at 620.

120 Feichtner, *Law and Politics of WTO Waivers*, *supra* note 102 at 243.

121 *Ibid* at 185.

122 *Ibid*.

123 *Ibid* at 187.

climate response measure in the Paris Agreement is likely to make this judgment in WTO dispute settlement especially difficult, for the WTO judges will have to determine the legal meaning of a response measure in the climate agreement — a turn of events that may come as an unwelcome surprise to the climate regime, which has yet to grapple seriously with settling on a definition.¹²⁴

It may be suggested by some that a waiver can be granted by the WTO only if it does not result in significant trade diversion. There is, however, no general rule that says that the waiver power can only be used for measures that do not negatively affect trade. As Feichtner points out, the practice reflects that most do.¹²⁵ It may be suggested also that a WTO waiver must be consistent with the objectives of the WTO.¹²⁶ Here there is not a problem for a potential WTO climate waiver. As the Appellate Body has underscored in *US-Shrimp*, the preamble to the WTO Agreement — on the very first page of the WTO treaty — recognizes that “trade and economic endeavor” should be conducted while allowing for “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect the environment and to enhance the means of doing so.”¹²⁷ Trade actions to support climate actions seem to fit within this WTO objective.

Securing a WTO Climate Waiver

If any circumstances can be said to be exceptional, surely the unique circumstances of climate change can be. Yet, as the WTO prepares for its upcoming Ministerial Conference in Buenos Aires, in December, virtually no sentiment has been voiced among the members of the WTO for considering a WTO climate waiver. WTO trade negotiators evidently remain content to permit the WTO judges, or perhaps even the global

climate negotiators, to tackle the thorny issues of the connections between trade and climate change rather than have to add those issues to the list of seemingly intractable issues they already face in WTO negotiations. In their view, there is already more than enough on the WTO agenda.

The *first* step toward a WTO climate waiver, thus, will be to convince the members of the WTO that embarking on a multilateral effort to frame a WTO climate waiver is far better for the world trading system than waiting for the approaching legal collision that just might topple it. This will not be a legal challenge. Fundamentally, this will be a challenge of political persuasion that must be addressed, not to the trade negotiators in Geneva, but rather to those for whom they work and to whom they answer in their national capitals. Simply put, there will be no WTO climate waiver unless those who actually wield decision-making political power are persuaded that such a waiver is necessary. At this time, they are not.

The *second* step toward a WTO climate waiver will be to unite the separate silos of trade and climate change by bringing together the negotiators on both topics to discuss the nexus between the two. The trade and the climate regimes are each moving ahead separately, on numerous vital fronts, on many interrelated issues affecting both trade and climate change. None of their separate efforts will succeed unless major efforts are made by the two regimes to work together on advancing trade and saving the climate as essential parts of attaining our agreed Sustainable Development Goals.

As I have said before, in concert with like-minded colleagues, in considering this challenge, “Our overriding message to trade negotiators and to climate negotiators alike about how best to meet the global challenge of reconciling our goals for trade and for climate change is that they must begin by acknowledging the inseparability of the two issues. Based on this mutual acknowledgment, they must each acknowledge, too, the essential legitimacy of the goals of the other, and they must begin now, belatedly, to communicate. This communication must aim at framing rules on trade and on climate that are mutually consistent, mutually supportive, and mutually reinforcing.”¹²⁸

¹²⁴ See *Paris Agreement*, *supra* note 5, art 4.15 and accompanying decisions at para 95(f).

¹²⁵ Feichtner, *Law and Politics of WTO Waivers*, *supra* note 102 at 193.

¹²⁶ *Ibid* at 194.

¹²⁷ *Marrakesh Agreement*, *supra* note 2 at Preamble.

¹²⁸ Bacchus, *supra* note 95 at 9.

The second step of escaping from the separation of the climate and trade silos could begin with a joint meeting of the COP to the UNFCCC (the Paris Agreement) and the delegates to the WTO in Bonn, or Geneva, or some other mutually agreed location. This should be a joint session of at least several days in which all participants engage in an exchange of views in both formal and informal settings. Ideally, such a gathering should include all the delegates of both international institutional regimes. If that cannot be arranged, the session should consist of groups of delegates broadly representative of the varying points of view within the two regimes. The shared aim of this joint meeting should be to reach a mutual understanding expressed in writing that the complex issue of the interrelationships between trade and climate change must be addressed immediately by both regimes, and that, to be addressed successfully, this must be done by working together.

With this agreement in hand, the *third* step toward a WTO climate waiver will be to place the topic of the relationship between trade and climate change on the WTO agenda. The Ministerial Conference in Buenos Aires would be none too soon for this to happen, but it is unlikely to happen as soon as the conference in Buenos Aires. At this late date, there are already too many other issues in the negotiating swirl for Buenos Aires, along with too many complications surrounding them. A more realistic initial goal is to increase the visibility for trade negotiators of the issues relating to trade and climate change in the conference corridors and in the sideline events surrounding the trade summit in Buenos Aires. These initial efforts could then be followed by accelerated efforts to put the topic of trade and climate change on the WTO agenda in 2018, some time soon after the Ministerial Conference. Already, a small group of WTO members is contemplating this approach.

With this in mind, all those from business, NGOs and the rest of civil society who support this ambition and who will be gathering in Buenos Aires on the sidelines of the Ministerial Conference should be resolved to stress, while there, the urgency of placing the topic of trade and climate change on the WTO agenda. In addition, while there, they should voice their own views about the imperative for a WTO climate waiver, and about what should be included within the coverage of that waiver. On this crucial global issue, in Buenos Aires, the wider world must be heard loud and clear

by those entrusted with the future of the world trading system and, thus, with the future of efforts to reconcile our goals for trade and climate change.

Once the topic of trade and climate change is on the WTO agenda, the *fourth* step forward should be for a group of WTO members to join in submitting for consideration a request for a collective waiver of the Multilateral Trade Agreements due to the exceptional circumstances created by climate change. Per the WTO understanding on waivers under the GATT, this request will have to describe the measures the requesting members propose to take, the specific policy objectives they seek to pursue, and the reasons preventing them from achieving these policy objectives through measures consistent with their obligations under the GATT. This same requirement will presumably also apply to the extent that the requesting members propose to include in the waiver actions that would otherwise be inconsistent with other WTO-covered agreements.

The *fifth* step toward a WTO climate waiver should be the establishment in response to this request of a working party tasked with framing and proposing a WTO climate waiver. Although common during the GATT, when waivers were often put to a vote, such working parties have not been employed by the WTO, which has largely approved waivers by consensus. Feichtner has recommended that working parties be reinstituted for all WTO waivers.¹²⁹ A good place to start would be with a waiver on climate change.

As happened under the GATT, a WTO working party on a WTO climate waiver should be open to the participation of all interested WTO members. The work of the working party should cover all aspects of the connections between trade and climate change, and their implications for world trade and for world trade rules. The report of the working party should delve into all relevant issues, and it should set out in detail all competing points of view. If the working party concludes that exceptional circumstances exist that justify a climate waiver, then it should recommend adoption of a climate waiver by the members of the WTO.

Together with its report, the working party should, as a *sixth* step, prepare a draft waiver decision for the consideration of the WTO members and include

129 Feichtner, "Subsidiarity", *supra* note 103 at 94–96.

it as an annex to its report. In taking this step, the working party on a climate waiver should draw on the in-house expertise of the WTO Secretariat and should work closely and in concert with the WTO Committee on Trade and Environment. The draft WTO waiver decision should draw from and be based on a full consideration of all the views expressed to the working party.

Crucial to the success of the working party will be ensuring that its work is transparent to the wider world and that its reach extends beyond the WTO and out into the wider world. The negotiation of a WTO climate waiver behind closed doors in Geneva and under a cloak of secrecy would only undermine such an endeavour, while alarming climate and trade advocates alike and empowering the opposition to international cooperation by naysayers of sundry kinds all over the world.

As part of this outreach to the wider world, the working party should seek the views of the COP and also of the other international institutions engaged on climate change and on sustainable development. The working party should also seek the views of NGOs and of business, labour and other affected interests. It could be helpful, too, for the working party to assemble an international advisory group of experts on both trade law and climate and other environmental law to assist it in preparing the draft climate waiver for the consideration of the entire membership of the WTO. Drawing the right limits of a draft climate waiver — not too narrow and not too broad — will be central to the success of the working party. Securing outside legal expertise from around the world may prove helpful indeed.

Lastly, the *seventh* step toward a WTO climate waiver will be the adoption of the proposed waiver by the members of the WTO. Ideally, this will be achieved by consensus. A collective waiver by the WTO will benefit from the combined strength of a consensus of 164 countries and other customs territories. But, if necessary, the adoption of a climate waiver may have to be accomplished by a three-fourths vote. The urgent necessity of cooperative global action to confront the challenges at the legal borders of trade and climate change, and to prevent the approaching collision between the international trade and climate systems, argues for not permitting one or a few countries to exercise a veto over a WTO climate waiver.

Looking ahead, the adoption of a WTO climate waiver should be only the first of the negotiating

efforts by the members of the WTO to revise and realign WTO rules more closely with the WTO's professed aim of conducting "trade and economic endeavor" in ways "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development."¹³⁰

Adoption of a WTO climate waiver will prove that they can do so — perhaps with a targeted approach to advancing sustainable energy, and continuing thereafter with any needed amendments or additions to the existing WTO rules. A climate waiver would help build the legal and political foundations for such further actions. Time will tell whether the will can be summoned by the members of the WTO to do all this. The inescapable reality is, this broader task of global economic and environmental governance must also not be postponed.

130 Marrakesh Agreement, *supra* note 2 at Preamble.

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