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Climate Clubs, the Paris Agreement, and the International Trade Regime: Synergies and Conflicts

Joel Fun Wei Xuan*

Abstract

Climate clubs have recently come to the fore as a policy option to overcome the deficiencies in meeting the Paris Agreement goals. This paper seeks to explore and explain the interactions between this emerging policy option and the relevant international regimes. Specifically, it will look at the interactions with the Paris Agreement and the international trade regime, and argues that climate clubs are, in principle, consistent with these regimes. However, to ensure that climate clubs would meet their purpose of carbon abatement while addressing important legal and normative concerns, care must be taken to ensure that the implementation of carbon clubs is sufficiently robust. In a similar vein, supporting structures should also be instituted in tandem with climate clubs to meet these objectives, which this paper will proffer.

I. Introduction

The international regime to deal with climate change has gone through periods of evolution, from the United Nations Framework Convention on Climate Change (“UNFCCC”) in 1992,¹ to the Kyoto Protocol in 1997² (with the Doha Amendment in 2012),³ to the Paris Agreement in 2015.⁴ The Kyoto Protocol took a “top-down” approach, mandating targets and timetables for carbon emissions reduction for Annex B states comprising largely developed and market

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¹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

² Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

³ Doha Amendment to the Kyoto Protocol (adopted 8 December 2012, entered into force 31 December 2020) UN Doc C.N.718.2012.TREATIES-XXVII.7.c.

⁴ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) TIAS No. 16-1104.

economies in transition.⁵ By contrast, the Paris Agreement established a “bottom-up” approach, with the scope of actions to be determined by all states parties.⁶ This is done through a system whereby states submit their non-binding nationally determined contributions⁷ before undergoing legislative scrutiny.⁸ While the Paris Agreement aimed⁹ at holding “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”,¹⁰ much more must be done in order to meet these goals. In fact, recent studies by the Climate Action Tracker¹¹ have shown that no important indicators suggest that the world is presently on track to meet the Paris Agreement goals.¹²

To meet the Paris goals, this paper will focus on an increasingly emergent measure: – the climate club regime. This paper will discuss the following: first, an overview of climate clubs; second, the interaction between climate clubs and the Paris Agreement and in particular, the symbiotic relationship between these regimes; third, the multitudinous interactions between climate clubs and the international trade regime; finally, the complementary trade policies and other approaches which could work in tandem with climate clubs to meet the Paris Agreement goals.

⁵ UNFCCC, ‘Parties & Observers’ <<https://unfccc.int/parties-observers#:~:text=Annex%20I%20Parties%20include%20the,Central%20and%20Eastern%20European%20States>> accessed 19 March 2022. It has been observed that ‘Annex I states under the UNFCCC are largely the same as those under Annex B of the Kyoto Protocol’: see Julian Allwood, Valentina Bossetti, Navroz Dubash *et al*, ‘Glossary’ in Ottmar Edenhofer, Ramón Pichs-Madruga, Youba Sokona *et al* (eds), *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), 1252.

⁶ Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Oxford University Press, 2019), 299–300.

⁷ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) TIAS No. 16-1104, Article 4.

⁸ E.g., UNFCCC Secretariat, *Nationally Determined Contributions under the Paris Agreement* (17 September 2021) FCCC/PA/CMA/2021/8, which produced a report synthesising information from 164 latest available NDCs communicated. These NDCs are available at UNFCCC, ‘NDC Registry’ <<https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>> accessed 19 March 2022.

⁹ Hereinafter referred to as the ‘Paris goals’.

¹⁰ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) TIAS No. 16-1104, Article 2.

¹¹ Climate Action Tracker, ‘Home’, <<https://climateactiontracker.org/>> accessed 19 March 2022.

¹² Sophie Boehm, Katie Lebling *et al*, *State of Climate Action 2021: Systems Transformations Required to Limit Global Warming to 1.5°C* (World Resources Institute, 2021) <https://climateactiontracker.org/documents/989/state_climate_action_2021.pdf> accessed 19 March 2022, 4-9; see also, Warren Cornwall, ‘The Paris Climate Pact is 5 Years Old. Is it Working?’ (2020) *Science Magazine* <<https://www.science.org/content/article/paris-climate-pact-5-years-old-it-working>> accessed 19 March 2022; UNDP, *The State of Climate Ambition* (UNDP, 2021) <http://climatepromise.undp.org/sites/default/files/research_report_document/State%20of%20Climate%20Ambition.pdf> accessed 19 March 2022, 8-9.

II. Climate Clubs: A Primer

The problem of climate change has been described in a variety of colourful language; just to name a few, these include “super-wicked”,¹³ “complex, polycentric, and seemingly intractable”,¹⁴ and an “issue from hell”.¹⁵ This is mainly because of the prevalence of freeriding, which refers to the inability to exclude a non-compliant country from enjoying the benefits of another nation’s contribution to reducing greenhouse gases (“GHG”) output, although the countries implementing environmental policies will bear the entire cost of its green policies.¹⁶ The problem with free-riding, is that it frequently generate the “tragedy of the commons”,¹⁷ where individual incentives point to over-consuming and inaction,¹⁸ which may lead to a collapse of the climate regime.¹⁹

Some have therefore suggested that the only way to curb such practices of free-riding is to provide “carrots” for compliant states, and “sticks” to punish errant ones.²⁰ In this regard, a measure that has been proposed is the usage of climate clubs, which is rapidly moving from the academic realm into the sphere of policy circles.²¹ Climate clubs are simply a “coalition of countries that commit to strong steps to reduce greenhouse gas emissions and may have

¹³ Richard Lazarus, ‘Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future’ (2009) 94(5) Cornell Law Review 1153; Kelly Levin, Benjamin Cashore *et al.*, ‘Overcoming the Tragedy of Super Wicked Problems: Constraining our Future Selves to Ameliorate Global Climate Change’ (2012) 45 Policy Sciences 123.

¹⁴ Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2016), 2.

¹⁵ Al Gore, *The Future: Six Drivers of Global Change* (Random House, 2013), 314; Peter Coy, ‘The Most Important Number You’ve Never Heard Of’ (2021) *New York Times* <<https://www.nytimes.com/2021/09/17/opinion/greenhouse-gas-cost.html>> accessed 19 March 2022.

¹⁶ Natalie Roy, ‘Climate Change’s Free Rider Problem: Why We Must Relinquish Freedom to Become Free’ (2021) 45(3) William & Mary Environmental Law and Policy Review 821, 837; William Nordhaus, ‘Climate Clubs: Overcoming Free-riding in International Climate Policy’ (2015) 105(4) American Economic Review 1339, 1339-1340; Jobst Heitzig, Kai Lessman, and Yong Zou, ‘Self-enforcing Strategies to Deter Free-riding in the Climate Change Mitigation Game and Other Repeated Public Good Games’ (2011) 108(38) PNAS 15739, 15741.

¹⁷ Christian Gollier and Jean Tirole, ‘Negotiating Effective Institutions Against Climate Change’ (2015) 4(2) Economics of Energy & Environmental Policy 5, 6.

¹⁸ Some have therefore criticised the status quo in the fields of economics and moral philosophy, arguing that the present manner of viewing economic growth as unlimited cannot be sustainable: see e.g., Matthew MacLellan, ‘The Tragedy of Limitless Growth: Re-Interpreting the Tragedy of the Commons for a Century of Climate Change’ (2016) 7(1) Environmental Humanities 41.

¹⁹ See Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162(3859) Science 1243.

²⁰ Scott Barrett, *Negotiating the Next Climate Treaty* (Policy Exchange, 2009), 8; Antonio Gois, Fernando Santos, ‘Reward and punishment in climate change dilemmas’ (2019) 9 Scientific Reports 16193.

²¹ Andreas Goldthau and Simone Tagliapietra, ‘How an Open Climate Club Can Generate Carbon Dividends for the Poor’ (2022) <<https://www.bruegel.org/2022/01/how-an-open-climate-club-can-generate-carbon-dividends-for-the-poor/>> accessed 19 March 2022; Robert Falkner, Naghme Nasiritousi, and Gunilla Reischl, ‘Climate Clubs: Politically Feasible and Desirable?’ (2021) Climate Policy 1, 1.

mechanisms to penalize countries that do not participate”.²² This ensures that states which are “willing”²³ to partake in climate action are not comparatively disadvantaged in the international marketplace due to climate policies resulting in higher costs.²⁴

A climate club could possibly take the form of regional partners coming together under the auspices of their respective regional organisations (e.g., the Association of Southeast Asian Nations (“ASEAN”);²⁵ the South Asian Association for Regional Cooperation (“SAARC”))²⁶ to engage in regional climate change issues and setting tariffs against non-state clubs. Agreements could then be formed between different regional clubs to exempt each other from these tariffs. Alternatively, it could also take the form of larger states (e.g., the Group of Seven (“G7”))²⁷ taking the initiative to create a singular climate club setting tariffs against all non-club states, where all states are welcome to join the club if they pledge to meet these goals.

In his seminal work, William Nordhaus sketched how a climate club could work in practice: a minimum domestic carbon tax of US\$25/ton would be imposed on all club members, while a relatively low tariff rate would be set on imports of all non-participants (as long as the international target carbon price is up to US\$50 per ton).²⁸ This “creates a strategic situation in which countries acting in their self-interest will choose to enter the club and undertake high levels of emissions reductions because of the structure of the incentives”, thereby reducing incidences of free-riding.²⁹

Importantly, climate clubs will not require one to believe in a world where states will work

²² Rafael Leal-Arcas and Andrew Filis, ‘International Cooperation on Climate Change Mitigation: The Role of Climate Clubs’ (2021) Queen Mary Law Research Paper No 362/2021, 1; cf. Katsuri Das and Kaushik Bandyopadhyay, *Climate Change and Clean Energy in the 2030 Agenda: What Role for the Trade System?* (ICTSD, 2016), 16, where climate clubs are more broadly as ‘groups of countries that are willing to undertake more ambitious climate mitigation action than is envisaged under the multilateral forum of the UNFCCC’.

²³ The usage of the term ‘willing’ to describe states that seek greater climate action was adopted from James Bacchus’s work, in James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge University Press, 2018), ix. He defines the willing world as those ‘willing and trying to their part and their best to find the right ways to help make life better for billions of people on our imperilled planet.’

²⁴ Andreas Goldthau and Simone Tagliapietra, ‘How an Open Climate Club Can Generate Carbon Dividends for the Poor’ (2022) *Euractiv* <<https://www.euractiv.com/section/climate-environment/opinion/how-an-open-climate-club-can-generate-carbon-dividends-for-the-poor/>> accessed 19 March 2022.

²⁵ ASEAN, ‘Home’ <<https://asean.org/>> accessed 19 March 2022.

²⁶ SAARC, ‘SAARC Secretariat’ <<https://www.saarc-sec.org/>> accessed 19 March 2022.

²⁷ G7, ‘Germany Takes Over G7 Presidency’ <<https://www.g7germany.de/g7-en>> accessed 19 March 2022. The G7 comprises Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. The G7 presidency is held by Germany since 1 January 2022.

²⁸ William Nordhaus, ‘Climate Clubs: Overcoming Free-riding in International Climate Policy’ (2015) 105(4) *American Economic Review* 1339, 1341.

²⁹ William Nordhaus, ‘Climate Clubs: Overcoming Free-riding in International Climate Policy’ (2015) 105(4) *American Economic Review* 1339, 1341.

for the interests of the greater good through liberal institutions;³⁰ even adopting the bleaker “realist” vision of international relations,³¹ self-interest will also compel other states to tackle this collective problem for there are tangible benefits that states can reap from abiding by the rules of the club.³² For a climate club to be effective in practice, three requirements have been proposed:

- (1) That they must include most big GHG emitters;
- (2) That membership benefits must outweigh obligations; and
- (3) That clubs must be related to sanctions for non-compliance.³³

These requirements are sensible ones. First, without including GHG emitters, the critical mass required to meet the Paris goals would simply be impossible.³⁴ Second, if obligations outweigh benefits, no state would be incentivised to join the club. Third, without sanctions, “there (can be) no stable climate coalition other than the noncooperative, low-abatement coalition”.³⁵

Climate clubs fall within the wider ambit of market-based solutions to climate change, which has met its fair share of supporters and detractors alike. Simply put, market-based solutions look at GHG emissions as a negative externality that is not reflected in the price of goods and services; the solutions thus seek to include a price on such emissions to correct such market failure.³⁶ Apart from climate clubs, such solutions also include carbon taxes and emissions trading schemes (“ETS”).³⁷ Market-based solutions, in contrast to other solutions (such as command-and-control regulatory programmes) are generally seen as providing the most

³⁰ See e.g., Francis Fukuyama, *The End of History and The Last Man* (Macmillan, 1992); Robert Keohane, ‘Moral Commitment and Liberal Approaches to World Politics’ in Eivind Hovden and Edward Keene (eds), *The Globalization of Liberalism* (Palgrave Macmillan, 2002).

³¹ See e.g., E.H. Carr, *The Twenty Years’ Crisis: 1919–1939: An Introduction to the Study of International Relations* (Harper Perennial, 1964); Hans Morgenthau and Kenneth W. Thompson, *Politics among Nations* (Knopf, 1985).

³² Jon Hovi, Detlef Sprinz *et al*, ‘Climate Change Mitigation: A Role for Climate Clubs?’ (2016) 2 *Palgrave Communications* 16020, 3 – 4. See also, Richard Thaler and Cass Sunstein, *Nudge: The Final Edition* (Penguin, 2021), 286 – 292.

³³ Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 22.

³⁴ Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 36.

³⁵ William Nordhaus, ‘Climate Clubs: Overcoming Free-riding in International Climate Policy’ (2015) 105(4) *American Economic Review* 1339, 1368.

³⁶ William Nordhaus, *The Climate Casino: Risk, Uncertainty, and Economics for a Warming World* (Yale University Press, 2013), 6-7.

³⁷ See e.g., Carbon Market Watch, *Pricing carbon to achieve the Paris goals Policy Briefing, September 2017* (Carbon Market Watch, 2017); Ian Parry, ‘Carbon Taxation and the Paris Agreement’ in *Oxford Research Encyclopaedia of Economics and Finance* (Oxford University Press, 2021); World Bank, *State and Trends of Carbon Pricing 2021* (World Bank, 2021).

efficient means of reducing carbon emissions, as it creates room for flexibility and innovation to reduce the cost of less carbon-emitting technology.³⁸ However, it must also be acknowledged that a purely market-based approach may underestimate the complexities of climate change, which requires fundamental changes to the present system. Climate change, apart from just being a market failure, is a system-wide problem that requires fundamental transformations.³⁹ In contrast, a market-based solution tends to generate only optimization of existing systems instead of fundamental transformations and fails in being context-sensitive.⁴⁰ There are also some disagreements on principle, where some states have rejected market-based solutions on the grounds that it would be tantamount to commodifying the climate.⁴¹ A middle-ground must therefore be struck even in implementing primarily a market-based approach by implementing supporting non-market approaches such as technology transfers,⁴² for a more holistic and politically acceptable solution to climate change.

III. Climate Clubs and the Paris Agreement

Given the near-universal ratification of the Paris Agreement,⁴³ an important preliminary question that must first be answered is whether climate clubs would run afoul of the treaty. Under Article 6 of the Paris Agreement, states parties recognised that it was possible to pursue “voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation action”, and even envisioned

³⁸ Janet Peace and Jason Ye, “Market Mechanisms: Options for Climate Policy” (2020) *Center for Climate and Energy Solutions* <<https://www.c2es.org/wp-content/uploads/2020/04/market-mechanisms-options-climate-policy.pdf>>.

³⁹ Daniel Rosenbloom, Jochen Markard, Frank W. Geels, and Lea Fuenfschilling, “Why carbon pricing is not sufficient to mitigate climate change—and how “sustainability transition policy” can help” (2020) 117(16) *PNAS* 8664, 8664.

⁴⁰ Daniel Rosenbloom, Jochen Markard, Frank W. Geels, and Lea Fuenfschilling, “Why carbon pricing is not sufficient to mitigate climate change—and how “sustainability transition policy” can help” (2020) 117(16) *PNAS* 8664, 8664.

⁴¹ UNFCCC, “Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Views on the elaboration of market-based mechanisms” (2011) *FCCC/AWGLCA/2011/MISC.2*, 11-12, 87-88.

⁴² There has yet to be a universally accepted definition of non-market approaches, and work on this topic is still ongoing: see Chandreyee Bagchi, ‘Non-Market Based Approaches: Status of Discussions under the UNFCCC’ (2015) *Climate Policy Info Hub*, <<http://climatepolicyinfohub.eu/non-market-based-approaches-status-discussions-under-unfccc>>.

⁴³ As of 17 January 2021, 195 states are signatories, and 193 states have ratified the Paris Agreement. See UN Treaty Collection, ‘Paris Agreement’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.

new mechanisms to contribute to the mitigation of GHG emissions for use of a voluntary basis.⁴⁴ This may form the basis for the emergence of market-based cooperative regimes, which could also presumably encompass the climate club regime.⁴⁵

However, even if the Paris Agreement permits the usage of climate clubs, there are still important questions regarding the structure of these regimes. Are climate clubs consistent with the Paris Agreement, from both a legal and a structural standpoint? Can climate clubs truly support the Paris Agreement goals? Will climate clubs erode any gains from the Paris Agreement? These questions converge at a broader concern, which is that climate clubs appear to take a different approach to the same problem that the Paris Agreement seeks to tackle, which not only raises issues of fragmentation of laws,⁴⁶ but also serious institutional issues that will require harmonization: unlike the Paris Agreement, which stands for a bottom-up “facilitative and non-punitive process for implementation and compliance”, the climate club approach relies on a top-down structure based on trade penalties.⁴⁷ Some have argued that the implementation of these clubs may be therefore undesirable to the Paris regime, since a fragmented landscape of climate clubs may erode collective efforts and multilateralism in the Paris Agreement by setting off a “competitive dynamic” between states.⁴⁸ On the other hand, obtaining sufficient will for a single multilateral climate club may also not be feasible, especially given the polarised political landscape⁴⁹ and the vastly different views as to how stringent these clubs should be.⁵⁰ One is also reminded of the failures of the top-down

⁴⁴ Article 6(8) of the Paris Agreement, which provides that ‘(p)arties recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties to assist in the implementation of their nationally determined contributions...’

⁴⁵ ICTSD, *Carbon Market Clubs under the Paris Climate Regime: Climate and Trade Policy Considerations* (ICTSD, 2016), 8-9; Jae Edmonds *et al*, *The Economic Potential of Article 6 of the Paris Agreement and Implementation Challenges* (IETA, 2019), 15.

⁴⁶ See generally, Martin Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2014) A/CN.4/L.682.

⁴⁷ Rafael Leal-Arcas and Andrew Filis, ‘International Cooperation on Climate Change Mitigation: The Role of Climate Clubs’ (2021) Queen Mary Law Research Paper No 362/2021, 3-4.

⁴⁸ Robert Falkner, Naghmeh Nasiritousi, and Gunilla Reischl, ‘Climate Clubs: Politically Feasible and Desirable?’ (2021) Climate Policy 1, 5; Bernice Lee and Richard Baron, ‘Why the EU’s Proposed CBAM Must Not Be Used to Launch a Carbon Club’ (2021) *World Economic Forum*

<<https://www.weforum.org/agenda/2021/06/eu-carbon-border-clubs-climate-cbam/>> accessed 19 March 2022.

⁴⁹ Thomas Carothers and Andrew Donohue, ‘How to Understand the Global Spread of Political Polarization’ (2019) *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2019/10/01/how-to-understand-global-spread-of-political-polarization-pub-79893>> accessed 19 March 2022; Anne Wilson, Victoria Parker and Matthew Feinberg, ‘Polarization in the Contemporary Political and Media Landscape’ (2020) 34 *Current Opinion in Behavioural Sciences* 223.

⁵⁰ There are even some that argue that a climate club regime is undesirable: see e.g., Kemal Derviş, ‘Keep Climate Commitments Voluntary’ (2020) *Brookings* <<https://www.brookings.edu/opinions/keep-climate-commitments-voluntary/>> accessed 19 March 2022. For a parallel debate occurring in the context of EU’s

multilateral regime in the Kyoto Protocol.⁵¹ Not only did the United States (“the US”) refuse to ratify the treaty due to perceptions that these would unreasonably favour emergent states that make up a large portion of GHG emissions,⁵² Kyoto also did not manage to result in larger-scale behavioural change to reduce GHG emissions, with emissions reductions being achieved via exogenous forces and not pressures from the protocol.⁵³ Broadly, is it even possible to harmonise these divergent approaches by reducing GHG emissions through a conciliatory mood in the Paris Agreement, while sanctioning polluters through the mechanism of the climate club?

I argue that such harmonisation is not only possible, but it is also necessary. Despite the Paris Agreement marking a turning point for international coordination, it cannot be doubted that there are still many deficiencies. Indeed, the Paris Agreement, by striving for universal acceptance,⁵⁴ has resulted in weak ambitions and outcomes thus far.⁵⁵ The continual compromises that had to be made by the “willing world” to accommodate the “unwilling world” have led even some to criticise the agreement as “meaningless”⁵⁶ and “doomed to fail”.⁵⁷ However, this lack in ambition is well complemented by minilateral⁵⁸ climate clubs, since they can provide the edge required for greater abatement of GHG emissions by side-

CBAM, see Kerstine Appunn, ‘Emission reduction panacea or recipe for trade war? The EU’s carbon border tax debate’ (2021) *Clean Energy Wire* <<https://www.cleanenergywire.org/factsheets/emission-reduction-panacea-or-recipe-trade-war-eus-carbon-border-tax-debate>> accessed 19 March 2022.

⁵¹ For a broad overview of the failures of the Kyoto Protocol and the reasons for the failure, see Gerard Kutney, *Carbon Politics and the Failure of the Kyoto Protocol* (Routledge, 2014).

⁵² George W. Bush’s opposition in his open letter to US Senators aptly reflects the key reason for US’s refusal to join the Kyoto Protocol: ‘As you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy...’ See Office of the Press Secretary, *Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts* (2001) <<https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html>> accessed 19 March 2022.

⁵³ Christopher Napoli, ‘Understanding Kyoto’s Failure’ (2012) 32(2) SAIS Review of International Affairs 183, 188.

⁵⁴ Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope?’ (2016) 110(2) American Journal of International Law 288, 291.

⁵⁵ Lindsay Maizland, ‘Global Climate Agreements: Successes and Failures’ (2021) *Council on Foreign Relations* <<https://www.cfr.org/backgrounder/paris-global-climate-change-agreements>> accessed 19 March 2022.

⁵⁶ Oren Crass, ‘Why the Paris Climate deal is Meaningless’ (2015) *Politico* <<https://www.politico.com/agenda/story/2015/11/why-the-paris-climate-deal-is-meaningless-000326/>> accessed 19 March 2022.

⁵⁷ Nicholas Kusnetz, ‘Why the Paris Climate Agreement Might be Doomed to Fail’ (2021) *Inside Climate News* <<https://insideclimatenews.org/news/28072021/pairs-agreement-success-failure/>> accessed 19 March 2022.

⁵⁸ Such minilateral approaches is contrasted with multilateralism by ‘forget(ting) about trying to get the planet’s nearly 200 countries to agree’ and seeks to work with the ‘the smallest possible number of countries needed to have the largest possible impact on solving a particular problem’: Moises Naim, ‘Minilateralism: The Magic Number to Get Real International Action’ (2009) 173 Foreign Policy 134, 135.

stepping the need for large-scale and drawn-out negotiations by virtue of it being smaller in size.⁵⁹ It also obviates the problem of the Kyoto Protocol being unduly harsh only to developed countries and encouraging free-riders.⁶⁰ Concerns relating to inter-club rivalry may also be overstated: studies have shown that minilateral clubs, as polycentric groups, are able to adjust to each other and “develop collaborations (to produce) trusting interrelationships over time”.⁶¹ Present trends also support the hypothesis that having different clubs would not result in rivalry but collaboration: the disbandment of the Asia-Pacific Partnership built as an alternative to the UNFCCC,⁶² and the increase in partnerships showing a closer linkage with the UNFCCC, shows that minilateral clubs if firmly rooted in the overarching goals and ideals in the Paris Agreement, can create mutually supporting structures to meet the Paris goals.⁶³ Regional climate clubs can also serve as grounds for collective solutions to tackle concerns common to a particular region of the world. For example, a carbon club in South-East Asia could be established in creating cleaner ways to conduct agricultural business, especially given frequent haze events resulting from slash-and-burn methods to clear land for agriculture.⁶⁴ Incentives could come in the form of exclusive access to technologies and technical assistance, while disincentives could come in the form of tariffs placed on the relevant agricultural imports from non-participating states within the region. Another example that has been suggested, is the creation of an Arctic black carbon club to reduce the usage of black carbon from states engaged in international shipping in the Arctic.⁶⁵ However,

⁵⁹ See e.g., Håkan Pihl, ‘A Climate Club as a Complementary Design to the UN Paris Agreement’ (2020) 1(3) Policy Design and Practice 45, where he explains how climate clubs may be able to complement the flaws of the Paris Agreement through ‘high ambitions’, which cannot be achieved with universal inclusion since nations with low ambitions would be able to veto the actions of others with higher ambitions.

⁶⁰ Christopher Napoli, ‘Understanding Kyoto’s Failure’ (2012) 32(2) SAIS Review of International Affairs 183, 194.

⁶¹ Karin Backstrand, Fariborz Zelli, and Philip Schleifer, ‘Legitimacy and Accountability in Polycentric Climate Governance’ in Andrew Jordan *et al* (eds), *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press, 2018), 350.

⁶² See e.g., Harro van Asselt, ‘From UN-ity to Diversity? The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change’ (2007) 1(1) CCLR 17; Harro van Asselt, ‘The Continuing Relevance of the Asia-Pacific Partnership (†) for International Law on Climate Change’ (2017) 3 CCLR 184.

⁶³ Karin Backstrand, Fariborz Zelli, and Philip Schleifer, ‘Legitimacy and Accountability in Polycentric Climate Governance’ in Andrew Jordan *et al* (eds), *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press, 2018), 350; Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 39.

⁶⁴ Kate Mayberry, ‘Southeast Asia struggles to tackle haze despite long-term dangers’ (2019) *Al-Jazeera* <<https://www.aljazeera.com/news/2019/10/7/southeast-asia-struggles-to-tackle-haze-despite-long-term-dangers>> accessed 19 March 2022.

⁶⁵ Thomas Brewer, ‘Arctic Black Carbon from Shipping: A Club Approach to Climate-and-Trade Governance’ (ICTSD, 2015) <<https://www.tralac.org/images/docs/8621/arctic-black-carbon-from-shipping-brewer-ictsd-series-on-climate-change-architecture-october-2015.pdf>> accessed 19 March 2022; Harro van Asselt, ‘Climate

in dealing with smaller regional climate clubs, incentives should be clearly emphasised over any sanctions, especially since the share of trade between regional partners may not be extremely significant,⁶⁶ therefore blunting the edge off any adverse trade consequences. Further, it may exacerbate regional political tensions if such clubs are seen as oppressive and unfair.

There is also good reason to think that the major superpowers in a post-Trump era are more on board with increased climate action: the US-China Joint Statement on Climate Change,⁶⁷ China's shift towards carbon neutrality,⁶⁸ and the European Union's ("the EU") continued involvement in pushing the climate agenda,⁶⁹ point towards the emergence of a "cooperative equilibrium" to tackle the climate crisis.⁷⁰ The involvement of these superpowers in both regional clubs and/or a singular climate club would be extremely important, as not only do they make up at least 40% of the world's GHG emissions,⁷¹ but they also provide the necessary leadership for other states to act. And even if a politically viable agreement cannot be met between the two dominant superpowers in the formation of a singular climate club (i.e., China and the US), it would probably not spell the death knell for the climate club approach, as a narrower list of parties in such a club can still form germinating seeds for a broader project in the future.⁷² In fact, a carbon club including the G7 and EU states (which are already considering or have implemented border carbon taxes) would cover 44% of global

Change and Trade Policy Interaction: Implications of Regionalism" (OECD, 2017) <<https://www.oecd-ilibrary.org/docserver/c1bb521e-en.pdf?expires=1644912269&id=id&accname=guest&checksum=124FE8AFF9AB35342958CA1A7858599F>> accessed 19 March 2022, 19.

⁶⁶ E.g., the only regional country amongst the top 5 markets of export and import with Indonesia is Singapore: World Integrated Trade Solution, 'Indonesia' <<https://wits.worldbank.org/CountrySnapshot/en/IDN>> accessed 19 March 2022.

⁶⁷ US Office of the Spokesperson, 'U.S.-China Joint Statement Addressing the Climate Crisis' (2020) <<https://www.state.gov/u-s-china-joint-statement-addressing-the-climate-crisis/>> accessed 19 March 2022.

⁶⁸ Steven Lee Myers, 'China's Pledge to Be Carbon Neutral by 2060: What It Means' (2020) *New York Times* <<https://www.nytimes.com/2020/09/23/world/asia/china-climate-change.html>> accessed 19 March 2022.

⁶⁹ The EU has recently provided the much-needed impetus and germinating seeds of a more comprehensive carbon club through its Carbon Border Adjustment Mechanism (i.e. a carbon border levy). For a short summary on how the CBAM works, see Directorate-General for Taxation and Customs Union, 'Carbon border: adjustment mechanism' (2021) *EU Publications Office* <<https://data.europa.eu/doi/10.2778/584899>> accessed 19 March 2022.

⁷⁰ Judy Da Zhu, 'Cooperative equilibrium of the China-US-EU climate game' (2022) 39 *Energy Strategy Reviews* 100797, 6-7.

⁷¹ Steven Mufson and Brady Dennis, 'Chinese greenhouse gas emissions now larger than those of developed countries combined' (2021) *Washington Post* <<https://www.washingtonpost.com/climate-environment/2021/05/06/china-greenhouse-emissions/>> accessed 19 March 2022.

⁷² Myanna Dellinger, 'Narrowed Constellations in a Supranational Climate Change Regime Complex: The 'Magic Number' Is Four' (2014) 37(2) *Fordham International Law Journal* 373, 434.

international trade, and would undoubtedly send a strong signal to accelerate global decarbonisation.⁷³

Admittedly however, concerns regarding climate justice⁷⁴ may persist, since climate clubs may unduly disfavour developing states.⁷⁵ Tilak Doshi notes that “(by) penalizing CO2 emissions, the only path up the energy ladder which allowed people in the now-developed countries to graduate to their current wealth and comfort is denied to the developing countries”.⁷⁶ Instead, a climate club must be sensitive to the general environmental law principle that espouses common, but differentiated responsibilities between developed and developing states.⁷⁷

For starters, while climate clubs would *de facto* entail greater effective representation to larger developed states, these clubs must acknowledge and give significant weight to the views of states that bear the brunt of the negative effects arising from climate change. It has been observed that the “cruel irony” of climate change is that those contributing the least to global warming (i.e., small coastal island states) would be the most affected by its consequences.⁷⁸ Indeed, climate change results in rising sea levels, which may cause the submergence of the territory of small island states, threatening the very existence of the state.⁷⁹ Other significant impacts include the threat of increased migrant and refugee flows from these states, creating greater instability in the surrounding states. For example, in Kiribati and Tuvalu, which are

⁷³ Bethan Adams, Kaya Axelsson, Adam Parr, “The Carbon Club revisited: Harnessing enterprise and trade to decarbonise the global economy” (2022) Oxford Smith School of Enterprise and the Environment Working Paper No. 22-01, 5-6.

⁷⁴ See generally, Tahseen Jafry, Michael Mikulewicz, and Karin Helwig, *Routledge Handbook of Climate Justice* (Routledge, 2018).

⁷⁵ Rafael Leal-Arcas and Andrew Filis, ‘International Cooperation on Climate Change Mitigation: The Role of Climate Clubs’ (2021) Queen Mary Law Research Paper No 362/2021, 2.

⁷⁶ Tilak Doshi, ‘Will U.S. Join the New Trade Protectionism of Europe’s ‘Climate Club?’ (2021) *Forbes* <<https://www.forbes.com/sites/tilakdoshi/2021/04/05/belong-to-the-climate-club-or-get-penalized-the-eus-new-trade-protectionism/>> accessed 19 March 2022.

⁷⁷ For the meaning of common but differentiated responsibility, see UNGA, “Rio Declaration on Environment and Development” (12 August 1992) UN Doc A/CONF.151/26, Principle 7, where it states that “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”.

⁷⁸ Alliance of Small Island States, “Press Conference by Alliance of Small Island States on Climate Change” (2009) <https://www.un.org/press/en/2009/090710_AOSIS.doc.htm> accessed 19 March 2022.

⁷⁹ See e.g., Ori Sharon, “State Extinction Through Climate Change” in Benoit Mayer and Alexander Zahar, *Debating Climate Law* (Cambridge University Press, 2021); Abhimanyu George Jain, “The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Statehood” (2013) *EJIL:Talk!* <<https://www.ejiltalk.org/the-21st-century-atlantis-the-international-law-of-statehood-and-climate-change-induced-loss-of-statehood/>> accessed 19 March 2022.

small island states especially affected by rising sea levels, more than 70% of households have expressed their desire to migrate if climate stressors worsened, but only about 25% have the financial means to do so.⁸⁰ Thus, regardless of whether a singular climate club or a regional solution is adopted, states especially affected should have an avenue to express their views. This concern may be addressed by granting observer status to intergovernmental organisations that have arguably the most to lose from the failure of these club solutions,⁸¹ such as the Alliance of Small Island States (“AOSIS”).⁸²

Additionally, it must be acknowledged that significant and ambitious steps toward the abatement of climate change may require significant economic costs,⁸³ and developing states may not have the necessary resources or political will to effect such changes domestically. This is especially so if it means that significant domestic resources would be channelled away from more domestically popular policy options that encourage unsustainable development. A timely case study is the recent COP26 discussions to phase out energy production from coal. There, India had pressurised states to water down the agreement, which resulted in an agreement to “phase down” rather than to “phase out” coal,⁸⁴ a move that was strongly supported domestically.⁸⁵ Arguments suggesting that India is singularly to blame for this disappointing outcome⁸⁶ fail to recognise the broader context that encumbers developing states. Pertinently, promises of climate finance by developed states have not been fulfilled (most pertinently, the US\$100 billion a year committed at COP15 in 2009),⁸⁷ and developing

⁸⁰ “On the frontlines of climate change: Migration in the Pacific Islands” (2015) *United Nations University Institute for Environment and Human Security* <<https://ehs.unu.edu/media/press-releases/on-the-frontlines-of-climate-change-migration-in-the-pacific-islands-2.html#info>> accessed 19 March 2022.

⁸¹ Marlene Moses, ‘6th Session of the OWG-SDG on the needs of countries in special situations (SIDS)’ (2013) <<https://sdgs.un.org/statements/alliance-small-island-states-aosis-11365>> accessed 19 March 2022.

⁸² The Alliance of Small Island States represents the interests of 39 small island and low-lying coastal developing states in international climate change: see AOSIS, ‘Member States’ <<https://www.aosis.org/>> accessed 19 March 2022.

⁸³ See generally, William Cline, *Carbon Abatement Costs and Climate Change Finance* (Columbia University Press, 2011).

⁸⁴ Jennifer A Dlouhy, Ewa Krukowska, and Akshat Rathi, “Deal Sealed After Late Pushback by India and China: COP26 Update” (2021) *Bloomberg Green* <<https://www.bloomberg.com/news/articles/2021-11-13/negotiators-wrestle-coal-cash-carbon-trading-cop26-update>> accessed 19 March 2022.

⁸⁵ Debarshi Dasgupta, “COP26: India's opposition to phasing out coal supported at home” (2021) *The Straits Times* <<https://www.straitstimes.com/asia/south-asia/cop26-indias-opposition-to-phasing-out-coal-supported-at-home>> accessed 19 March 2022.

⁸⁶ Rhyannon Bartlett-Imadegawa, “Nations strike climate deal after India-led compromise on coal” (2021) <<https://asia.nikkei.com/Spotlight/Environment/Climate-Change/COP26/Nations-strike-climate-deal-after-India-led-compromise-on-coal>> accessed 19 March 2022; Navin Singh Khadka, “COP26: Did India betray vulnerable nations?” (2021) <<https://www.bbc.com/news/world-asia-india-59286790>> accessed 19 March 2022.

⁸⁷ Nuran Erkul Kaya, “Developed countries' failure to commit to climate finance 'disappointing', UNFCCC says” (2021) *AA Turkey* <<https://www.aa.com.tr/en/world/developed-countries-failure-to-commit-to-climate>>

states are left to support large green projects on their own, without the adequate resources. Ministers from Nepal,⁸⁸ Bangladesh,⁸⁹ and India⁹⁰ have all voiced similar concerns. Ultimately, as some have observed, the real villain behind the disappointing outcome, was not India's lack of ambition, but that of "climate injustice".⁹¹ For example, data from the World Bank shows that the GDP per capita of South Asia is only US\$1,824 per year.⁹² Given these considerations, it is simply unrealistic and unreasonable to expect lofty pledges which would drain a significant amount of resources if developed states are not forthcoming in providing international support in the form of adequate climate finance to developing regions.

To avert such considerations, not only must the structure of climate clubs provide adequate accountability for club states in setting tariffs and sanctions on non-club states, but it must also provide accountability mechanisms to ensure that developed states within the club provide the climate finance and transfer of green technology that they have pledged. Such mechanisms could take the form of judicial mechanisms like the UN Convention of the Law of the Sea,⁹³ which obligates states parties to settle their disputes through informal means, failing which they would have to submit the dispute to an international tribunal.⁹⁴ However, international judicial settlements have been unpopular especially for disputes on climate change,⁹⁵ and public scrutiny mechanisms like the Paris Agreement's nationally determined contributions, which are available in the public domain for criticism, may be a good

finance-disappointing-unfccc-says/2417007> accessed 19 March 2022; Shashi Tharoor, "Commentary: Why India can't commit to phasing out coal just yet" (2021) *Channel Newsasia* <<https://www.channelnewsasia.com/commentary/cop26-india-coal-carbon-dioxide-emissions-2363211>> accessed 19 March 2022.

⁸⁸ Sher Bahadur Deuba (Nepal's Prime Minister), "Statement by the Rt. Hon. Prime Minister Sher Bahadur Deuba at the World Leaders Summit during the 26th Conference of Parties (COP 26)" (2021) *Government of Nepal Ministry of Foreign Affairs* <<https://mofa.gov.np/statement-by-the-rt-hon-prime-minister-sher-bahadur-deuba-at-the-world-leaders-summit-during-the-26th-conference-of-parties-cop-26/>> accessed 19 March 2022.

⁸⁹ Sheikh Hasina (Bangladesh's Prime Minister), "Bangladesh PM: We need a global 'climate prosperity plan' not empty pledges" (2021) *Financial Times* <<https://www.ft.com/content/67b17114-5503-4db6-a49a-7b8b21355344>> accessed 19 March 2022.

⁹⁰ Sriram Lakshman, "Rich countries need to do more on climate change: Jaishankar (India's External Affairs Minister)" (2021) *The Hindu* <<https://www.thehindu.com/news/international/rich-countries-need-to-do-more-on-climate-change-jaishankar/article36767812.ece>> accessed 19 March 2022.

⁹¹ Hannah Ellis-Petersen, "India criticised over coal at Cop26 – but real villain was climate injustice" (2021) *The Guardian* (2021) <<https://www.theguardian.com/environment/2021/nov/14/india-criticised-over-coal-at-cop26-but-real-villain-was-climate-injustice>> accessed 19 March 2022.

⁹² "GDP per capita (current US\$) – South Asia" (2020) <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=8S>> accessed 19 March 2022.

⁹³ Convention on the Law of the Sea (1982) 1833 UNTS 397.

⁹⁴ Convention on the Law of the Sea (1982) 1833 UNTS 397, Part XV. See also, Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2019), 493-537.

⁹⁵ Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2016), 355-356.

alternative.⁹⁶ For the latter suggestion, developed states could be obligated to make their contributions public on a yearly-basis, which in turn would be subject to debate and deliberation by club states in open discussions. This ensures that developed states would not balk at the agreement by virtue of the legal obligations being overly onerous⁹⁷ while keeping them accountable through public pressure and scrutiny. In addition to keeping developed states accountable, the structure of these clubs can also be tapped on to provide climate finance. The tariff revenue collected from non-club states may be used for green investments, and the dividends, whether in the form of green technology or simply funds for green projects, may be invested back to developing states to dampen the negative impacts of participation in the club.⁹⁸ The considerations raised above also further the point that taking a blunt approach through a *carte blanche* tax for all non-club states and stringent requirements for all club states (including developing states) from the get-go may not be the silver bullet to resolve the deficiencies of the Paris Agreement, since such blanket measures may unduly disfavour developing states.⁹⁹

Additionally, transparency and accountability would also be important in the tracking of any climate finance flows, especially since developing and developed countries often cannot agree on climate finance statistics.¹⁰⁰ For example, while the Organisation for Economic Co-operation and Development (“OECD”)¹⁰¹ suggested that US\$57 billion was engaged in climate finance in 2013-2014,¹⁰² there were important voices in India criticising the report on the grounds of its credibility and methodology.¹⁰³ Thus, any agreement on climate finance should be accompanied by mutually agreed terms on the methodology for accounting for

⁹⁶ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) TIAS No. 16-1104, Article 4.

⁹⁷ See Part III.

⁹⁸ Andreas Goldthau and Simone Tagliapietra, ‘How an Open Climate Club Can Generate Carbon Dividends for the Poor’ (2022) *Euractiv* <<https://www.euractiv.com/section/climate-environment/opinion/how-an-open-climate-club-can-generate-carbon-dividends-for-the-poor/>> accessed 19 March 2022.

⁹⁹ Bernice Lee and Richard Baron, ‘Why the EU’s Proposed CBAM Must Not Be Used to Launch a Carbon Club’ (2021) *World Economic Forum* <<https://www.weforum.org/agenda/2021/06/eu-carbon-border-clubs-climate-cbam/>> accessed 19 March 2022.

¹⁰⁰ Romain Weikmans and J Timmons Roberts, ‘The International Climate Finance Accounting Muddle: Is There Hope on the Horizon?’ (2019) 11 *Climate and Development* 97.

¹⁰¹ OECD, ‘Homepage’ <<https://www.oecd.org/>> accessed 19 March 2022.

¹⁰² OECD, ‘Climate Finance in 2013–14 and the US\$100 Billion Goal’ (2015) <<https://www.oecd.org/env/climate-finance-in-2013-14-and-the-usd-100-billion-goal-9789264249424-en.htm>> accessed 19 March 2022.

¹⁰³ Ministry of Finance (India) ‘Climate Change Finance, Analysis of a Recent OECD Report: Some Credible Facts Needed’ (2015) <https://dea.gov.in/sites/default/files/ClimateChangeOEFDReport_0.pdf> accessed 19 March 2022.

climate finance. Club solutions could also seek guidance from the UNFCCC's Standing Committee on Finance to come to these terms, especially since the Standing Committee has already had recourse to views from a wide range of experts and policymakers and has been working on providing much-needed clarity on good practices for climate finance.¹⁰⁴ Ultimately, by improving transparency and accountability in the processes within climate clubs and spreading the costs of climate clubs more equitably, the problems of climate justice which have prevented developing states from fully contributing to climate action will hopefully be alleviated.¹⁰⁵

IV. Climate Change, Climate Clubs, and the International Trade Regime

While trade contributes to and exacerbates climate change, it is also a crucial piece of the puzzle to solving climate change, yet the major emitters and net exporters of carbon do not place a strong focus on trade-related measures.¹⁰⁶ In this section, we look at the complex interactions between climate clubs and the international trade regime,¹⁰⁷ since the climate club regime is ultimately built on modifying the unabated mode of free trade to deal with climate concerns.

From a legal dimension, there are concerns that the current World Trade Organisation ("WTO") regime prohibits the operation of these clubs,¹⁰⁸ and this task to untangle the intersections in these areas of law is a gargantuan one: it was observed that "the most

¹⁰⁴ UNFCCC Standing Committee on Finance, 'Fourth (2020) Biennial Assessment and Overview of Climate Finance Flows' (2020) <https://unfccc.int/sites/default/files/resource/54307_1%20-%20UNFCCC%20BA%202020%20-%20Report%20-%20V4.pdf> accessed 19 March 2022.

¹⁰⁵ Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2016), 354-355.

¹⁰⁶ Clara Brandi, *Trade Elements in Countries' Climate Contributions under the Paris Agreement* (ICTSD, 2017) <https://ictsd.iisd.org/sites/default/files/research/trade_elements_in_countries_climate_contributions.pdf> accessed 19 March 2022, 31; Paul Brenton and Vicky Chemutai, *The Trade and Climate Change Nexus: The Urgency and Opportunities for Developing Countries* (World Bank, 2021), <<https://openknowledge.worldbank.org/bitstream/handle/10986/36294/9781464817700.pdf?sequence=5&isAllowed=y>> accessed 19 March 2022, 15.

¹⁰⁷ Harro van Asselt, Francesco Sindico, and Michael Mehling, 'Global Climate Change and the Fragmentation of International Law' (2008) 30(4) *Law and Policy* 423, 433-441.

¹⁰⁸ See e.g., Eduardo Porter, 'Climate Deal Badly Needs a Big Stick' (2015) *New York Times* <<https://www.nytimes.com/2015/06/03/business/energy-environment/climate-deal-badly-needs-a-big-stick.html>> accessed 19 March 2022.

controversial and difficult interface issues arise in (this) relationship”.¹⁰⁹ While a comprehensive overview of this mired area of law is inappropriate, some observations can still be made in relation to the WTO regime and climate clubs. As a preliminary point, it must be kept in mind that the WTO Agreement,¹¹⁰ in contrast to the General Agreement on Tariffs and Trade (“GATT”),¹¹¹ recognises the importance of the objective of sustainable development.¹¹²

At an institutional level, the notion of sustainable development in the WTO system is largely dealt with by the Committee on Trade and Environment (“CTE”).¹¹³ Instituted in 1994 after the Rio Conference in 1992, it reflected a wider acceptance of GATT members that sustainable development was important in the adoption of trade policies.¹¹⁴ Thus, the CTE was established in the *Decision on Trade and Environment*, which was adopted along with the Final Act of the Uruguay Round in Marrakesh under the auspices of the WTO framework.¹¹⁵ The CTE’s mandate is broadly to “to identify the relationship between trade measures and environmental measures, in order to promote sustainable development”, and to “make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required”.¹¹⁶ While the work of this Committee was initially criticised for its weak action,¹¹⁷ it has eventually proved to be effective and instrumental in developing a common understanding between states that trade liberalization and environmental protection can be consistent with each other, and how policy options chosen by states can ensure neither consideration is sacrificed at the altar of the other.¹¹⁸

¹⁰⁹ Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2016), 327.

¹¹⁰ Marrakesh Agreement Establishing the World Trade Organization (1985) 1867, 1868, 1869 UNTS 31874.

¹¹¹ General Agreement on Tariffs and Trade (concluded 30 October 1947, entered into force 1 January 1948) 55 UNTS 187.

¹¹² Preamble. Specifically, it notes that the parties seek ‘both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development’.

¹¹³ WTO, ‘The Committee on Trade and Environment’

<https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm> accessed 19 March 2022.

¹¹⁴ Summary Record of the First Meeting (1993) GATT Doc No SR.48/1, 13.

¹¹⁵ Decision on Trade and Environment, adopted at the Uruguay Round Trade Negotiations Committee in Marrakesh on 14 April 1994

¹¹⁶ Decision on Trade and Environment, adopted at the Uruguay Round Trade Negotiations Committee in Marrakesh on 14 April 1994.

¹¹⁷ Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford University Press, 2002), 702.

¹¹⁸ Manisha Sinha, “An Evaluation of the WTO Committee on Trade and Environment” (2013) 47(6) *Journal of World Trade* 1285, 1313-1315.

However, from a legal standpoint, it is still unclear how climate issues should be dealt with under the current WTO regime, as evidenced by the lack of emissions trading issues being raised in intergovernmental trade disputes at the WTO.¹¹⁹ However, what is at least clear is that the recognition of sustainable development in the preamble renders it relevant to the proper interpretation of the WTO Agreement.¹²⁰ For example, in the *US—Shrimp* Appellate Body decision, the concept of “sustainable development” was invoked in interpreting “exhaustible natural resources” as encompassing both living and non-living natural resources.¹²¹ The notion of sustainable development was also found to be relevant in the interpretation of the WTO Agreement and the GATT. Specifically, the Appellate Body noted that “(a)s this preambular language (referring to sustainable development) reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretations of the agreements annexed to the WTO Agreement, in this case, GATT 1994.”¹²²

With respect to the usage of climate clubs, many have suggested that the operation of a climate club may be in violation of the “most favoured nation” (“MFN”) principle,¹²³ which, under Article I(1) of the GATT, requires that (1) any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country; (2) be accorded immediately and unconditionally; (3) to the like product originating in or destined for the territories of all other contracting parties.¹²⁴ There are two ways that climate clubs may violate the MFN principle: the first is that the *goods* between club-states and non-club-states are treated differently; the second is that the *emission units* as traded and

¹¹⁹ Rafael Leal-Arcas and Andrew Filis, ‘International Cooperation on Climate Change Mitigation: The Role of Climate Clubs’ (2021) Queen Mary Law Research Paper No 362/2021, 2.

¹²⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31(1), 31(2). See e.g., *Asylum Case* (1950) ICJ Rep 266, 282; *Rights of US Nationals in Morocco* (1952) ICJ Rep 176.

¹²¹ *US—Shrimp* (1998) WT/DS58/AB/R, [129]–[131].

¹²² *US—Shrimp* (1998) WT/DS58/AB/R, [153].

¹²³ Most-favoured nation. See generally, Kasturi Das, ‘Climate Clubs: Carrots, Sticks and More’ (2015) 50(34) Economic and Political Weekly 24, 24; Joachim Monkelbaan, *Interactions between Trade and Climate Governance: Exploring the Potential of Climate Clubs* (Global Challenges, 2021) <<https://globalchallenges.org/wp-content/uploads/2021/06/Interactions-Between-Trade-and-Climate-Governance-2021-06-15.pdf>> accessed 19 March 2022, 49–50; Rafael Leal-Arcas *et al*, ‘The World Trade Organisation and Carbon Market Clubs’ (2021) 52(4) Queen Mary School of Law Legal Studies Research Paper No. 352/2021, 6. The National Treatment principle may also be relevant, but will not be dealt with in this paper. See e.g., Kateryna Holzer, ‘Proposals on Carbon-related Border Adjustments: Prospects for WTO Compliance’, 4(1) Carbon & Climate Law Review 51.

¹²⁴ Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law: Text, Materials and Commentary* (Routledge, 2018), 311–328.

utilised between club-states may be treated differently.¹²⁵

The first possibility is that the emission units and goods coming from within the club are “unlike” those coming from outside. The question of likeness has always been a troubled one,¹²⁶ and as the Appellate Body has also acknowledged, there “can be no one precise and absolute definition” of what is “like”, because “(n)o one approach ... will be appropriate for all cases”,¹²⁷ despite the existence of a list of non-exhaustive indicia of “likeness” provided by the Appellate Body in *Canada—Periodicals*.¹²⁸ Nonetheless, while they will be treated on a case-by-case basis,¹²⁹ some guidance may still be helpful from the jurisprudence of the WTO. In this regard, the *US—Gasoline* Panel Report¹³⁰ suggests that environmental concerns may not be entirely relevant to the question of whether goods are like each other. Gasoline produced from developing countries which did not adopt production methods and processes to reduce emissions of toxic pollutants were “like” those that had had done so.¹³¹ However, recent developments run contrary to this trend. In the *Canada—Feed-in Tariffs* dispute,¹³² the Appellate Body considered the “inputs and processes of production”¹³³ in determining the relationship between competing products. Similarly, in departing from the Panel Report of *EC—Asbestos*,¹³⁴ the Appellate Body¹³⁵ suggested that the legal determination of “likeness” may consider consumer tastes and habits.¹³⁶ If a state can show that consumers consider climate considerations in purchasing goods, it may be argued that goods from states within

¹²⁵ Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 99.

¹²⁶ See, in a different context, Peter Westen, *The Empty Idea of Equality* (1982) 95(3) Harvard Law Review 537, where he explains how it is problematic in treating ‘like’ items ‘alike’, and there cannot be a politically neutral answer to this question.

¹²⁷ *Japan—Alcoholic Beverages II* (1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 21.

¹²⁸ These include: (i) the product's end-uses in a given market; (ii) consumers' tastes and habits; and (iii) the product's properties, nature and quality: *Canada—Periodicals* (1997) WT/DS31/AB/R, 21-22.

¹²⁹ *Japan—Alcoholic Beverages II* (1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; *Indonesia—Autos* (1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, [14.109].

¹³⁰ *US—Standards for Reformulated and Conventional Gasoline* (1996) WT/DS2/R.

¹³¹ *US—Standards for Reformulated and Conventional Gasoline* (1996) WT/DS2/R, [6.5]-[6.29].

¹³² *Canada—Measures Relating to the Feed-in Tariff Program* (2013) WT/DS412/AB/R, WT/DS426/AB/R.

¹³³ *Canada—Measures Relating to the Feed-in Tariff Program* (2013) WT/DS412/AB/R, WT/DS426/AB/R, [5.63].

¹³⁴ *EC—Asbestos* (2000) WT/DS135/R. For an in-depth analysis of the case, see generally, Robert Howse and Elisabeth Tuerk, ‘The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute’ in George Bermann, Petros Mavroidis, *Trade and Human Health and Safety* (Cambridge University Press, 2009).

¹³⁵ *EC—Asbestos* (2001) WT/DS135/AB/R.

¹³⁶ *EC—Asbestos* (2001) WT/DS135/AB/R, 90-122.

the climate club are different from those from outside.¹³⁷ Similarly, because of how any ETS system in a climate club would be dealt with differently from those from non-club states (e.g., different penalty enforcement systems between clubs, different allocation systems, different time-period of the ETS, different amounts of emissions reduction target per year), there is little room to argue that the ETS between club-states and non-club-states are “like” each other.¹³⁸ Another possibility would be through Article XX of the GATT, which may allow states to enforce measures which do not constitute “arbitrary or unjustifiable discrimination”.¹³⁹ The grounds under which a state may justify these measures include where they are (b) “necessary to protect human, animal or plant life or health”,¹⁴⁰ and (g) “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.¹⁴¹ While climate change was undoubtedly un-envisaged during the drafting of the GATT,¹⁴² an evolutionary interpretation as permitted in the Vienna Convention on the Law of Treaties (“VCLT”)¹⁴³ would certainly allow those grounds to expand to include climate policies.¹⁴⁴ Yet, for climate clubs to be consistent with Article XX, it is possible that calibrated exceptions must be made for states that do take similar measures against climate change, and that there must be a case-by-case approach to imposing tariffs against non-club states. This is in line with the *US—Shrimp* case, where the US’s regulation to require countries to take “essentially the same policy” was

¹³⁷ James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge University Press, 2018), 241.

¹³⁸ Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 106

¹³⁹ Other WTO cases that have dealt with Article XX include *Brazil—Tyres* (2007) WT/DS332/AB/R and *EC—Seal Products* (2014) WT/DS400/AB/R, WT/DS401/AB/R. For a more in-depth assessment of Article XX, see generally Anthony Davies, ‘Interpreting the Chapeau of GATT Article XX in Light of the ‘New’ Approach in *Brazil—Tyres*’ (2009) 43(3) *Journal of World Trade Law* 507; Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law: Text, Materials and Commentary* (Routledge, 2018), 427-443.

¹⁴⁰ Cases dealing with Article XX(b) include *US—Gasoline* (1996) WT/DS2/AB/R, *EC—Asbestos* (2000) WT/DS135/AB/R, and *EC—Tariff Preferences* (2004) WT/DS246/AB/R.

¹⁴¹ Cases dealing with Article XX(g) include *US—Gasoline* (1996) WT/DS2/AB/R, *China—Raw Materials* (2012) WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, and *China—Rare Earths* (2014) WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R.

¹⁴² Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 135.

¹⁴³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31(3)(a), (b). See also, Kirsten Schmalenbach and Oliver Dorr, *The Commentary on the Vienna Convention on the Law of Treaties* (Springer, 2018), 572-574; More generally, Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014).

¹⁴⁴ Jean-Marie Paugam, ‘WTO rules no barrier to ambitious environmental policies’ (2021) <https://www.wto.org/english/news_e/news21_e/ddgjp_16sep21_e.htm> accessed 19 March 2022.

considered inconsistent with Article XX,¹⁴⁵ while the revised regulation to allow states to adopt a program “comparable in effectiveness” was permissible.¹⁴⁶ Similarly, club states may not be permitted to exclude non-club states based on their non-inclusion into the club *simpliciter*. Instead, they must consider whether any climate mitigation efforts, and any ETS scheme that the non-club state is enrolled in, are comparable to the club’s own rules and efforts. In this regard, Michael Mehling *et al*’s suggestion of a “weak” climate club in the form of carbon adjustments based on the carbon footprint of the specific product¹⁴⁷ may be preferable to William Nordhaus’s approach of a uniform tax for all products from non-club countries,¹⁴⁸ although further economic studies must be done, as this would conceivably come at the cost of creating weaker incentives to join these clubs.¹⁴⁹

But a more problematic concern in the previous approaches is that, by stretching the current regime too far, it may have unintended and unwanted consequences. The fear is that expanding the current regime through a broader interpretation of the GATT may ultimately be a slippery slope towards an ever-expanding list of non-commercial values that may be imposed on states through trade restrictions.¹⁵⁰ Thus, instead of a broader interpretation of the existing regime, James Bacchus has argued that a climate waiver should be made that explicitly permits discriminatory climate club trade benefits.¹⁵¹ Such waivers under the WTO regime is neither unprecedented nor legally unjustifiable. Under Article IX(3) of the WTO Agreement, “the Ministerial Conference may decide to waive an obligation imposed on a

¹⁴⁵ *US—Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R, [161]-[186].

¹⁴⁶ *US—Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/RW, [135]-[152].

¹⁴⁷ Michael Mehling *et al*, ‘Beat Protectionism and Emissions at a Stroke’ (2018) *Nature* <<https://www.nature.com/articles/d41586-018-05708-7>> accessed 19 March 2022.

¹⁴⁸ William Nordhaus, ‘Climate Clubs: Overcoming Free-riding in International Climate Policy’ (2015) 105(4) *American Economic Review* 1339, 1341.

¹⁴⁹ Carol Petsonk, Nathaniel Keohane, and Alex Hanafi, ‘Some for All? Carbon Clubs in the context of the Paris Agreement and the WTO’ in Daniel Esty and Susan Biniaz (eds), *Cool Heads in a Warming World Part Two* (Yale, 2020) <[https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_Petsonk\(2\).pdf](https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_Petsonk(2).pdf)> accessed 19 March 2022.

¹⁵⁰ See e.g., Walter Mead, ‘Global Free Trade is in Crisis’ (2021) *The Wall Street Journal* <<https://www.wsj.com/articles/the-world-free-trade-system-is-in-crisis-organization-meeting-omicron-tariffs-sanctions-11638220676>> accessed 19 March 2022.

¹⁵¹ James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge University Press, 2018), 253. See also, Joachim Monkelbaan, *Interactions between Trade and Climate Governance: Exploring the Potential of Climate Clubs* (Global Challenges, 2021) <<https://globalchallenges.org/wp-content/uploads/2021/06/Interactions-Between-Trade-and-Climate-Governance-2021-06-15.pdf>> accessed 19 March 2022, 50; Philip Crowe ‘Carbon Tariffs and Conflict Diamonds – A WTO Climate Waiver and the UK’s Role in the International Legal Order’ (2021) <<http://cilj.co.uk/2021/01/22/carbon-tariffs-and-conflict-diamonds-a-wto-climate-waiver-and-the-uks-role-in-the-international-legal-order/>> accessed 19 March 2022.

Member by this Agreement or any of the Multilateral Trade Agreements” in exceptional circumstances where such decision is taken by three-fourths of the Members, and this has been already been utilised in many occasions.¹⁵² One such instance was in 2003, where countries’ obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“**TRIPS Agreement**”) were waived due to a surge in demand for HIV/AIDS and malaria medicine in developing countries.¹⁵³ Apart from a waiver, other policy options that may be explored include: (1) a WTO decision on climate measures; (2) a WTO decision on climate clubs; (3) a WTO decision on environmental exceptions in the GATT.¹⁵⁴ Essentially, the commonality between these options are that they seek to carve out a narrow exception instead of through a reinterpretation of more general principles under the GATT to remove any incidences of unintended consequences. These modes of reconciling the trade regime and climate clubs would be preferable, although much more political will would be required which may not presently exist in our present world. One is reminded of the unwillingness to waive obligations under the TRIPS agreement even amid the Coronavirus Disease 2019 (“**COVID-19**”) pandemic,¹⁵⁵ to see how difficult this may be for states to agree that climate considerations may trump general trade obligations.

On a political level, there are also concerns that the creation of such clubs would spark off a new wave of protectionism. Amongst others, John Kerry has raised concerns about having “serious implications for economies, and for relationships, and trade”,¹⁵⁶ with others warning that it could lead to growing waves of protectionism.¹⁵⁷ Indeed, it is difficult to shake off

¹⁵² Note, however, that collective waiver for extended periods has thus far only been utilised twice: see Isabel Feitchner, *The Law and Politics of WTO Waivers Stability and Flexibility in Public International Law* (Cambridge University Press, 2011), 65-157.

¹⁵³ Isabel Feitchner, *The Law and Politics of WTO Waivers Stability and Flexibility in Public International Law* (Cambridge University Press, 2011), 126-130.

¹⁵⁴ Joachim Monkelbaan, *Interactions between Trade and Climate Governance: Exploring the Potential of Climate Clubs* (Global Challenges, 2021) <<https://globalchallenges.org/wp-content/uploads/2021/06/Interactions-Between-Trade-and-Climate-Governance-2021-06-15.pdf>> accessed 19 March 2022, 89.

¹⁵⁵ Médecins Sans Frontières, ‘In the wake of postponement of WTO’s Ministerial, MSF underscores the urgency of adopting the TRIPS Waiver for people’s unhindered access to COVID-19 medical tools’ (2021) <<https://reliefweb.int/report/world/wake-postponement-wto-s-ministerial-msf-underscores-urgency-adopting-trips-waiver>> accessed 19 March 2022; Siva Thambisetty, ‘Opposition to the TRIPS waiver: dispatches from the frontline’ (2021) <<https://blogs.lse.ac.uk/politicsandpolicy/trips-waiver-one-year-on/>> accessed 19 March 2022.

¹⁵⁶ ‘Kerry 'concerned' about EU carbon border tax implications: FT’ (2021) *Reuters* <<https://www.reuters.com/article/us-usa-eu-kerry-idUSKBN2B40J2>> accessed 19 March 2022.

¹⁵⁷ Joachim Monkelbaan, *Interactions between Trade and Climate Governance: Exploring the Potential of Climate Clubs* (Global Challenges, 2021) <<https://globalchallenges.org/wp->

accusations that such clubs are simply disguised protectionism, since “the starting point (for climate clubs) clearly is concern about low-cost foreign production”,¹⁵⁸ with China’s leader Xi Jinping also warning that “responding to climate change should...not become an excuse for trade barriers”.¹⁵⁹ To mitigate concerns of such nature, the climate club must meet sufficient standards of fairness, equity,¹⁶⁰ transparency, and predictability.¹⁶¹ An “open” climate club – one that is open to other states wishing to achieve climate neutrality, but also facilitates the “willing” but unable states to achieve this goal¹⁶² – must also be inherent in the structure of these clubs, to refute claims of such clubs being a disguised way to impose tariffs. In this regard, the push towards this structure of “open” climate clubs is certainly welcomed.¹⁶³ These concerns highlighted in the sections above probably furthers the point that there is much more that needs to be done before any implementation of such a club,¹⁶⁴ especially since the design of these clubs – including the emission share regulated, club goods, sanctions against non-club members – may have impacts on its coherence with the Paris Agreement,¹⁶⁵ its coherence with the international trade regime, its effectiveness in meeting the climate goals,¹⁶⁶ and the domestic political feasibility of these clubs.¹⁶⁷ Ultimately, however, one must

content/uploads/2021/06/Interactions-Between-Trade-and-Climate-Governance-2021-06-15.pdf> accessed 19 March 2022, 23.

¹⁵⁸ Yuka Hayashi and Jacob Schlesinger, ‘Tariffs to Tackle Climate Change Gain Momentum. The Idea Could Reshape Industries’ (2021) *The Wall Street Journal* <<https://www.wsj.com/articles/tariffs-climate-change-greenhouse-gases-manufacturing-steel-11635862305>> accessed 19 March 2022.

¹⁵⁹ Ministry of Foreign Affairs of the People's Republic of China, ‘Xi Jinping Holds Video Summit with French and German Leaders’ (2021) <<https://www.mfa.gov.cn/ce/cemn//eng/gnyw/t1869825.htm>> accessed 19 March 2022.

¹⁶⁰ Such notions are also included in the Paris Agreement. See Ulrike Will and Cornelia Manger-Nestler, ‘Fairness, equity, and justice in the Paris Agreement: Terms and operationalization of differentiation’ (2021) 34(2) *Leiden Journal of International Law* 397.

¹⁶¹ Michael Mehling *et al*, ‘Beat Protectionism and Emissions at a Stroke’ (2018) *Nature* <<https://www.nature.com/articles/d41586-018-05708-7>> accessed 19 March 2022.

¹⁶² Olaf Scholz, ‘Steps towards an alliance for climate, competitiveness and industry – building blocks of a cooperative and open climate club’ (2021) <https://www.bundesfinanzministerium.de/Content/EN/Downloads/Climate-Action/key-issues-paper-international-climate-club.pdf?__blob=publicationFile&v=4> accessed 19 March 2022.

¹⁶³ ‘Germany pushes for international climate club that protects industry interests’ (2021) *Clean Energy Wire* <<https://www.cleanenergywire.org/news/germany-pushes-international-climate-club-protects-industry-interests>> accessed 19 March 2022.

¹⁶⁴ See e.g., Achim Hagen and Klaus Eisenack, ‘Climate Clubs versus Single Coalitions: The Ambition of International Environmental Agreements’ (2018) 10(3) *Climate Change Economics*, where it was found that different types of coalitions would work better in different circumstances, depending on the marginal damages and marginal benefits, suggesting that more studies must be done to determine the economic costs before a particular structure can be preferred over another.

¹⁶⁵ See Part III.

¹⁶⁶ Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 37-38.

¹⁶⁷ Robert Gampfer, ‘Minilateralism or the UNFCCC? The Political Feasibility of Climate Clubs’ (2016) 16(3) *Global Environmental Politics* 62, 83-84.

not lose sight of the proverbial forest for the trees. It is important to ensure that such matters of “second-order”¹⁶⁸ importance do not cloud the crucial point that such clubs have significant positive impacts in curbing the problem of climate free-riding, and strengthen resolve towards the Paris goals. The climate club regime, despite its amorphousness in its current phase of conceptualisation, may be the much-needed panacea to meet the Paris goals.

V. Complementary Approaches to Enforce the Paris Agreement Goals

While the climate club regime, through the form of smaller minilateral environmental agreements, may be an effective means of meeting the Paris Agreement goals, it should also be sufficiently evident that the present form of climate clubs is only one prong to a multi-pronged approach to meet the Paris goals. This is especially since the ideal form of a climate club to meet the Paris goals has yet to be identified, and there are also many hurdles (political and legal) that states may face before any effective implementation of the climate club regime will be possible. In this section, I will highlight a few approaches to effectively implement the climate club regime.

First, states should continue the trend of utilising the framework of Free Trade Agreements (“FTAs”) to further the climate agenda. While the trends in multilateral environmental agreements (“MEAs”) have not been entirely promising in terms of mitigating climate change, the same cannot be said for FTAs, where the “web of bilateral and regional trade agreements is rapidly increasing”.¹⁶⁹ Importantly, these FTAs have been able to make inroads into creating bilateral/regional agreements on environmental protection obligations, even where decisive consensus has not been reached at a multilateral level.¹⁷⁰ For one, the EU¹⁷¹ and US FTAs have

¹⁶⁸ Jean Tirole, ‘Some Political Economy of Global Warming’ (2012) 1(1) *Economics of Energy and Environmental Policy* 121, 123.

¹⁶⁹ Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 164.

¹⁷⁰ Elena Cima, ‘Can Trade Work for the Environment? The Promotion-Based Model’ in *From Exception to Promotion: Re-Thinking the Relationship between International Trade and Environmental Law* (Brill Nijhoff, 2021), 235.

¹⁷¹ Eline Blot and Marianne Kettunen, *Environmental credentials of EU trade policy: A comparative analysis of EU free trade agreements* (Institute for European Environmental Policy, 2021) <[https://ieep.eu/uploads/articles/attachments/fa0af713-08e5-4800-b263-439138f627c4/Environmental%20credentials%20of%20EU%20trade%20policy%20\(IEEP%202021\).pdf?v=63785611056](https://ieep.eu/uploads/articles/attachments/fa0af713-08e5-4800-b263-439138f627c4/Environmental%20credentials%20of%20EU%20trade%20policy%20(IEEP%202021).pdf?v=63785611056)> accessed 19 March 2022, 2-7.

included comprehensive chapters devoted to environmental protection. Councils have also been created to monitor the implementation of the FTA's environmental chapter.¹⁷² However, as Christopher Dent's recent study of FTAs show, much more can still be done to push for more ambition in these FTAs. While the main way in which climate action measures have been incorporated is through cooperation, the shift towards more specific action-structured (e.g., workshops, joint projects)¹⁷³ and programmatic (i.e., having a list of specified actions, targets, and schedules)¹⁷⁴ cooperation has been recent and gradual. Further, these shifts have largely been driven by the EU, and the wider adoption of such norms has been limited.¹⁷⁵

Second, trade policies should be readjusted such that any pre-existing tariffs and non-tariff barriers facilitate less carbon-intensive trade. Joseph Shapiro observes that each year, trade policy subsidises amount to approximately US\$550-800 billion, because of substantially higher tariffs and non-tariff barriers to less carbon-intensive goods.¹⁷⁶ This arises because, since industries are better organised than final consumers, more intense lobbying efforts are made to ensure greater protection of their outputs and less protection of their inputs (which are generally more carbon-intensive than the outputs).¹⁷⁷ Thus, trade policies should seek to restructure tariffs by applying similar barriers to clean and dirty goods¹⁷⁸ or by taking the more disruptive step of restructuring them to favour high-technology green sectors. These would not only mitigate the impacts of carbon production but also increase incomes for low- and middle-income states.¹⁷⁹

An examination of trade policies must also include consideration of activities that result in

¹⁷² Rafael Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer Law, 2021), 172.

¹⁷³ Christopher Dent, 'Trade, Climate and Energy: A New Study on Climate Action through Free Trade Agreements' (2021) 14(14) *Energies*, 14.

¹⁷⁴ Christopher Dent, 'Trade, Climate and Energy: A New Study on Climate Action through Free Trade Agreements' (2021) 14(14) *Energies*, 14.

¹⁷⁵ Christopher Dent, 'Trade, Climate and Energy: A New Study on Climate Action through Free Trade Agreements' (2021) 14(14) *Energies*, 26.

¹⁷⁶ Joseph Shapiro, 'Environmental Bias of Trade Policy' (2021) 136(2) *The Quarterly Journal of Economics* 831, 836.

¹⁷⁷ Joseph Shapiro, 'Environmental Bias of Trade Policy' (2021) 136(2) *The Quarterly Journal of Economics* 831, 881.

¹⁷⁸ Joseph Shapiro, 'Environmental Bias of Trade Policy' (2021) 136(2) *The Quarterly Journal of Economics* 831, 832.

¹⁷⁹ Paul Brenton and Vicky Chemutai, *The Trade and Climate Change Nexus: The Urgency and Opportunities for Developing Countries* (World Bank, 2021), <<https://openknowledge.worldbank.org/bitstream/handle/10986/36294/9781464817700.pdf?sequence=5&isAllo wed=y>> accessed 19 March 2022, 14-16.

substantial GHG emissions, which includes foreign investment.¹⁸⁰ To leverage trade policy in meeting the Paris goals, supportive structures should be created in the realm of foreign investment. These structures should shift foreign investment away from the traditional view that such investments focus purely on economic gains. Indeed, in the first wave of foreign investment treaties, they tended to focus “entirely on the protection of the interests of the foreign investor and did not concern the interests of the international community”.¹⁸¹ Kate Miles also explains that, in the early investment cases, environment-related matters were frequently pitched as competing norms with the Bilateral Investment Treaties (“BITs”), with investment tribunals tending to prioritise investment protection over environmental protection.¹⁸² This was most prominently on display in *Metalclad Corporation v The United States of Mexico*,¹⁸³ where the tribunal found that there was an expropriation of foreign investment when the government revoked a permit, even though it was a revocation of a permit to operate a hazardous waste plant, for the purposes of environmental protection.¹⁸⁴ However, such concerns are gradually being alleviated,¹⁸⁵ as balanced BITs are becoming increasingly widespread.¹⁸⁶ Examples of such balanced investment treaties include the Model BITs from the US¹⁸⁷ and India,¹⁸⁸ which recognise the need for environmental sensitivity and modifies certain obligations to be more inclusive of environmental interests.

But apart from simply welcoming in a wave of balanced treaties, investment tribunals must

¹⁸⁰ Daniel Esty and Susan Biniarz, ‘Introduction’ in Daniel Esty and Susan Biniarz (eds), *Cool Heads in a Warming World: How Trade Policy Can Help Fight Climate Change* (Yale, 2020) <[https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_Introduction\(3\).pdf](https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_Introduction(3).pdf)> accessed 19 March 2022.

¹⁸¹ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2018), 264.

¹⁸² Kate Miles, ‘Investment’, in Lavanya Rajamani and Jacqueline Peel (eds), *Oxford Handbook on International Environmental Law* (Oxford University Press, 2021), 773-774.

¹⁸³ *Metalclad Corporation v The United Mexican States* (2000) ICSID Case No. ARB(AF)/97/1.

¹⁸⁴ Josefa Sicard-Mirabal and Yves Derains, *Introduction to Investor-State Arbitration* (Kluwer, 2018), 121.

¹⁸⁵ See also, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development* (2015) UNGA A/RES/69/313, where the UN General Assembly recognised the importance of environmental concerns in foreign investments.

¹⁸⁶ Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107(1) *American Journal of International Law* 45, 81.

¹⁸⁷ E.g., the US’s 2012 Model BIT, provides that ‘except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.’

¹⁸⁸ E.g., India’s 2016 Model BIT, at Article 5.5, provides that ‘non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article’.

also be more sensitive to the application of these treaties, to reconcile these areas of the law.¹⁸⁹ In *S.D. Meyers v Canada*,¹⁹⁰ the tribunal interpreted Article 1114(1) of North American Free Trade Agreement (“NAFTA”) (which concerned environmental concerns) in a manner suggesting that it was merely hortatory,¹⁹¹ instead of giving it its proper weight. So, too, did the tribunal in *Clayton & Bilcon v Canada*,¹⁹² where the Permanent Court of Arbitration found that Canada’s Review Panel’s report on Bilcon’s Environmental Impact Statement violated NAFTA because the Review Panel used the term “community core values” that was novel to environmental assessments,¹⁹³ even though the Panel had clearly considered a wide variety of considerations typical to the assessment of EIAs in its report.¹⁹⁴ Such interpretations of foreign investment treaties divorced from its interconnectedness with environmental considerations can no longer hold given the advent of balanced investment treaties, and some promising signs are indeed taking root in cases such as *Parkerings-Compagniet AS v Republic of Lithuania*,¹⁹⁵ and *Chemtura v Canada*,¹⁹⁶ where the tribunals appear to be taking environmental considerations more seriously.¹⁹⁷

Finally, the traditional notions of trade and environmental treaties could be extended well beyond Westphalian conceptions of statehood and sovereignty, to encompass a wider range

¹⁸⁹ For a greater in-depth analysis of the various linkages between foreign investment law and environmental law, see e.g., Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012); Pierre-Marie Dupuy and Jorge Viñuales, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press, 2013).

¹⁹⁰ *S.D. Myers v Canada (Partial Award)* (2001) 40 ILM 1408.

¹⁹¹ Nathalie Bernansconi-Osterwalder and Edith Weiss, ‘International Investment Rules and Water: Learning from the NAFTA experience’, in Edith Weiss, Laurence De Chazournes, and Nathalie Bernansconi-Osterwalder (eds), *Fresh Water and International Economic Law* (Oxford University Press, 2005), 270; Luigi Crema, ‘Investor Rights and Well-Being’, in Tullo Treves, Francesco Seatzu, and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge, 2013), 55.

¹⁹² *Clayton & Bilcon v Canada (Award on Jurisdiction and Liability)* (2015) PCA Case No 2009-04.

¹⁹³ *Clayton & Bilcon v Canada (Award on Jurisdiction and Liability)* (2015) PCA Case No 2009-04, [534]-[535]; [543].

¹⁹⁴ Kate Miles, ‘Investment’, in Lavanya Rajamani and Jacqueline Peel (eds), *Oxford Handbook on International Environmental Law* (Oxford University Press, 2021), 776; cf. Jorge Viñuales, ‘Foreign Investment and the Environment in International Law: Current Trends’ in Kate Miles (ed), *Research Handbook on Environment and Investment* (Edward Elgar 2019), 12. Jorge Viñuales contended that the methodology of the PCA evinced a wider concern for the environment, although it did not come to the conclusion that the Panel’s decision was in violation of the NAFTA.

¹⁹⁵ *Parkerings-Compagniet AS v Republic of Lithuania (Award)* (2007) ICSID Case No ARB/05/8.

¹⁹⁶ *Chemtura Corporation v Government of Canada (Award)* (2010) NAFTA Arbitration (UNCITRAL Rules)

¹⁹⁷ In *Parkerings-Compagniet AS*, the tribunal considered the environmental impacts of two different projects to determine if the investors were in ‘like circumstances’, at [375], [392]. In *Chemtura*, the tribunal considered Canada’s obligations in light of international practice in prohibiting the pesticide concerned (lidane), and Canada’s obligations under their MEAs.

of stakeholders in reaching international climate goals.¹⁹⁸ While the decision to adopt the Paris Agreement explicitly acknowledges the relevance of non-party stakeholders to climate action,¹⁹⁹ their participation in the Conference of Parties (“COP”) is still highly limited, with them having no right to vote,²⁰⁰ and often having limited access to the observation of proceedings.²⁰¹ The present framework leaves much to be desired, especially because these stakeholders often hold much financial and political power to effectively lobby policymakers and governments.²⁰² Further, such non-governmental stakeholders are often prepared to exceed the ambitions set by the state. In fact, subnational governments have formed coalitions to abate GHG emissions, with examples including the Western Climate Initiative,²⁰³ the Regional Greenhouse Gas Initiative,²⁰⁴ and the Tokyo/Saitama ETS in Japan.²⁰⁵ While these coalitions are different in how they operate, they have served as crucial catalysts that can not only serve as a proof-of-concept that certain policy options to reduce GHG emissions are feasible, but also increase pressure on governments to strive towards greater ambition.

VI. Conclusion

It was contended recently by climate activist David Attenborough that climate change is “the

¹⁹⁸ Daniel Esty and Peter Boyd, ‘To Move Paris Accord Forward, Bring Cities and Companies On Board’ (2018) *Yale Environment* <<https://e360.yale.edu/features/to-move-paris-accord-forward-bring-cities-and-companies-on-board>> accessed 19 March 2022.

¹⁹⁹ UNFCCC, ‘Adoption of the Paris Agreement’ (2015) UN Doc FCCC/CP/2015/L.9 at [109], [117]–[118], [133]–[136].

²⁰⁰ UNFCCC, ‘Organizational Matters: Adoption of the Rules of Procedure’ (1996) UN Doc FCCC/CP/1996/2, Rules 6.2, 7.2.

²⁰¹ Freedom-Kai Phillips, ‘Participation of Non-party Stakeholders under the UNFCCC: Options for Future Engagement’ (2018) *Centre for International Governance Innovation* <<https://www.cigionline.org/static/documents/documents/Paper%20no.205web.pdf>> accessed 19 March 2022, 3-4.

²⁰² See e.g., ‘We Mean Business Coalition: Companies’ <<https://www.wemeanbusinesscoalition.org/committed/>> accessed 19 March 2022.

²⁰³ Western Climate Initiative, ‘Homepage’ <<https://wci-inc.org/>> accessed 19 March 2022.

²⁰⁴ The Regional Greenhouse Gas Initiative, ‘Welcome’ <<https://www.rggi.org/>> accessed 19 March 2022.

²⁰⁵ Bureau of Environment, ‘Tokyo Cap-and-trade Program’ <https://www.kankyo.metro.tokyo.lg.jp/en/climate/cap_and_trade/index.html> accessed 19 March 2022; Saitama City, ‘Environmental Protection’ <<https://www.city.saitama.jp/001/009/index.html>>; see also, World Bank, ‘Carbon Market Clubs and the New Paris Regime’ (2016) <<https://thedocs.worldbank.org/en/doc/323531476453676433-0020022016/original/1700505CarbonMarketClubsWeb.pdf>> accessed 19 March 2022.

biggest threat to security that modern humans have ever faced”.²⁰⁶ Other experts have likewise echoed this sentiment, with over 200 various leading scientific journals,²⁰⁷ including *The Lancet*,²⁰⁸ *The New England Journal of Medicine*,²⁰⁹ and the *British Medical Journal*,²¹⁰ publishing a joint statement calling for emergency action to limit global temperature increases.²¹¹ The climate club regime is but one out of many solutions proffered to solve this climate crisis, and it has shown much promise by tackling the free-riding problem so prominent in our present MEAs. Undoubtedly, many hurdles still stand in the way of its implementation, which would favour adopting other more conservative approaches (e.g., increased environmental concerns in FTAs and BITs) in the meantime. Yet, that should not deter pushing for such ambitious action. The G7, under the leadership of Germany, has provided the much-needed push for climate clubs.²¹² As this paper has sought to demonstrate, there is reason to be optimistic that we just might be turning round the corner towards meeting our Paris Agreement Goals, if we are able to effectively tap on trade policies.

²⁰⁶ UN Security Council, ‘Climate Change ‘Biggest Threat Modern Humans Have Ever Faced’, World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation’ (23 February 2021) Press Release SC/14445.

²⁰⁷ The British Medical Journal, ‘Full list of authors and signatories to climate emergency’ (2021) <<https://www.bmj.com/content/full-list-authors-and-signatories-climate-emergency-editorial-september-2021>> accessed 19 March 2022.

²⁰⁸ Lukoye Atwoli, Abdulla H Baqui, Thomas Benfield, et al., ‘Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health’ (2021) 398(10304) *The Lancet* 939.

²⁰⁹ Lukoye Atwoli, Abdulla H Baqui, Thomas Benfield, et al., ‘Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health’ (2021) *The New England Journal of Medicine*.

²¹⁰ Lukoye Atwoli, Abdulla H Baqui, Thomas Benfield, et al., ‘Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health’ (2021) 1734 *British Medical Journal* 374.

²¹¹ Other professions have similarly called for climate action: for lawyers, see e.g., Saskia Stucki, Guillaume Futhazar, Tom Sparks *et al*, ‘World Lawyers’ Pledge on Climate Action: An Urgent Call for Climate Mainstreaming’ (2021) *EJIL:Talk!* <<https://www.ejiltalk.org/world-lawyers-pledge-on-climate-action-an-urgent-call-for-climate-mainstreaming/>> accessed 19 March 2022; World Lawyers’ Pledge on Climate Action <<https://lawyersclimatepledge.org/>> accessed 19 March 2022.

²¹² ‘Germany to push for international climate club during G7 presidency’ (2021) *Clean Energy Wire* <<https://www.cleanenergywire.org/news/germany-push-international-climate-club-during-g7-presidency>> accessed 19 March 2022.