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Trade, Law *and* Development

Vol. 13, No. 2

2021

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ISSN: 0976-2329 | eISSN: 0975-3346

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13(2) TRADE L. & DEV. 192 (2021)

INTERNATIONAL TRADE, ENERGY TRANSITION AND CLIMATE CHANGE OBLIGATIONS: THE PERSPECTIVE OF SMALL PACIFIC ISLANDS AND THE CARIBBEAN COMMUNITY

Rafael Leal-Arcas,* Manuliza Faktaufon, Raphael Ribeaud,† Rojae Brown††, Kaushal Prakash‡**

This paper explores how the international trading system can help achieve sustainability worldwide. It aims to do three things: first, an explanation of how the international trading system (multilaterally, regionally, or bilaterally) helps and contributes to the achievement of the 2030 Sustainable Development Goals (2030 SDGs); second, an analysis of the role of free trade agreements (FTAs) in the energy transition, by focusing on small Pacific island developing states; and third, an exploration of how trade law is the enforcer of climate change obligations from the perspective of the states of the Caribbean Community (CARICOM).

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I. INTRODUCTION

International trade and sustainability were initially seen as two parallel lines which would never intersect. However, over the years, this understanding has seen a paradigm shift with the evolution of sustainable technology and renewable sources of energy. This article argues that the international trading system can be a catalyst for achieving sustainability worldwide. To elaborate upon the same, it presents four distinct parts that deal with different contentions having conclusions of their own.

Following this introduction, Part II provides an explanation of the manner in which the international trading system, at the multilateral, regional, or bilateral level, can contribute towards the attainment of the 2030 SDGs. To elaborate upon the same, it examines the provisions of treaties at the three levels and their enforceability. It concludes that regional and bilateral treaties can create a reasonable starting point from which trade negotiations can move to a multilateral level.

Part III undertakes an analysis of the role FTAs play in the transition of energy by centring the discussion on small Pacific-island developing states. It examines the subsidies given to fossil fuels and argues that, apart from the definitional subsidies, other kinds of ‘support’ extended to fossil fuels must also be restricted. It further argues that FTAs should include provisions that liberalise trade in renewable energy and energy-efficient products as well as rules for extending subsidies to such products.

Part IV explores the manner in which climate change obligations can be enforced by means of trade law from the viewpoint of CARICOM states. To explain the same, it undertakes an analysis of the existing usage of trade sanctions at the regional and domestic levels. It then examines the manner in which CARICOM states can implement different measures to support the movement towards renewable energy and ensure compliance with the principles of international trade law. The last part (Part V) provides some recommendations.

II. THE INTERNATIONAL TRADING SYSTEM AND ACHIEVING SUSTAINABILITY IN THE WORLD

The trading system is one of the three pillars of the world economic order (the others being the monetary system and development/investment). It is the set of rules that enables commerce between entities in different states/regions. It is composed of three levels: multilateral (General Agreement on Tariffs and Trade (GATT)/General Agreement on Trade in Services, World Trade Organisation

(WTO), etc.); regional (European Union (EU), North American FTA (now United States-Mexico-Canada Agreement (USMCA)), etc.); and bilateral (Bilateral Trade Agreements (BTAs)). Economies around the world have become more and more reliant on this pillar as they have become more interconnected and globalised. The increased globalised nature of the world has enabled many countries to thrive economically; however, only recently has the idea of sustainability been read in conjunction with the trading system. This has come through the realisation that economic growth will, in the future, be hindered by the lack of sustainable development of the system. Although the concept of sustainability has become more prevalent, spearheaded by the 2030 SDGs, a lot remains to be achieved.

This begs the questions: What is the current state of the trading system in relation to sustainability and what are the further steps that the trading system is required to take to achieve both the current and the future goals of sustainable development?

This part will answer these questions in three sub-parts. The first will examine the current impact of trade and the trading system on sustainability. The second sub-part will adopt a top-down approach, breaking down each level — multilateral, regional, and bilateral. In this, a critical analysis of each of them will be made, identifying their shortcomings and their strengths. The third and last sub-part will evaluate the steps that still need to be taken by the trading system to achieve the 2030 SDGs and sustainability beyond that.

This part will argue that the trading system needs reform at all levels. It will explain that although the current trading system will be sufficient to attain the 2030 SDGs, further steps need to be taken for sustainability to have any lasting effects.

A. The Impact of Trade on Sustainability: Historical Developments and Status Quo

Historically, trade and sustainability are two concepts that have not been read together. However, with the increase of human activity and its consequences on the globe, such a perspective has become indispensable. This part will examine the impact trade has had on the world. It will argue that despite it being an issue that was first raised nearly thirty-five years ago, only very little has been done.

At its inception in 1987, sustainable development was defined in the World Commission on Environment and Development's Brundtland Report as, "development that meets the needs of the present without compromising the

ability of future generations to meet their own needs”.¹ Following this, in 1992, the Rio Earth Summit concluded that, “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”.² However, since then, sustainability has become such a wide-ranging topic that it is losing the strength of its original meaning.³ Most notably, it has expanded drastically, but not without reason, in the areas relating to environmental protection and climate change. There is, however, a lot more to sustainability than that. Since their inception in 2015, the SDGs have been the metric by which sustainability is quantified. Its seventeen goals regroup broad and independent goals with specific targets for each goal totalling up to 169 targets.⁴ To this day, 193 countries have adopted the 2030 SDGs.⁵ The objectives range from workers’ rights,⁶ to the protection of life under water.⁷ While not all goals are directly relevant to international trade, they show the extent and the complexity of sustainable development and the number of ways in which it ought to be tackled.

Globalisation has vastly expanded the amount of international trade since the 1950s. Accordingly, it has contributed more and more to the countries’ Gross Domestic Product (GDP).⁸ It has had an increasingly important role in enabling global development and facilitating the said development for nations that are faced with scarcity of resources. However, this increase has shone a light on both social and environmental issues. It has led, in some cases, to a race to the bottom to reduce production costs. This has resulted in breaches of workers’ rights and grave environmental damage, through the emission of carbon dioxide equivalent (CO₂e),

¹ G. Brundtland, World Comm’n on Env’t & Dev., Rep. on our Common Future on its Forty-Second Session, U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter The Brundtland Report].

² U. N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug.12, 1992) [hereinafter Rio Declaration].

³ N. Bonsu et al., *Beyond Agenda 2030: Future-Oriented Mechanisms in Localising the Sustainable Development Goals*, 12(23) SUSTAINABILITY 9797 (2020) [hereinafter Bonsu].

⁴ See G.A. Res. 70/1 2030 Agenda for Sustainable Development (Sept. 25, 2015) [hereinafter 2030 SDGs].

⁵ See U.N., Sustainable Development Goals Officially Adopted by 193 Countries, U.N. CHINA (Sept. 27, 2015), <http://www.un.org.cn/info/6/620.html>.

⁶ 2030 SDGs, *supra* note 4, at Goal 8.

⁷ *Id.* at Goal 14.

⁸ The WTO notes that the share of international trade in world GDP has risen from 5.5% in 1950 to 20.5% in 2006, see WTO, *The Impact of Trade Opening on Climate Change*, WTO, https://www.wto.org/english/tratop_e/envir_e/climate_impact_e.htm.

biodiversity loss, deforestation and pollution of the adjacent natural habitats.⁹ Trade currently accounts for 60% of global greenhouse gas (GHG) emissions.¹⁰

However, globalisation has also been recognised as a factor encouraging the efficient allocation of natural resources around the world and, therefore, promoting sustainable growth.¹¹ The difficulty of examining trade through the lens of sustainability is the different impacts it can have on the developing and developed countries, on the producing countries and the importing countries.¹² The standards must be applied in different ways depending on the country at hand.

Historically, the literature has focused on the economic consequences of international trade rather than its impact on sustainable development.¹³ Research has been done on the consequences of trade on deforestation,¹⁴ or on the loss of habitat,¹⁵ but very little on the consequences of trade on sustainable development.¹⁶ However, if this part is to explore what the trading system needs to do to achieve sustainability, it is necessary that the *status quo* is clear and understood.

The research that has been published shows a disparity in the impacts of international trade on sustainable development. Some research indicates that trade agreements have a negative impact on climate change mitigation efforts,¹⁷ whereas other indicates that although overall trade has had a positive impact on achieving the SDGs, especially for developed nations, the same cannot be said for

⁹ Z. Xu et al., *Impacts of International Trade on Global Sustainable Development*, 3 NATURE SUSTAINABILITY 964, 968 (2020) [hereinafter Xu].

¹⁰ R. Andrew et al., *Climate Policy and Dependence on Traded Carbon*, 8(23) ENVTL. RES. LETTERS 1 (2013).

¹¹ *Id.*

¹² Xu, *supra* note 9.

¹³ See e.g., G. Atkinson et al., *Are National Economies (Virtually) Sustainable? An Empirical Analysis of Natural Assets in International Trade*, in U.N. UNIV. INT'L HUMAN DIMENSIONS PROGRAMME ON GLOB. ENVTL. CHANGE & UNEP, INCLUSIVE WEALTH REPORT 2012: MEASURING PROGRESS TOWARD SUSTAINABILITY 87 (2012); and J. E. Givens et al., *Ecologically Unequal Exchange: A Theory of Global Environmental Injustice*, 13(5) SOC. COMPASS (2019).

¹⁴ See J. Liu, *Forest Sustainability in China and Implications for a Telecoupled World*, 1 ASIA PAC. POL'Y STUD. 230 (2013); R. Smith, *Trade and Public Health: Facing the Challenges of Globalisation*, 60(8) J. EPIDEMIOLOGY & COMMUNITY HEALTH 650 (2006).

¹⁵ M. Lenzen et al., *International Trade Drives Biodiversity Threats in Developing Nations*, 486 NATURE 109 (2012).

¹⁶ Xu, *supra* note 9.

¹⁷ B. Lilliston, *The Climate Cost of Free Trade: How the TPP and Trade Deals Undermine the Paris Climate Agreement*, INST. AGRIC. & TRADE POL'Y (2016), https://www.iatp.org/sites/default/files/2016_09_06_ClimateCostFreeTrade.pdf.

developing economies.¹⁸ Though trade has improved a developed country's position towards the SDGs, in practice, this often results in pollution displacement, where the developing country will bear the burden of the resource extraction and production.¹⁹ Likewise, the impact of distant/far away trade was very different to that of adjacent/nearby trade in achieving the SDGs.²⁰ Accordingly, in the context of adjacent trade, most neighbouring countries have similar socio-economic backgrounds and resources, limiting trade and therefore, reducing pollution displacement.²¹ This has a two-fold implication: firstly, owing to the complexity of sustainable development within a globalised system, it must be understood that different standards should be applied for countries whose economies rely on different industries. Logically, a country whose GDP is heavily reliant on the production of goods for the whole world, such as Bangladesh, should be judged on different standards as opposed to a country specialised in services, such as the United Kingdom (UK). Secondly, any measure of sustainability should consider the displaced pollution created as a result of a nation's import of goods and services. This would enable a clearer metric of understanding the root source of these issues and would also hold importing nations accountable for the consequences of their practices.

Thus, the trading system must overcome these issues and improve the accountability of developed economies for displaced pollution. These issues are governed by international agreements and, in the context of international trade, there are three levels to these agreements: multilateral, regional, and bilateral.

B. Trade Agreements: Contents and Effectiveness

Considering the impact trade has on both the environment and the developing economies, one would expect that these issues would be of paramount importance for any future trade agreement. However, as this sub-part will show, this is not the case. This sub-part will assess the steps that have been taken at each level of trade. It shall undertake a top-down approach, recognising that multilateral changes are a catalyst for changes in regional trade agreements (RTAs) and BTAs. RTAs and BTAs will be grouped for conciseness owing to their similarities.

1. Multilateral Trade Agreements (MTAs)

¹⁸ Xu, *supra* note 9, at 967.

¹⁹ G. Peters et al., *Growth in Emission Transfers via International Trade from 1990 to 2008*, 108(21) PROC. NAT'L ACAD. SCI. 8903, 8907 (2011).

²⁰ Xu, *supra* note 9, at 968.

²¹ *Id.*

MTAs dictate the standards to be respected by the adherent nations in the context of their trade. They intend to push the boundaries of what countries are willing to accept, especially considering that countries cater to their own selfish interests and often hold opposed views on a given subject. To that extent, MTAs and indeed multilateral agreements as a whole, make it very difficult to incorporate any significant change.

While these agreements may be the most effective in theory, owing to the range of nations they reach, the reality of it is completely different. MTAs have, historically, been unable to efficiently tackle the issues surrounding sustainability and environmental protection.²² Despite having relatively strong enforcement mechanisms, the standards are mere benchmarks and do not reflect what can be achieved. For example, despite having some environmental measures covered by Article XX of the GATT,²³ the agreement fails to cover measures aimed at 'environment protection'.²⁴ Although knowledge about climate change was nearly non-existent in 1948, GATT failed to reinvent itself in 1994,²⁵ as it was unable to adapt to the reality of climate change by finding a way to conciliate international trade and sustainable development. In line with this, the WTO missed the opportunity to deal with or even mention climate change at its creation despite the United Nations Framework Convention on Climate Change (UNFCCC) being adopted over a decade earlier.²⁶ Furthermore, doubt has been cast upon the legality of subsidising or in any other way incentivising the use of renewable energy under WTO law, thereby showing no desire to include sustainability in the WTO agreements.²⁷ Finally, the Paris Agreement,²⁸ which is seen as the leading document on climate change mitigation, does not mention the word 'trade' even

²² R. LEAL-ARCAS, SOLUTIONS FOR SUSTAINABILITY: HOW THE INTERNATIONAL TRADE, ENERGY AND CLIMATE CHANGE REGIMES CAN HELP 114 (2019) [hereinafter LEAL-ARCAS].

²³ General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT] (Art. XX covers the justifiable reasons to restrict international trade); see METI, 2015 REPORT ON COMPLIANCE BY MAJOR TRADING PARTNERS WITH TRADE AGREEMENTS – WTO, FTA/EPA AND IIA 211 (2015), https://www.meti.go.jp/english/report/data/2015WTO/gCT15_1coe.html.

²⁴ Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 7.46, WTO Doc. WT/DS332/R (adopted Dec. 17, 2007).

²⁵ The Brundtland Report, *supra* note 1; Rio Declaration, *supra* note 2 (Both these had already alerted the world to the danger of climate change. However, GATT failed to reflect these issues in its amendments.).

²⁶ Rio Declaration, *supra* note 2.

²⁷ LEAL-ARCAS, *supra* note 22, at 93; see also D. Peat, *The Wrong Rules for the Right Energy: The WTO SCM Agreement and Subsidies for Renewable Energy*, 24 ENVTL. L. & MGMT. 3, 3 (2012).

²⁸ Conference of the Parties, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/L9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Agreement].

once. The previous examples highlight two things: first, there is no appetite to incorporate the issues of sustainability within the agreements; and second, the multilateral agreements are written with one purpose in mind and have been unable, for the most part, to advance an agenda on more than one topic. This is consistent with the idea that they provide a set of benchmarks on a given issue, but it is for the regions and the states to figure out how to balance all these different issues with one another.

The focus of multilateral agreements is either fixed on sustainability or economic development/trade, but there is no agreement which efficiently and effectively manages to tackle both issues under a sole pledge. This is the case owing to the current dissociation between the needs of trade and economic development and the needs of sustainability.²⁹ Whether it is wanted or not, these needs will eventually align and hence, it is more advisable to take initiative on this rather than have it imposed.

2. BTAs and RTAs

BTAs and RTAs have been grouped in this section because of their similarities, namely, they are the product of negotiation between states regarding rules to apply to future trade whereas MTAs set out guidelines and benchmarks from which a trade agreement is produced between nations. The incorporation of environmental and sustainable clauses in BTAs and RTAs has become the norm. BTAs and RTAs underpin the trade between whole regions of the globe. However, although the agreements make mention of issues surrounding sustainability, they fail to deliver on the specifics of the clauses.

The rationale behind BTAs and RTAs is always to open new trading routes and increase economic growth. However, countries are now using them to achieve non-economic goals such as sustainable development.³⁰ Many BTAs and RTAs' sustainability and environmental clauses operate as exceptions similar to those found in Article XX of the GATT, these clauses are then reinforced by exceptions found in the agreements. For example, Article 2.15 of the EU–Korea FTA, signed on October 6, 2010, directly refers to the parties' reliance on Article XX. There are also clauses stating that any trade facilitation efforts will not hinder the fulfilment

²⁹ N. Eisenmenger et al., *The Sustainable Development Goals Prioritize Economic Growth over Sustainable Resource Use: A Critical Reflection on the SDGs from a Socio-ecological Perspective*, 15 SUSTAINABILITY SCI. 1101, 1101 (2020) [hereinafter Eisenmenger].

³⁰ M. Gehring et al., *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview*, INT'L CENTRE TRADE & SUSTAINABLE DEV. [ICTSD]: GLOB. PLATFORM ON CLIMATE CHANGE, TRADE & SUSTAINABLE ENERGY 7 (2013), <https://www.files.ethz.ch/isn/168816/climate-change-and-sustainable-energy-measures-in-regional-trade-agreements-rtas.pdf> [hereinafter Gehring].

of objectives such as, “the protection of national security, health and the environment”.³¹ Additionally, “human, animal or plant life or health,”³² may be protected through non-discriminatory measures. The EU–Colombia–Peru Trade Agreement, signed on June 26, 2012, has a more comprehensive approach, which clearly addresses climate change — albeit in vague commitments — and highlights the need to decarbonise the economy.³³ Along these clauses are often included statements designed to facilitate understanding of rules where potential conflict may arise. For example, the relationship between the EU–Korea FTA and multilateral environment agencies, regarding climate change mitigation objectives, has been explicitly addressed in the FTA.³⁴ The same is done in Article 270 of the EU–Colombia–Peru Trade Agreement.³⁵ Unfortunately, as is the case for many of these clauses, they remain vague and contain commitments to discussing the issues only if they were to arise. Finally, and perhaps most importantly, the RTAs contain clauses preventing the lowering of investment standards. These clauses contain commitments by the signatories of the RTAs not to lower environmental, health, or safety standards, kickstarting a race to the bottom.³⁶ For example, Section G-14 of the Canada–Chile FTA and Article 14.16 of the USMCA contain those clauses.

The environmental and sustainability clauses contained in BTAs and RTAs for cooperative work between the nations can loosely be broken down into four categories.³⁷ First, and most prevalent in these agreements, are clauses aimed at developing the countries’ environmental laws to address and mitigate climate change. Second, there are clauses to promote climate finance instruments and carbon markets. Third, commitments to promote climate-change technologies are present. Fourth, they mention undertakings to develop climate change disaster mitigation tools.

It is now a given that a BTA and an RTA will have a sustainability clause. However, these agreements have a poor track record of enforcement of their sustainability clauses.³⁸ Research has shown that the clauses are either overly vague or non-enforceable, or a combination of the two.³⁹ Countries have failed to give

³¹ Free Trade Agreement art. 6(1)(g), European Union-S. Kor., May 14, 2011, O.J. (I 127) [hereinafter EU-S. Kor. FTA].

³² *Id.* at art. 7.50.

³³ Trade Agreement, European Union-Colom.-Peru art. 275, Dec. 21, 2012, O.J. (L 354) [hereinafter EU-Colom.-Peru Trade Agreement].

³⁴ EU-S. Kor. FTA, *supra* note 31, at art.13.5.

³⁵ EU-Colom.-Peru Trade Agreement, *supra* note 33, at art. 270.

³⁶ Gehring, *supra* note 30, at 15.

³⁷ *Id.* at 17-20.

³⁸ M. Bronckers & G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, 24 J. INT’L ECON. L. 25, 25 (2021).

³⁹ LEAL-ARCAS, *supra* note 22, at 154-171.

importance to issues relating to sustainability as they are seen as a hamper to the economic development that would otherwise come from the increased trade from the RTA.⁴⁰ Perhaps surprisingly, the environmental clauses of the FTAs of which the United States of America (US) is a part, are more effective than their European equivalents. The key difference is that the US clauses are enforceable, whereas the European clauses are not.⁴¹

Sustainability clauses are proving to be a stumbling block for international cooperation towards attaining sustainability. This is consistent with the idea set out in the first sub-part that developed nations are comfortable with displacing pollution to developing nations. However, things do not have to remain that way. Both international and national laws underpin global efforts to prevent climate change and encourage sustainable trade. Since a top-down solution to the problem seems unlikely owing to the unwillingness from all parties to bind themselves to strict standards, a ground-up solution is presented as the most effective solution.

C. *Towards Achieving the 2030 SDGs and Beyond*

Sustainability has traditionally been seen as a barrier to economic growth. Nevertheless, this is merely a preconception and trade could be enhanced by sustainable development. For instance, trade can be used to accelerate and facilitate the transition away from fossil fuels.⁴² This sub-part will argue that the current system is equipped to achieve the 2030 SDGs. It contends that if this is the case, changes from the ground-up in the ways in which regional and bilateral FTAs are viewed and constructed, will have to be implemented. This sub-part also argues that steps to go beyond the 2030 SDGs must be taken as the deadline approaches.

Despite the ‘slowbalisation’⁴³ and, more recently, the COVID-19 pandemic, countries have become and remain dependent on international trade,⁴⁴ the recent

⁴⁰ Eisenmenger, *supra* note 29.

⁴¹ LEAL-ARCAS, *supra* note 22, at 171.

⁴² OECD, TRADE POLICY BRIEF: TRADE AND THE ENVIRONMENT (2019) [hereinafter Trade Policy Brief].

⁴³ ‘Slowbalization’ is a term coined by The Economist, according to which international trade would decrease by 10% - 30% in 2020; See *Goodbye Globalisation: The Dangerous Lure of Self-Sufficiency*, THE ECONOMIST (May 16, 2020), <https://www.economist.com/weeklyedition/2020-05-16> (This depression and precipitous fall in global trade has nothing to do with new technical barriers to trade; rather, with lack of demand in trade in services due to the pandemic, to the benefit of trade in goods bought online. Trade has become regionalised and globalization has become slowbalization. Openness in global trade seems to have also come to an end with the protection of domestic producers as a matter of national security. Moreover, global competition has pressurized exporters to become more efficient and competitive).

blockage of the Suez Canal is evidence to that. Trade and the system built around it, can therefore be used as a tool to incentivise sustainability. The 2030 SDGs can be achieved through the current system of trade agreements; however, these trade agreements require certain changes. As set out in the previous sub-part, the catalyst for change is likely to be in RTAs and BTAs. Countries recognise, on the one hand, that environmental issues have become urgent and necessary to tackle,⁴⁵ and on the other, they understand that trade agreements have proved effective in the past at delivering change.⁴⁶ This sub-part noted a gap between MTAs and the enforcement of the rules under them and the enforcement of the rules under BTAs and RTAs. Indeed, it found that most of the sustainability or environmental clauses in these trade agreements lack enforceability or are built on weak and vague wordings.⁴⁷

First and foremost, the agreements must make the environmental and sustainability clauses an indispensable part, and these clauses must be read together with the main trading rules. They must be built around both quantitative and qualitative objectives.⁴⁸ Accordingly, these clauses must be legally enforceable. With the increase of the usage of trade agreements, there must be a clear understanding of how disputes will be resolved and the consequences of non-compliance. Once these steps are achieved, there will be a rippling effect up the pillar, triggering changes at the multinational level, enabling a wide-ranging impact.

The multinational level must remediate the issues identified in the first sub-part of this part. If it wants to be effective, it must broaden its scope and treat the issues of trade, climate change, and sustainable development collectively.⁴⁹ It is understandable that not every GHG emitting sector can be treated in this way, but trade is responsible for such a large proportion of those emissions,⁵⁰ that it has become indispensable to review the international treaties in light of it. Furthermore, the fact that dedicated treaties such as the Paris Agreement find

⁴⁴ *Id.*

⁴⁵ At the 2019 Climate Action Summit, sixty-five countries committed to cut GHG emissions to net-zero by 2050, and seventy other countries engaged themselves to boost their national action plans by 2020, or have started the process of doing so; see *About the Summit*, GLOBAL CLIMATE ACTION: NAZCA (Sept., 2019), <https://climateaction.unfccc.int/views/events.html>.

⁴⁶ LEAL-ARCAS, *supra* note 22, at 50.

⁴⁷ *Id.*

⁴⁸ See C. McGrath, *The Role Played by Policy Objectives in Environmental Law*, in RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW (D. Fisher et al. eds., 2016) [hereinafter McGrath].

⁴⁹ Trade Policy Brief, *supra* note 42.

⁵⁰ Paris Agreement, *supra* note 28, at art. 6(4).

themselves unenforceable on reducing GHG emissions,⁵¹ whereas RTAs' environmental clauses are,⁵² is evidence of the work that is still required to be done to attain the 2030 SDGs.

Finally, when considering the impact of trade agreements on sustainability and the environment, it is important to consider the impact on the non-members of these agreements. On the one hand, the effect can be positive, the 'complementarity effect',⁵³ whereby the members of an FTA will lower their tariffs for non-member countries. Conversely, where the effect on the members can be overwhelmingly positive, non-members can suffer greatly from being left out of the trade agreement.⁵⁴ When countries join an FTA, because of the increase in trade between themselves, they become less inclined to trade with non-members of the FTA. This phenomenon referred to as 'trade diversion',⁵⁵ ends up being counterproductive towards the objective of sustainable trade. Although this has been changing over recent times, the considerations of the countries should turn towards sustainability rather than economic growth.

D. Conclusion

This part set out to explain the usage of the trading system to achieve sustainability in the world. It firstly explored the impact the trading system has on sustainable development. It noted that on the one hand, the trading system was the largest single contributor to GHG emissions, and on the other, it showed that developed nations have been displacing pollution on poorer countries. Secondly, it undertook a top-down exploration of trade agreements to identify their shortcomings and determine ways in which they can be improvised. It concluded that MTAs were ineffective in combining issues of trade along with sustainability and environmental protection. It then explored BTAs and RTAs and noted that despite many of the sustainability and environmental protection clauses being vaguely worded and/or legally unenforceable, they constituted a strong start point from which change could originate. This part argued that if any change is to be significant, the nations must change the way in which they look at trade agreements and sustainable development. They must ensure that climate change mitigation and sustainability clauses are legally enforceable. To that extent, this part argued that change would be most efficiently introduced into the trading system in a ground-up way. Finally,

⁵¹ LEAL-ARCAS, *supra* note 22, at 117.

⁵² See e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 20.15, § 2, Mar. 8, 2018, [2018] ATNIA 1 [hereinafter CPTPP].

⁵³ K. Bagwell & R. Staiger, *Multilateral Tariff Cooperation During the Formation of Free Trade Areas*, 38(2) AM. ECON. REV. 291, 291 (1997).

⁵⁴ K. Saggi et al., *Do Free Trade Agreements Affect Tariffs of Non-member Countries? A Theoretical and Empirical Investigation*, 10(3) AM. ECON. J.: APPLIED ECON. 128, 128 (2018).

⁵⁵ *Id.*

agreements at the multinational level must evolve and become capable of treating issues such as trade and sustainability together.

With the deadline for the 2030 SDGs looming, it is essential to plan ahead. It will be important that a new set of goals containing both qualitative and quantitative objectives is set forward.⁵⁶ As explained in the first sub-part, these objectives must be tailored, on the one hand, to the capabilities of each nation and, on the other, to reflect the reality of pollution displacement of some countries. Additionally, building on the idea that the change will be built from the ground-up, participation in achieving these objectives should start at the local level.⁵⁷ The lack of awareness of the 2030 SDGs at the local level,⁵⁸ creates an inefficiency. Having a wider part of the population tackling these issues will prove invaluable in attaining the next set of objectives.

III. THE ROLE OF FTAs IN THE ENERGY TRANSITION

Fiji and other small Pacific-island developing states unsurprisingly have little to no influence on international rules in global trade.⁵⁹ However, in 2020, Fiji became part of a relatively small group of states⁶⁰ that are currently negotiating the Agreement on Climate Change, Trade and Sustainability (ACCTS). Although the text of the ACCTS has not been released, it is a promising representation of the possibility of a future ‘clean’ FTA.⁶¹ As an FTA, the ACCTS could provide Small Island Developing States (SIDS) the much-needed forum for positively influencing or contributing to international trade rules with the focus on climate and environmental matters, with sustainability at its core.⁶²

As such, this part engages with some of the contributions of the past, present, and might-have-been FTAs to climate change action, particularly in relation to the energy sector. The focus on the energy sector is primarily because it contributes

⁵⁶ McGrath, *supra* note 48.

⁵⁷ Bonsu et al., *supra* note 3.

⁵⁸ *Id.* at 9.

⁵⁹ This is often the case because they operate in geographically delineated and isolated economic areas.

⁶⁰ Namely, New Zealand, Switzerland, Norway, Costa Rica, and Iceland.

⁶¹ R. Richardson & B. Trimble, *Clean Tax Cuts & Clean Free Market Policy Innovation*, in GREEN MARKET REVOLUTION: HOW MARKET ENVIRONMENTALISM CAN PROTECT NATURE AND SAVE THE WORLD 81, 96 (C. Barnard & K. Weiss eds., 1st ed. 2020) [hereinafter Richardson & Trimble].

⁶² See Press Release, Fiji Ministry of Commerce, Trade, Tourism and Transport, *Chief Negotiators of the Agreement on Climate Change, Trade and Sustainability (ACCTS)* (Sept. 11, 2020), <https://www.mcttt.gov.fj/publications-resources/press-release/chief-negotiators-of-the-agreement-on-climate-change-trade-and-sustainability-accts/>.

the highest amount of GHG emissions.⁶³ The energy sector includes electricity generation, transportation, and manufacturing.⁶⁴ Transforming the energy sector by shifting from the use of fossil fuels to low-carbon or renewable energy sources is crucial. Despite relatively recent contemporary FTAs addressing challenges beyond the trade aspects,⁶⁵ it has been very perplexing to substantially deal with concrete climate change action that responds to the need to decarbonise the energy sector. As such, this part also sets out two sub-parts that discuss the contribution of future FTAs (such as the ACCTS) in meeting the hurdles to decarbonisation.

The first sub-part proposes that FTAs can contribute to phasing out fossil fuels by reducing or removing support to the same. To that end, it suggests substantive or concrete commitments that should be included in FTAs. The second sub-part proposes that FTAs should actively pursue their platforms for liberalising trade in environmental goods and services (EGS). The focus will especially be on environmental goods complementary to the phasing out of fossil fuels. The last sub-part concludes.

These two sub-parts attempt to respond to the general overarching question of how FTAs contribute to climate change action and sustainable energy in the broader context of sustainable development. More importantly, it attempts to offer some proposals for Fiji's negotiators to consider advocating for in the final text of the impending ACCTS.⁶⁶

A. FTAs and Fossil Fuels

The rationale behind phasing out fossil fuels is simple: emissions from burning fossil fuels are the dominant cause of global warming,⁶⁷ and in order for states to

⁶³ H. Ritchie, *Sector by Sector: Where do Global Greenhouse Gas Emissions Come From?*, OUR WORLD IN DATA (Sept. 18, 2020), <https://ourworldindata.org/ghg-emissions-by-sector>.

⁶⁴ J. Friedrich et al., *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, WORLD RESOURCES INST. (Dec. 10, 2020), <https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters>; see also, *U.S. Energy Facts Explained – Consumption and Production*, U.S. ENERGY INFO. ADMIN. [U.S. EIA], (May 14, 2021), <https://www.eia.gov/energyexplained/us-energy-facts/>.

⁶⁵ HANDBOOK OF DEEP TRADE AGREEMENTS (Aaditya Mattoo et al. eds., 2020).

⁶⁶ We make specific reference to Fiji because of how useful the ACCTS would be for small island states like Fiji that would otherwise have seemingly insignificant global trade influence. The ACCTS provides the forum for small and climate vulnerable states to strongly place at the forefront of trade rules, climate considerations specific to the Pacific. It also helps to amplify Fiji's status in trade that it is part of a group of states with relatively influential status in the global economy.

⁶⁷ INT'L PANEL FOR CLIMATE CHANGE [IPCC], GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-

meet the goals of the Paris Agreement on climate change, there is a need to shift from fossil fuels to low-carbon and renewable energy sources. Although statistics indicate that the demand for fossil fuels may peak in the next decade,⁶⁸ the production and consumption of fossil fuels have been continuously high as they remain rooted in various factors. As an illustration, the majority of the world's primary energy supply is derived from fossil fuels (oil, coal and gas), that accounts for 81% of fossil fuel usage.⁶⁹ Some of these resources are found in states prone to political turmoil. China, a state that heavily relies on fossil fuels to meet 68% of its energy consumption,⁷⁰ mainly depends on states in the Middle East for the supply of fuel. Thus, this leaves China's growing energy demand particularly vulnerable to any geopolitical disruptions that occur in the supplying region.⁷¹ In turn, fossil fuel exporting states rely economically on exploiting and producing such resources for eventual export to large markets like China. These situations — albeit oversimplified, exemplify the geopolitical complexities — along with the high and entrenched dependency on fossil fuels and increased energy demands,⁷² make phasing out fossil fuels less than straightforward and naturally challenging. Some argue,⁷³ in proposing reforms to RTAs (a subset of FTAs), that trade agreements can tackle fossil fuels by dealing with the support given to such non-renewable energy sources, although on an interim basis.⁷⁴ This sub-part builds on this argument; however it suggests that FTAs, having the backing of states that enter into such trade agreements and through the leveraging of market access, should merge concerns of market dependency and climate change into substantive provisions that provide long term solutions in response to fossil fuels. As such, the

INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY (V. Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf [hereinafter GLOBAL WARMING OF 1.5°C].

⁶⁸ *Global Energy Perspective 2021*, MCKINSEY & CO. (Jan., 2021), <https://www.mckinsey.com/industries/oil-and-gas/our-insights/global-energy-perspective-2021>.

⁶⁹ İBRAHİM DİNÇER & OSAMAH SİDDİQUİ, AMMONIA FUEL CELLS (2020) [hereinafter DİNÇER & SİDDİQUİ].

⁷⁰ *Country Analysis Executive Summary*, U.S. EIA (Sept. 30, 2020), https://www.eia.gov/international/content/analysis/countries_long/China/china.pdf.

⁷¹ M. Meidan, *China: Climate Leader and Villain*, in THE GEOPOLITICS OF THE GLOBAL ENERGY TRANSITION (M. Hafner & S. Tagliapietra eds., 2020) [hereinafter Meidan].

⁷² DİNÇER & SİDDİQUİ, *supra* note 69.

⁷³ M. A. Young, *Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies*, 17 INT'L ENVTL. AGREEMENTS: POLITICS, L. & ECON. (2017) [hereinafter Young].

⁷⁴ C. Verkuijl et al., *Tackling Fossil Fuel Subsidies through International Trade Agreements*, CLIMATE STRATEGIES (2017), https://climatestrategies.org/wp-content/uploads/2017/11/CS-Report_FFS-2017.pdf [hereinafter Verkuijl et al.].

following are areas in which FTAs can provide more substantive or concrete commitments in relation to dealing with support for fossil fuels.

1. Explicitly Dealing with Fossil Fuel Subsidies (FFS)

One way to encourage phasing out fossil fuels is by creating stronger commitment and momentum in FTAs to limit or remove measures supporting fossil fuels in the energy sector,⁷⁵ particularly FFS. FFS have adverse impacts on global GHG emissions and ultimately the ability to ensure global warming limits.⁷⁶

Unfortunately, some FTAs have not dealt with the issue of FFS effectively. For instance, the EU–Singapore FTA, in adopting the definition and scope of ‘subsidy’ under the WTO’s Agreement on Subsidies and Countervailing Measures (ASCM), also recognises the goal of progressively reducing subsidies for fossil fuels.⁷⁷ The EU, in particular, has continuously committed to phasing out the use of coal, which produces the most carbon emissions as compared to other fossil fuels.⁷⁸ Yet, Article 11.5 of the EU–Singapore FTA expressly excludes subsidies to the coal industry within the scope of prohibited subsidies.⁷⁹ This is unfortunate as the global decrease in coal power generation,⁸⁰ provided the opportunity for the EU and Singapore to wean off coal subsidies and redirect such support to encouraging diversification in renewable energy sources. Similarly, in the Pacific Agreement on Closer Economic Relations Plus (PACER Plus), a 2020 FTA between Oceania and a group of Pacific SIDS, there were no mentions of the reduction or removal of FFS despite PACER Plus states pledging to move towards renewable energy.⁸¹ Many other states have made similar commitments to phasing out and rationalising FFS. These include states that are among the largest GHG emitters.⁸² For example, the economies of the Group of Twenty (G20) pledged to phase out and rationalise

⁷⁵ Although all sectors are equally important.

⁷⁶ OECD & Int’l Energy Agency [IEA], *Energy and Climate Change: World Energy Outlook Special Report*, IEA (2015), <https://iea.blob.core.windows.net/assets/8d783513-fd22-463a-b57d-a0d8d608d86f/WEO2015SpecialReportonEnergyandClimateChange.pdf>.

⁷⁷ Free Trade Agreement art. 11.5, European Union–Sing., Nov. 14, 2019, O.J. (L 294) [hereinafter EU–Sing. FTA].

⁷⁸ *Natural Gas vs. Coal – A Positive Impact on the Environment*, GASVESSEL, <https://www.gasvessel.eu/news/natural-gas-vs-coal-impact-on-the-environment/>.

⁷⁹ EU–Sing. FTA, *supra* note 77.

⁸⁰ *Electricity Market Report*, IEA (Dec., 2020), https://iea.blob.core.windows.net/assets/a695ae98-cec1-43ce-9cab-c37bb0143a05/Electricity_Market_Report_December_2020.pdf.

⁸¹ *Pacific Agreement on Closer Economic Relations Plus*, PAC. ISLANDS F. (June 14, 2017), <https://www.forumsec.org/wp-content/uploads/2020/05/PACER-Plus-Text.pdf>.

⁸² *Each Country’s Share of CO₂ Emissions*, UNION CONCERNED SCIENTISTS (Aug. 12, 2020), <https://www.ucsusa.org/resources/each-countrys-share-co2-emissions>.

FFS voluntarily in 2009, and since then, have engaged in periodic reporting and sharing experience on FFS.

In a similar fashion, the ACCTS parties have indicated stronger support for the removal of FFS. They have already indicated three core proposals that would be the epitome of this FTA, one of which is to establish concrete commitments to eliminate FFS.⁸³ Arguably, all FTAs have the opportunity to include substantive environmental protection as part of trade deals if the parties to the same so wished. However, the extent to which the ACCTS parties are willing to discipline fossil fuels and support renewable energy is yet to be seen.⁸⁴ The point being made here is that the ACCTS, or FTAs in general, provide the opportunity for international trade agreements to meet with the realities of the state parties and bring them to the international front.

Unfortunately, in the present scenario, removing FFS has not been met with total success. One of the challenges in dealing with FFS is in identifying which measures support fossil fuels, as these can occur in different forms. Many FTAs often refer to the framework of the WTO for guidance on what is considered a subsidy as this is the only multilateral forum regulating FFS and is supported by a dispute settlement mechanism. FTAs are often guided by the definition of a subsidy provided under Article 1 of the ASCM. Essentially, a subsidy is deemed to exist where there is a financial government contribution and where such contribution confers a benefit.⁸⁵ The range of actions constituting a financial government contribution includes direct transfers of funds; government revenue foregone; government provision for goods or services, or purchase of goods; and government payments to a funding mechanism or entrusting or directing a private body to carry out the previously mentioned types of actions.⁸⁶ The ASCM further provides various actions to be taken in the event of a prohibited or actionable subsidy.⁸⁷ However, the ASCM does not account for the impact of subsidies on the environment and on whether such subsidies result in negative or positive externalities.

⁸³ R. Steenblik & S. Droege, *Time to ACCTS? Five Countries Announce New Initiative on Trade and Climate Change*, INT'L INST. SUSTAINABLE DEV. (Sept. 25, 2019), <https://www.iisd.org/articles/time-accts-five-countries-announce-new-initiative-trade-and-climate-change>.

⁸⁴ C. Adolf et al., *TTIP and Fossil Fuel Subsidies: Using International Policy Processes as Entry Points for Reform in the EU and the USA*, HEINRICH BÖLL FOUND. (Mar. 2014), https://www.boell.de/sites/default/files/ttip_fossil_fuel_subsidies.pdf [hereinafter Adolf].

⁸⁵ Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter ASCM].

⁸⁶ *Id.* at art. 1.1(a)(1)(i)-(iv).

⁸⁷ *Id.* at art. 4.

This part proposes going beyond the scope of the ASCM that only seems to discipline subsidies to the extent it distorts trade. Institutions such as the International Energy Agency, the Organisation for Economic Co-operation and Development (OECD), and the International Monetary Fund track and compile the various forms of measures supporting fossil fuels. These compilations of support measures can be used to consider the implications of such support beyond trade distortions.⁸⁸ In particular, the OECD tracked and identified that across the G20, OECD, and EU Eastern Partnership economies, support for the production of fossil fuels (whether indirect or direct) increased by 30%, with fifty states increasing support by 5% year-on-year to US\$ 178 billion in 2019.⁸⁹ Over 1,300 support measures for fossil fuels were identified, including budgetary transfers and tax expenditures providing preferential treatment for the production and consumption of fossil fuels.⁹⁰ These measures identified by the OECD possibly qualify as subsidies within the purview of the ASCM.⁹¹ However, the OECD compilation goes beyond the ASCM and offers a broader dataset, which state parties to FTAs can use to identify all support that can be considered inefficient. For instance, where the ASCM focuses on direct transfer of funds, the OECD's focus is on support, as opposed to subsidy, meaning all budgetary transfers and tax expenditures that provide a benefit to the production or consumption of fossil fuels are significant.

The above-mentioned OECD publication stems from the OECD Inventory of Support Measures for Fossil Fuels (OECD Inventory), an online inventory that, “identifies, documents[,] and estimates the value of support arising from numerous individual policies that encourage production or consumption of fossil fuels”.⁹² By leveraging market access promises through FTAs, states can use the OECD Inventory to identify the various forms of support for fossil fuels to be exported into a specific list. Subsequently, FTAs should specify that the measures contained in this list, which the states agree are tantamount to a subsidy or result in adverse environmental externalities, are required to be reduced or removed within a given timeframe. This broader approach to fossil fuel ‘support’ measures and policies

⁸⁸ World Bank Group, *State and Trends of Carbon Pricing 2019*, WORLD BANK 71 (June, 2019), <https://openknowledge.worldbank.org/handle/10986/31755>.

⁸⁹ OECD, *OECD Companion to the Inventory of Support Measures for Fossil Fuels 2021*, OECD (Mar. 30, 2021), https://www.oecd-ilibrary.org/environment/oecd-companion-to-the-inventory-of-support-measures-for-fossil-fuels-2021_e670c620-en [hereinafter OECD Inventory].

⁹⁰ *Id.*

⁹¹ Harro van Asselt & Tom Moerenhout, *Fit for Purpose? Toward Trade Rules that Support Fossil Fuel Subsidy Reform and the Clean Energy Transition?*, INT'L INST. SUSTAINABLE DEV. (Nov. 18, 2020), <https://pub.norden.org/temanord2020-539/#43723>.

⁹² OECD Inventory, *supra* note 89.

may cast a wider net in identifying, reducing and removing FFS rather than focusing merely on subsidies in the strictest sense.

Therefore, FTAs should either: (a) specify a list of government ‘support’ measures to fossil fuels which state parties agree should be mandatorily reduced or removed within a given timeframe; or (b) agree that the said list of measures is tantamount to inefficient FFS, which states thereby agree are actionable and subject to countervailing measures and remedies under the ASCM or under the said FTA. Specificity in FTAs clarifies what measures are prohibited or actionable and avoids complicated analysis of each measure on a case-by-case basis.⁹³ These provisions would increase further transparency and compel the accountability of states to see through their commitments of disciplining FFS.

Although it is evident that identifying support for fossil fuels increases transparency and following that accountability, it is also worth mentioning that the OECD’s approach to support measures has been used to track and measure FFS in the context of the SDGs.⁹⁴ The OECD Inventory covers support to all fossil fuel production and consumption sectors, including electricity generation, transportation, residential, and other energy transformation sectors other than the industrial and manufacturing sector.⁹⁵ Therefore, by utilising the expansive transparency offered under the OECD Inventory to create a stronger commitment to phasing out fossil fuels, FTAs also help track a number of SDGs. Particularly relevant in the context of fossil fuels is SDG Target 12.c, which relates to rationalising inefficient FFS. Since SDGs are essentially the blueprint to achieving sustainability,⁹⁶ FTAs can also contribute to accounting for the sustainability of energy in the broader context of sustainable development. Additionally, these help states achieve their Nationally Determined Contributions under the Paris Agreement, whereby many states have pledged to reduce their carbon emissions.⁹⁷

For further transparency, FTAs can build on Article 25 of the ASCM, which establishes extensive reporting requirements for notifying subsidies as defined in

⁹³ Adolf, *supra* note 84.

⁹⁴ OECD Inventory, *supra* note 89; *see also*, UNEP & Int’l Inst. Sustainable Dev., *Measuring Fossil Fuel Subsidies in the Context of the Sustainable Development Goals*, UNEP (2019), <https://wedocs.unep.org/bitstream/handle/20.500.11822/28111/FossilFuel.pdf?sequence=1&isAllowed=y>.

⁹⁵ *Id.*

⁹⁶ U.N., *Take Action for the Sustainable Development Goals*, U.N.: SUSTAINABLE DEVELOPMENT GOALS, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

⁹⁷ U.N. Framework Convention on Climate Change, *Nationally Determined Contributions (NDCs)*, U.N.: CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs#eq-4>.

the ASCM.⁹⁸ However, as mentioned previously, all support for fossil fuels should be disclosed. To that end, FTAs should also mandate peer review whereby state parties hold each other accountable to reporting as well as for the commitments to disciplining FFS. Under the OECD Inventory mechanism, such reporting and peer review between states are done voluntarily.

Similarly, the 2014 abandoned provisions of the Trans-Pacific Partnership Agreement (TPP)⁹⁹ would have required parties, who were also members of Asia-Pacific Economic Cooperation (APEC), to apply APEC's voluntary reporting mechanism on reporting and peer-reviewing of FFS reform and progress on phase-out of fossil fuels. Interestingly, the subsequent text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP/TPP-11)¹⁰⁰ omitted any reference to phasing out fossil fuels altogether. In fact, Article SS.15 of the 2014 draft version of the TPP dedicated to "trade and climate change",¹⁰¹ was omitted from the CPTPP. FTAs should bring back such firmly worded provisions found in the TPP and make FFS reporting mandatory.¹⁰²

Irrespective of the approach taken in FTAs to define 'subsidy' and prohibit or remove inefficient FFS, it is argued that, unlike other subsidies, FFS result in trade distortions and negative transboundary environmental externalities.¹⁰³ Anthropogenic emissions (also an externality of FFS) persist for centuries to millennia and will continue to cause further long-term changes in the climate system.¹⁰⁴ This presents an even stronger argument for the inclusion of, alongside trade distortions, considerations for the adverse climate impacts of FFS. In retrospect, the EU–Singapore FTA could have included in the list of prohibited subsidies, support for fossil fuels that adversely impact the environment or climate, regardless of whether such measures affect the trade of the other party.

Therefore, rather than emphasising what is or is not a subsidy, it is proposed that FTAs should boldly recognise that wherever a government measure supporting

⁹⁸ ASCM, *supra* note 85, at art. 25.

⁹⁹ To be clear, this is the abandoned 2014 draft version of the TPP, which was leaked; see *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS (Jan. 15, 2014), https://wikileaks.org/tpp-enviro/#trade_and_climate [hereinafter TPP].

¹⁰⁰ Following US' departure from the TPP, the CPTPP replaced the TPP; CPTPP, *supra* note 52.

¹⁰¹ See TPP, *supra* note 99.

¹⁰² Bacchus suggests the same in the context of the ASCM; J. Bacchus, *Triggering the Trade Transition: The G20's Role in Reconciling Rules for Trade and Climate Change*, ICTSD (2018).

¹⁰³ R. Steenblik et al., *Fossil Fuel Subsidies and the Global Trade Regime*, in THE POLITICS OF FOSSIL FUEL SUBSIDIES AND THEIR REFORM (J. Skovgaard & Harro van Asselt eds., 2018) [hereinafter Steenblik].

¹⁰⁴ Global Warming of 1.5°C, *supra* note 67.

fossil fuels generates transboundary negative environmental externalities, irrespective of whether they are global (climate change) or localised (for instance, transboundary air pollutants), such measures ought to be reduced or removed.¹⁰⁵ Ultimately, the strength of an FTA is heavily dependent on the political will of states to discipline or reform their own fossil fuel sector.¹⁰⁶

As an illustration, Young asserts that attempts to address FFS could follow a similar trajectory to that in the fisheries sector.¹⁰⁷ Reference is again made to the TPP, which contained important subsidy disciplines in the marine fisheries sector.¹⁰⁸ The TPP recognised that in order to deal with the rather inadequate fisheries management, fisheries' subsidies that contributed to overfishing, overcapacity, and illegal, unreported, and unregulated (IUU) fishing needed to be reduced and eventually eliminated.¹⁰⁹ As a consequence, the TPP expressly mandated that none of the parties were to grant or maintain, firstly, any subsidies that supported the fishing of fish stocks that are in an overfished condition and secondly, subsidies to any fishing vessel listed by the relevant approved organisations, involved in IUU fishing, in conformity with international law.¹¹⁰ Albeit in the context of fisheries subsidies, the TPP does present strong support for similar action in respect of FFS. Had it come into force, the TPP would have resulted in significant changes in support for the marine fisheries sector. This would have especially impacted the states heavily reliant on the same, such as Japan and the US. Nonetheless, the TPP's provisions on fisheries subsidies exemplify the commitment translated into firmer language required in FTAs regarding FFS.

Essentially, FTAs should make it mandatory for state parties to disclose any contributions or support rendered in respect of the fossil fuel sector. In fact, following the example of the fisheries subsidies, attention should be given to all the stages of the fossil fuel value chain as there are different FFS or support provided at different levels of the same.¹¹¹ This is of significance as FFS in the upstream sector is said to have the most impact on trade and eventually the most adverse effect on the environment.¹¹² The upstream sector refers to activities involving the exploration, exploitation, and production of oil, gas, coal, and other types of fossil

¹⁰⁵ Steenblik, *supra* note 103.

¹⁰⁶ *Id.*

¹⁰⁷ Young, *supra* note 73.

¹⁰⁸ TPP, *supra* note 99, at art. SS.16.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ T. Moerenhout & T. Irschlinger, *Exploring the Trade Impacts of Fossil Fuel Subsidies*, INT'L INST. SUSTAINABLE DEV. (Mar. 2020), <https://www.iisd.org/system/files/publications/trade-impacts-fossil-fuel-subsidies.pdf> [hereinafter Moerenhout & Irschlinger].

¹¹² *Id.* at 34.

fuels. In the UK alone, GHG emissions from the extraction of oil and gas in 2018 were estimated at 13.2 million metric tons of carbon dioxide (CO₂).¹¹³ Subsidies in the upstream sector are meant to reduce the cost of investment and, essentially, the cost of production, therefore, having a significant distorting impact on trade.¹¹⁴ Therefore, transparency in disclosing government support measures or FFS, although not innovative, is nonetheless crucial.

Subsequently, transparency also allows states to collectively decide upon how to deal with support for fossil fuels with the overall objective of reducing or removing the said support. If such an approach is advanced in FTAs involving major economies, i.e., through mega-RTAs, this will encourage the momentum or commitment for transparency of FFS at the multilateral level.¹¹⁵ This is because, as Schill *et al.* argue, the commitments in mega-RTAs tend to be adopted into other RTAs and, ultimately, can influence multilateral action.¹¹⁶

2. Using FTAs to Coerce SDG and Vice Versa

Some FTAs require states to provide interval reports of subsidies to trade in goods and services. Despite such reporting intended to ensure transparency, the extent of its practice often lacks substantive purpose and is not mandatory.¹¹⁷

In respect of reporting obligations, which are essential for the maintenance of transparency, FTAs can set out a guide for state parties to identify and quantify all support.¹¹⁸ Again, this builds on the already expansive list of measures under the OECD Inventory. In addition, FTAs can provide substance to the obligation of disclosing support for fossil fuels by linking the same to specific commitments under an existing framework that parties have likely agreed to. At present, this cannot be the WTO because energy, in particular, has not been dealt with as a

¹¹³ Ian Tiseo, *Upstream Oil and Gas GHG Emissions by Type UK 2000-2018*, STATISTA (June 29, 2020), <https://www.statista.com/statistics/457901/upstream-oil-and-gas-ghg-emissions-by-type-uk/>.

¹¹⁴ Moerenhout & Irschlinger, *supra* note 111.

¹¹⁵ OECD Inventory, *supra* note 89.

¹¹⁶ S. W. Schill & G. Vidigal, *Reforming Dispute Settlement in Trade: The Contribution of Mega-Regionals*, E15 INITIATIVE (ICTSD & Inter-Am. Dev. Bank, Apr., 2018), <http://e15initiative.org/publications/reforming-dispute-settlement-in-trade-the-contribution-of-mega-regionals/>.

¹¹⁷ For SIDS such as Fiji, reporting obligations can also be resource intensive. This can be addressed if, for instance in the case of the impending ACCTS, obligations are matched with the necessary capacity building assistance.

¹¹⁸ Adolf, *supra* note 84.

distinctive sector in this multilateral forum.¹¹⁹ One reason is that national governance of energy reigns above global governance.¹²⁰ FTAs arguably allow for better connections between the national, regional, and multilateral governance of energy.¹²¹ Some of the WTO's rules may affect energy goods and services. However, FTAs may deal with FFS parallel to the WTO's approach to subsidies.

For instance, the EU–Singapore FTA requires parties to report on a legal basis, the form, the amount (to the extent possible), and recipients of subsidies.¹²² However, not only does this not apply to the coal industry, but any requirement to report for the purposes of transparency is unenforceable under the said FTA. Also, what is achieved by ‘transparency’ seems to be lost in the vague context. Therefore, linking the obligation to disclose with a pre-existing obligation may ease the burden on states to report (avoiding duplication of reporting) and disclosure becomes purposeful. Therefore, FTAs should provide that parties apply a methodology for reporting FFS used in monitoring the United Nations SDGs.¹²³ As mentioned previously, SDG 12 targets, among other things, rationalising inefficient FFS that encourage wasteful consumption.¹²⁴ To help achieve this target, the OECD and the Global Subsidies Initiative of the International Institute for Sustainable Development (GSI) developed a methodology referred to as “Measuring Fossil Fuel Subsidies in the Context of the Sustainable Development Goals” (SDG Mechanism).¹²⁵ FTAs can put forth the obligation upon states to report, under the SDG Mechanism, disaggregated information on all support rendered to fossil fuels.

Essentially, this encourages the assimilation of reporting of the various range of support given to fossil fuels with the aim of improving the progress of transparency of fossil fuel support.¹²⁶ This not only reduces duplication of reporting under the FTA and SDG Mechanism, but it also means that FTAs create

¹¹⁹ W. Jigang & P. Webb, *Special Report 5: International Energy Cooperation and Governance, in CHINA'S ENERGY REVOLUTION IN THE CONTEXT OF THE GLOBAL ENERGY TRANSITION* (2020).

¹²⁰ T. Van de Graaf. & J. Colgan, *Global Energy Governance: A Review and Research Agenda*, 2 PALGRAVE COMM. 15047 (2016), <https://www.nature.com/articles/palcomms201547#article-info>.

¹²¹ See generally R. LEAL-ARCAS ET AL., *ENERGY SECURITY, TRADE AND THE EU: REGIONAL AND INTERNATIONAL PERSPECTIVES* (2016); R. LEAL-ARCAS ET AL., *INTERNATIONAL ENERGY GOVERNANCE: SELECTED LEGAL ISSUES* (2014).

¹²² EU–Sing. FTA, *supra* note 77, at art. 11.9.

¹²³ OECD Inventory, *supra* note 89.

¹²⁴ U.N., *Goal 12: Ensure Sustainable Consumption and Production Patterns*, U.N. DEP'T ECON. & SOC. AFF. (2021), <https://sdgs.un.org/goals/goal12>.

¹²⁵ OECD Inventory, *supra* note 89.

¹²⁶ *Id.*

a closer nexus and meaningful purpose for the need to disclose fossil fuel support. In a way, FTAs can bolster parties' commitments to SDG and vice versa.

On the issue of enforceability, FTAs can draw from Annex 5 of the ASCM, which provides that WTO's Dispute Settlement Body is authorised to engage in information gathering concerning subsidy program.¹²⁷ Alternatively, the GSI proposes that sanctions could be attached to non-compliance with WTO obligations to disclose or report on measures supporting fossil fuels.¹²⁸ FTAs could adopt a similar approach and incentivising states that comply, could improve transparency. In addition, this part proposes a stronger approach to enforcement which involves drawing adverse inferences against a state's support for fossil fuel consumption — where there is non-compliance with transparency, disclosure, or reporting obligations — before the dispute mechanisms either under the FTA or at the WTO. Admittedly, this may prove unpopular.¹²⁹ First, for a long time now, states have been failing even at the WTO to report or disclose support to fossil fuels. Many states have called for strong sanctions for failing to report, but this has been rejected.¹³⁰ The importance of such disclosure cannot be undermined as the first step of phasing out fossil fuels is identifying where the support lies. Second, it ought to be recognised that the pretext of FFS being difficult to challenge because of definitional issues or because some FFS do not clearly distort trade,¹³¹ should not hold water any longer. This is because there are expansive datasets available such as the OECD Inventory that clearly provide the types of government support measures for consideration. As proposed earlier, the availability of these datasets provides the states with the option of identifying and sanctioning FFS or support. Transparency is available; it is a matter of accountability that is lacking on part of the states. As Meyer pointed out, FFS have largely avoided trade-related subsidy disciplines because states have chosen not to challenge them.¹³² Against this background, adverse inferences about the existence of FFS is justified.

B. *Liberalising Renewables*

Phasing fossil fuels needs to be complemented by increasing support for renewable energy. Therefore, it is necessary to remove impediments to the diffusion of EGS. This is because EGS can assist in scaling up renewable energy and ultimately

¹²⁷ ASCM, *supra* note 85.

¹²⁸ Moerenhout & Irschlinger, *supra* note 111.

¹²⁹ This reform proposal was put forward to the WTO, but never agreed to in consensus; see S. Whitley, *Time to Change the Game: Fossil Fuel Subsidies and Climate*, OVERSEAS DEV. INST. (2013), <https://www.cbd.int/financial/climatechange/g-climatesubsidy.pdf>.

¹³⁰ *Id.*

¹³¹ Steenblik, *supra* note 103.

¹³² *Id.*; See also T. Meyer, *Explaining Energy Disputes at the World Trade Organization*, 17(3) INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 391 (2017).

addressing climate change. Liberalising trade in EGS by removing or reducing barriers can lead to lowering costs and increasing accessibility to a range of these EGS and positively encourages innovation in environmental technologies or approaches. As this part places much focus on the energy sector, this sub-part argues that FTAs can liberalise, particularly those environmental goods that support the energy transition in the overall goal of achieving sustainable energy. Liberalising environmental goods will ultimately impact the relevant environmental services needed to support these goods.

1. Renewable Energy and Energy-Efficient Products

The WTO has undertaken efforts to liberalise EGS, and Lang *et al.* argue that it is the appropriate trade-related forum to do so.¹³³ However, success has been limited.¹³⁴ In relation to environmental goods, the WTO-led negotiations on the Environmental Goods Agreement (EGA) have been stalled mainly because of definitional challenges and non-participation of developing states. In turn, this has somewhat stifled progress in the environmental services aspect.

To some extent, existing FTAs promote support for trade and investment in EGS by importing classifications into areas of cooperation between the parties. For instance, the EU–Korea FTA requires parties to ‘strive’ to facilitate and promote trade and foreign direct investment (also through addressing related non-tariff barriers) in EGS, including “environmental technologies, sustainable renewable energy, energy-efficient products[,] and eco-labelled goods”.¹³⁵ Likewise, the EU–Singapore FTA requires parties to facilitate and promote trade and investment in EGS.¹³⁶ The parties agree to facilitate the removal of obstacles to trade concerning “climate friendly goods such as sustainable renewable energy goods and energy-efficient products and services”.¹³⁷ Similarly, the textual proposals for the Transatlantic Trade and Investment Partnership (TTIP) provided that parties were to facilitate and promote trade and investment in EGS, such as “sustainable renewable energy goods, and energy-efficient goods, the adoption of policy frameworks conducive to the deployment of best available technologies[,] and the promotion of initiatives that respond to environmental and economic needs and minimise technical obstacles to trade”.¹³⁸ Finally, in the EU–Colombia–Peru

¹³³ Verkuil et al., *supra* note 74.

¹³⁴ A. Berger et al., *Towards Greening Trade? Environmental Provisions in Emerging Markets’ Preferential Trade Agreements*, in SUSTAINABILITY STANDARDS AND GLOBAL GOVERNANCE (A. Negi et al. eds., 2020).

¹³⁵ EU–S. Kor. FTA, *supra* note 31, at art. 13.6(2).

¹³⁶ EU–Sing. FTA, *supra* note 77, at art. 12.11(1).

¹³⁷ *Id.* at art. 12.11(2).

¹³⁸ EU Textual Proposal: Trade Favouring Low-Emission and Climate-Resilient Development, EU ¶ 4.1 (July, 2016),

FTA,¹³⁹ while considering actions to contribute to achieving climate change mitigation and adaptation through their trade and investment policies, the parties agreed to facilitate the removal of trade and investment barriers to access, innovation, development, and deployment of goods and technologies that contribute to mitigation and adaptation.¹⁴⁰

Conversely, FTAs between larger economies, such as the CPTPP, fall short of defining EGS. Although the parties to the CPTPP have ‘endeavoured’ to address any political barriers to trade in EGS,¹⁴¹ they are left to decide on issues relating to trade in EGS, which presumably include the categories or classifications of such goods mentioned in the TTIP and other FTAs. In the Regional Comprehensive Economic Partnership (RCEP), which is a mega-RTA between major economies, there is no reference at all to EGS.

The above-mentioned FTAs marginally (or not at all, in the case of RCEP) provide broad classifications on the EGS that require liberalising. Addressing EGS more specifically could be beneficial. Although this may contravene WTO rules, particularly Article XXIV of the GATT, these rules are believed never to be fully enforced.¹⁴² In support, Winters states that owing to the increased political and economic importance of FTAs, the WTO is less inclined to impose restrictions.¹⁴³ FTAs are liberal in liberalising EGS, especially those environmental goods evidently needed to respond to climate change.

Indeed, what constitutes environmental goods is without precision because of the heterogeneity of goods (that will continue to expand as technology evolves), which are usually integrated into production processes and are often hard to tease out as separate items. Nonetheless, in addition to setting out broad classifications of EGS, FTAs can build upon or expand existing EGS lists as well as allow for flexible interval renegotiations of the said list.

For instance, some of the FTAs mentioned above recognise core renewable energy subsectors which are referenced under the APEC List of Environmental Goods

https://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154800.pdf (this document was referred to in the Report of the 14th Round of Negotiations for the Transatlantic Trade and Investment Partnership).

¹³⁹ EU-Colom.-Peru Trade Agreement, *supra* note 33.

¹⁴⁰ *Id.* at art. 275.

¹⁴¹ CPTPP, *supra* note 52, at art. 20.18(3).

¹⁴² E. Lydgate & L. A. Winters, *Deep and Not Comprehensive? What the WTO Rules Permit for a UK-EU Trade Agreement*, 18(3) WORLD TRADE REV. 451 (2019).

¹⁴³ *Id.*; In addition, all WTO members are also members of at least one RTA, see *Regional Trade Agreements: An Introduction*, WTO (Sept. 15, 2021), https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm.

and Services (APEC List)¹⁴⁴ and by the OECD. These include renewable energy technologies such as solar and wind. The APEC List pioneered the first set of environmental goods that major trading parties agreed were eligible for tariff reductions. The APEC List set complete tariff reductions to not more than 5% for fifty-four goods.¹⁴⁵ The EGA intended to draw on the experience of the APEC members. However, it has not achieved the same.¹⁴⁶

Unlike at the EGA level, the FTA approach may be more successful as FTA parties are deeply integrated regional or economic trading blocs, suggesting less complicated negotiations (as evidenced in the case of the APEC List). As an illustration, the CPTPP parties are all economic members of the APEC and as such could import — even if only a subset — the APEC List of EGS under the CPTPP. The same could be achieved under RCEP, where the majority of its parties also have economic membership to the APEC.

Even states that are not a part of a significant regional or economic trading bloc, as in the case of the ACCTS parties, have proposed the removal of tariffs on environmental goods. As such, FTAs could build upon the APEC List or explore additional goods drawing from other FTAs. FTAs can also build on the definition of environmental goods provided by the OECD and Eurostat, which include “activities which produce goods to measure, prevent, limit, minimise[,] or correct environmental damage to water, air[,] and soil, as well as problems related to waste, noise[,] and eco-systems”.¹⁴⁷ This encompasses parts for conventional renewable energy, such as solar and wind, and the related technology.

FTAs could focus on energy-efficient products or renewable energy products that ought to be specifically mentioned in FTAs and given the privilege of removal of tariff and non-tariff barriers. For instance, the EU–Korea FTA provides for the entire removal of customs duties on some materials relevant to renewable energy, including photovoltaic cells, solar collectors, and parts thereof, and other such equipment.¹⁴⁸ Unfortunately, the said FTA does not seem to liberalise goods relevant to hydropower generation or wind energy. In addition, electric vehicles did not receive immediate reduced barrier benefits under the said FTA as compared to internal combustion vehicles (to which customs duties have been eliminated

¹⁴⁴ Asia-Pac. Econ. Co-operation [APEC], *2012 Leader’s Declaration, Annex C – APEC List of Environmental Goods*, APEC (Sept. 8, 2012), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm/2012_aelm_annexC [hereinafter APEC].

¹⁴⁵ Market Access Group, *APEC Advances Environmental Goods Tariffs Cut*, APEC (Mar. 11, 2021), https://www.apec.org/Press/News-Releases/2021/0311_MAG.

¹⁴⁶ *Id.*

¹⁴⁷ Richardson & Trimble, *supra* note 61.

¹⁴⁸ EU-S. Kor. FTA, *supra* note 31.

entirely), despite the fact that the lifetime cost of battery electric vehicles is lower than that of internal combustion vehicles.¹⁴⁹

Additionally, the APEC List refers to the classification of renewable energy, which includes reference to wind turbines.¹⁵⁰ Generally, wind turbine manufacturing is limited to a few manufacturers with the required technological expertise to encourage trade in wind turbines.¹⁵¹ Therefore, for many states without domestic capabilities, it is challenging to replicate these technologies at the level of efficiency required. Their wind energy sector is dependent on access to these technological advancements through trade. Trade in wind turbines is, thus, crucial. Since 2007, Fiji has used relatively conventional wind turbine technology involving a two-blade system. While this has meant some diversification of Fiji's energy mix, onshore wind energy only contributed less than 1% to Fiji's energy demand, whereas fossil fuels provided 42%.¹⁵² In addition, modern wind turbines and technological wind systems linked to other renewable source facilities are also crucial in eliminating intermittency issues.¹⁵³

In fact, feasibility studies regarding offshore power plants in Fiji indicate the potential benefit of having offshore power plants where the wind is stronger and more uniform at sea.¹⁵⁴ Constructions of offshore wind farms are predicted to immensely support the national electricity grid in Fiji instead of the present onshore wind farms.¹⁵⁵ However, this will require better wind turbine selection and technology systems. There are other factors that impact Fiji's energy mix, but undeniably having access to the latest technology in renewables such as wind turbines can increase the renewables' efficiency, especially for Pacific SIDS. The barriers to trade in wind turbines are also barriers to vital environmental technologies which are not otherwise widely available.¹⁵⁶ Therefore, at least in the case of Fiji, it would be wise to firmly push for the liberalisation of such energy

¹⁴⁹ Roland Geyer, *It's Unavoidable: We Must Ban Fossil Fuels to Save Our Planet. Here's How We Do It*, GUARDIAN (Mar. 9, 2021), <https://www.theguardian.com/commentisfree/2021/mar/09/its-unavoidable-we-must-ban-fossil-fuels-to-save-our-planet-heres-how-we-do-it>.

¹⁵⁰ APEC, *supra* note 144.

¹⁵¹ G. Garsous & S. Worack, *Trade as a Channel for Environmental Technologies Diffusion: The Case of the Wind Turbine Manufacturing Industry* (OECD Trade & Env't, Working Papers No. 2021/1, 2021) [hereinafter Garsous & Worack].

¹⁵² K. DAYAL ET AL., *PREFEASIBILITY STUDY OF OFFSHORE WIND ENERGY TO SUPPORT THE NATIONAL ELECTRICITY GRID IN FIJI* (2021) [hereinafter DAYAL].

¹⁵³ B. K. Sovacool & C. Watts, *Going Completely Renewable: Is It Possible (Let Alone Desirable)?*, 22(4) *ELECTRICITY J.* 95 (2009).

¹⁵⁴ DAYAL, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ Garsous & Worack, *supra* note 151.

products in the ACCTS negotiations. By removing barriers to access these technologies, FTAs advance a transition to clean energy, especially for developing economies; and may also encourage increased deployment of other energy-efficient materials such as lightning, wind, and solar power generating plants and batteries.¹⁵⁷

2. Creating Rules for Renewable Subsidies

States continue to support fossil fuels despite its trade-distorting effects. In 2018, the world-wide FFS was over US\$ 400 billion, double that of renewable subsidies.¹⁵⁸ Renewable energy subsidies can encourage the growth of the said sector. As such, it is proposed that FTAs should require states to set out a list of support required to subsidise the renewable energy sector. Admittedly, this sub-part recognises that this proposal is problematic in terms of consistency with the ASCM. In fact, renewable energy subsidies have come under WTO scrutiny whereby essentially it is argued that such subsidies attract trade-distorting effects.

In spite of this, it is proposed that FTAs should expressly specify a list of environmental products that can be subjected to ‘renewable’ subsidies, which FTAs express as non-actionable. Of course, the ASCM has its own criteria in identifying non-actionable subsidies (Article 8.2(c), in particular).¹⁵⁹ The ASCM framework already provides the response to trade-distorting measures, including the imposition of countervailing measures. However, it does not account for the necessity of climate change action and mitigation, and therefore the opportunity presents itself for FTAs to fill this gap. Even if renewable subsidies do not conform to the non-actionable criteria provided under the ASCM, so long as such subsidies are not prohibited subsidies,¹⁶⁰ FTAs should allow parties to agree not to challenge these otherwise actionable subsidies under the ASCM. This argument is an inversion of Article 11 of the EU–Singapore FTA that had excluded the coal industry from the application of prohibited subsidies.¹⁶¹ While the said FTA provides leeway for a subsidising party to demonstrate that the subsidy in question is not prohibited, this relates to where the subsidy does not affect the other party’s

¹⁵⁷ Meidan, *supra* note 71.

¹⁵⁸ W. Matsumura & Z. Adam, *\$400bn in Global Fossil Fuel Consumption Subsidies, Twice that for Renewables*, ENERGYPOST.EU (June 20, 2019), <http://energypost.eu/400bn-in-global-fossil-fuel-consumption-subsidies-twice-that-for-renewables/>.

¹⁵⁹ ASCM, *supra* note 85, art. 8.2(c).

¹⁶⁰ Within the purview of Article 3 of the ASCM – this had been the case in the US–Renewable Energy case, where subsidies were attached to local content requirements thereby constituting prohibited subsidies; *See* Panel Report, *United States — Certain Measures Relating to the Renewable Energy Sector*, WTO Doc. WT/DS510/R (adopted June 27, 2019) [hereinafter US — Renewable Energy].

¹⁶¹ EU–Sing. FTA, *supra* note 77, art. 11.

trade.¹⁶² There is no consideration for the positive environmental impact that renewable energy subsidies have in reducing GHG emissions. Therefore, it is recommended that FTAs include environmental or climate change carve-outs or exceptions to the application of subsidies. Additionally, FTAs could allow for states to negotiate to offset each other's renewable energy subsidies.

States that have vocalised their commitment to the energy transition must equally make stronger and bolder commitments in their FTAs. The ACCTS parties, for instance, can go beyond regurgitating rules of the ASCM that seem to have worked against renewable energy. In addition to the proposals made earlier, ACCTS should include a waiver for renewable energy subsidies justifying such subsidies as necessary to protect human, animal, or plant life or health.¹⁶³ Howse proposes that such a waiver could apply to existing renewable energy subsidies and be conditioned on the removal of any discriminatory element including local content requirements or contrary to the purpose of the waiver and be granted temporarily.¹⁶⁴ Arguably, allowing for waivers at the FTA level can act as a catalyst for political persuasion,¹⁶⁵ for multilateral action for waivers in the broader context of climate change on the basis that the extent of the impact of the climate crisis warrants exceptional circumstances for the said waivers.¹⁶⁶

3. Nuclear Energy as a Clean Energy Source

Nuclear energy is controversial because of its history,¹⁶⁷ and the immense costs associated with constructing nuclear power plant facilities. However, it remains crucial to the energy transition. Through a process called fission, involving splitting

¹⁶² *Id.* at art. 11.7(2).

¹⁶³ General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

¹⁶⁴ R. Howse, *Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis*, INT'L INST. SUSTAINABLE DEV. (May, 2010), https://www.iisd.org/system/files/publications/bali_2_copenhagen_subsidies_legal.pdf [hereinafter Howse].

¹⁶⁵ J. Bacchus, *Special Report: The Case for a WTO Climate Waiver*, CTR. INT'L GOVERNANCE INNOVATION (2017), [https://www.cigionline.org/static/documents/documents/NEWEST Climate Waiver - Bacchus_0.pdf](https://www.cigionline.org/static/documents/documents/NEWEST_Climat_Waiver_-_Bacchus_0.pdf) [hereinafter Bacchus].

¹⁶⁶ This was the case for states participants to the Kimberly Process Certification Scheme for Rough Diamonds that had requested a waiver from the WTO in respect of measures prohibiting export and import of rough diamonds to and from non-participants to the said scheme on the basis that human rights violations were fuelled by trade in conflict diamonds; *See Agreement Reached on WTO Waiver for 'Conflict Diamonds'*, WTO (Feb. 26, 2003), https://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm.

¹⁶⁷ Most notably, the three major nuclear shocks: Three Mile Island in US, Chernobyl in Ukraine, and the aftermath of the Fukushima disaster in Japan.

uranium atoms in a nuclear reactor, nuclear power produces heat for power generation and, ultimately, clean and efficient electricity.¹⁶⁸ It also acts as a ‘spinning reserve’ for renewable energy,¹⁶⁹ meaning that it provides a stable power source necessary to address the renewable intermittency issues. Therefore, FTAs can promote nuclear energy as a means to meet energy demands as states move away from dependency on fossil fuels.

As is the recurring theme in this part on the attitude towards renewable and non-renewable energy, markets and regulatory systems do not account for the positive environmental externality of new energy by pricing in its value as a clean energy source and its contribution to energy security.¹⁷⁰ As such, FTAs can include aspects of trade in nuclear material, such as reducing tariffs and quotas, although this is still subject to states meeting international nuclear safeguard obligations. In a way, FTAs can promote the perception of nuclear power as a legitimate means to support the energy transition.

The EU–Korea FTA provides for various eliminations of customs on originating goods which relate to nuclear materials and equipment.¹⁷¹ These materials include nuclear reactors, parts of nuclear reactors, machinery and apparatus for isotopic separation, spent fuel elements (which is reflective of recyclability of used nuclear fuel),¹⁷² centrifuges (crucial to the enrichment of uranium), etc. All these have a staging category of ‘0’, meaning that the parties must eliminate customs duties entirely on these materials.¹⁷³ Essentially, this encourages the nuclear energy sector in the EU and South Korea to benefit from the support in trade to nuclear materials. The said FTA also allows parties to consider accelerating and broadening the scope of eliminating customs duties on these goods. Of course, there are

¹⁶⁸ *Nuclear Power Basics*, HITACHI, <https://nuclear.gepower.com/company-info/nuclear-power-basics>.

¹⁶⁹ See generally Maria del Carmen Prats Soriano, *Spinning Reserve Provided by Renewable Energy Sources* (July, 2019) (unpublished Master’s Thesis) (on file with the Universidad Pontificia Comillas, Escuela Técnica Superior de Ingeniería), <https://repositorio.comillas.edu/xmlui/bitstream/handle/11531/40822/TFM-%20Prats%20Soriano%2C%20Carmen.pdf?sequence=1&isAllowed=y>.

¹⁷⁰ *Nuclear Power in a Clean Energy System*, IEA (May, 2019), https://iea.blob.core.windows.net/assets/ad5a93ce-3a7f-461d-a441-8a05b7601887/Nuclear_Power_in_a_Clean_Energy_System.pdf.

¹⁷¹ EU-S. Kor. FTA, *supra* note 31, at art. 2.5, annex 2-A; see also COMMITTEE ON EXITING THE EUROPEAN UNION, NUCLEAR SECTOR REPORT, 2017, HC ¶ 79 (UK), <https://www.parliament.uk/globalassets/documents/commons-committees/Exiting-the-European-Union/17-19/Sectoral-Analyses/24-Nuclear-Report.pdf>.

¹⁷² This, arguably, is an advantage of nuclear energy, as spent fuel is capable of being reused in the nuclear generation.

¹⁷³ EU-S. Kor. FTA, *supra* note 31, at annex 2-A.

bilateral safeguards in place,¹⁷⁴ but the point being made here is that the said FTA has given crucial support to nuclear material, emphasising the extensive use of nuclear power in the EU and South Korea.¹⁷⁵

There is also increasing renewed interest in nuclear energy, as seen by the number of nuclear reactors under construction or proposed (particularly in Asia). India, for instance, has achieved independence in its nuclear fuel cycle, while China is increasingly honing on technology to do the same.¹⁷⁶ This could mean that states become less dependent on importing fossil fuels in order to meet energy demand.

FTAs, as was the case with the EU–South Korea FTA, can focus on reducing duties on imports of nuclear reactors, tariffs on machinery and apparatus for isotopic separation, fuel elements and nuclear reactor parts and a wide range of water boilers, which would boost the usage of nuclear power in the state parties.

There is also an interest in small modular reactors (SMRs) which are advanced factory-built reactors capable of producing up to 300MW of electricity that can be deployed or shipped for installation where required.¹⁷⁷ Although SMRs are still at development stages, it is worth considering in terms of future-looking FTAs. The first SMR design was approved in the US in 2020, and operation is expected to begin in 2029.¹⁷⁸ In Canada and the UK, there has been some planning for the development of SMRs.¹⁷⁹ SMRs are considered cost-effective and do not involve costly overruns, as is often the case with nuclear power facilities. In addition, SMRs are intended to include enhanced safety mechanisms.¹⁸⁰ Therefore, SMRs have the

¹⁷⁴ *Id.* at ch. 3.

¹⁷⁵ *EU-South Korean Deal to Benefit Nuclear Power Sector*, WORLD NUCLEAR NEWS (Oct. 22, 2009), https://www.world-nuclear-news.org/NP-EU_South_Korean_deal_to_benefit_nuclear_power_sector-2210095.html.

¹⁷⁶ *Asia's Nuclear Energy Growth*, WORLD NUCLEAR ASS'N (Aug., 2021), https://world-nuclear.org/information-library/country-profiles/others/asias-nuclear-energy-growth.aspx#:~:text=Asia%20is%20the%20main%20region,Many%20more%20are%20proposed_.

¹⁷⁷ Int'l Atomic Energy Agency [IAEA], *Considerations for Environmental Impact Assessment for Small Modular Reactors* (IAEA, IAEA-TECDOC-1915, June, 2020), https://www-pub.iaea.org/MTCD/Publications/PDF/TE-1915_web.pdf.

¹⁷⁸ Office of Nuclear Energy, NRC Approves First U.S. Small Modular Reactor Design, U.S. DEP'T ENERGY: OFF. NUCLEAR ENERGY (Sept. 2, 2020), <https://www.energy.gov/ne/articles/nrc-approves-first-us-small-modular-reactor-design>.

¹⁷⁹ Omar Yusuf, *Development of SMRs: European Experts Explore Strategies for Stakeholder Involvement*, IAEA (Feb. 5, 2021), <https://www.iaea.org/newscenter/news/development-of-smrs-european-experts-explore-strategies-for-stakeholder-involvement>.

¹⁸⁰ *Id.*

potential to be widely accessible to the world. Of course, this will be subject to international standards on nuclear safety and security.

SMRs provide an opportunity to revolutionise the world's energy industry and indeed the energy transition; and therefore, FTAs need to consider (when the technology is finalised) materials and technologies related to the area of SMRs.

C. Conclusion

In terms of climate change mitigation efforts that are realisable and effective, addressing emissions in the energy sector presents a 'low-hanging fruit'. As such, FTAs should provide express provisions to limit or altogether remove support provided to fossil fuels which are the cause of GHG emissions in the energy sector. Furthermore, FTAs should draw on the already expansive datasets provided in the OECD Inventory to increase transparency and accountability of removing all inefficient FFS or support. FTAs are also instrumental in impacting change at the multilateral level through the creation of new rules regarding fossil fuels and renewables.

In addition, scaling up environmental goods that support renewable energy is crucial. To that end, and in spite of the definitional challenges to EGS faced at the multilateral level, FTAs should seek more favourable treatment for environmental goods. A fundamental observation of the APEC List, OECD and Eurostat contributions indicate that the various EGS that could be liberalised is potentially vast.

Therefore, FTAs can expand on these definitive lists, and in turn, provide catalytic reactions to multilateral negotiations such as the EGA. Finally, FTAs should also consider encouraging the diversification of renewable energy sources. The suggestion made herein encourages nuclear energy considering the increased renewed interest in the same and the technological advancements in SMRs.

Overall, it is argued that the above roles of FTAs contribute to climate mitigation action and promote sustainable energy in the broader context of sustainable development. This is also true for open plurilateral agreements such as the ACCTS, which is currently under negotiation. Under this agreement, Fiji, by becoming a part of a group of states, might be able to push towards ensuring the inclusion of sustainable provisions. Hopefully, other like-minded countries may join it in the near future and the suggestions made herein are taken into account at the negotiating table.

IV. TRADE LAW AS THE ENFORCER OF CLIMATE CHANGE OBLIGATIONS: THE PERSPECTIVE OF CARICOM STATES

While climate change agreements are specialized, and set out policy priorities among state parties, their largely non-binding nature and the absence of robust enforcement mechanisms do not advance the ambition of state compliance. Additionally, they may be inefficient in: advancing more proportionate and suitable goals to a complex issue; engaging non-state actors; and enticing continuous participation from actual and potential members. As a result, the respective agreements may be considered to be in a state of desuetude, or for some, of limited effectiveness until there is substantive reform.

Climate change is not only anthropogenic, but also an existential and pervasive issue.¹⁸¹ To name a few effects, climate change affects state security, environmental preservation, international co-operation, and human rights.¹⁸² These effects are increasingly visible in SIDS, and Small and Vulnerable Economies (SVEs).¹⁸³ Barbados, as an SIDS, has commented that SIDS are more vulnerable than other states to climate change because of their exposure to exogenous shock in the form of hurricanes, flash-flooding, and other natural disasters.¹⁸⁴ Furthermore, SVEs' dependence on agriculture has caused the impact of natural disasters to be significantly heightened when compared to other states. Moreover, coral reefs, which are instrumental to the protection of island coasts from hurricanes, have been substantially degraded because of global warming and acidification.¹⁸⁵ Lastly, the situation of 'climate change refugees' or people displaced across borders due to weather-related disasters,¹⁸⁶ and internally displaced peoples has been exacerbated because of geographical displacement.¹⁸⁷

¹⁸¹ Rafael Leal-Arcas, *Unilateral Trade-Related Climate Change Measures*, 13 J. WORLD INV. & TRADE 875, 892 (2012) [hereinafter Leal-Arcas (2012)].

¹⁸² *Climate Change and Human Rights*, UNEP & SABIN CTR. CLIMATE CHANGE L. (Dec., 2015), [https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rights-climate-change.pdf.pdf?sequence=2&isAllowed=1](https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rights%3Fsequence=2&isAllowed=1).

¹⁸³ Poorvi Goel et al., *Priorities for Small and Vulnerable Economies in the WTO: Nairobi and Beyond*, 122 COMMONWEALTH: HOT TRADE TOPICS (2015), <https://www.tralac.org/images/docs/8624/priorities-for-sves-in-the-wto-nairobi-and-beyond-commonwealth-trade-hot-topics-november-2015.pdf>.

¹⁸⁴ WTO, Committee on Trade and Development Thirty-Eighth Dedicated Session, Note on the Meeting of 29 April 2019, WTO Doc. WT/COMTD/SE/M/38 (Oct. 21, 2019).

¹⁸⁵ Laretta Burke & Jonathan Maidens, *Reefs at Risk in the Caribbean*, WORLD RESOURCES INST. (2004), <https://www.wri.org/research/reefs-risk-caribbean>.

¹⁸⁶ Tetsuji Ida, *Climate Refugees – The World's Forgotten Victims*, WORLD ECON. F. (June 18, 2021), <https://www.weforum.org/agenda/2021/06/climate-refugees-the-world-s-forgotten-victims/>.

¹⁸⁷ *Climate Change and Disaster Displacement*, U.N. HIGH COMMISSIONER REFUGEES, <https://www.unhcr.org/climate-change-and-disasters.html>.

Much in the way the effects of climate change are ubiquitous, the system of trade law that regulates the conduct of human affairs is far-reaching. It is therefore unsurprising that there is an inexorable connection between trade law and climate change. On one hand, unchecked trade policy has detrimental effects on the larger efforts to combat climate change; on the other, it is an effective tool in climate change mitigation. It is noteworthy that trade policy appertains to the WTO Agreement, plurilateral, bilateral, and regional trade agreements, and domestic policies with the direct or indirect effect of causing change in the international trade landscape. The Revised Treaty of Chaguaramas (RTC) is an example of a trade instrument. It is an RTA and the constituent treaty for the CARICOM including the Caribbean Single Market and Economy (CSME). The RTC also sets out that Organs of CARICOM are competent to promote and develop policies for the protection and the preservation of the environment and for sustainable development.¹⁸⁸ It also provides that states party to the RTC should undertake to implement the policies of the Community within their domestic law.¹⁸⁹ As such, the trade polices enacted at the Community level may become national trade measures. Therefore, unless a member state opts-out of the Community decision, there should be a streamlining of regional trade policies at the domestic level.

Addressing climate change within trade blocs is neither new nor innovative. The Parliament of the EU has sought to levy carbon border adjustment mechanisms to combat climate change.¹⁹⁰ Similarly, the USMCA, while not expressly addressing climate change, has advanced an environmental chapter that is likely to have some effect on the efforts to address climate change.¹⁹¹ Likewise, in the face of the Amazon fires of 2019, members of the Parliament of the EU called for the EU–

¹⁸⁸ Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, 2259 U.N.T.S. 293 [hereinafter RTC]; This treaty is supported by: *Protocol on the Provisional Application of the Revised Treaty of Chaguaramas*, SICE, FOREIGN TRADE INFO., ORG. AM. STATES (Feb. 4, 2002), <http://www.sice.oas.org/Trade/CCME/prtapch.asp>; and the *Protocol on the Revision of the Treaty of Chaguaramas*, SICE, FOREIGN TRADE INFO., ORG. AM. STATES (Jan. 1, 2006), <http://www.sice.oas.org/Trade/CCME/prtrevch.asp> (The latter Protocol makes provision for the legal transition from the original CARICOM and common market to the new CARICOM including the CARICOM Single Market and Economy. This is necessary because the same Protocol terminates the former CARICOM Treaty (art. V) and dissolves the old organization (art. III(d)).) For treaty information, see CARICOM SECRETARIAT, MATRIX OF AGREEMENTS art. 15 (July, 2012).

¹⁸⁹ RTC, *supra* note 188, at art. 13.

¹⁹⁰ Enrique Gomez Ramirez, *Amazon Wildfire Crisis: Need for an International Response*, EUR. PARLIAMENT: THINK TANK (Nov. 29, 2019), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2019\)644198](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2019)644198).

¹⁹¹ Agreement between the United States of America, the United Mexican States, and Canada art. 24, Nov. 30, 2018, PUB. L. 116–113 [hereinafter USMCA].

Mercosur Trade Agreement to be frozen to leverage stronger climate and environmental concerns in partnered countries.¹⁹² As such, while CARICOM's global share of GHG emissions and trade is relatively marginal, its design of policies to mitigate climate change will add to the trade and environmental conversations already in motion.¹⁹³

It is with this in mind that this part addresses how trade law can be the enforcer of climate change obligations within CARICOM. It begins from the position that the overarching aim of climate change obligations is to transition to climate-friendly economies and to limit the global average temperature to well below two degrees Celsius above pre-industrial levels. This is achievable by reducing the emission of GHGs and actualizing the shift from non-renewable to renewable energy sources. This part accepts the position that climate change agreements are ill-suited to achieve the intended results and proposes that the CARICOM RTA, the RTC, can affect these results. Since this discussion is localized to CARICOM states, it considers how universal paradigms may be oriented into regional regulations, taxes, tariffs, and subsidies. Additionally, this part attempts to weigh the objective of climate change enforcement against development priorities such as attracting foreign investments and increasing regional competitiveness.

A. CARICOM's Intergovernmental Trade Infrastructure to Address Climate Change

Trade measures within CARICOM are determined and implemented by the Conference of Heads of Government (Conference), the Council of Ministers, the Council of Trade and Economic Development (COTED), and the Council of Foreign and Community Relations.¹⁹⁴ The RTC sets out specific functions of each Organ. Intriguingly, the powers and functions of each Organ are expansive. Further, the RTC does not outline substantive outer limits to the exercise of the Organs' functions and powers. Effectively, pursuant to the powers set out in the Articles, each Organ may make decisions on trade that conform to the object and purpose of the treaty. The RTC however imposes procedural outer limits. As such, the Organs must adhere to the respective voting requirements in their decision making for the decision to be valid.¹⁹⁵

¹⁹² Jana Titievskaia, *Using Trade Policy to tackle Climate Change*, EUR. PARLIAMENT RES. SERVICES (Oct., 2019), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/642231/EPRS_ATA\(2019\)642231_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/642231/EPRS_ATA(2019)642231_EN.pdf).

¹⁹³ *Greenhouse Gas Emissions in the Eastern and Southern Caribbean Region*, U.S. AGENCY INT'L DEV. (Apr. 30, 2017), http://www.ipsnews.net/Library/2019/02/2017_USAID_GHG-Emissions-Factsheet_Eastern-and-Southern-Caribbean-Regional.pdf.

¹⁹⁴ RTC, *supra* note 188, at arts. 10, 15 & 16.

¹⁹⁵ *Id.* at arts. 27 & 28.

Article 12 of the RTC states that, “the Conference shall determine and provide policy direction[s] for the Community.”¹⁹⁶ Similarly, “the Conference may issue policy directives of a general or specific character to other Organs and Bodies of the Community concerning the policies to be pursued for the achievement of the objectives of the Community.”¹⁹⁷ Under Article 13, the Council of Ministers has the duty to issue directives to Organs aimed at ensuring the timely implementation of Community decisions.¹⁹⁸ The COTED has wide responsibilities and duties regarding trade. Broadly, its duties are to ensure that trade relations within the Community and between the Community and third parties is efficient and within the interest of the member states.¹⁹⁹ The duties of the Council of Foreign and Community Relations are narrower. With regard to trade, it is tasked with ensuring that the trade policies determined are coordinated to maintain or preserve external foreign relations with the Community.²⁰⁰ The RTC also imposes on these Organs the duties and responsibilities to manage environmental degradation and the climate change crisis. These treaty obligations are a manifestation of the individual will of member states to address climate change.²⁰¹ Pursuant to Article 15(e), COTED is obligated to “promote measures for the development of energy and natural resource on a sustainable basis”.²⁰² Similarly, COTED has an obligation to “promote and develop policies for the protection of and preservation of the environment and for sustainable development”.²⁰³ Additionally, in pursuing its industrial trade policy, the Community shall enhance industrial production on an environmentally sustainable basis.²⁰⁴

The RTC also imposes a broad duty on the Organs to “undertake any additional functions remitted to it by the Conference, arising under this Treaty.”²⁰⁵ This is a ‘catch all’ obligation and it is relevant to the environment and climate change. In a fast paced and moving international system, it is conventional that issues will arise that are not specifically contemplated by the RTC. As such, the Conference may be required to formulate rules on the environment and climate change and provide those policy directions to other Organs of the Community.

¹⁹⁶ *Id.* at art. 12.2.

¹⁹⁷ *Id.* at art. 12.7.

¹⁹⁸ *Id.* at art. 13.4(h).

¹⁹⁹ *Id.* at art. 15.

²⁰⁰ *Id.* at art. 16.

²⁰¹ Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

²⁰² RTC, *supra* note 188, at art. 15.2(e).

²⁰³ *Id.* at art. 15.2(h).

²⁰⁴ *Id.* at art 51.2(g).

²⁰⁵ *Id.* at art. 13.

B. Trade Mechanisms within CARICOM to Enforce Climate Change Obligations

States often opt to use trade as a stick rather than a carrot.²⁰⁶ As a trade ‘stick’, sanctions have achieved notoriety in international relationships owing to their coercive effects and their direct response to breaches of international obligations. Whether imposed at the domestic level or regional level, trade sanctions aim to redress actions that are detrimental to a recognized ideal. This sub-part proposes that regional and domestic trade sanctions can enforce climate change objectives. From a position of comparative sanction regimes, it asserts that CARICOM can indeed impose trade sanctions on states and non-state actors where they have engaged in actions that exacerbate the climate crisis.

1. Regional Trade Sanctions

CARICOM does not have a specific ‘sanctions regime’. However, the possibility of levying sanctions against third-party states and non-state actors can be found in the powers of the Organs of the Community. Article 15(2)(f) of the RTC states that COTED shall promote policies for the development of energy and natural resources on a sustainable basis.²⁰⁷ Likewise, 15(2)(h) highlights that COTED shall promote and develop policies for the protection and preservation of the environment and for sustainable development.²⁰⁸ Additionally, Article 15 notes that COTED may work in collaboration with the Council of Foreign and Community Relations to co-ordinate policies for external trade relations.²⁰⁹ Therefore, CARICOM’s intergovernmental institutions have the power to take unilateral actions on behalf of the Community to achieve climate change mitigation. One of those unilateral actions is regional trade sanctions.

The cross-cutting effect of trade sanctions has incentivized the implementation of trade sanctions to achieve results in other areas of international law. A pertinent example is the Pelly Amendment Act, 1971. The Act empowers the President of the US to impose trade sanctions on a state that violates its fishing industry or threatened species.²¹⁰ Here, trade sanctions are used for environmental preservation (i.e., the preservations of species). More recently, the EU’s High Representative for Foreign Affairs has put trade sanctions on the table in relation to Turkey. The Representative noted in a joint communication to the EU

²⁰⁶ Leal-Arcas, *Compliance to Promote Sustainability*, in COMPLIANCE & ENVIRONMENTAL L. 453, 457 (T. Trennepohl & N. Trennepohl Rafael eds., 2020) [hereinafter Leal-Arcas (2020)].

²⁰⁷ RTC, *supra* note 188, at art. 15.2(f).

²⁰⁸ *Id.* at art. 15.2.(h).

²⁰⁹ *Id.* at art. 15.2.(i).

²¹⁰ Leal-Arcas (2012), *supra* note 181.

Commission that if Turkey were to “return to unilateral actions or provocations in international law”,²¹¹ in response, the EU may impose import and export bans and restrictions on the energy and related sectors.²¹² The provocation alleged by the EU is Turkey’s challenge to the rights of the Republic of Cyprus in its maritime zones. As such, the trade sanctions mentioned by the EU would be implemented to uphold regional stability.²¹³

The EU’s Global Human Rights Sanctions Regime (EU Regime) is more critical.²¹⁴ The structure of this regime is useful for this part because it imposes trade sanctions on states and non-state actors where they breach human rights norms. This part, therefore, asserts that the framework of this regime can be adopted and modified by CARICOM states to impose trade sanctions on states and non-state actors for breaches of climate change goals and obligations. By the Council Decision, the EU established a framework to employ ‘restrictive measures’ to address serious human rights violations and abuses worldwide.²¹⁵ Both natural and juridical persons can be sanctioned for human rights breaches, and there are no territorial limits to the applicability of the sanctions. This EU Regime finds support in general principles of international law that acknowledge a state’s right to demand punishment not only for injuries suffered by them or their subjects, but for those which excessively violate the law of nature or of nations.²¹⁶ Striking features of the EU Regime are the unilateral nature of the sanctions, their far-reaching effects, and their ability to coerce states and non-state actors into compliance with human rights obligations. Article 16 grants member states the authority to lay down penalties applicable to the infringements provided they are effective, proportionate, and dissuasive.²¹⁷ Remarkably, the EU Regime is expansive and addresses abuses of human rights falling within customary

²¹¹ High Representative, Union for Foreign Aff. & Sec. Pol’y, Eur. Comm’n, Joint Communication to the European Council, State of Play of EU-Turkey Political, Economic and Trade Relations, Doc. No. JOIN(2021) 8 final/2, (Mar. 22, 2021).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ The Council Regulation (EU) 2020/1998 and Council Decision (CFSP) 2020/1999 constitute the bedrock of the Regime. See *European Union: Global Human Rights Sanctions Regime Enters into Force*, LIBR. CONGRESS, U.S. LEGIS. INFO. (Jan. 12, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-01-12/european-union-global-human-rights-sanctions-regime-enters-into-force/>.

²¹⁵ Council Decision 2020/1999 of Dec. 7, 2020, Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses, 2020 O.J. (L 410 I/13) [hereinafter Council Decision 2020/1999]; Council Regulation 2020/1998 of Dec. 7, 2020, Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses, 2020 O.J. (L 410 I/1) [hereinafter Council Regulation 2020/1998].

²¹⁶ HUGO GROTIUS, *DE JURE BELLI AC PACIS* ch. XX, sec. XL, ¶ 1504 (1625).

²¹⁷ Council Decision 2020/1999, *supra* note 215, art. 16.

international law and treaties. Its expansive nature is complemented by Article 2(1)(d) that outlines that the list of obligations is indicative and not exhaustive.²¹⁸ The list includes, but is not limited to, violations or abuses that are “widespread, systemic or are of otherwise serious concerns”.²¹⁹

The EU Regime is an important example of actions in one sphere of international law (i.e., international human rights) requiring state response from the international trade arena. Under the EU Regime, trade sanctions can be imposed as a response to human rights breaches. The UK, the EU (as an institution), and EU member states may impose trade sanctions on the condition that the trade sanctions are effective, proportionate, and dissuasive. Ordinarily, trade sanctions are imposed on states as either countermeasures or responses to a material breach. The EU Regime not only sanctions states, but also allows for the sanctioning of non-state actors. The duality of the EU Regime makes it more impactful and effective. This is because it recognizes that human rights breaches are not only committed by states but also non-state actors. Moreover, non-state actors established in other states may commit these human rights breaches with impunity because the host state does not have effective mechanisms for enforcing obligations.

a. CARICOM’s Implementation of Trade Sanctions for Climate Change Breaches

By the same token, trade sanctions geared towards climate change mitigation may adopt these broad forms. The benefits may be indisputable. First, sanctions in international trade exert coercive power over other states. This is as opposed to climate change agreements that do not. Major GHG emitters are state-owned entities and the trade sanctions may directly accelerate their efforts at decarbonization.²²⁰ Second, the trade sanctions will impact non-state actors. Sanctioning non-state actors has a more coercive and direct effect than only sanctioning states. This is especially the case since the mass of climate change degradation is not committed by states but by non-state actors, such as corporations.²²¹ Third, trade sanctions against non-state actors may have a chilling effect on climate change effects produced by other non-state actors, more specifically corporations operating in the downstream. This is because the burden of trade sanctions would be passed on to all producers in the production chain.

²¹⁸ *Id.* at art. 2(1)(d).

²¹⁹ *Id.*; Council Regulation 2020/1998, *supra* note 215.

²²⁰ UNEP, EMISSIONS GAP REPORT 2019 39 (2019), <https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf>.

²²¹ Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, GUARDIAN (July 10, 2017), <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change>.

Fourth, as a corollary, it will incentivize clean producers to continue producing in a climate-friendly manner to maintain a competitive advantage over other sanctioned corporations.

b. Configuration of Trade Sanctions

If CARICOM is desirous of imposing sanctions for climate abuses, the first step is to determine what actions require a response in sanctions. This is indeed a difficult task. The EU Regime identifies broad issues that may require sanctions. Examples of these are breaches of ‘customary international law’ and ‘crimes against humanity’.²²² International standards exist as a signpost to indicate what may fall within these broad grounds. These are highlighted by the International Criminal Court, the UN Human Rights Council, regional human rights bodies, and civil and common law institutions. However, there is no binding and universal authority on the obligations of states and non-state actors regarding climate change mitigation. Therefore, the CARICOM trade sanctions would have to be a region-specific approach.

Although broader grounds for sanctions may result in their broader application, broad grounds may not be conducive to addressing climate degradation. This is because states and non-state actors will not be able to foresee with a sufficient degree of certainty whether their actions or omissions would fall within the category of a breach. Cultural relativity further heightens this issue, as non-state actors partaking in an established practice in one region may not easily modify their behaviour, or know to do so, to conform to broad requirements in other regions. Compounding this is the unilateral nature of trade sanctions and the likelihood that they may not afford persons the right to review the sanctions. Therefore, states and non-state actors may not be able to advance evidence or reasons to combat the imposition of the sanction.

To this end, this part proposes that, first, the CARICOM must impose limits on forms of GHG emissions in identifiable sectors. Where corporations or state-owned entities exceed the stated threshold, CARICOM may look to apply trade sanctions. The threshold should not be fixed. The threshold may take into consideration past emissions, projected emissions, and the reasonableness of the reduction. Second, trade sanctions may take the form of freezing of capital moving within states, the control of export and imports, and raw materials used in production. The freezing of capital has already been employed as a coercive tool

²²² Council Decision 2020/1999, *supra* note 215, at art. 1.

under the EU Regime.²²³ The aim of prohibiting the movement of capital for climate breaches is to restrict both the incentive and the cause of the breach.

c. The Feasibility of Applying CARICOM Trade Sanctions to GHG Emissions

As demonstrated where a state has imposed sanctions on another state or its citizens, the receiving state has responded by imposing sanctions on the sanctioning state. Therefore, while the imposition of trade sanctions may be well-intended to preserve the global good of a healthy climate, there may be serious ramifications to the Caribbean economy. Sanctions are in substance extraterritorial forms of executive intervention. This is especially the case when there is no direct, immediate, and identifiable transboundary harm to CARICOM states. Additionally, the likelihood of retaliation may be a deterrent for foreign investment. Foreign investors would be unwilling to establish themselves in the Caribbean for fear that their investment would lose its value because of the inability to reach consumer markets, access raw materials, and the targeting of natural persons operating the investment vehicles. Moreover, the enactment of sanctions to address climate change presupposes that the state of affairs in CARICOM states is in keeping with the conditions set out in the EU Regime. If the conditions within CARICOM are not consistent with the EU Regime, the entire system may collapse. Further, CARICOM (as an independent institution) may be required to sanction non-conforming CARICOM states to ensure compliance with the regime within CARICOM.

2. Domestic Trade Sanctions

Plastic consumption is both an environmental and a climate change issue. 99% of plastics are made from fossil fuels, both natural gas and crude oil.²²⁴ If plastic production and consumption stay on their current trajectory, by 2030, GHG emission from plastic could reach 1.34 billion tonnes per year.²²⁵ Banning single-use plastics would be very effective in this regard. Plastic production as a contributor to climate change should not be understated. 1.35 billion tonnes of GHG emissions are equivalent to three-hundred new five-hundred megawatt (MW) coal-fired power plants.²²⁶ Therefore, recycling plastic is a significant way to reduce the consumption of natural gases and crude oil that are used to make plastic. Plastic pollution is a second layer to plastic consumption that aggravates

²²³ *Id.*

²²⁴ Renee Cho, *More Plastic is on the way: What it Means for Climate Change*, COLOM. CLIMATE SCH. (Feb. 20, 2020), <https://news.climate.columbia.edu/2020/02/20/plastic-production-climate-change/>.

²²⁵ *Id.*

²²⁶ *Id.*

climate change. Of the thirty countries that produce the most plastic pollution, ten are in the Caribbean.²²⁷ This consumption is compounded by the Caribbean's documented culture of inefficient solid waste management.²²⁸ Across the Caribbean, there is an established practice of burning plastics as opposed to recycling them. The burning of plastics releases GHGs into the atmosphere. Owing to the realities of plastic consumption and improper disposal, respective CARICOM states have taken steps to ban the import of single-use plastics.²²⁹

There has been a unilateral governmental response to the import of single use plastic across the Caribbean. In 2018, Jamaica gazetted two Orders: The Plastic Packaging Material Order,²³⁰ and The Plastic Packaging Prohibitions Order.²³¹ The Orders were made under Section 8(1) of the Trade Act, 2018 and under Section 32(1) of the Natural Resources Conservation Authority Act, 1991.²³² In Barbados, the Control of Disposable Plastics Act, 2019, banned the import, distribution, sale, and use of a variety of plastics.²³³ The Act went further to impose a labelling requirement on imports that received a special licence from the Minister.²³⁴ Similarly in 1995, Guyana had imposed an environment tax of Guyanese\$ 10 per beverage container on all imported non-returnable beverage containers. This was

²²⁷ Sophie Hirsh, *7 Countries are Banning Single Use Plastics*, GREEN MATTERS (Jan. 3, 2020), <https://www.greenmatters.com/p/caribbean-countries-banning-single-use-plastic>.

²²⁸ Rodrigo Riquelme et al., *Solid Waste Management in the Caribbean: Proceeding from the Caribbean Solid Waste Conference*, FELIPE HERRERA LIBR. (Apr., 2016).

²²⁹ CARICOM and 'The Caribbean' are not used interchangeably. There are several definitions of the Caribbean. This paper focuses on those states that are also states parties to the RTC.

²³⁰ The Trade (Plastic Packaging Materials Prohibition) Order, § 3, 141 Jam. Gazette Supp., No. 146 (2018) (Jam.).

²³¹ The Natural Resources Conservation Authority (Plastic Packaging Materials Prohibition) Order, 141 Jam. Gazette Supp., No. 145 (2018) (Jam.).

²³² *The Trade Act*, § 8(1), MINISTRY JUST. (1955), https://moj.gov.jm/sites/default/files/laws/Trade%20Act_0.pdf (Jam.); *The Natural Resources Conservation Authority Act*, § 32(1), MINISTRY JUST. (1991), <https://moj.gov.jm/sites/default/files/laws/Natural%20Resources%20Conservation%20Authority%20Act.pdf> (Jam.).

²³³ *Control of Disposable Plastics Act*, § 3, BARB. PARLIAMENT (2019), <https://www.barbadosparliament.com/uploads/document/8dfda40c3ffafefeb35aaac98691f50536.pdf> (Barb.).

²³⁴ The plastic products that qualify for these exemptions are those that are 'environmentally sustainable'.

pursuant to Section 7A of the Customs Act,²³⁵ as amended by the Guyana Fiscal (Enactments) Amendment Act, 1995.²³⁶

Interestingly, the Caribbean Court of Justice (CCJ), in its original jurisdiction, has addressed whether imposing obstacles to the import of non-returnable beverage containers is in breach of the RTC. In both recorded cases, the CCJ found that the environmental tax imposed to curb pollution was inconsistent with the RTC. In the more recent case of *SM Jaleel & Co ltd v. The Co-operative Republic of Guyana*, the CCJ found that the environmental tax on imports from Trinidad and Tobago breached Article 87 of the RTC because the products in question qualified for ‘Community treatment’.²³⁷ Strikingly, at trial, counsel for the Respondent did not advance arguments that the environmental tax fell within the general exceptions set out in Article 226 of the RTC. Article 226(1)(a) provides the well-known exception of state measures to protect human, animal, or plant life or health.²³⁸ This ground can accommodate measures for environmental protection and climate change mitigation. Conceivably, the reason for this omission is that the CCJ has, in past cases, underscored the absolute prohibition on import duties on goods of Community origin.²³⁹ The RTC does not expressly state that the general exceptions may not apply to Article 87. However, the Court of Justice of the EU (CJEU) has found that they may not be applied to the prohibition against import duties.²⁴⁰ It is likely that the CCJ, by judicially mirroring the jurisprudence of the CJEU, may find that import duties are generally impermissible under the RTC. Therefore, the general exceptions in Article 226 of the RTC may not accommodate measures that breach Article 87 of the RTC.

²³⁵ *Customs Act*, § 7A, Laws of Guy. ch. 82:01 (1998), [https://www.gra.gov.gy/customs-act/\(Guy.\)](https://www.gra.gov.gy/customs-act/(Guy.)).

²³⁶ *Fiscal (Enactments) Amendment Act*, ch. 82:01, PARLIAMENT CO-OPERATIVE REPUBLIC GUY. (1998), <https://parliament.gov.gy/publications/acts-of-parliament/fiscal-enactments-amendment-act-19921> (Guy.).

²³⁷ *Rudisa Beverages v. The State of Guyana*, 003/2013, CCJ 1 (OJ), Judgement, Caribbean Court of Justice (Feb. 13, 2014), <http://www.caribbeancourtjustice.org/wp-content/uploads/2021/02/OA-003-of-2013-RUDISA-JUDGMENT-REVISED-6-7May14-2.pdf> [hereinafter *Rudisa Beverages*]; RTC, *supra* note 188, at art. 87; *see also*, RTC, *supra* note 188, at art. 1 (Community treatment has been defined as “the access accorded to goods which are of Community origin to the markets of Member States without the application of import duties or quantitative restrictions”); *see also Protocol Amending the Treaty establishing the Caribbean Community (Protocol VII: Disadvantaged Countries, Regions and Sectors)*, SICE, FOREIGN TRADE INFO., ORG. AM. STATES, art. I (1999), <http://www.sice.oas.org/trade/ccme/protoc7a.asp>.

²³⁸ RTC, *supra* note 188, at art. 226(1)(a).

²³⁹ *Rudisa Beverages*, *supra* note 237, at 22 (“subject to the exception of services rendered and this has been interpreted very restrictively by the ECJ”).

²⁴⁰ Case C-372/05, *Eur. Comm’n v. Ger.*, 2009 E.C.R. I-11801, ¶ 68.

a. Evaluation

Domestic sanctions are in substance ‘bottom-up’ policies. Bottom-up policies are effective ways of cutting through bureaucracy that would otherwise stall bilateral or plurilateral engagements.²⁴¹ However, environmental measures that relate to trade are best tackled at the CARICOM level as opposed to national levels. This is because the policies would be more uniformed across CARICOM states. The uniformity in the formulation and implementation of trade rules may result in the predictability of the rules and less challenge to banned products. Also, a regional ban on imports may achieve cohesion and wide participation within CARICOM. Currently, not all CARICOM states are moving to limit the consumption of fossil fuels. At the Conference, state parties may deliberate and vote to impose a ban on specified product. In doing so, there can be a larger consensus among members on how to treat goods coming from outside the Community and goods moving within the internal market.

SM Jahleel v. Guyana demonstrates that member states do not have the power to unilaterally impose import duties on products originating from member states. This is a prerogative of COTED, subject to the primacy of the Conference and the Council of Ministers.²⁴² Member states are, therefore, constrained in their use of unilateral trade mechanisms to curb climate change. In light of this, imposing a tax on products originating from member states is not ideal.

b. Recommendations

This sub-part proposes that Jamaica’s trade ban is the most practical option for CARICOM states. It further recommends that the ban can be complemented by Barbados’ labelling requirement for goods that receive a special license from the Minister. The reason for this is that Guyana’s trade measures were inconsistent with the RTC. Guyana’s measures were, in substance, import duties and general exceptions under the RTC cannot be applied to import duties. On the other hand, Jamaica’s measures are quantitative restrictions. There is a vast distinction between the two. General exceptions under Article 226 may be applied to quantitative restrictions.²⁴³ However, the only exception to Article 87 are fees and similar charges commensurate with the cost of services rendered.²⁴⁴ Therefore, of the two

²⁴¹ Rafael Leal-Arcas, *Bottom-Up Approach for Climate Change: The Trade Experience*, 2(4) ASIAN J. L. & ECON. (2012).

²⁴² *Hummingbird Rice Mills Ltd. v. Suriname & the Caribbean Community*, OA1/2011, CCJ 1 (OJ), CARIBBEAN CT. JUST. ¶ 41 (Feb. 23, 2012), [https://ccj.org/judgments/oa1_2011/Judgment%20Hummingbird%20Rice%20Mills%20Ltd%20v%20Suriname%20%20CARICOM%20advance%20copy%20\(2\).pdf](https://ccj.org/judgments/oa1_2011/Judgment%20Hummingbird%20Rice%20Mills%20Ltd%20v%20Suriname%20%20CARICOM%20advance%20copy%20(2).pdf).

²⁴³ RTC, *supra* note 188.

²⁴⁴ *Id.* at art. 87(3).

options, quantitative restrictions are better served as a treaty mechanism to achieve climate change mitigation. If, however, CARICOM states are desirous of imposing import duties on goods of Community origin as opposed to quantitative restrictions, this paper proposes that a ‘protocol’ be validated to include climate change as an exception to Article 87 of the RTC.

In 2018 the Caribbean Regional Fisheries Mechanism met to validate the Draft Protocol to Integrate Climate Change Adaptation and Disaster Risk Management in Fisheries and Aquatics in the Caribbean Community Common Fisheries Policy (Protocol).²⁴⁵ Present at the ratification was the international organization — Caribbean Community Climate Change Centre (CCCCC). The object and purpose of the Protocol is to ensure that the regional fisheries sector is resilient to “a changing climate”.²⁴⁶ By the same token, CARICOM states should ensure that their economies and all sectors are resilient to climate change, not only fisheries. The Protocol demonstrates that climate change is central to the crafting of regional policy. Implementing the Protocol to provide a climate change exception would be instrumental in furthering the objectives of The Regional Framework for Achieving Development Resilient to Climate Change.²⁴⁷

This part does not only propose that the ban be limited to forms of plastics. The policy may take a purposive approach and extend to petrochemicals and hazardous materials. The suggested trade ban can be implemented in stages aimed at modifying consumption habits. For COTED to consolidate banning measures at the CARICOM level, it must first consider how the ban will affect conditions in each state. First, the regional ban of products should be designed to apply to domestic as well as imported products. This is to ensure that CARICOM members do not violate national treatment.²⁴⁸ Domestic producers may therefore not manufacture or produce the specified material. Second, there should be a careful assessment to determine whether the policy may have an impact on international investment. If it does, investors may initiate proceedings because the policy

²⁴⁵ Michelle Nurse, *Region Advancing Protocol on Climate Change, Disaster Risk Management in Fisheries*, CARICOM TODAY (June 14, 2018), <https://today.caricom.org/2018/04/19/region-advancing-protocol-on-climate-change-disaster-risk-management-in-fisheries/>; see also Caribbean Reg’l Fisheries Mechanism [CRFM], *Protocol on Climate Change Adaptation and Disaster Risk Management in Fisheries and Aquaculture in the Caribbean*, FAO (Oct. 11, 2018), <http://www.fao.org/3/cb4205en/cb4205en.pdf> [hereinafter *CRFM Protocol*].

²⁴⁶ *CRFM Protocol*, *supra* note 245, at pmbl.

²⁴⁷ *The Regional Framework for Achieving Development Resilient to Climate Change*, CARICOM: CLIMATE CHANGE CTR., <https://www.caribbeanclimate.bz/blog/2017/11/28/the-regional-climate-change-strategic-framework-and-its-implementation-plan-for-development-resilient-to-climate-change-us2800000/>.

²⁴⁸ GATT, *supra* note 163, at art. III.

breached the obligation to grant investors fair and equitable treatment. In any event, a CARICOM State that may face disastrous consequences may explore the option to opt out of the regional policy.²⁴⁹

3. Carbon Border Adjustments and their Relation to CARICOM Investments

Domestic Carbon Tax (DCT) and Carbon Border Tax Adjustments (CBTAs) have been touted as revolutionary means of achieving the goals set out in the Paris Agreement.²⁵⁰ Although some states have already implemented these mechanisms, such implementation may not be desirable for CARICOM states. This is owing to the reality of carbon leakages, and the possibility of investor state dispute settlement (ISDS) being initiated against CARICOM states by foreign investors. Potential and actual foreign investors in CARICOM states may opt to shift their business elsewhere to avoid the austerity of a carbon tax (i.e., carbon leakage). CARICOM states, being largely investment importing states, may find the possibility of losing critical investment unattractive. Second, given the expansive state obligations under concluded Bilateral Investment Treaties (BITs), a weak right to regulate, the complexity of general exceptions, and the prominent view that ISDS is pro-investor, adjusting domestic conditions may prove costly for CARICOM states. This sub-part considers the intersection of carbon taxes and international investment obligations. It assesses the problems associated with the introduction of carbon taxes in CARICOM states and it proposes recommendations to implement a carbon tax.

DCTs are internal price-based measures such as a tax or other such charge imposed on domestic products containing articles of carbon.²⁵¹ Though the tax may apply to products with articles of carbon, there is much uncertainty surrounding whether DCTs may apply to products that, while not having carbon as an element, are involved in the emission of carbon. The rationale behind the imposition of a domestic measure is to further the domestic climate change policy. CBTAs may be price-based internal measures, such as a tax or other such charge imposed on imported products. Additionally, CBTAs may exist where rebates of the same tax applied to imports are imposed on domestic products that are being

²⁴⁹ *Advisory Opinion of the Caribbean Court of Justice in Response to a Request from the Caribbean Community*, [2020] CCJ 1 (OJ) (AO), CARIBBEAN CT. JUST. (Mar. 18, 2020), https://ccj.org/wp-content/uploads/2021/08/2020-CCJ-1-AO_CD.pdf.

²⁵⁰ Long Yingfeng, *Challenges to China from Carbon Tax Border Adjustment under Global Climate Change and China's Answer*, 3 CHINA LEGAL SCI. 61, 64 (2015).

²⁵¹ Joost Pauwelyn, *Carbon Leakage Measures and Border Tax Adjustments under WTO Law*, in RESEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO (G. Van Calster & D. Prevost eds., 2013) [hereinafter Pauwelyn].

exported.²⁵² For CBTAs to be consistent with international trade principles, they must, at first, conform to Articles II(2)(a) and III(2) of the GATT.

Under Article II(2) of the GATT, a state may impose a charge equivalent to an internal tax consistently with the provisions of Article III(2) on imported products where the charge is equivalent to a charge applied to like domestic products or in respect of an article from which the imported products have been manufactured or produced in whole or in part.²⁵³ Further, Article III(2) recognizes that the taxes to be considered are indirect or direct internal taxes or other internal charges, and they must not be more than the taxes directly or indirectly applied to like domestic products.²⁵⁴

The concept of CBTAs is difficult to establish because there is no jurisprudence on the matter. It is not clear whether, if challenged, CBTAs may be considered inconsistent with the abovementioned GATT articles. The basis of the inconsistency would be that the adjusted taxes do not apply to products but to producers or a process. Second, the measures may not be considered to be indirect taxes but prohibited direct taxes that may not be adjusted. Third, they may breach the principles of national treatment and most favoured nation (MFN) treatment.²⁵⁵

a. Can BTAs be Applied to Carbon?

The exception of Article II(2)(a) applies to products or articles from which the product is made.²⁵⁶ Similarly, Article III(2) applies to products.²⁵⁷ The aim of CBTAs is to slow GHG emissions. With this in mind, a state may not only seek to introduce measures to slow consumption of products that contain carbon, but for all products which contribute to a carbon footprint. Where carbon is not an article from which the domestic product is made, a state may not be able to claim the exception in Article II(2)(a) for CBTAs concerning the subject product. If carbon is not an aspect of the product, the alternative is that CBTAs be applied as a process measure. On this point, the *US — Tuna II* Panel Report is instructive.²⁵⁸ In this report, the Panel noted that under Article III, contracting parties may apply BTAs with regard to those taxes that are borne by products, but not for domestic

²⁵² *Id.*

²⁵³ GATT, *supra* note 163, at art. II(2).

²⁵⁴ *Id.* at art III(2).

²⁵⁵ Pauwelyn, *supra* note 251.

²⁵⁶ Aaron Cosbey, *Border Carbon Adjustments*, INT'L INST. SUSTAINABLE DEV. (2008), https://www.iisd.org/system/files/publications/cph_trade_climate_border_carbon.pdf.

²⁵⁷ GATT, *supra* note 163, at art. III(2).

²⁵⁸ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/RW2 (adopted on Oct. 26, 2017).

taxes not directly levied on products.²⁵⁹ Likewise, the *US — Taxes on Petroleum and Certain Imported Substances* Panel remarked on the consistency of direct taxes on products and the inconsistency of indirect taxes on products.²⁶⁰ The basis of the Panels' views in these cases is the 1970 GATT Working Party on Border Adjustments (Working Party).²⁶¹ As such, CBTA's may be considered indirect taxes and therefore inconsistent with the GATT.

The Working Party did not come to a convincing position on the eligibility for the adjustment of consumption tax on materials used in the production of other taxable goods.²⁶² The Working Party noted that adjustments were not normally made for these 'taxes occultes'.²⁶³ Thus, this leaves open the question of whether exceptional circumstances may exist, which, if applied, may cause adjustments to be made. Climate change mitigation may be considered a circumstance that requires a deviation from the norm, thereby concluding that consumption tax can be adjusted on carbon.

Even if carbon may not be considered to fall within the Working Party's view, its view is not determinative of how the international trade regime may consider 'taxes occultes' today, fifty years after the Working Party Report was adopted. Furthermore, its view and the previous decisions of the WTO are not binding on subsequent WTO dispute panels. However, they would indeed create a point of reference for future panels.²⁶⁴

The distinction between product, producer, and process is important. This is because it will affect how states calculate carbon emission. While it may be easier to identify an industry or producers as being energy-intensive and apply a tax to those producers or processes, that may not fall within the abovementioned rules. This is because the applicable tax is on products not on the producers. However, where a state can identify the carbon emission related to a product and apply it to that product, then that may be an acceptable adjustable tax. It is, therefore, unsurprising that the US' Guidance Policy on GHG Tax and Regulations states the

²⁵⁹ GATT, *supra* note 163, at art. III.

²⁶⁰ Panel Report, *United States — Taxes on Petroleum and Certain Imported Substances*, WTO Doc. L/6175 – 34S/136 (adopted June 17, 1987).

²⁶¹ GATT, *Report of the Working Party on Border Tax Adjustments*, ¶ 14, WTO Doc. L/364 (Nov. 20, 1970).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages II*, at 15, WTO Doc. WT/DS11/AB/R (adopted on Oct. 4, 1996).

products the policy aims to regulate.²⁶⁵ However, there is an inherent difficulty in calculating the carbon content associated with a product. This is because there is no certainty in how much carbon is related to the product. The likelihood is that the importing member state would have to assess the emitted CO₂ based on the technology used in the production.²⁶⁶

b. CBTAs and MFN Principle

Another hurdle in the imposition of CBTAs is its potential to breach the MFN treatment and national treatment principles. Article I of the GATT provides that the levying of charges destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.²⁶⁷ If CBTAs are applied to carbon-based products, two scenarios may arise which call into question whether CBTAs are conform to the MFN principle.

In the first scenario, the industries of specific states are dependent on carbon. As examples, these are the automotive industries, and manufacturing industries. Therefore, Japan and China may argue that CBTAs are discriminatory because they confer an advantage to electronic vehicles produced in the US. The Appellate Body opined that advantage was construed broadly and meant ‘any advantage’.²⁶⁸ In *Colombia — Ports of Entry*,²⁶⁹ the requirement that importers of goods from Panama had to fill out forms and pay taxes in advance conferred an advantage to importers of goods from other countries in violation of the MFN principle. There may be a more glaring breach of MFN if there is *de facto* discrimination on products based on their carbon footprint. An argument may however be raised that the products are not like products because of the difference in their carbon footprint. While bold, the authors do not believe that it is a convincing argument. On the authority

²⁶⁵ Brian Flannery et al., *Policy Guidance for US GHG Tax Legislation and Regulation: Border Tax Adjustments for Products of Energy-Intensive Trade-Exposed and Other Industries*, RESOURCES FOR THE FUTURE (Oct., 2020), https://media.rff.org/documents/Policy_Guidance_Update.pdf.

²⁶⁶ Alex Bowen, *The Case for Carbon Pricing*, GRANTHAM RES. INST. CLIMATE CHANGE & ENV'T & CTR. CLIMATE CHANGE ECON. & POL'Y (2011), https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2014/02/PB_case-carbon-pricing_Bowen.pdf.

²⁶⁷ GATT, *supra* note 163, at art. I.

²⁶⁸ Panel Report, *Canada — Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/R, WTO Doc. WT/DS142/R, (adopted Feb. 11, 2000); Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/AB/R, WTO Doc. WT/DS142/AB/R (adopted on June 19, 2000) (Panel Report adopted as modified by the Appellate Body Report on June 19, 2000).

²⁶⁹ Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, WTO Doc. WT/DS366/R (adopted on Apr. 27, 2009).

of *EU — Asbestos*, a likeness may exist between products where a competitive relationship is present between or among them.²⁷⁰ Vehicles with a smaller carbon footprint may be substitutable with vehicles with a larger footprint because the consumer market may not distinguish between them.

In the second scenario, as a coercive measure, CARICOM states may only apply CBTA on products originating from states without climate-friendly policies. Here, the overt emphasis on the place of origin of the product may violate Article I(1) of the GATT. This method of applying CBTAs may give rise to other issues. Producers who produce with a carbon heavy footprint may attempt to circumvent the CBTAs to qualify for the advantage. For example, a Chinese steel producer may seek to funnel this steel through a country without CBTAs, though it has climate-friendly policies. Then, from that country, it may seek to export the product into the country with the CBTA.²⁷¹ Although there are rules of origin that aim to mitigate against this action, the lack of resources to oversee product export and the lack of a global imposition of CBTA would grant the necessary space for undertaking the same.

c. CBTAs and National Treatment Principle

Article III of the GATT provides that measures should not be applied to imported or domestic products to afford protection to domestic products.²⁷² Therefore, for CBTAs to be consistent with the GATT, DCTs on like products may have to be applied in conjunction with the CBTAs. This will preclude *in concreto* discrimination from existing between national products and imported products. In one breath, DCTs may ensure that CBTAs are GATT consistent, in another, DCTs may affect the competitiveness of domestic products. The imposition of DCTs on domestic products may result in those products being more costly in comparison to like products being produced outside CARICOM. Reduced competitiveness is most probably the reason behind the limited imposition of carbon taxes.

d. Carbon Leakage from CARICOM

Carbon leakage occurs where in response to tighter carbon production regulations, enterprises migrate to states with relaxed carbon rules.²⁷³ The migration aims to avoid the ‘austerity’ of the measures to reduce carbon. Carbon leakage reduces the effectiveness of climate change mitigation policy. A more dire consequence of

²⁷⁰ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 9, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

²⁷¹ Pauwelyn, *supra* note 251.

²⁷² GATT, *supra* note 163, at art. III.

²⁷³ Pauwelyn, *supra* note 251.

carbon leakage is its effect on foreign direct investment flowing into CARICOM. Investors seeking to establish themselves in CARICOM states, do so because of the economic benefit. If that advantage is lost, investors would have no incentive to establish themselves in CARICOM states. Carbon leakage will result in reduced employment options, lowering the standard of living of residents. Additionally, it may result in the collapse of industries that are dependent on the product or service offered by the investor.

C. *Stimulating the Shift to Renewable Energy: Meeting Climate Goals*

A shift from fossil fuels to renewable energy can be made possible through the use of various methods. This sub-part throws light on three such ways — climate change waivers, renewable energy subsidies, and green bonds — and examines whether they breach GATT provisions.

Climate change waivers can be requested by the CARICOM states under the provisions of GATT which provide broad protection and can last for a substantial amount of time. Additionally, renewable energy subsidies can also be a substantial tool to achieve the goal of sustainability. The ‘benefits’ granted by such subsidies can be implemented in a better manner by paying attention to the ‘market’ and the form of such subsidies. Lastly, green bonds — a type of financial support given to sustainable and environment-friendly projects — are also a means enabling the change towards the usage of renewable sources of energy.

1. Climate Change Waivers

Without discounting the utility of general exceptions under Article XX of the GATT,²⁷⁴ which is dominant in the WTO jurisprudence, this part proposes that a climate change waiver is a better avenue to pursue climate change mitigation. This is because general exceptions are reactive in nature and narrow in their application. On the other hand, a climate change waiver, depending on its text, may be broader and collectively beneficial to states. In fact, a climate change waiver permitting trade sanctions in specific national measures would be helpful in slowing climate change while posing the least risk to the indispensable basic principles of non-discrimination.²⁷⁵ Climate change waivers may not only apply to individual states, but they can also be granted to a group of countries. To that end, CARICOM member states may request a climate change waiver.

²⁷⁴ GATT, *supra* note 163, at art. XX.

²⁷⁵ James Bacchus, *The Content of a WTO Climate Waiver*, CTR. INT’L GOVERNANCE INNOVATION (Dec., 2018).

A climate change waiver may be permissible under Article IX(3) of the WTO Agreement. The Article states that in exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a member state provided that such decision shall be taken by three-fourths of the Members unless otherwise provided.²⁷⁶ The waiver requested by CARICOM states would be a 'collective waiver'. Unlike the EU (as an institution), which is a state party to the WTO Agreement, CARICOM is not. Therefore, as a procedural consideration, CARICOM member states would have to apply for the waiver as members to the WTO Agreement. The substantive prerequisite to making an application for a waiver is that CARICOM states must identify and articulate the exceptional circumstances that the measures allowable under the waiver are to address. The WTO Agreement does not define the term 'exceptional circumstance'. As a matter of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties,²⁷⁷ the ordinary meaning of 'exceptional circumstances' is circumstances that are extraordinary and abnormal. The unique global challenge of climate change may be considered an exceptional circumstance.²⁷⁸ Indeed it is. In fact, CARICOM states may go further to demonstrate that climate change affects them more particularly because they are SIDS. The deluge of evidence from climate change agreements and conferences may be influential in advancing the exceptional circumstances for CARICOM states. Nevertheless, such a determination is entirely for the Ministerial Conference.²⁷⁹

Moreover, the climate waiver need not be temporary.²⁸⁰ It can be applied as directed by the Ministerial Conference. This is provided for in Article IX(4) of the GATT, which states that any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference no later than one year after it is granted, and thereafter annually until the waiver terminates.²⁸¹ The Ministerial Conference shall also examine to see whether the exceptional circumstances justifying the waiver still exist, and whether the terms and conditions of the waiver have been met. Therefore, the waiver may exist as long as exceptional circumstances exist. Since climate change may not be resolved in the near future, the more practical option is to impose terms and conditions for the termination of the climate waiver. In 2003, the Ministerial Conference in granting a waiver, outlined that the compulsory licensing of medicines is permitted without the

²⁷⁶ GATT, *supra* note 163, at art IX(3).

²⁷⁷ VCLT, *supra* note 201, at art 31.

²⁷⁸ James Bacchus, *A Call for Climate Change Waiver*, CTR. GLOBAL ECON. & ENVTL. OPPORTUNITY, UNIV. OF CENT. FLA., https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_Bacchus.pdf.

²⁷⁹ Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 185, WTO Doc. WT/DS27/AB/R (adopted May 22, 1997).

²⁸⁰ Bacchus, *supra* note 165, at 1-4.

²⁸¹ GATT, *supra* note 163, at art. IX(3).

permission of the patent holder if affordable medicines are not otherwise available during a health crisis of another WTO member.²⁸² The duration of the waiver would be from the granting of the waiver to a state to when an amendment to the intellectual property rules replacing the provisions of that waiver took effect.²⁸³

Similarly, the climate change waiver sought by CARICOM states could be structured to be conditional on the amendment or revision of existing rules. However, the cases of CBTA, calculating carbon, and the overall use of trade law to mitigate climate change, highlight that agreement on the existing rules may be difficult. In the authors' view, a specified time condition is a more reasonable alternative. 2030 is the hallmark of climate goals not only for some CARICOM states but also EU member states, Australia, Bosnia and Herzegovina, Brazil, and Cuba.²⁸⁴ A climate waiver set to terminate in 2025 may give states more room to better achieve their 2030 goals and transition into more climate-friendly economies. The Nationally Determined Contributions acknowledge that there is agreement in meeting the 2030 goals; therefore, there may be a high likelihood of agreement at the Ministerial Conference.

Another issue to be determined by CARICOM states is the respective trade-restrictive national measures that the waiver will address. To put forward a proposal, CARICOM states must ensure that there is an identifiable and streamlined policy. There is a real difficulty here given the fact that although CARICOM is a regional trading bloc, its composite economies are not economically homogenous. As such, it may be difficult to design a collective policy that caters to the needs of each state without damaging its economies. Furthermore, to be attractive, the policies put forward should neither be extravagant nor unreasonable. Moreover, while unconnected, it may be pertinent for CARICOM States to demonstrate that the measures are not disguised restrictions on international trade as provided by Article XX of the GATT. This is because Articles IX(3) and XX of the GATT may be legally contiguous. It is unlikely that a waiver will be granted to a disguised restriction on trade. CARICOM states may apply for the waiver for national measures (or regionally harmonized measures) that discriminate on products with a high carbon footprint and products that have a manifest effect on climate change. Therefore, CARICOM states must demonstrate a causal relationship between the measure and climate change mitigation.

²⁸² WTO General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health Decision*, WTO Doc. WT/L/540 (Aug. 30, 2003).

²⁸³ *Id.*

²⁸⁴ *Nationally Determined Contributions Tracker*, CLIMATE WATCH (2020), <https://www.climatewatchdata.org/2020-ndc-tracker>.

2. The Configuration of Renewable Energy Subsidies under Part III of the RTC and the ASCM

The matter of subsidies will address whether benefits to clean energy producers are actionable under the respective trade agreements and whether the actual provision of subsidies is practical. In considering whether the benefit is actionable, this sub-part will assess the treaty definition.

Between 2006 and 2015, Trinidad, as an oil-importing SIDS in CARICOM, had a cumulative fuel subsidy of US\$ 28.7 billion.²⁸⁵ In Belize, the electricity subsidies estimated were at an average of 1.2% of the state's GDP.²⁸⁶ In Suriname, there was an energy subsidy of 1.5-2% of the country's GDP. The Caribbean has been moving towards the de-escalation of GHGs in the atmosphere by lessening the provision of subsidies to oil and gas as well as consumer subsidies for electricity and transport fuels.²⁸⁷ This is in keeping with the suggestions set out in Article 2(1)(a) of the Kyoto Protocol.²⁸⁸ As a corollary to the reduction in subsidies for contributors to GHGs, CARICOM members may look to provide subsidies to enterprises that are advancing the objective of clean energy production. The provision of subsidies is not free from controversy.²⁸⁹ A state's imposition of measures for 'clean energy producers' calls into question whether the measures fall within the treaty definition of 'subsidy'.

Article 96 of Chapter III in the RTC outlines the provision on subsidies for CARICOM states.²⁹⁰ It also sets out several requirements a state must prove to make out that a domestic subsidy is 'actionable'. Article 1 of the RTC defines subsidies as those included in Schedule V.²⁹¹ In highlighting subsidies, Schedule V only references goods that are exported. Therefore, if CARICOM states were to impose measures on imports to rehabilitate its energy sector, they may not be considered subsidies under the RTC. As such, Article 96 would not be breached. However, though the subsidy provision may not be breached, the state may be in breach of other principles such as MFN treatment, national treatment, or other specific state obligations in the RTC. This is dependent on how the policy is

²⁸⁵ Gabriel Di Bella et al., *Energy Subsidies in Latin America and the Caribbean: Stocktaking and Policy Changes* (Int'l Monetary Fund, Working Papers no. WP/15/30, 2015) [hereinafter Bella et al.].

²⁸⁶ *Id.*

²⁸⁷ Michelle Scobie, *Fossil Fuel Reform in Developing States: The Case of Trinidad and Tobago, a Petroleum Small Island Developing State*, 104 ENERGY POLICY 265, 265 (2017).

²⁸⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 2(1)(a), Dec. 10, 1997, 2303 U.N.T.S. 148 [hereinafter Kyoto Protocol].

²⁸⁹ Howse, *supra* note 164.

²⁹⁰ RTC, *supra* note 188, at art. 96.

²⁹¹ *Id.* at art 1 & schedule V.

constructed. David Berry argues that non-discriminatory subsidies may breach Article 93(1)(b) of the RTC.²⁹² This Article states that,

Except as otherwise provided in this Treaty, [] Member State[s] shall not maintain or introduce . . . any other forms of assistance, the main purpose or effect of which is to frustrate the benefits expected from such removal or absence of duties and quantitative restrictions as is required by this Treaty.²⁹³

Where renewable energy subsidies are challenged as being contrary to Article 93(1)(b), the litigant must prove that the “main purpose or effect is to frustrate the benefits expected”.²⁹⁴ Although the CCJ has not adjudicated on this provision, one can anticipate that the court may engage in treaty interpretation. The text, and indeed the test, of Article 93 may be tripartite. First, a claimant may need to prove a causal relationship between the subsidies and the frustration of benefits. Second, the claimant must prove that the provision of subsidies directly or indirectly falls within the ground. Third, the claimant would prove that the expected benefits have been frustrated. If, on the other hand, the CCJ may only consider energy subsidies under Article 96, the court may be prompted to consider that these subsidies are in breach because they affect the downstream export market. Therefore, as an example, subsidizing solar power for factories may lower the cost of production and the cost of the goods produced.

In addition to the RTC, CARICOM states have an obligation to comply with the rules on subsidies found in the ASCM.²⁹⁵ The ASCM is in *pari materia* to Part III of the RTC. Under both treaties, a treaty subsidy exists where there is a financial contribution to an undertaking by the Government and a benefit is conferred to the undertaking.²⁹⁶ The key aspect of the definition, for this discussion, is whether the measure granted confers a ‘benefit’ to clean energy producers. Where the measure does not confer a benefit, it may not be considered a subsidy under the respective treaties. Broadly, a ‘benefit’ occurs where the undertaking receives a financial contribution on terms that are more favourable than those available to

²⁹² JAMES BERRY, CARIBBEAN INTEGRATION LAW (2014).

²⁹³ RTC, *supra* note 188, at art. 93.

²⁹⁴ *Id.*

²⁹⁵ Here, a distinction is made between the treaty definition of subsidy and the denotative meaning of a subsidy. This part operates from the position that a denotative subsidy is merely a benefit and may not rise to the threshold of a treaty subsidy.

²⁹⁶ Appellate Body Report, *United States — Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WTO Doc.WT/DS257/AB/R (adopted on Feb. 17, 2004).

other recipients in the market.²⁹⁷ Determining whether a subsidy has been granted is a matter of whether the government has granted a comparative advantage to renewable energy producers. Therefore, if the market is narrowly defined, and advantages are given to all members within that market, this may not be considered a benefit. Using the concepts in *Canada — Renewable Energy* to illustrate, there may be a wind and solar photovoltaic (PV)-generating electricity market, distinct from the broad energy market. This is to distinguish between the renewable and the non-renewable energy markets. As such, enterprises operating in the non-renewable energy markets may not be able to successfully assert that CAIRCOM states granting subsidies to enterprises in the non-renewable energy market have breached Chapter III.

This part proposes that much in the same way as there has been a distinction between Annex I countries and non-Annex I countries of the Kyoto Protocol,²⁹⁸ there may also be a distinction between the types of enterprises operating in the renewable energy market and the non-renewable energy markets. This may be implemented in the RTC or defined by the COTED. Article 15(1) of the RTC highlights that COTED shall promote measures for the development of energy and natural resources on a sustainable basis.²⁹⁹ Since it may be more difficult to amend a multilateral trade treaty such as the WTO Agreement or an environmental agreement such as the Paris Agreement, CARICOM may look to define their own markets within the Community. As a result, member states may be able to provide benefits to clean energy producers without breaching international obligations.

a. Market as Encompassing the Entire Energy Sector

Furthermore, even where the market to be considered is the entire energy sector, advantages granted to enterprises in the renewable sector may not be considered a benefit. This is on the premise that non-renewable energy producers have been granted substantial subsidies in the past.³⁰⁰ This is disproportionately larger than the subsidies cumulatively granted to clean energy producers.³⁰¹ Therefore, CARICOM states seeking to impose measures to benefit clean energy producers may contend that the measure is not a ‘treaty subsidy’. This is because the idea of providing subsidies for clean energy is to recalibrate an already distorted market;³⁰²

²⁹⁷ PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WTO* (4th ed. 2017).

²⁹⁸ Kyoto Protocol, *supra* note 288, annex I.

²⁹⁹ RTC, *supra* note 188, at art. 15(1).

³⁰⁰ Howse, *supra* note 164.

³⁰¹ *Id.*

³⁰² Appellate Body Report, *Japan — Countervailing Duties on Dynamic Random Access Memories from Korea*, WTO Doc. WT/DS336/23 (adopted Dec. 17, 2007).

thereby, achieving equilibrium in the energy market. As such, clean energy producers are not being granted ‘benefits’.

Cases on subsidies emerging from the WTO and under RTAs demonstrate that a large issue in providing subsidies for non-renewable energy sources is the inability of undertakings in other states to benefit from a state’s subsidies.³⁰³ This is because the subsidies are applied to benefit national producers or enterprises as opposed to all enterprises established or registered in the state. Therefore, if a CARICOM state were to provide subsidies for all enterprises, it would be less objectionable. Nevertheless, as can be seen from the issue raised in the pending case of *China — Measures Concerning Wind Power Equipment*, the indiscriminate provision of subsidies may still attract liability.³⁰⁴

b. The Forms Subsidies Should Take

In 2015, 88% of Jamaica’s electricity sector was dependent on fossil fuels for energy generation and the remaining 12% was provided through renewable sources.³⁰⁵ In St. Vincent and the Grenadines, only 20% of the total energy production was produced from hydroelectricity.³⁰⁶ To shift the methods of energy production and consumption towards renewable energy sources, this sub-part proposes that subsidies in CARICOM states may take the form of tax incentives on the import of raw materials.

Barbados passed a Fiscal Incentives Act in 1974 that granted tax holidays to installers of Renewable Energy Generating Systems.³⁰⁷ Subsequent legislation provided an annual allowance of 150% of the capital expenditure for assets used in the business and an exemption from the imposition of import duty or the environmental levy on various items.³⁰⁸ Barbados is currently ranked fifth in the world per capita in solar power and its consumption of fossil fuels has reduced

³⁰³ T. Couture & Y. Gagnon, *An Analysis of Feed-in Tariff Remuneration Models: Implications for Renewable Energy Investment*, 38(2) ENERGY POL’Y 955, 957 (Feb., 2010).

³⁰⁴ Request for Consultations by the United States, *China — Measures Concerning Wind Power Equipment*, WTO Doc. WT/DS419/1 (Jan. 6, 2011).

³⁰⁵ Bella et al., *supra* note 285.

³⁰⁶ *Id.*

³⁰⁷ *Fiscal Incentives Act*, SICE, FOREIGN TRADE INFO., ORG. AM. STATES (1974), [http://www.sice.oas.org/investment/NatLeg/Bar/Fiscal_Incentive_Act_with_Amendments\[1\].pdf](http://www.sice.oas.org/investment/NatLeg/Bar/Fiscal_Incentive_Act_with_Amendments[1].pdf) (Barb.).

³⁰⁸ Morton Holder, *Renewable Energy – The Next Industrial Revolution for Barbados*, BUS. BARB. (Aug. 13, 2015), <https://businessbarbados.com/trending/green-business/renewable-energy-industrial-revolution/>.

significantly.³⁰⁹ CARICOM states may exempt those materials from import duties, which are instrumental in developing alternative energy solutions, including wind turbines, batteries, distribution, and conversion machinery.

Since the raw materials used in the production of alternative energy are not exclusively related to alternative energy production, the possibility exists for enterprises to use subsidisation to continue pursuing non-renewable options. In anticipation to avoid this, CARICOM should impose safeguards on the use of subsidies. First, CARICOM may authorize a schedule of goods that qualify for subsidies. The schedule achieves standardisation and certainty regarding the raw materials that are excluded across all states. Second, there must also be a schedule of enterprises or natural persons that are eligible for the subsidy, reviewable by COTED. Having identifiable beneficiaries of subsidies, fosters the shift to renewable energy because enterprises are better able to anticipate and organise their resources to benefit from the subsidies. This is as opposed to a system where there is open subsidisation of raw materials and those raw materials benefit the non-renewable energy sector.

3. Trade Liberalisation in Capital and Financial Services: Green Bonds

This part further proposes that green bonds can be used to make the transition from non-renewable to renewable energy. Green bonds involve the financing of investments or projects that provide environmental and social benefits. Since 2007, the cumulative issuance of green bonds has surpassed US\$ 1trillion. These may be in the form of private or public debt. Under Article 39 of the RTC, member states shall not introduce any new restrictions on the movement of capital and payments connected with such movements and on current payments and transfers.³¹⁰ Therefore, under Article 39 there should be no new impediments for enterprises established in Jamaica from accessing capital in Trinidad. As an example, Williams Renewable Energy Limited (WREL) raised and deployed Barbados\$ 19 million to fund 6.9 MW of PV Solar in Barbados.³¹¹ The programme would be renewed in 2021 to fund 8.7 MW of PV Solar. The green bond is instrumental in promoting investment in renewable energy. With the liberalisation of trade in capital and financial service, investors in other CARICOM states can participate in Barbados' programme. Similarly, Wigton Windfarm Limited (Wigton) offered eleven-billion

³⁰⁹ Helen Shair-Singh, *Get It While It's Hot- Barbados' Solar Energy Revolution*, CARIBBEAN BEAT (2015), <https://www.caribbean-beat.com/issue-132/barbados-solar-energy-get-hot#axzz76eGqaYt7>.

³¹⁰ RTC, *supra* note 188, at art. 39.

³¹¹ *Williams Caribbean Capital*, CLIMATE BONDS: INITIATIVE, <https://www.climatebonds.net/certification/williams-caribbean-capital>.

shares at Jamaican\$ 0.50 (fifty cents) each to the public in Jamaica.³¹² The projected total plant output of the project is 164,755 MWh per year. Effectively, this will account for 3.7% of Jamaica's electricity generation.

Unlike WREL, Wigton's participation in renewable energy was not owing to green bonds. However, green bonds would contribute to a larger participation. Furthermore, the cross-national access to these bonds would be heightened by the liberalisation of the trade in capital.

D. Conclusion

Trade measures can advance the goal of climate change mitigation. These measures can be coercive measures to unilaterally address the effects of climate change within the region. Alternatively, the measures can be industry supportive to actuate the shift from non-renewable energy dependency to renewables. However, if CARICOM states are desirous of using trade measures to enforce climate change obligations, they should balance the consequences of the measures against the global benefit of climate change mitigation.

V. CURRENT RESPONSE OF THE INTERNATIONAL COMMUNITY TOWARDS SIDS/LEAST DEVELOPED COUNTRIES (LDCs) AND RECOMMENDATIONS

The international community's role in addressing the unique challenges faced by SIDS and LDCs is complex and multifaceted. This part discusses the positive aspects and limitations present in the current structure of international institutions. It further provides recommendations for addressing these limitations.

A. Positive Aspects

This sub-part analyses the success of the international community in addressing the unique challenges faced by SIDS and LDCs. Due to treaties such as the Paris Agreement, the complex needs and vulnerabilities of SIDS and LDCs are, at the very least, legally recognised by the global community. This recognition is demonstrated through three key legal principles embedded in the Paris Agreement.³¹³

³¹² *Wigton Wind Farm*, DEV. BANK JAM. LTD. (Dec. 8, 2020), <https://dbankjm.com/completed-transactions/wigton-wind-farm/>.

³¹³ Achala Abeysinghe et al., *The Paris Agreement and the LDCs*, INT'L INST. ENV'T DEV. (Mar., 2016).

First, the Preamble of the Paris Agreement states that LDCs in specific, are subject to funding and technology transfer from the greater international community due to their unique situations and needs. Second, Article 13 of the Paris Agreement specifically establishes a framework for acknowledging the special situations and needs of SIDS.³¹⁴ Lastly, the Paris Agreement ensures that LDCs play a participatory role in enabling non-punitive compliance of other nations within the provisions of the agreement. This is substantiated through Article 15, which establishes an expert-based committee on compliance that permanently includes at least one LDC member.

Not only was the Paris Agreement legally effective in making LDCs and SIDS commit to a global response to curb emissions, but it was also politically influential in facilitating their unity and undertaking of global leadership. Even the smallest of the nations were granted a fair opportunity to respond as a united coalition with their needs and vulnerabilities. The Alliance of Small Island States (AOSIS) advocated for the recognition of SIDS's special circumstances and needs as particularly vulnerable countries.³¹⁵ This is substantiated through SIDS being affiliated with and accounted for in mitigation, adaptation, finance, capacity building, and transparency issues in the Paris Agreement.³¹⁶

Moreover, a small island nation like Fiji was able to demonstrate the response of such nations to address climate change with its Presidency of Conference of the Parties (COP 23) in Bonn and its Presidency of the Oceans Conference in 2017. This enabled SIDS to raise awareness on adaptation strategies being equally important as mitigation efforts undertaken by wealthier nations. Leadership of multilateral conferences by SIDS educated the world on the issues faced by them, such as rising sea levels, food insecurity, settlement relocations, imminent climate refugee displacement, etc.³¹⁷ In summary, the international community has done fairly well in realising the needs of LDCs and SIDS through diplomatic engagements and leadership opportunities presented to them.

B. *Issues that Require Addressal*

This sub-part discusses the flaws of the international community in catering to the specific needs and vulnerabilities of SIDS and LDCs. First, SIDS and LDCs are

³¹⁴ Paris Agreement, *supra* note 28, at art. 13.

³¹⁵ Timothée Ourbak & Alexandre K. Magnan, *The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players*, REG'L ENVTL. CHANGE 2201, 2203 (2018).

³¹⁶ *Id.*

³¹⁷ Gray Johnson & Becca Hunziker, *Fiji's COP23 Presidency Highlights Climate Struggles of Small Island Nations*, ATLANTIC COUNCIL (Nov. 16, 2017), <https://www.atlanticcouncil.org/blogs/new-atlanticist/fiji-s-cop23-presidency-highlights-climate-struggles-of-small-island-nations/>.

still excluded from major climate-oriented discussions. Most of the global arena, outside the UNFCCC, focuses on climate mitigation strategies for top emitter nations. This should come as no surprise as it is these nations that initiate the multilateral discussions in the first place. For instance, Joe Biden, President of the US, inaugurated the first climate summit under his administration in which the US government invited only forty nations because of their high emission rates.³¹⁸ The only SIDS and LDCs that were included in the discussions were nations of geopolitical strategic importance to the US such as the Marshall Islands, the Democratic Republic of Congo, and a few others.

Such summits initiated only by the 'big' players have serious implications on climate policy. It sends an indirect message to nations, vulnerable due to climate change, that the world perceives adaptation measures as being far less important than mitigation efforts. Although it is acknowledged that mitigation strategies are more critical in the efforts towards curbing global emissions, adaption and mitigation are not 'zero sum games'. Both should be considered equally important since it is the failure of industrialised nations to mitigate emissions that is causing citizens of remote climate vulnerable countries to adapt to the effects of climate change. However, the harsh reality surrounding climate and international politics is that there is no 'world police' to adjudicate these matters. Every single nation is a unitary actor. Thus, the larger, wealthier, and stronger nations set the rules of the game and the agenda that the world is to follow.³¹⁹ This theory of international politics unfortunately applies to climate law and policy as well.

Second, the international community's use of the World Bank's income classification in distributing funds to LDCs and SIDS for climate vulnerabilities is erroneous and illogical in nature. When developing nations reach upper middle-income status, they are only eligible for loans from the International Bank for Reconstruction and Development (IBRD). The IBRD has more stringent guidelines than the International Development Association (IDA) which provides loans for LDCs.³²⁰ Therefore, when middle-income countries face severe climate disasters, which destroy large portions of their economies overnight, their income status renders them ineligible to receive other forms of assistance.

³¹⁸ *President Biden Invites 40 World Leaders to Leaders Summit on Climate*, WHITE HOUSE (Mar. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/26/president-biden-invites-40-world-leaders-to-leaders-summit-on-climate/>.

³¹⁹ BRUCE BUENO DE MESQUITA, *PRINCIPLES OF INTERNATIONAL POLITICS* (5th ed. 2013).

³²⁰ Lindsay Dolan, *What's in a World Bank Income Classification?*, CTR. GLOB. DEV. (July 11, 2016), <https://www.cgdev.org/blog/whats-world-bank-income-classification>.

For example, Fiji faced Cyclone Winston in 2016 which came to be known as the most damaging cyclone ever in the Southern Hemisphere. The damage done overnight was equivalent to 31% of the nation's GDP.³²¹ Due to this state of emergency, Fiji found itself in need of greater international assistance.³²² Fiji is not the only upper middle-income country placed in this global dilemma. Other nations outside of the South Pacific such as Maldives, Mauritius, Guyana, Thailand, and many more fall into the category of being subject to frequent climate-related disasters, but being ineligible for wider assistance due to their income status.

Furthermore, the income classification system for countries subject to climate disasters negatively affects the incentive systems set in place for LDCs. Data shows that over the past thirty years, low-income countries suffered disproportionately high damage from natural disasters.³²³ In addition to that, relative economic losses are extremely high in coastal cities of low and lower middle-income countries.³²⁴

LDCs are put in a position where they must choose between striving for higher economic growth at the cost of receiving less foreign aid when plagued with frequent climate disasters in the future, or to remain as a low-income nation and continue receiving increased foreign aid from the international community. It seems that most LDCs choose the latter. However, economic growth and aid are supposed to be complementary goods, not substitutes. Instead, developing nations are incentivised to stay in the low-income categorization in order to receive IDA finance and other concessional loans from international institutions. With seasonal climate disasters becoming more frequent and severe in nature for coastal low-income countries, it is no surprise that governments of these LDCs will prioritise a frequent income fund through aid at the cost of long term domestic economic growth.

C. *Recommendations*

This sub-part assesses the potential recommendations for addressing the flaws previously discussed. A new international system is required to be set in place for

³²¹ WTO, STUDY 1 PACIFIC COUNTRY ANNEX 40 (2018).

³²² *More Funding Needed to Help Those Affected by Cyclone Winston*, RELIEFWEB (Mar. 31, 2016), <https://reliefweb.int/report/fiji/more-funding-needed-help-those-affected-cyclone-winston>; *Fiji and UN Appeal for \$38 Million to Relieve 'Catastrophic Loss' after Cyclone Winston*, U.N. (Mar. 4, 2016), <https://news.un.org/en/story/2016/03/523602-fiji-and-un-appeal-38-million-relieve-catastrophic-loss-after-cyclone-winston>.

³²³ J. E. Rentschler, *Why Resilience Matters: The Poverty Impacts of Disasters* (World Bank Pol'y Res., Working Paper No. 6699, 2013).

³²⁴ Stephane Hallegatte et al., *Future Flood Losses in Major Coastal Cities*, 3 NATURE CLIMATE CHANGE 802 (2013).

allocation of funds during climate disasters, based on a metric of climate vulnerability rather than income classification. This would incentivise climate vulnerable lower-income countries to increase economic growth without the concern of reduced aid from international institutions in the future. Furthermore, a system like this could potentially reduce the problems unaddressed in income classifications, which ignore a nation's frequency to natural disasters, its human development with respect to citizens' education and health, and likelihood of displacement of the citizens.

However, the question is not whether it should be done, but *how* this new system can be implemented efficiently and fairly. Any attempt to classify countries according to a metric is bound to face controversies and complications. A perfect example is the obsolete classification of Annex I and non-Annex I countries in the Kyoto Protocol, whereby the old classification system was not representative of major developing and developed nations today. Other research studies have attempted the categorization of developing countries based on their ability to address poverty through redistribution,³²⁵ which again ignores qualitative factors such as human development and political institutions.

Thus, a metric for classifying developing countries according to climate vulnerability will be met with similar shortcomings and criticism. While there is no chartered framework for this new metric, it is recommended that any new classification should consider these factors simultaneously: (a) frequency of climate-related disasters and this may correspond with regions of the world; (b) income levels according to the purchasing power parity of citizens; (c) position of the governments with respect to civil liberties, political freedoms, and quality of political institutions; and (d) ability to adhere to the seventeen long-term 2030 SDGs, including response for climate change. While it may not be the most ideal model, any new metric for classifying countries and their accessibility to foreign aid should assess these four elements equally. However, it is acknowledged that other factors such as politics, geopolitical strategies, national interests, resources, and country-specific macroeconomics play a role in the real world as well.

D. Conclusion

In conclusion, this part has highlighted what the international community has done for addressing the unique challenges faced by SIDS and LDCs in terms of legal provisions in the Paris Agreement. Second, it underlined the flaws of the global community in failing to recognise the vulnerabilities/needs of SIDS and LDCs, such as ignorance of adaption measures and limitations of income classifications in

³²⁵ Martin Ravallion, *Do Poorer Countries Have Less Capacity for Redistribution?* (World Bank Pol'y Res., Working Paper No. 5046, 2009).

granting funds to climate fragile developing countries. Lastly, it recommends a new metric for granting aid to developing countries which equally prioritises four imperative factors rather than just national income, acknowledging the criticism encompassing any new proposed classification system.