

# THE WORLD TRADE ORGANIZATION'S RESPONSIBILITY TO THE GLOBAL COMMONS

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*The international community has recognised the need for an urgent response to the environmental challenges facing the global commons, evidenced by a multitude of international agreements. A global issue requires a global response. The World Trade Organization's unique structure and dispute resolution system is not only well positioned to lead such a response, but as a global organisation holds a responsibility to do so. This paper examines the ways in which the World Trade Organization and its covered agreements permit environmentally damaging policies, such as fishery and agricultural subsidies, and obstructs the use of measures in pursuit of preserving the commons, namely those utilised to combat climate change. As the threat increases, the World Trade Organization must adapt to new global attitudes and step into a more pro-environmental role.*

## I INTRODUCTION

The modern world has enjoyed an era of immense globalisation, generating economic growth and higher standards of living. This growth has been met with increasing activities in the 'global commons' – those domains that do not fall within the jurisdiction of any one state but are open for use by all countries, companies and individuals, such as the High Seas.<sup>1</sup> Over-fishing, industrial pollution and intensive farming are causing severe global environmental challenges to the commons, as do the perverse incentives created by the government programs that support them. The ability of the World Trade Organization (WTO) to cope with these global challenges is limited to the structure and interpretation of the covered agreements. While a number of relevant provisions may be harnessed in pursuit of sustainable development and environmental protection, the *Marrakesh Agreement Establishing the World Trade Organization*<sup>2</sup> ('WTO Agreement') fails to provide coherent regulation on activities harming the commons.<sup>3</sup> Scholar Steve Charnovitz announced 'in a globalized world, the WTO can no longer be merely a

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<sup>1</sup> UN System Task Team, 'Global governance and governance of the global commons in the global partnership for development beyond 2015' (Thematic Think Piece, UN, January 2013) 3.

<sup>2</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Preamble ('WTO Agreement').

<sup>3</sup> Ken Conca, 'The WTO and the undermining of global environmental governance' (2000) 7(3) *Review of International Political Economy* 484, 484.

trade agency. The WTO also has to be an environmental agency'.<sup>4</sup> This paper supports his view, particularly in the aftermath of the *Paris Agreement*.<sup>5</sup> Part I of this paper introduces the relevant concepts and discusses current international governance, whilst parts II, III and IV will examine how policies relating to fishery depletion, climate change and biodiversity are affected by the WTO. Each part will also explore the avenues through which the WTO may enhance or fulfil its environmental role in the pursuit of coherent regulation, namely, addressing fishery subsidies and notification requirements, legitimising measures that address carbon leakage and assistance to the renewable energy sector, and increasing transparency and enforcement of harmful agricultural subsidies. The author recognises the impact of other international organisations and global efforts to reverse current trends. However, this paper adopts a narrow focus, limiting its discussion to the role of the WTO.

## II THE GLOBAL COMMONS AND TRADE

International law identifies four commons: the High Seas<sup>6</sup>, the Atmosphere, the Antarctica and the Outer Space.<sup>7</sup> Recently, other natural resources vital to the welfare of nations, such as biodiversity, have been included.<sup>8</sup> These commons are the earth's shared natural resources, described as an unregulated 'no man's land', accessible and appropriated by everyone free of charge. This is commonly referred to as a tragedy of the commons.<sup>9</sup> Society has demanded more from these resources than ever before, ill-accompanied by a lack of sufficient adjustments in the global governance regime.<sup>10</sup>

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<sup>4</sup> Steve Charnovitz, 'A New WTO Paradigm for Trade and The Environment' (2007) 11 *Singapore Year Book of International Law* 15, 36.

<sup>5</sup> *Paris Agreement* opened for signature 22 April 2016 (entered into force 4 November 2016).

<sup>6</sup> The United Nations Convention of the Law of the Sea (UNCLOS) is the overarching treaty for managing human activities in the ocean. It divides the ocean into six different zones. A State has varying degrees of jurisdiction over five zones: Internal Waters, Territorial Sea, Contiguous Zone, Exclusive Economic Zone (EEZ) and Continental Shelf. The sixth zone is the High Seas and Deep Ocean Floor, which are beyond any national jurisdiction. The ocean surface and the water column beyond the EEZ are referred to as the High Seas. The seabed beyond the EEZ and Continental Shelf are referred to as the Area. This paper focuses on fishing activities on the High Seas as defined by the UNCLOS. See *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>7</sup> UN Task Team, above n 1, 5.

<sup>8</sup> *Ibid.* Note that 'global commons' is used as a descriptive term, rather than one denoting a legal or technical meaning. International treaties may not refer to these resources as such. For instance, the Convention on Biological Diversity states that 'the conservation of biological diversity is a *common concern of humankind*'. UNCLOS refers to the seabed and ocean floor as the '*common heritage of mankind*'. However, for simplicity, the term 'global commons' is used throughout this paper.

<sup>9</sup> Ottmar Edenhofer et al, 'The Atmosphere as a Global Commons – Challenges for International Cooperation and Governance' (Discussion Paper, The Harvard Project on Climate Agreements, August 2013) 2.

<sup>10</sup> UN Task Team, above n 1.

However, it must be noted that these commons are not completely unregulated. Agreements such as the *Code of Conduct for Responsible Fisheries*<sup>11</sup> and the *Southern Indian Ocean Fisheries Agreement*<sup>12</sup> seek to restrict and manage human activities on the High Seas. Climate change regulation is spearheaded by the *United Nations Framework Convention on Climate Change* (UNFCCC)<sup>13</sup> and the *Paris Agreement*<sup>14</sup>; an unprecedented international agreement which aims to strengthen the global response to climate change.<sup>15</sup> UN Member States adopted the *2030 Agenda for Sustainable Development*, including goals specifically referring to action against climate change, sustainable use of marine resources and restoring biodiversity.<sup>16</sup> Regional trade agreements such as the *North American Free Trade Agreement* and the *Trans-Pacific Partnership*, have gone beyond the WTO by making environmental issues a component of international trade agreements.<sup>17</sup>

These international agreements represent a mix of both hard law, such as the binding UNFCCC treaty, and soft law, such as the *2030 Agenda for Sustainable Development* and the nationally determined contributions of the *Paris Agreement*.<sup>18</sup> The effect is to motivate change by imposing varying degrees of obligations on participating States. However, it is argued that in the absence of an authoritative international environmental organisation to protect the commons, governments are not adequately encouraged to implement policies to prevent their depletion.<sup>19</sup> Evidently, environmental and sustainability concerns have become a major international policy field. Implementing such measures will create synergies and collisions with the international trade obligations

<sup>11</sup> United Nations Food and Agriculture Organization, *Code of Conduct for Responsible Fisheries*, FAO Doc 95/20/Rev/1 (31 October 1995).

<sup>12</sup> *Southern Indian Ocean Fisheries Agreement*, opened for signature 7 July 2006, 2835 UNTS 409 (entered into force 21 June 2012).

<sup>13</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

<sup>14</sup> UNFCCC, Decision 1/CP.21, 'Adoption of the Paris Agreement' (29 January 2016), UN Doc FCCC/CP/2015/10/Add.1, 15 December 2015.

<sup>15</sup> Charles De Jager, *Potential U.S. Withdrawal from Paris Climate Agreement Likely to Lead to WTO Challenges* (8 December 2016) <<http://www.lexology.com/library/detail.aspx?g=b7dc0bcb-14e7-485a-b694-42787fca-7b6a>>.

<sup>16</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc GAOR, 17<sup>th</sup> sess, Agenda Item 15 and 116, UN Doc A/RES/70/1 (25 September 2015) Goals 13, 14, 15 ('ASD').

<sup>17</sup> Susanne Droege et al, 'The trade system and climate action: ways forward under the Paris Agreement' (Working Paper, Climate Strategies, October 2016) 12.

<sup>18</sup> See e.g. Peter Lawrence and Daryl Wong, 'Soft law in the Paris Climate Agreement: Strength or weakness?' (2017) 26(3) *Review of European Law* 276.

<sup>19</sup> Gabrielle Marceau, 'The Interface Between the Trade Rules and Climate Change Actions' in Deok Young Park (ed) *Legal Issues on Climate Change and International Trade Law* (Springer, 2016) 3, 4.

of the WTO regime, sparking disputes and trade sanctions.<sup>20</sup> This is understood by examining the interplay between trade and the environment. Firstly, global trade impacts the environment through increased production and emissions from international transport.<sup>21</sup> Secondly, trade rules can create challenges for these environmental policies, for example, by impeding the diffusion of ‘green technologies’.<sup>22</sup> Thirdly, implementing environmental policies may impact trade volumes, particularly industries reliant on fossil fuels.<sup>23</sup> With this context, the WTO is well-positioned to stimulate change and create the necessary obligations on individual Member States.

### III THE HIGH SEAS

Unsustainable fishing practices have led to overexploitation of the world’s fisheries.<sup>24</sup> International agreements have sought to restrict such practices, including the *United Nations Fish Stocks Agreement*<sup>25</sup> and Regional Fisheries Management Organisations. However, lack of compliance and enforcement has generated weak multilateral cooperation.<sup>26</sup> If current trends continue, the world’s fisheries could be beyond recovery within decades, debilitating ecosystems and impacting livelihoods in fishery-dependent economies.<sup>27</sup> With approximately 78% of seafood products exposed to international trade competition, increased trade in fisheries has exacerbated the issue.<sup>28</sup> This has been facilitated by freezing and storage technology, low transportation costs and trade liberalisation.<sup>29</sup> Trade restrictions and regulations therefore play a significant role in the protection of this resource. The following exploration of this issue is confined to the WTO’s approach to fishery subsidies.

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<sup>20</sup> *Ibid* 6.

<sup>21</sup> Richard Baron and Justine Garrett, ‘Trade and Environment Interactions: Governance Issues’ (Background Paper, OECD, June 2017) 7.

<sup>22</sup> *Ibid* 8.

<sup>23</sup> *Ibid*.

<sup>24</sup> Frank Asche and Martin Smith, ‘Trade and Fisheries: Key Issues for the WTO’ (Working Paper, WTO, December 2009) 2.

<sup>25</sup> *Agreement for the Implementation of the United Nations Convention of the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001).

<sup>26</sup> See Michael Lodge, ‘Managing International Fisheries: Improving Fisheries Governance by Strengthening Regional Fisheries Organizations’ (Briefing Paper, Chatham House, March 2007).

<sup>27</sup> Stephen Fevrier and Manleen Dugal, ‘The WTO’s role in fisheries subsidies and its implications for Africa’, *International Centre for Trade and Sustainable Development: Bridges Africa* (online), 20 December 2016 <<https://www.ictsd.org/bridges-news/bridges-africa/news/the-wto's-role-in-fisheries-subsidies-and-its-implications-for>>.

<sup>28</sup> Food and Agriculture Organization, ‘The State of the World Fisheries and Aquaculture 2016’ (Report, FAO, 2016) 51 (‘FAO’).

<sup>29</sup> Asche and Smith, above n 24.

A *Fisheries Subsidies*

Many fisheries around the world receive sizeable subsidies in order to counteract its unprofitable nature and keep the industry in economic balance.<sup>30</sup> According to recent research, the global fishery industry is being supported by \$35 billion worth of government subsidies per annum.<sup>31</sup> The most harmful forms of fisheries subsidies are those that are 'capacity-enhancing', such as fuel and boat construction subsidies.<sup>32</sup> Reducing such costs in the industry leads to increased efforts, overfishing and declining fish stocks.<sup>33</sup>

As the extensive subsidisation of the industry indicates, the regulations provided by the *Agreement on Subsidies and Countervailing Measures*<sup>34</sup> (SCM) are ineffective in curtailing fisheries subsidies.<sup>35</sup> The SCM regulates prohibited and actionable subsidies. A prohibited subsidy must be, *inter alia*, contingent upon export performance.<sup>36</sup> These are prohibited as they are designed to directly affect trade and are likely to be detrimental to other Members.<sup>37</sup> However, due to a lack of sufficient data and difficulties in measuring trade distortion, no direct connection between the subsidisation of fisheries and its trade-distorting effects can be identified.<sup>38</sup> The absence of reliable data is largely attributable to the disregard of the subsidy notification requirement by Member States.<sup>39</sup> Actionable subsidies must cause adverse effects on the interests of another Member.<sup>40</sup> This is difficult in the fisheries context as countries can support the sector in many different ways and the effects are spread over heterogeneous fisheries products.<sup>41</sup> Therefore, the environmental impact aggravated by this subsidisation is not adequately covered in the SCM. The lack of substantial grounds for complaint may explain the absence of WTO litigation in the area. However, the likely explanation is that, given the common nature

<sup>30</sup> Oliver Delves, 'WTO Disciplines and Fisheries Subsidies – Should the "SCM Agreement" Be Modified?' (2006) 37 *Victoria University of Wellington Law Review* 341, 346; Asche and Smith, above n 24, 24.

<sup>31</sup> Rashid Sumaila et al, 'Global fisheries subsidies: An updated estimate' (2016) 69 *Marine Policy* 189, 189.

<sup>32</sup> Asche and Smith, above n 24, 38.

<sup>33</sup> FAO, above n 28, 186.

<sup>34</sup> *WTO Agreement*, annex 1A ('*Agreement on Subsidies and Countervailing Measures*') ('SCM').

<sup>35</sup> Delves, above n 30.

<sup>36</sup> *SCM* art 3.

<sup>37</sup> WTO, *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") <[https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm)>.

<sup>38</sup> OECD, 'Support to fisheries: Levels and Impacts' (OECD Food, Agriculture and Fisheries Papers, No 103, OECD Publishing, May 2017) 12; Delves, above in 30, 347.

<sup>39</sup> Delves, above n 17, 350; *SCM* art 25.

<sup>40</sup> *SCM* arts 5, 6, 15.

<sup>41</sup> Margaret Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, 2011) 92.

of the practice, Members wish to avoid precedent that can be used to scrutinize their own measures.<sup>42</sup>

## B *WTO's Environmental Role*

Having recognised these harms, the *2030 Agenda for Sustainable Development* aims to eliminate damaging forms of fisheries subsidies by 2020.<sup>43</sup> Additionally, the *Trans-Pacific Partnership* requires parties to prohibit harmful fisheries subsidies.<sup>44</sup> However, despite the commitment in the 2001 Doha Declaration to ‘clarify and improve WTO disciplines on fisheries’, the issue stalemated in the WTO since the proposal of sector-specific disciplines in 2007.<sup>45</sup> Recently the debate has reignited, where new proposals to eliminate harmful forms of fisheries subsidies were expected to be agreed upon at the Ministerial Conference in December 2017.<sup>46</sup> Unfortunately, no agreement was reached, and the decision was made merely to ‘continue to engage constructively in the fisheries subsidies negotiations’.<sup>47</sup> Negotiations have intensified in 2018 in preparation for the next Ministerial Conference in June 2020, the last opportunity to reach an agreement before the *2030 Agenda for Sustainable Development* deadline.<sup>48</sup>

Any future agreement must avoid a ‘one-size-fits-all’ approach. Fishery trade represents a significant source of foreign currency earnings for many developing countries, representing 54% of total fishery export value in 2014.<sup>49</sup> Subsidy elimination will also impact the accessibility of an important source of food for these countries, including approximately 400 million Africans.<sup>50</sup> Accordingly, special and differential

<sup>42</sup> Ibid.

<sup>43</sup> *ASD*, UN Doc A/RES/70/1, Goal 14.6.

<sup>44</sup> Fevrier and Dugal, above n 27. The *Trans-Pacific Partnership* (TPP) is signed but not yet in force. Following the withdrawal of the US in 2017, the remaining 11 countries signed the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), which is currently in force. This is a separate agreement that incorporates the provisions of the TPP.

<sup>45</sup> OECD, above n 38, 6; *Doha Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (Ministerial Declaration) para 28.

<sup>46</sup> ‘Two new proposals discussed in continuing negotiations on fisheries subsidies’, *WTO News* (online), 14 June 2017 <[https://www.wto.org/english/news\\_e/news17\\_e/fish\\_14jun17\\_e.htm](https://www.wto.org/english/news_e/news17_e/fish_14jun17_e.htm)>; Arun S, ‘Decision on fishing subsidies certain in WTO’s Dec. meet’, *The Hindu* (online), 28 October 2017 <<http://www.thehindu.com/business/decision-on-fishing-subsidies-certain-in-wtos-dec-meet/article19934131.ece>>.

<sup>47</sup> Catherine Benson Wahlen, *WTO Puts Off Agreement on Fisheries Subsidies* (18 December 2017) International Institute for Sustainable Development <<http://sdg.iisd.org/news/wto-puts-off-agreement-on-fisheries-subsidies/>>.

<sup>48</sup> ‘WTO fisheries subsidies negotiations – down but not out’, *United Nations Conference on Trade and Development* (online) 17 July 2018 <<http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1816>>; ‘WTO members voice commitment to intensify fisheries subsidies negotiations in 2019’, *WTO News* (online), 20 December 2018 <[https://www.wto.org/english/news\\_e/news18\\_e/fish\\_20dec18\\_e.htm](https://www.wto.org/english/news_e/news18_e/fish_20dec18_e.htm)>.

<sup>49</sup> FAO, above n 28, 55.

<sup>50</sup> Fevrier and Dugal, above n 27.

treatment provisions for developing and least-developed countries have been part of the recent negotiations.<sup>51</sup> Notification requirements have also been part of the discussions, which must be addressed to provide transparency and accurate statistics.<sup>52</sup> These recent efforts are promising as Members appear to have recognised the urgency of the situation, resulting in a change of attitudes towards the fishery industry. Combined with stricter obligations and clear grounds for complaint, Members would be more likely to utilise reliable data to commence action and hold each other accountable within the dispute settlement process. This exhibits the WTO's potential to contribute to sustainability, however, concrete outcomes are yet to be achieved.

#### IV ATMOSPHERE

The atmosphere has functioned as a sink for carbon dioxide and other greenhouse gas emissions, increasing global mean temperatures.<sup>53</sup> Recent reports from the World Meteorological Organization revealed record levels of emissions in 2016.<sup>54</sup> While numerous policies seek to combat the issue, this section focuses on carbon pricing and subsidisation of renewable energy, within the context of WTO rules and agreements.

##### A Carbon Pricing

Climate change policies, such as national carbon taxes and cap-and-trade schemes, incorporate the negative externalities of fossil fuel emissions into the cost of production.<sup>55</sup> However, differing commitments between countries leads to asymmetric climate policies and 'leakage' of production and jobs as corporations relocate to countries with less stringent policies to regain a competitive advantage.<sup>56</sup> Emissions are not reduced, but simply shifted to other areas.<sup>57</sup> The *Paris Agreement* appears to reinforce 'leakage' due to the range of differing efforts embodied in each country's own nationally

<sup>51</sup> 'WTO Members Set their Sights on Kazakhstan Ministerial Conference in June 2020', *International Centre for Trade and Sustainable Development: Bridges* (online) 2 August 2018 <<https://www.ictsd.org/bridges-news/bridges/news/wto-members-set-their-sights-on-kazakhstan-ministerial-conference-in-june>>.

<sup>52</sup> *Ibid.*

<sup>53</sup> Edenhofer et al, above n 9.

<sup>54</sup> World Meteorological Organization, 'WMO confirms 2017 among three warmest years on record' (Press Release, 18 January 2018) <<https://public.wmo.int/en/media/press-release/wmo-confirms-2017-among-three-warmest-years-record>>; World Meteorological Organization, 'Greenhouse gas levels in atmosphere reach new record' (Press Release, 20 November 2018) <<https://public.wmo.int/en/media/press-release/greenhouse-gas-levels-atmosphere-reach-new-record>>.

<sup>55</sup> Gary Hufbauer and Jisun Kim, 'The WTO and Climate Change: Challenges and Options' (Working Paper, No 9, Peterson Institute for International Economics, September 2009) 5.

<sup>56</sup> Marceau, above n 19, 3.

<sup>57</sup> *Ibid.*

determined contributions ('NDC').<sup>58</sup> Border carbon tax adjustments ('BCAs') seek to mitigate these issues by applying a charge to imports originating from countries with no or unsatisfactory carbon-restrained policies, preserving a level playing field.<sup>59</sup> Paris-partnered countries have considered proposals of a BCA on imports from the United States to deter any prolonged absence from the *Paris Agreement*.<sup>60</sup> Any subsequent trade disputes will be resolved through WTO procedures and subject to its non-discrimination obligations.<sup>61</sup>

According to the WTO's national treatment obligation, the BCA must not be applied so as to treat imported products less favourably than like domestic products.<sup>62</sup> 'Likeness' is determined by, *inter alia*, product-related characteristics, where the BCA may discriminate on the basis of inputs in production to the extent they are physically incorporated into the final product.<sup>63</sup> In reality, BCAs commonly differentiate products by their carbon footprint or by the associated policies of the origin country.<sup>64</sup> The orthodox view is that differences in non-product-related process and production methods ('NPR-PPMs') with respect to environmental impacts will not be sufficient to make the products 'unlike' and may not form the basis for discrimination.<sup>65</sup> To comply, the BCA on carbon-intensive imported products cannot be in excess of the domestic carbon tax.<sup>66</sup> However, effective retaliation for non-compliance with the *Paris Agreement* will require a more onerous BCA on United States imports, which will be WTO-inconsistent.

Applying a BCA to one country, such as the United States, will also contravene the most-favoured nation obligation ('MFN'), where imported products from one country cannot be treated less favourably than like products from another country.<sup>67</sup> However, applying the BCA to all like imports will be counterproductive, as it would impose a

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<sup>58</sup> Clara Brandi, 'Trade Elements in Countries' Climate Contributions under the Paris Agreement' (Issue Paper, *International Centre for Trade and Sustainable Development*, March 2017) 2.

<sup>59</sup> Rudi Kruse, 'Climate change regulation in Australia: Addressing leakage and international competitiveness consistently with the law of the WTO' (2011) 28 *Environmental and Planning Law Journal* 297, 303.

<sup>60</sup> De Jager, above n 15.

<sup>61</sup> Joel Trachtman, 'WTO Law Constraints on BTA and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes' (Discussion Paper, No 16(3), Resources of the Future, 2016) 3.

<sup>62</sup> *WTO Agreement*, annex 1A ('*General Agreement on Tariffs and Trade 1994*') arts III, II:2(a) ('GATT').

<sup>63</sup> Kruse, above n 59, 304.

<sup>64</sup> Patrick Low, Gabrielle Marceau and Julia Reinaud, 'The Interface between the Trade and Climate Change Regimes: Scoping the Issue' (Paper presented at Climate Change, Trade and Competitiveness: Issues for the WTO, Geneva, June 2010) 7.

<sup>65</sup> GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994) (not adopted) para 5.15; Trachtman, above n 61, 12.

<sup>66</sup> *GATT* art III:2.

<sup>67</sup> *GATT* art I.



'double taxation' on trading partners who remain committed to the *Paris Agreement* and may discourage stricter climate change policies.<sup>68</sup> Conflict may also arise if a BCA was utilized to encourage stronger commitment to countries' NDCs. Precedent suggests applying a BCA differently to Member States reflecting differing carbon intensities will violate the MFN.<sup>69</sup>

### 1 *WTO's Environmental Role*

The WTO allows for justification of environmental measures under the specific exceptions in Article XX of the *General Agreement on Tariffs and Trade* (GATT), the most applicable being measures related to human, animal or plant life or health and exhaustible natural resources.<sup>70</sup> However, the chapeau must be satisfied; it cannot be arbitrary or unjustifiable discrimination, or disguised trade restrictiveness.<sup>71</sup> In doing so, all alternative measures that are not as trade-restrictive must be exhausted, and the environmental purpose of the measure is established with clarity.<sup>72</sup> With regards to BCAs, while reducing carbon emissions and preventing carbon leakage would fit within the scope of the exception, shielding a domestic industry from the competition of carbon-intensive countries would most likely be viewed as a disguised restriction on trade.<sup>73</sup> Government debates on climate change policies and potential BCAs are likely to refer to maintaining international competitiveness and protecting the economy in the face of cheaper foreign substitutes unaffected by similar carbon policies.<sup>74</sup> This is particularly relevant as the Appellate Body has previously examined relevant parliamentary documents to establish protectionist intent.<sup>75</sup>

The panel and Appellate Body could legitimise the use of BCAs by determining 'likeness' by NPR-PPMs.<sup>76</sup> Consumers are becoming increasingly sensitive to environmental impacts of production; therefore, differentiation could be based on

<sup>68</sup> Kevin Doyle, *Withdrawal from Paris Agreement Introduces a Climate of Uncertainty in Trade* (9 June 2017) Tradevistas <<https://tradevistas.csis.org/withdrawal-paris-agreement-introduces-climate-uncertainty-trade/>>.

<sup>69</sup> GATT Panel Report, *Belgian Family Allowances*, GATT Doc G/32-1S/59 (7 November 1952) para 3; Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, WTO Doc WT/DS139/R, WT/DS142/R (19 June 2000); Trachtman, above n 61, 14.

<sup>70</sup> GATT arts XX(b), XX(g).

<sup>71</sup> GATT art XX.

<sup>72</sup> Droege et al, above n 17, 32, 40.

<sup>73</sup> Kruse, above n 59, 302; See also Appellate Body Report, *United States—Import Prohibition of Certain Shrimps and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998).

<sup>74</sup> Kruse, above n 59.

<sup>75</sup> Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WTO Doc WT/DS87/AB/R, WT/DS110/AB/R (13 December 1999) at [672], [17].

<sup>76</sup> Christine Kaufmann and Rolf Weber, 'Carbon-related border tax adjustment: mitigating climate change or restricting international trade' (2011) 10(4) *World Trade Review* 497, 508.

consumers' perceptions and behaviours; a criterion in analysing 'likeness'.<sup>77</sup> However, discriminatory measures based on NPR-PPMs inadvertently determines the climate change policies of the penalised country, diminishing their regulatory autonomy.<sup>78</sup>

### C Renewable Energy Subsidies

The conservation of the atmosphere depends largely on society's ability to source energy from renewable sources, such as solar, wind and hydropower.<sup>79</sup> Domestic government policy must support industries turning to renewable energies and allow sustainable practices to cultivate and replace carbon-intensive sectors.<sup>80</sup> Feed-in tariff programmes ('FIT'), a minimum guaranteed price for renewable energy producers, and attached local content requirements ('LCR'), an obligation to use a percentage of domestic input, provide stable prices and fast development of the domestic industry.<sup>81</sup> While it remains unclear whether such programmes qualify as a subsidy under the SCM, it is likely that they would be prohibited, as payments are commonly contingent upon LCR, thus restricting and distorting trade.<sup>82</sup> Recent WTO disputes have forced governments to alter or remove such measures, limiting their effectiveness and deterring domestic support.<sup>83</sup> For example, Canada's FIT programme was amended to comply with the Dispute Settlement Body's recommendations by eliminating or significantly lowering LCR.<sup>84</sup> The mere threat of a WTO dispute by the United States was sufficient for China to revoke its support to domestic wind turbine manufacturers.<sup>85</sup> Furthermore, such programmes are incompatible with non-discrimination obligations. Recently, the panel found India's LCR violated the national treatment obligation as it discouraged the

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<sup>77</sup> *Report of the Working Party on Border Tax Adjustments*, GATT Doc L/3464 (20 November); See also Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) para 101; Peter Van den Bossche Werner Zdouc, *The Law and Policy of the WTO* (Cambridge University Press, 3<sup>rd</sup> ed, 2014) 393.

<sup>78</sup> Kaufmann and Weber, above n 76, 509.

<sup>79</sup> Phebe Asantewaa Owusu and Samuel Asumadu-Sarkodie, 'A Review of Renewable Energy Sources, Sustainability Issues and Climate Change Mitigation' (2016) 3 *Cogent Engineering* 1, 14-15.

<sup>80</sup> Droege et al, above n 17, 19.

<sup>81</sup> Paolo Farah and Elena Cima, 'The WTO, Renewable Energy Subsidies, and the Case of Feed-in Tariffs: Time for Reform and Sustainable Development?' (2015) 27 *Georgetown International Environmental Law Review* 515, 519.

<sup>82</sup> *SCM* art 3.1(b); Appellate Body Reports, *Canada—Renewable Energy / Feed-In Tariff*, WTO Docs WT/DS412/ABR, WT/DS426/AB/R (6 May 2013); *Ibid* 522.

<sup>83</sup> Farah and Cima, above n 81, 522, 525.

<sup>84</sup> 'Canada – Certain Measures Affecting the Renewable Energy Generation Sector', *World Trade Organization* (online) 26 June 2014 <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds412\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm)>; Jamie Wilks and Geoffrey Kubrick, 'Shining a Light on Solar Panels: Government Promotion of Renewable Energy Leads to Trade Disputes and Trade Remedies' (International Trade Bulletin, McMillan, October 2015) 2.

<sup>85</sup> Farah and Cima, above n 81, 527.

use of foreign components for solar panels.<sup>86</sup> Article XX exceptions were not available, as the cumulative supply of both foreign and domestic components was sufficient to meet the demand of power developers, and thus a less trade-restrictive alternative was available.<sup>87</sup>

## 1 *WTO's Environmental Role*

When stepping into a more pro-environmental role, the WTO must not lose sight of its fundamental goal of trade liberalisation. In this sense, it must also function as a backstop to climate protectionism, especially where domestic renewable energy subsidies have harmful or unfair effects on international trade of green equipment and technologies.<sup>88</sup> A middle ground must be reached. Indeed, encouraging conversion to renewable energy requires domestic support, but not at the cost of discriminating against foreign producers. WTO compatible incentives may include:

- Direct subsidies to domestic manufacturers and tax breaks without LCR;<sup>89</sup>
- A transition period permitting LCR until a certain level of development is reached, allowing renewable energy industries to cultivate domestically, if not only for developing countries;<sup>90</sup>
- Revival of the expired non-actionable subsidies category; and<sup>91</sup>
- Providing support to consumers of renewable energy.

Interpreting the SCM to include the Article XX exception could also provide some legal shelter to subsidies with environmental objectives.<sup>92</sup> Arguably, this is contrary to the intention of negotiators, due to the very fact the category expired and the lack of express reference to Article XX, unlike other covered agreements.<sup>93</sup> However, the threat of irrevocable damage to the environment is a far more prevalent concern internationally now than it was nearly 25 years ago when the WTO agreement was formed. Accordingly, the WTO has a responsibility to adapt to new global attitudes.

<sup>86</sup> Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/AB/R (16 September 2016); See also *Canada—Renewable Energy*; Droegge et al, above n 17, 23.

<sup>87</sup> Pradeep Mehta and Smriti Bahety, *India's Solar Panel Dispute: A Need to Look Within* (15 March 2016) The Wire <<https://thewire.in/24787/indias-solar-panel-dispute-a-need-to-look-within/>>.

<sup>88</sup> Farah and Cima, above n 81.

<sup>89</sup> Mehta and Smriti, above n 87.

<sup>90</sup> Farah and Cima, above n 81, 536.

<sup>91</sup> *Ibid* 523.

<sup>92</sup> *Ibid* 523.

<sup>93</sup> *Ibid* 537; Also, it is unlikely LCR will satisfy the chapeau.

The WTO has recognised the importance of access to high-quality environmental goods, including renewable energy technologies, by commencing negotiations for the *Environmental Goods Agreement* (EGA).<sup>94</sup> The reduction or elimination of tariff and non-tariff barriers to environmental goods and services will assist in implementing the *Paris Agreement* and the *2030 Agenda for Sustainable Development* goals and accelerate the diffusion of ‘green’ technologies contributing to climate change mitigation and adaptation.<sup>95</sup> Accessibility is vital to developing countries as it is estimated they contribute two-thirds of new emissions to the atmosphere but face multiple barriers in obtaining green technologies, including lack of government funding or tax incentives.<sup>96</sup> However, disagreement among Members in late 2016 resulted in no further progress on the EGA.<sup>97</sup> Consequently, the WTO Agreement fails to provide a focus on trade in green technologies despite possessing instrumental power to do so. The WTO should aim to incorporate a suitable mechanism to reflect the positive externalities of renewable energy and its diffusion. In particular, it must provide either tangible incentives or obligations for industrialised countries to increase flow of trade in green technology to developing and least-developed countries.

## V BIODIVERSITY AND AGRICULTURAL SUBSIDIES

Agricultural expansion, in the face of overpopulation and increased food demand, is a major driver of deforestation and loss of biodiversity.<sup>98</sup> Concern surrounds the capacity of ecosystems to sustain future food production, with world population estimated as reaching 11.2 billion by 2100.<sup>99</sup> Agricultural subsidies create perverse incentives for production techniques that involve the destruction of habitats, including the intensive use of harmful chemicals and unsustainable stocking of livestock.<sup>100</sup> The decoupling

<sup>94</sup> WTO, *Environmental Goods Agreement (EGA)* <[https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm)>.

<sup>95</sup> Department of Foreign Affairs and Trade, Australian Government, *Environmental Goods Agreement* <<http://dfat.gov.au/trade/agreements/environmental-goods-agreement/pages/environmental-goods-agreement.aspx>>.

<sup>96</sup> Ludivine Tamiotti et al, ‘Trade and Climate Change’ (Report, WTO-UNEP, 2009) viii.

<sup>97</sup> Lara Rebello, ‘EU blames China for failure of WTO environmental trade talks’, *International Business Times* (online) 5 December 2016 <<http://www.ibtimes.co.uk/eu-blames-china-failure-wto-environmental-trade-talks-1594830>>.

<sup>98</sup> J.R. Treweek, Claire Brown and Phillip Bubb, ‘Assessing Biodiversity Impacts of Trade: A Review of Challenges in the Agriculture Sector’ (2006) 24(4) *Impact Assessment and Project Appraisal* 299, 299.

<sup>99</sup> Ibid 300; recognized in Goal 2 and 15 in the 2030 ASD; Bruno Lanz, Simon Dietz and Tim Swanson, ‘The expansion of modern agriculture and global diversity decline: an integrated assessment (Working Paper, No 167, Grantham Research Institute on Climate Change and the Environment, May 2017) 1.

<sup>100</sup> Jonathan Hepburn, ‘Biodiversity: Why do farm trade policies matter?’, *International Centre for Trade and Sustainable Development: Biores* (online), 14 October 2014 <<https://www.ictsd.org/bridges-news/biores/news/biodiversity-why-do-farm-trade-policies-matter>>.

of agricultural support from production will remove incentives to overproduce.<sup>101</sup> Furthermore, support of agricultural production creates trade-distorting effects, where developing countries cannot compete with the artificial prices of industrialised countries.<sup>102</sup>

### A *WTO's Environmental Role*

The WTO has taken steps towards liberalising agricultural trade. The *Agreement on Agriculture*<sup>103</sup> includes reduction commitments in market access, domestic support and export subsidies and, more recently, adopted the decision to abolish export subsidies.<sup>104</sup> While reform aims to achieve efficient allocation of resources, trade-distorting subsidies are often those that create the strongest incentives for increasing production, and their elimination will consequently assist in restoring biodiversity.<sup>105</sup> However, uncertainty ensued as to how much progress would be achieved at the 2017 Ministerial Conference, given the range of different proposals and concerns from countries with highly-protected farm sectors on their compliance ability, such as Japan, Norway and Switzerland.<sup>106</sup> Again, a deadlocked Conference provided no such clarity.<sup>107</sup> The reduction commitment has however seen progress, as permitted 'Green Box' subsidies, which must have no or minimal trade-distorting effects, have significantly increased.<sup>108</sup> Policy-specific criteria include decoupled income supports and environmental or conservation programmes.<sup>109</sup> These payments are exempted from the reduction commitment and encourage governments to provide support to agro-environmental and organic programmes, enhancing sustainable agricultural practices.<sup>110</sup> Reform in the European

<sup>101</sup> Charnovitz, above n 4, 24.

<sup>102</sup> Cinthia Golcher, 'Agricultural Subsidies in the form of Environmental Incentives' (Research Paper, International Institute of Social Studies, December 2013) 13.

<sup>103</sup> *WTO Agreement*, annex 1A ('*Agreement on Agriculture*).

<sup>104</sup> 'WTO members secure "historic" Nairobi Package for Africa and the world', *WTO News* (online), 19 December 2015 <[https://www.wto.org/english/news\\_e/news15\\_e/mc10\\_19dec15\\_e.htm](https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm)>.

<sup>105</sup> Ronald Steenblik and Charles Tsai, 'The environmental impact of green box subsidies: exploring the linkages' in Ricardo Melendez-Ortiz, Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box* (Cambridge University Press, 2009) 427, 427.

<sup>106</sup> 'WTO Agriculture Negotiators Weigh New Proposals as Buenos Aires Meet Approaches', *International Centre for Trade and Sustainable Development: Bridges* (online) 19 October 2017 <<https://www.ictsd.org/bridges-news/bridges/news/wto-agriculture-negotiators-weigh-new-proposals-as-buenos-aires-meet>>.

<sup>107</sup> Luc Cohen and David Lawder, 'WTO meeting ends in discord, ministers urge smaller-scale trade talks', *Reuters* (online) 13 December 2017 <<https://www.reuters.com/article/us-trade-wto/wto-meeting-ends-in-discord-ministers-urge-smaller-scale-trade-talks-idUSKBN1E711J>>.

<sup>108</sup> Golcher, above n 102, 17.

<sup>109</sup> Secretariat for the Convention on Biological Diversity, 'Assessing the Impact of Trade Liberalization on the Conservation and Sustainable Use of Agricultural Biological Diversity' (Peer Review, Convention on Biological Diversity, January 2002) 9.

<sup>110</sup> *Ibid* 10.

Union transformed support to comply with the Green Box criteria by making payments conditional upon minimum environmental standards.<sup>111</sup> However, developing countries are suspicious of this increase and are concerned with its potential misuse, by which industrialised countries may shift programmes to the Green Box without complying with the criteria.<sup>112</sup> While some may achieve concrete environmental goals, others remain trade-distorting or disproportionate to the costs of implementing environmental standards; merely a disguised form of production support.<sup>113</sup>

The WTO must address ‘Amber Box’ subsidies, those connected to domestic support and trade distortion, hiding under a thin veil of green.<sup>114</sup> Green Box criteria and poor compliance could be reinforced through the dispute resolution process.<sup>115</sup> Alterations to the existing Green Box disciplines, such as a quantitative means of measuring whether a policy is non-distorting, may strengthen its ability to prevent the negative environmental impacts of these subsidies.<sup>116</sup> However, this must be balanced against the reality that enforcing stringent compliance may reduce incentives to shift to the Green Box, which is generally less environmentally harmful.<sup>117</sup> Currently, the WTO agenda aims to address trade-distortion, however, biodiversity must become a more central issue in future negotiations.

## VI CONCLUSION

In a 2007 address, former Director-General of the WTO, Pascal Lamy, stressed that ‘trade, and indeed the WTO, must be made to deliver sustainable development’.<sup>118</sup> Trade has the ability to contribute to the *Paris Agreement* and prevent further unsustainable activities in the commons, namely by eliminating harmful subsidies. However, given the lack of coherent principles evident in the WTO, particularly with respect to BCAs and renewable energy subsidies, the extent of this ability remains unresolved. Indeed, there is considerable danger in giving the WTO power over the legitimacy of environmental measures without any responsibility for achieving environmental outcomes.<sup>119</sup> We are now at a critical stage in the fight against the depletion of the commons, and while trade

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<sup>111</sup> Steenblik and Tsai, above n 103, 455.

<sup>112</sup> *Ibid* 428.

<sup>113</sup> Golcher, above n 102, 15.

<sup>114</sup> *Ibid* 48.

<sup>115</sup> Steenblik and Tsai, above n 103, 460.

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid* 462.

<sup>118</sup> ‘Lamy urges support for environmental chapter of the Doha Round’, *WTO News* (online), 5 February 2007 <[https://www.wto.org/english/news\\_e/sppl\\_e/sppl54\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl54_e.htm)>.

<sup>119</sup> Charnovitz, above n 4, 40.

liberalisation is a fundamental focus for the WTO, its international influence is key to a more sustainable future. The WTO must build on and clarify its pro-environmental agenda through its effective enforcement mechanism and binding regulations.