Making the International Trade System Work for Climate Change: Assessing the Options

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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>5</td>
</tr>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>6</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>10</td>
</tr>
<tr>
<td>2. METHODOLOGY</td>
<td>13</td>
</tr>
<tr>
<td>3. ASSESSING THE OPTIONS</td>
<td>16</td>
</tr>
<tr>
<td>3.1 LEGAL CHANGES AT THE WTO</td>
<td>16</td>
</tr>
<tr>
<td>3.2 PROCEDURAL CHANGES IN INSTITUTIONS AND PRACTICES</td>
<td>23</td>
</tr>
<tr>
<td>3.3 ACTIONS UNDER PLURILATERAL AND REGIONAL TRADE AGREEMENTS</td>
<td>28</td>
</tr>
<tr>
<td>3.4 BORDER CARBON ADJUSTMENTS</td>
<td>33</td>
</tr>
<tr>
<td>3.5 FOSSIL FUEL SUBSIDIES</td>
<td>38</td>
</tr>
<tr>
<td>4. CONCLUSIONS</td>
<td>47</td>
</tr>
<tr>
<td>4.1 KEY FINDINGS</td>
<td>47</td>
</tr>
<tr>
<td>4.2 FUTURE DIRECTIONS AND RESEARCH QUESTIONS</td>
<td>49</td>
</tr>
<tr>
<td>REFERENCES</td>
<td>51</td>
</tr>
<tr>
<td>ANNEX: LIST OF INTERVIEWEES</td>
<td>57</td>
</tr>
</tbody>
</table>
List of Abbreviations

APEC   Asia-Pacific Economic Cooperation
ASCM   Agreement on Subsidies and Countervailing Measures
BCA    Border carbon adjustment
COP    Conference of the Parties (to the UNFCCC)
CTE    Committee on Trade and Environment
DSU    Dispute Settlement Understanding
EDB    Environmental Database (of the World Trade Organization)
EGA    Environmental Goods Agreement
EU     European Union
G20    Group of 20
GATT   General Agreement on Tariffs and Trade
HS     Harmonized Commodity Description and Coding System
IEA    International Energy Agency
IMF    International Monetary Fund
MC     Ministerial Conference (of the World Trade Organization)
MFN    Most-favoured-nation
NAFTA  North American Free Trade Agreement
NDC    Nationally determined contribution
PPM    Process and production method
RTA    Regional trade agreement
SDGs   Sustainable Development Goals
TPP    Trans-Pacific Partnership
TPR    Trade Policy Review
TPRM   Trade Policy Review Mechanism
TRIPS  Trade-Related Aspects of Intellectual Property Rights
UNEP   United Nations Environment Programme
UNFCCC United Nations Framework Convention on Climate Change
US     United States
WTO    World Trade Organization
Executive Summary

A new era for international climate cooperation

The adoption of the Paris Agreement in December 2015, and its rapid entry into force in November 2016, heralds a new era of international cooperation on climate change. The new regime confirms the transition towards a more bottom-up architecture for international climate cooperation, centred around a system of national climate pledges called nationally determined contributions (NDCs). These NDCs differ widely in ambition, nature and scope, and, absent strong centralised enforcement, will likely face uneven implementation. Moreover, taken together, their ambitions are far from adequate to meet the Paris Agreement’s goal to keep the global temperature rise well below 2°C, let alone the more ambitious target of restricting it to 1.5°C. The Paris Agreement leaves room for countries to increase ambition in the future, however. If the goals of the Agreement are to be reached, massive improvements in energy efficiency, a substantial scale-up in production of renewable energy, and enhanced access to clean energy technologies are imperative. This calls for support from other international regimes, as rules that are working at cross-purposes may hamper climate action.

What role for trade?

Policy and regime coherence are particularly important in the context of the international trading system. In a globalised world, trade influences emissions patterns worldwide. Trade rules also matter for the diffusion of climate-friendly technologies. Conversely, stronger climate action through NDCs will require a major overhaul of domestic policies and measures, which can have significant trade effects. Moreover, in implementing their respective NDCs, countries can take various direct trade measures, such as removing or reducing tariffs on environmental goods and services; implementing carbon pricing; developing technical standards for low-carbon products; transferring low-carbon technologies; etc. With more ambitious NDCs expected in the future, trade-related climate measures are likely to assume increasing importance.

The need for coherence across regimes

National climate policy measures with trade implications may collide with the rules and requirements of international trade agreements. Such concerns have emerged particularly in the context of the World Trade Organization (WTO), with climate policymakers becoming apprehensive that WTO law could limit the ways in which they can implement effective domestic climate policies. At the same time, there are concerns that trade-related climate measures could be used for protectionist purposes. These concerns are being put to the test with the emergence of a series of WTO disputes related to climate and clean energy policies. However, leaving the fate of climate-related actions to the WTO dispute settlement system is risky and fraught with uncertainty. It is therefore important to explore the ways in which trade policies and institutions could create a more favourable environment for advancing the goals of the Paris Agreement and their implementation.

Assessing the options

This report explores how the international trading system could help contribute to achieving the climate goals by systematically assessing 22 policy options, drawing on our earlier work as part of the project ‘Making the International Trade System Work for Climate Change, as well as an additional literature review and interviews with 26 experts. The options belong to three broad categories (see Figure 1):

1. Options that focus on increasing the trade system’s supportiveness of climate action ‘in general’;
2. Options specifically focusing on implementation of border carbon adjustments (BCAs); and
3. Options dealing specifically with the phase-out and reform of fossil fuel subsidies.

For each of these options the report suggests ways in which they could be implemented. The aim of
this study is to inform policy decisions on trade and climate, and to show a broad set of available measures and initiatives without being prescriptive on how a concrete set might look like. Instead, the report discusses the political feasibility of implementing the options in the short term (defined as less than five years), as well as in the medium (i.e. five to ten years) and long term (i.e. more than ten years).

Legal changes at the WTO

All options involving legal changes at the WTO – amendment, waiver, authoritative interpretation and peace clause – are difficult to implement in the short term. Some key reasons for this are the geopolitical developments that have taken place in 2017–2018, including intensifying trade conflicts between the United States and other countries. However, reforming WTO law has always been challenging. The consensus requirement makes reaching even basic agreement on reforms difficult. Moreover, a more fundamental question is whether there is a need for legal reform at the WTO to promote climate action in the first place. If WTO Members have a genuine – rather than a protectionist – intent to implement climate measures, flexibilities are already arguably available under WTO law. Furthermore, legal changes run the risk of backfiring against their intended objectives. Expressly specifying anything may ignite dormant debates on what is permissible, and narrow down already existing wiggle room for Member countries.

Procedural changes in institutions and practices

The options that focus on procedural changes in trade- and climate-related institutions and practices appear politically more promising. For instance, including climate-related technical expertise in WTO dispute settlement panels may help clarify the contested climate measures and expedite dispute resolution. Given that it is already possible to include climate-related technical expertise in WTO dispute settlement panels, this option seems to be feasible in the near term. Procedural reform could also mean making more effective use of the existing forums under the WTO and the United Nations Framework Convention on Climate Change (UNFCCC). Doing so could help to apply and interpret laws and promote integration of climate concerns in trade matters, which eventually improves legal certainty. While in the short term the mandatory inclusion of climate-related impact assessments in the WTO’s Trade Policy Review Mechanism may not be feasible, voluntary disclosures could be achievable.

Actions under plurilateral and regional trade agreements

Advancing climate objectives among a small set of like-minded countries, through plurilateral or regional trade agreements (RTAs), is an avenue worth exploring further. Plurilateral negotiations on the Environmental Goods Agreement (EGA) have remained stalled since December 2016. While the EGA can help facilitate the diffusion of climate-friendly goods and technologies, much depends on whether fundamental conceptual hurdles are overcome when negotiations resume. As for RTAs, the European Union (EU) has played a pioneering role in including environmental provisions, and recently even refused to sign trade deals with countries that do not ratify the Paris Agreement. While other countries could potentially follow the EU’s lead, the political feasibility of including climate-related provisions in new or existing RTAs will likely vary from one country/region to another. Including binding climate-related provisions in prospective RTAs is likely to be challenging, but the prospects would increase if the provisions are voluntary in nature. In the short term, the review and renegotiation of existing RTAs for climate purposes is likely to be more difficult to accomplish politically.

Border carbon adjustments

Border carbon adjustments are a trade-related policy instrument to offset differences in the stringency of climate policies between trade partners. Because they affect trade in goods by differentiating these based on their carbon footprint, however, BCAs are seen as being at risk of violating WTO disciplines, and are considered a form of green protectionism by some. Many of the same considerations that apply to legal changes to the multilateral trade regime – notably, the challenge of achieving consensus among the WTO membership – also extend to the specific area of BCAs. If anything, their controversial nature would make it even more challenging to take any of the steps requiring consensus. Moreover, depending on their underlying intent and nuances of their design and implementation, BCAs may already be allowed under WTO law. While additional steps, such as an amendment of WTO rules, a waiver, or an authoritative interpretation, may increase
legal certainty in the short term, these could also convey that BCAs are illegal in the absence of such changes, and narrow down existing flexibility under WTO law. The current gridlock in multilateral trade negotiations suggests that any progress on BCAs as a tool of climate policy will most likely take shape at a regional level, with a coalition of like-minded countries advancing the concept on a reciprocal basis. Such cooperation may, over time, become a catalyst for broader and eventually multilateral action, but the short-term prospects for coordination on BCAs under the multilateral trade regime are dim.

**Fossil fuel subsidies**

The adverse environmental, economic, and social implications of fossil fuel subsidies are increasingly clear. Importantly, by affecting fossil fuel prices, subsidies can have distorting impacts on trade and investment. As the main international organisation for disciplining subsidies, the WTO has therefore attracted attention for its potential to address the issue. Some options are already being pursued by WTO Members, namely improving transparency by flagging fossil fuel subsidies in the WTO’s Trade Policy Reviews and the adoption of political declarations. These initial steps can be taken by small groups of WTO Members. Further options in this regard in the short to medium term include new actions by small groups of WTO Members, such as adopting a pledge-and-review model, and slowly building critical mass for addressing fossil fuel subsidies through international trade agreements, such as through future political declarations. Legal reform is the most challenging option, particularly if it requires the entire WTO membership to agree (e.g. amending the WTO Agreement on Subsidies and Countervailing Measures). Legal changes can also be pursued through a plurilateral approach (e.g. a new plurilateral WTO Agreement on Fossil Fuel Subsidies), but this is likely to be a long process.

**The way forward**

This report offers an indication of options that are worth exploring in the near future to support the objectives and implementation of the Paris Agreement through trade rules and procedures. It also shows that many options which may be deemed desirable (e.g. from the perspective of environmental effectiveness or legal certainty) appear not feasible in the short term and thus require more political capital and research. The discussion in this report is not meant to discard or prioritise any of the options. As is the case for many other issues on the table of trade negotiations, all options may need to remain on the table as political windows of opportunity may open (and close) unexpectedly, and the pursuit of some options (or even just their consideration, as in the case of BCAs) might improve the prospects of others. So while we have offered some suggestions on which ways forward may look more promising in the short term, we do not contend that other suggestions should be rejected outright. However, starting with the low-hanging fruit of what are likely the most feasible near-term options can lay the foundation for more ambitious and fundamental changes in the future.
FIGURE 1 - Overview of options

Legal Changes at the WTO

1A. Amend text of WTO Agreements to explicitly accommodate climate measures

1B. Adopt a waiver relieving WTO Members from legal obligation under WTO Agreements

1C. Adopt an authoritative interpretation of WTO provisions

1D. A temporary ‘peace clause’ for trade-related climate measures

Procedural Changes in Institutions and Practices

2A. Ensure technical expertise on climate change in WTO dispute settlement panels

2B. Include mandatory climate-related impact assessments in WTO Trade Policy Review Mechanism

2C. Enhance coordination between WTO and UNFCCC through more intensive use of existing forums

Actions under Plurilateral and Regional Trade Agreements (RTAs)

3A. Intensify efforts under plurilateral approaches, particularly the Environmental Goods Agreement

3B. Include climate-friendly provisions in RTAs under negotiation and in future RTAs

3C. Review and renegotiate RTAs to contribute to the implementation of the Paris Agreement

Border Carbon Adjustments (BCAs)

4A. Amend WTO rules for BCAs

4B. Adopt a waiver for BCAs

4C. Adopt an authoritative interpretation allowing BCAs

4D. Agree a ‘peace clause’ for BCAs

4E. Amend the Harmonized System

4F. Regional or plurilateral cooperation on BCAs

Fossil Fuel Subsidies

5A. Promote technical assistance and capacity-building related to fossil fuel subsidies

5B. Strengthen transparency of fossil fuel subsidies through increased disclosure

5C. Pledge-and-review of fossil fuel subsidies

5D. Adopt a political declaration on fossil fuel subsidies

5E. Amend the Agreement on Subsidies and Countervailing Measures to address fossil fuel subsidies

5F. A new WTO Agreement on Fossil Fuel Subsidies
1. Introduction

The adoption of the Paris Agreement in December 2015 – and its rapid entry into force in November 2016 following ratification by a critical mass of countries – ushered in a new era of international cooperation on climate change. The new regime is characterised by more universal efforts on climate change compared to the previous one, defined by the Kyoto Protocol, with the new agreement applying to both developed and developing countries. Moreover, the Paris climate deal confirms the shift towards a bottom-up approach by introducing a system of national climate pledges, called ‘nationally determined contributions’ (NDCs).

Under the Paris Agreement, Parties to the United Nations Framework Convention on Climate Change (UNFCCC) have pledged climate actions that differ widely in ambition, nature and scope, and, absent strong centralised enforcement, will arguably face very uneven implementation. Indeed, the built-in flexibility and bottom-up nature of the Paris architecture are uniquely suited to allow certain actors to move ahead with ambitious climate action while others fall behind, leading to a more fragmented climate regime. However, even such a flexible architecture may not rule out the possibility of defection entirely, as shown by President Donald Trump’s announcement in 2017 to withdraw the United States (US) from the Paris Agreement.\(^1\)

Moreover, even if all NDCs are implemented as promised, they are still far from adequate to keep the increase of global temperatures well below 2°C, as specified in the Paris Agreement, let alone the more ambitious aspirational goal to stay within 1.5°C, also agreed in Paris.\(^2\) To achieve these goals, massive improvements in energy efficiency, a huge scale-up in the production of renewable energy and enhanced access to clean energy technologies are imperative. This calls for unprecedented efforts across all areas of socioeconomic activity, and thus also depends on support from other international regimes. The rationale for this is twofold: first, other regimes may be better suited to address specific issue areas

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2. Rogelj et al. (2016); UNEP (2017).
relevant for climate action;³ and second, rules that are working at cross-purposes may hamper climate action.

The issues of policy and regime coherence assume particular importance in the context of the international trading system, given that trade has an important role to play towards the achievement of the Paris climate goals, both indirectly and directly. Indirectly, taking the necessary level of action will require a major overhaul of national policies and measures, which may end up having significant cross-border trade effects. In addition, in implementing their NDCs, countries may opt for applying directly various trade measures, such as removing or reducing tariffs on environmental goods and services, developing technical standards for low-carbon products traded across borders, promoting international transfer of climate-friendly technologies; applying border carbon adjustments (BCAs), and so on.⁴ Indeed, with more ambitious NDCs expected in the future, trade-related climate measures may assume increasing significance.

National climate policy measures with direct or indirect trade implications run the risk of colliding with the rules and requirements of international trade agreements. Such concerns have emerged particularly in the context of the World Trade Organization (WTO), with climate policymakers becoming increasingly apprehensive that WTO rules are limiting their room for manoeuvre to effectively implement domestic climate policies.⁵ However, ensuring coherence between trade and climate policy has also become more important in the context of regional and so-called ‘mega-regional’ trade agreements.⁶ At the same time, concerns have been raised about the use of trade-related climate measures for potentially protectionist purposes.⁷ Most notably, there has been a surge in WTO disputes pertaining to climate change and clean energy policies.

While the fate of climate actions could be left to the WTO dispute settlement system, doing so is fraught with risks and legal uncertainty: it would only address issues of coherence on a case-by-case basis, and leave important decisions related to climate policy to adjudicators of the multilateral trading system. It is therefore important to explore the various ways in which international trade law, policies and frameworks could create a more favourable environment for advancing the objectives of the Paris Agreement and their implementation.

There is certainly no dearth of options in this regard. For instance, the E15 Expert Group on Measures to Address Climate Change and the Trade System, convened by the International Centre for Trade and Sustainable Development and the World Economic Forum, produced a report that listed 24 different policy options.⁸ Many other suggestions can be found in the literature, ranging from options that are ‘general’ to others that focus on specific issues at the intersection of trade and climate (e.g. BCAs, energy subsidies, climate-friendly technologies).⁹ However, in many cases, these options are only briefly discussed, and the existing literature generally does not offer a systematic assessment of their feasibility.

The importance of analysing options in the light of real-world constraints is perhaps underscored by recent geopolitical developments. Options to address climate change through the WTO already faced an uphill battle in the context of broader disagreements on the future of the Doha Round (which did not explicitly include a mandate to address climate change).¹⁰ However, there are more fundamental challenges to the WTO, such as increasing protectionism in the form of tariffs imposed unilaterally by the United States, followed by retaliatory measures by US trading partners;¹¹ and ongoing uncertainty about Appellate Body judges’ appointments.¹² These may also challenge the feasibility of any changes oriented to climate policy.

³ For instance, phasing out ozone-depleting substances that are also greenhouse gases has taken place under the Montreal Protocol, rather than the UNFCCC (van Asselt, 2016).
⁴ Brandi (2017).
⁵ See, e.g., Derwent (2015).
⁶ van Asselt (2017).
⁷ See, e.g., Khor (n.d.).
⁸ Bacchus (2016).
⁹ For a review, see Droge et al. (2016).
¹⁰ The disagreements are captured by WTO (2015), para. 30: ‘We recognize that many Members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the [Doha Development Agenda] on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations. We acknowledge the strong legal structure of this Organization.’
¹¹ See, e.g., Rushe (2018).
This report aims to systematically discuss policy options for trade and climate policymakers. Drawing on our earlier work as part of the project ‘Making the International Trading System Work for Climate Change,’ as well as on additional literature review and interviews with 26 experts (see Annex 1), we have identified 22 options for further analysis. These include ‘general options’ addressing the link between trade and climate change, ranging from legal changes at the WTO to procedural changes in trade- and climate-related institutions and practices, and actions taken under plurilateral and regional trade agreements. In addition, we discuss options specifically related to BCAs and fossil fuel subsidies.

Based on available literature and on the interviews with experts, each of the proposed policy options is analysed with a focus on their political feasibility in the short term. In addition, where possible, we examine factors that may increase the utility and desirability of options, including their potential for reducing legal uncertainty. We also offer an indication of whether the likelihood of pursuing an option may change over time, in the medium and long term.

The report is structured as follows. Chapter 2 presents the methodology used for the assessment of options. Chapter 3 offers a detailed discussion of each of the proposed options, with a focus on their political feasibility in the short term. Chapter 4 discusses and summarises the key findings, and offers some recommendations for further research.

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13 Droege et al. (2016, 2017); Mehling et al. (2017); Verkuijl et al. (2017).
14 Defined as five years or less (see Chapter 2).
15 Defined as five to ten years and more than ten years, respectively (see Chapter 2).
Before exploring the policy options in detail (see Chapter 3), this chapter briefly outlines the methodology we have followed in carrying out the background research for this report, and explains how we present the main findings.

Our aim was to identify a set of policy options and undertake a systematic analysis of each of them from the point of view of their political feasibility. The choice of options built primarily on earlier reports produced as part of the project ‘Making the International Trading System Work for Climate Change’. Hence, the options analysed and presented in this report belong to the following three broad categories:

1. options that focus on increasing the trade system’s supportiveness of climate action in general, rather than in the context of any specific issue;
2. options that focus specifically on the implementation of border carbon adjustments; and
3. options that deal specifically with the phase-out and reform of fossil fuel subsidies.

Each of these earlier reports have undergone peer reviews by experts, and have also been informed by the feedback received from participants to several workshops and meetings organised as part of this project from 2016 to 2018. The three sets of options were further presented at a multi-stakeholder workshop held in Crozet, France, in October 2017.

17 Drawing on Mehling et al. (2017).
18 Drawing on Verkuilen et al. (2017).
19 For more information, see https://climatestrategies.org/projects/making-the-international-trading-system-work-for-climate-change/.
20 The general options were shared with workshop participants in the form of an unpublished policy brief. The options related to fossil fuel subsidies were incorporated in policy briefs drawing on Mehling et al. (2017) and Verkuilen et al. (2017), both of which were published and shared before the meeting.
A traffic light approach was developed for this purpose, which used colour schemes to indicate our subjective assessment of the feasibility of each option. The options were fine-tuned in light of the feedback received from the workshop, as well as our own understanding and evaluation considering changes in the geopolitical climate.\footnote{In particular, the general options that were provisionally shared with the participants of the Crozet workshop underwent significant modifications.}

![Traffic light colors](image)

In the next stage, we shared with select experts the (updated) set of policy options in the form of written briefs, before planning interviews by telephone or in person. For each of the options, we offered an overview with implications, based on which the interviewees could provide feedback. We asked interviewees to comment on the political feasibility of the options in the ‘short term’ (which we defined as less than five years). We then asked them whether they expected any changes over time – specifically in the ‘medium term’ (i.e. five to ten years) and ‘long term’ (i.e. more than ten years). Moreover, we inquired about the factors that could make certain options more or less feasible.

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To keep the length of interviews manageable and to reflect the areas of expertise of the interviewees, different sets of interviewees were approached for the general options (Sections 3.1–3.3), BCA-specific options (Section 3.4) and fossil fuel subsidies-related options (Section 3.5). Furthermore, to facilitate an open and frank discussion on the feasibility of options, full confidentiality was guaranteed.

The interviewees included individuals with expertise in the area of trade or climate policies or the intersection of the two. With the aim of bringing on board a variety of perspectives, we made a conscious attempt to ensure diversity of the interviewees with regard to their professional affiliation, their geographical location and country of origin (from both developed and developing countries). The 26 interviewees include trade policymakers, such as representatives from country missions at the WTO; climate policymakers; representatives of intergovernmental organisations or think tanks; academics; and independent consultants (see Annex 1). Following the interviews and where needed, further research was carried out to deepen the analysis of each option. While the views expressed by the interviewees are their personal ones, and not of the organisations they are affiliated with, explicit attribution was not possible for all interviewees. Being mindful of strict confidentiality requirements while also maintaining parity in the reporting style, we only cite interview numbers in the footnotes rather than explicitly attributing the views to interviewees.

In Chapter 3 we briefly present and explain each of the 22 options. We have analysed and assessed the political feasibility of each option in the light of (1) existing academic and policy literature; (2) official documents; (3) insights obtained in expert interviews; and finally (4) our own understanding. As such, we are solely responsible for the views, perspectives, and judgements presented in this report. We offer our subjective assessment of the political feasibility using the traffic light colours for all three time dimensions (i.e. short, medium and long term).
There are limitations in our methodology. First, our selection of the issue areas covered in this report is by no means exhaustive. Options related to other issues worth consideration by policymakers at the intersection of climate and trade\textsuperscript{22} have not been included in our discussion. This does not mean that the issue areas covered in this report (e.g. BCAs and fossil fuel subsidies) are more important than others. It is rather a result of the limited scope of the project. Similarly, the options we consider under each category are also non-exhaustive. However, by discussing a variety of ‘general’ options, we shed some light on options for those other issue areas as well.\textsuperscript{23}

Second, although we have sought to present our reasoning for the feasibility of each option as clearly as possible, we acknowledge that feasibility is the result of a complex and dynamic set of factors that cannot all be captured in a brief analysis and are difficult to predict. The assessment can serve as a compass of which options may be worth exploring in greater detail by actors – including governments and non-state actors – keen to make the international trading system work for climate change.

Third, the colour bars offer a depiction of our subjective view on the potential political feasibility, also over time. We acknowledge that it is difficult to comment on what will happen in the medium to long term. In the areas of both international trade and climate governance, there are many ‘unknown unknowns’. Arguably, any reform pursued through the WTO may be challenging in the present political climate; yet the political pressures on the organisation may also lead to major changes to the international trade regime.

Lastly, not all options are comparable in terms of their environmental effectiveness. As the realisation of an option often depends on its specific design and implementation, we have not carried out an assessment of environmental effectiveness, but rather focused on how an option could be implemented.

\textsuperscript{22} This includes subsidies for renewable energy, the use of free allocation in emissions trading systems, the transfer of climate-friendly technologies and intellectual property rights protection, promotion of climate-friendly investment, climate-friendly government procurement, among other issues.

\textsuperscript{23} For instance, the suggestion by the E15 Expert Group to ‘[s]pecify that Article XX of the GATT applies to the Agreement on Subsidies and Countervailing Measures (ASCM), so that subsidies intended to support climate action may deviate from the general obligations’ (Bacchus, 2016, p. 17, Policy Option 17) is one that would likely require an amendment or, at a minimum, an authoritative interpretation of this provision. The relevant procedures for amendment and authoritative interpretations as also their political feasibility are discussed in the ‘general options’ 1A and 1C (Section 3.1).
This chapter discusses a list of policy options to make the international trading system more supportive of climate action in line with the Paris Agreement. The options are selected drawing primarily on three earlier reports produced as part of this project. The first set calls for legal changes at the WTO to come into effect (Section 3.1). This is followed by another set of policy options dealing with procedural changes in trade- and climate-related institutions and practices (Section 3.2). The chapter then discusses policy options that can be implemented through plurilateral and regional trade agreements (Section 3.3). While the first three sections discuss policy options in general, rather than in the context of any specific issue, the subsequent two sections focus on the more specific issue areas of border carbon adjustments (Section 3.4) and fossil fuel subsidies (Section 3.5).

**3. Assessing the Options**

**3.1 LEGAL CHANGES AT THE WTO**

Recent years have seen a surge in WTO disputes targeting domestic support and policy measures related to clean energy, leading to potential contradictions between the trade regime and climate action. One argument in favour of reforming WTO rules is that the case-by-case nature of WTO disputes does not provide sufficient structural legal guidance for the implementation of NDCs under the Paris Agreement, and leaves the settlement of climate-related disputes to a body that is guided first and foremost by the rules of the multilateral trading system. If the demand for legal guidance increases, there are several ways in which WTO Members could provide it. In this regard, we consider a set of four ‘general’ policy options relating to changes in the WTO law.

24 Drooge et al. (2016, 2017); Mehling et al. (2017); Verkuijl et al. (2017).
25 Drooge et al. (2017), pp. 52-55.
27 Drooge et al. (2017), p. 27.
28 Drawing primarily on Drooge et al. (2017).
An amendment, if ratified by all WTO Members, can permanently alter their WTO obligations. An amendment could reduce the legal uncertainty confronting climate policies and measures deriving from the case-by-case nature of the WTO dispute settlement system. With an amendment clarifying the legal scope of trade-related climate measures, the frequency of disputes in this area is likely to reduce. This would ease the burden on the WTO dispute settlement system, which is already overburdened, while facilitating normative coherence between the trade and climate regimes.\(^{29}\)

The flipside, however, is that the *modus operandi* of an amendment in WTO law is highly complex, and any amendment will likely take long to come into force.\(^{30}\) Submitting an amendment itself needs consensus, and depending on the content (and the specific treaty provision it applies to), it will require the acceptance of at least two-thirds of the Members, and in some cases even of all Members to come into effect (see Box 1). Another major challenge is that WTO amendments, in general,\(^{31}\) are binding only on those Members that ratify them, and not on all Members. For any WTO Member that does not accept an amendment, the un-amended WTO rules would still apply, and that Member could bring and win a dispute against any climate change or renewable energy measure that violates the un-amended rules.\(^ {32}\)

Not surprisingly, amendments have hardly been used in WTO practice so far (the only exception has been an amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)).\(^ {33}\) Negotiating an amendment for climate purposes will be highly challenging. Even if the procedural barriers to its adoption could be overcome, it would still be difficult to reach agreement on its formulation.

For these reasons, the political feasibility of an amendment is very low in the short term.\(^{34}\) In addition, adopting an amendment on a topic that is still controversial at a time when overall decision-making in the WTO is proving to be challenging will likely be difficult. Thus, although an amendment seems to be a powerful option for clarifying the relationship between the trade and climate regimes, its political feasibility in the short term is very low.

### BOX 1. Steps for implementation of WTO amendments (according to Article X of the Agreement Establishing the WTO)

- The Ministerial Conference (MC) receives a proposal for an amendment by a WTO Member or one of the three specialised Councils (Goods, Services, TRIPS).
- The MC is given a period of at least 90 days to try and reach consensus on the proposal.
- If consensus is not reached by the stipulated timeframe, the MC may decide by a two-thirds majority of Members to submit the proposal to Members for acceptance in accordance with their ratification procedures.
- The amendment, in general, takes effect after two thirds of Members have ratified it.
- For certain specified provisions, amendments take effect only upon acceptance by all Members.

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29 van Asselt et al. (2008), p. 440.
30 The sole case of an amendment of WTO law (a compulsory licensing provision related to public health in the TRIPS Agreement) was adopted in 2005, but only came into effect in 2017. See https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.
31 Only a few amendments that do not alter the rights and obligations of Members take effect for all Members.
33 See https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.
34 Interviews 1–11.
A second legal window available within the WTO is the ‘waiver’ provision of Article IX.3 of the Agreement Establishing the WTO. A waiver enables WTO Members to lawfully take measures which, in the absence of the waiver, might be judged as violating WTO law. The WTO Ministerial Conference has the right to grant waivers. However, a waiver can be used only under ‘exceptional circumstances’ and for a limited period of time, as specified in the waiver decision. Waivers are also subject to well-specified terms and conditions (see Box 2).

There are two kinds of waivers: individual and collective. Waivers have been extensively used by the WTO. Most waivers granted belong to the first category, wherein individual countries seek respite from a WTO legal obligation. Collective waivers, instead, suspend the obligations for groups of, or potentially for all, WTO Members. Collective waivers have been granted by the WTO for a variety of policy reasons, which include the reconciliation of WTO laws with other societal values, and rules of other international regimes. Notable among them are the Kimberley Waiver on ‘blood diamonds’, which waived certain provisions of the General Agreement on Tariffs and Trade (GATT) to allow the participants to the Kimberley Process to ban trade with non-participants in rough diamonds. Another example is the TRIPS Waiver on compulsory licensing, which waived certain TRIPS requirements regarding compulsory licensing for facilitating access to medicines to countries lacking manufacturing capacity. Incidentally, both these waivers were granted in 2003.

The granting of a waiver is a simple and flexible method for relieving a WTO Member or all WTO Members from a particular WTO obligation (see Box 2). The waiver decision becomes legally effective as soon as it is adopted by the MC. Feichtner points out that a waiver allows for a general modification of WTO rules in the direction of non-economic interests. More precisely, it restricts the WTO’s jurisdiction in favour of ‘other international legal regimes which may have greater competence and legitimacy than the WTO to deal with certain issues’, and which actually have a legal mandate that affects trade. Climate change-related interests may fit the bill.

However, waivers also have several disadvantages. For instance, they can work as a defence against existing obligations but cannot create additional obligations to those set out in the WTO Agreements. All waivers are temporary, and, in general, have a specific expiration date. Waivers exceeding one year are subject to annual review during which they can be extended, modified or terminated by a simple majority (see Box 2). As waivers cannot provide a permanent and definitive reduction of a WTO obligation, this may result in an endless, contentious debate every year at the time of review. As opposed to the temporary character of a waiver, climate change poses long-term challenges, and the policies required to reduce emissions need to be long-term too. The built-in uncertainty of the waiver approach may therefore not provide the much-needed predictability to climate policy makers and other stakeholders. Hence, from the perspective of creating legal certainty, waivers fare worse than amendments and would not resolve structural, long-term conflicts between trade and climate regimes.

36 For a list of waivers granted by General Council and by the Ministerial Conference between 1995 and 2015 see WTO (2016a).
39 This was to clarify that trade actions taken against non-participant WTO Members to help suppress trade in conflict or blood diamonds under the Kimberley Process Certification Scheme for Rough Diamonds are justified under the GATT (WTO, 2003a).
40 WTO (2003b).
42 Feichtner (2009), p. 618.
43 The only exception is the waiver on TRIPS and public health, which states that it will terminate for each Member only on the date when an amendment to the TRIPS Agreement replacing its provisions enters into effect for that Member (WTO, 2003b).
In terms of political feasibility, the temporary nature of a waiver may render it more appealing. However, much like an amendment, requesting and obtaining a waiver involves a political process (see Box 2). The proponents of a waiver would still have to define the exact measures that would be covered within the scope of the waiver, and might have to convince other Members as to why the desired climate policy objectives could not be achieved through WTO-consistent measures. The proponents might also have to deal with the concerns of other Members regarding the trade impact of the climate measures that the waiver aims to cover.\textsuperscript{44}

At present, the political appetite for a climate waiver is arguably low.\textsuperscript{45} Waivers are complex instruments that can make their negotiation difficult. Furthermore, given that the beneficiaries of a waiver for climate policies may primarily be developed countries, concerns about disguised protectionism may also arise.\textsuperscript{46} In the short term, the feasibility of a climate waiver appears low,\textsuperscript{47} but its temporary nature may make it emerge as a more likely option in the medium to long term.

\begin{itemize}
\item Request for waivers is to be submitted to the relevant sectoral Councils (Goods, Services, TRIPS).
\item The request has to specify the proposed measure, underlying policy objectives, and explain as to what prevents application of GATT-compliant measures.
\item After up to 90 days the relevant Council has to submit a report to the MC or the General Council.
\item The decision may be adopted by a three-fourths majority.
\item In practice, however, waiver decisions are adopted by consensus.
\item The decision granting a waiver may specify terms and conditions that the Member to whom the waiver is being granted must fulfil.
\item Waivers exceeding one year are subject to annual review wherein any extension, modification or termination may be decided by a simple majority.
\item Waivers exceeding one year must undergo a review by the MC within one year since it is granted, and thereafter annually until the waiver terminates. In each such review, the MC is required to examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The MC, on the basis of the annual review, may extend, modify or terminate the waiver by a simple majority.
\end{itemize}
A third option is to adopt an authoritative interpretation of certain provisions of the WTO Agreements. Through an authoritative interpretation, WTO Members could, for instance, agree that certain measures pursuing climate change objectives or measures implementing a climate change agreement (e.g. the Paris Agreement) are consistent with certain provisions of the WTO Agreements.\(^\text{48}\)

Article IX.2 of the Agreement Establishing the WTO confers on the MC and the General Council the exclusive authority to adopt such interpretations. An authoritative interpretation requires a three-fourths majority to be passed, although consensus has been the norm in practice (see Box 3).\(^\text{49}\) An authoritative interpretation is immediately binding on all WTO Members, as well as on dispute panels and on the Appellate Body.\(^\text{50}\)

There are many provisions in the WTO Agreements that are open to interpretation and this option could help increase legal clarity in such cases. However, unlike an amendment, an authoritative interpretation cannot make new law or impose new obligations. It is only meant to clarify the meaning of existing provisions, and not to modify their content.\(^\text{51}\) This option, therefore, cannot offer the same extent of legal certainty as amendments.\(^\text{52}\) Nonetheless, a decision that removes the legal uncertainty surrounding a particular provision can have effects comparable to those of a clarifying amendment.\(^\text{53}\) Another potential issue is that authoritative interpretations cannot undermine the amendment provisions in Article X of the WTO.\(^\text{54}\) While introducing new rules through an authoritative interpretation therefore seems impossible, it could however lead to a change in interpretation of existing rules.\(^\text{55}\)

Importantly, authoritative interpretations could be used to modify or reverse interpretations of the Appellate Body,\(^\text{56}\) and could even (potentially) affect outcomes in WTO dispute settlement.\(^\text{57}\)

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**Box 3.**

Steps for implementation of authoritative interpretations (according to Article IX.2 of the Agreement Establishing the WTO)

- Recommendation for an authoritative interpretation is to be submitted to the MC by the body overseeing the functioning of the agreement concerned, namely the (a) Council for Trade in Goods for goods-related agreements; (b) Council for Trade in Services for the General Agreement on Trade in Services; and (c) Council for TRIPS for the TRIPS Agreement.

- The decision is to be adopted by the MC by a three-fourths majority.

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\(^{49}\) Ehlermann and Ehring (2005), p. 806.

\(^{50}\) ACWL (2006), p. 21.

\(^{51}\) WTO (1997), para. 383.

\(^{52}\) Notably, the Agreement Establishing the WTO clearly states that Article IX.2 ‘shall not be used in a manner that would undermine the amendment provisions in Article X’.


\(^{56}\) ACWL (2006), p. 25. As clarified by the WTO Appellate Body (WTO, 2012, para 262), a decision adopted by Members may qualify as a ‘subsequent agreement between the parties’ regarding the interpretation of a covered WTO agreement or the application of its provisions if: (i) the decision is adopted subsequent to the relevant covered agreement, and (ii) the terms and content of the decision express an agreement between Members on the interpretation or application of a provision of WTO law. Such a subsequent agreement would be taken into account in the interpretation of the WTO Agreements, pursuant to Article 31.3(a) of the 1969 Vienna Convention on the Law of Treaties, which with respect to interpretation of treaty provisions states: ‘There shall be taken into account, together with the context:(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.’

The WTO Members have hardly made any attempt to make use of the authoritative interpretation window.\textsuperscript{58} In one occasion, in 1999, the European Communities attempted to obtain an interpretation in order to resolve the so-called ‘sequencing’ issue regarding the relationship between Article 21.5 and 22.2 of the Dispute Settlement Understanding (DSU) on compliance measures.\textsuperscript{59} Another attempt by the EU was the EU Parliament’s resolution urging an authoritative interpretation on the ‘like product’ doctrine.\textsuperscript{60}

Compared to an amendment or a waiver, an authoritative interpretation appears to be a more limited intervention in the regime. It is also simpler and procedurally more straightforward because it concerns the interpretation of existing text, rather than the creation of new text.\textsuperscript{61} Hence, for clarifying certain grey areas in WTO law for climate change purposes, authoritative interpretations may be relatively more feasible, at least compared to an amendment or a waiver, in the medium term. However, like other legal changes, it seems unlikely that it could be adopted in the short term.\textsuperscript{62} The political feasibility will likely depend also on which particular provision of WTO law is in question.

Another option to create some legal breathing space for climate action by WTO Members is to agree on a ‘peace clause’ specifying that the Members will not take any legal action through the WTO dispute settlement system on the issue covered by the clause. A peace clause or a ‘moratorium’ could be time-limited and conditional.\textsuperscript{63} It could permit temporary breaches of WTO rules by Members, either for some or for all areas of climate change policy.\textsuperscript{64} Given the risks and unpredictability of litigation as a strategy, a moratorium on dispute settlement in the area of clean energy has been suggested.\textsuperscript{65} Such a moratorium could cover some or all areas of climate change mitigation based on an agreement with trading partners, including those whose trade could be impacted by such measures. A more concrete proposal is to require WTO Members to wait at least three years before challenging through WTO dispute settlement national climate measures or countermeasures that restrict trade or otherwise have trade effects.\textsuperscript{66}

There are some precedents for a peace clause or a moratorium, for instance in the areas of intellectual property rights and agriculture. Article 64.1 of the TRIPS Agreement provided for the theoretical possibility of disputes in respect of ‘non-violation, nullification or impairment’ of rights under the TRIPS Agreement. But Article 64.2 created room for a five-year moratorium on such disputes, with the option of extension.\textsuperscript{67} This moratorium has been extended periodically since, and most recently in 2017.\textsuperscript{68} Under Article 13 of the Agreement on Agriculture, WTO Members agreed to exercise restraint in making use of their rights to countervail or challenge domestic and export subsidies. This peace clause (or ‘due restraint’ provision) expired on 1 January 2004.\textsuperscript{69} Another precedent is the ‘interim peace
‘interim peace clause’ agreed through a Ministerial Decision\textsuperscript{70} (see Box 4) during the WTO Ministerial Conference held in Bali in 2011. The ‘interim peace clause’ allowed developing countries to provide subsidies under public stockholding programmes without being legally challenged in the WTO’s dispute settlement system, provided they met the conditions specified in the Decision and until a permanent solution was reached.\textsuperscript{71}

Adopting a peace clause through a ministerial decision appears to be relatively more straightforward (see Box 4) than the three options discussed above (Options 1A to 1C), but would still require an effort to find consensus among Members.

As for the legal implications, it is unclear whether this option would secure full protection against disputes. To provide legal certainty, a decision on a peace clause or a moratorium would have to clearly state the intention not to challenge certain measures, and clearly describe the measures not to be challenged. However, it remains debatable whether the doctrine of estoppel,\textsuperscript{72} which is well recognised in general international law, could be invoked if a WTO Member challenged a trade-related climate measure of another Member at the WTO dispute settlement system after agreeing to abide by a peace clause.\textsuperscript{73} According to some commentators, if a WTO Member were to bring a claim before the WTO dispute settlement system in clear violation of its commitment not to do so under the peace clause, this would be tantamount to a violation of the obligation of ‘good faith’ (enshrined in Article 3.10 of the WTO DSU), and the claim would likely be found inadmissible.\textsuperscript{74} It needs to be underscored that a peace clause is intended to provide temporary breathing space only; it is a mechanism to buy time\textsuperscript{75} until a permanent solution is found to create legal clarity.

Furthermore, it is necessary to define what constitutes a ‘climate measure’ or ‘climate action’ to make sure that a peace clause indeed prevents disputes over them. Thus, a major challenge with a peace clause is to get the scope right. It is important that the scope of the peace clause is not circumscribed so carefully that it would not be useful, while at the same time avoiding a general reference to the Paris Agreement as a whole. The question that arises then is how to single out those measures that legitimately seek to implement the Paris Agreement or otherwise promote climate goals. The flipside is that an ill-formulated peace clause could end up offering WTO Members a carte blanche, creating a perverse incentive for introducing protectionist or otherwise trade-restrictive climate policy measures.\textsuperscript{76}

Given these challenges, and the current political climate surrounding the WTO, adopting a peace clause for climate purposes appears to be very unlikely in the short term.

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\textsuperscript{70} O (2013), p. 1.
\textsuperscript{71} https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfagric_e.htm.
\textsuperscript{72} The doctrine of estoppel is a principle long recognized in international law, which prevents states from acting inconsistently to the detriment of others (Wagner, 1986, p. 1777).
\textsuperscript{73} Porges and Brewer (2014), pp. 7–8.
\textsuperscript{74} Howse (2014).
\textsuperscript{75} Droege et al. (2016), p. 37.
\textsuperscript{76} Droege et al. (2016), p. 37.
Given the significant hurdles confronting any legal changes at the WTO in the near term, alternative avenues to enhance the trade system's contribution to the implementation of the Paris Agreement could focus on procedural changes in trade-as well as climate-related institutions and practices. This section delves into three such options: (1) bringing in climate-relevant expertise in WTO dispute settlement panels; (2) including mandatory climate-related impact assessments in the WTO’s Trade Policy Review Mechanism (TPRM); and (3) strengthening coordination through use of existing forums under the WTO and UNFCCC.

One option is to ensure that the composition of WTO dispute settlement panels reflects the necessary technical expertise to cover climate-related matters. This will not require any legal change, since Article 13 and Appendix 4 of the WTO DSU and several other WTO Agreements already provide the dispute settlement panels with sufficient discretion to seek information and technical advice from experts, provided the relevant rules and procedures are followed. Article 13 of the DSU grants panels an almost unfettered right to seek information and technical advice from any individual or body on any field: technical, economic, linguistic, sociological among others.

This wide scope may be particularly helpful in the climate change context, considering the multidisciplinary nature of the challenges involved. Given that in the past panels have requested expert advice from other international organisations, a panel could conceivably seek advice from the UNFCCC Secretariat as well.

Expert advice, the report of expert review groups, as well as the opinions of individual experts are advisory only, barring a few exceptions. However, according to Pauwelyn, even if expert advice is advisory only, it will be difficult for a panel to overrule a consensus position expressed by the experts. Hence, expert advice could presumably play an important role in climate-related WTO disputes.

In theory the inclusion of climate change expertise in WTO dispute panels could be accomplished under existing WTO rules. But there is apprehension that in practice this could be made more challenging by the Appellate Body impasse created by the Trump Administration’s objections to the appointment of new Appellate Body judges. That said, this impasse has not stopped WTO Members from initiating new disputes, nor has it halted the ongoing work of the WTO dispute panels. Hence, it may be feasible to implement this option for ongoing and future climate-related disputes. If WTO Members manage to find a way out of the current Appellate Body impasse, this option will arguably become more feasible. Moreover, given that the complexities of climate-related WTO disputes will likely increase in the future, WTO Members may realise more and more the need to include climate expertise in dispute panels. Overall, this option seems to have a reasonably high potential in the short term.

77 Droege et al. (2016), p. 42.
81 DSU Appendix 4, para. 4.
82 Only advice gathered from the IMF under GATT Article XV.2 and from the Permanent Group of Experts under Article 4.5 of the Subsidies Agreement is binding (Pauwelyn, 2002, p. 355).
84 Payosova et al. (2018).
85 Interview 2. However, some other interviewees (e.g. Interview 1) suggested that the importance of this point should not be overstated.
86 An ongoing dispute that has become highly contentious and reached the stage of formation of a new compliance panel is India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells) (DS456) (for details, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm) brought about by the United States. A sort of a tit-for-tat dispute that India initiated and that has now reached the panel stage is United States – Certain Measures Relating to the Renewable Energy Sector (US – Renewable Energy) (DS510) (for details, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds510_e.htm).
87 Given that WTO disputes, in general, are becoming increasingly complex and the number of disputes requiring high levels of technical expertise is also increasing in tandem, more effective use of the external experts in WTO panels, in general, is also being suggested. See http://www.meti.go.jp/english/report/data/j400117e.html.
88 Interviews 1, 5, 6.
Another WTO window worth exploring is the Trade Policy Review Mechanism (TPRM), the WTO’s central surveillance system of national trade policies (see Box 6). There have been repeated calls for the TPRM to be opened up to environmental (and social) interests. It has been suggested, for instance, that the Trade Policy Reviews (TPRs) might survey not only the impact of national environmental requirements on free trade, but also the impact of international trade agreements on national ecological interests and policies. Similar arguments may hold for climate change.

Interestingly, according to the annual Environmental Database (EDB) published by the WTO Committee on Trade and Environment (CTE), there are many instances in which TPRs have covered environment-related and, more specifically, climate policy-related information. For example, the EDB published in October 2017 shows that among the 20 countries whose TPRs were carried out in 2015, 19 had included environment-related information. However, any inclusion of climate-related information still only occurs on an individual and voluntary basis. Also, at present these are mostly at the level of providing information, somewhat complementing the notification provisions of the WTO. Indeed, the TPRM has historically tended to be a dormant peer-review assessment mechanism, largely used only for information purposes. Bacchus, however, proposes

89 For further details, see https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.
90 Santarius et al. (2004), p. 45.
91 The annual Environmental Database (EDB) published by the WTO Committee on Trade and Environment (CTE) collates all environment-related information included in TPRs undertaken in a particular year (WTO, 2017a). The EDB covers information on environment-related policies, measures or programmes contained in the two TPR reports – one prepared by the member country’s government, and the other prepared by the WTO Secretariat.

BOX 5. Steps to include technical expertise in the WTO dispute panels

• If a WTO panel wishes to appoint external experts, it can either appoint individual experts, or it can set up a so-called ‘expert review group’ under Article 13.2 of the DSU, for which the procedures enshrined in Appendix 4 of the DSU apply. It is for the panel to decide whether it will appoint experts.

• A panel may appoint experts at its own initiative, or upon request by a party to a dispute. If a party to a dispute requests the appointment of an expert, the panel, however, is under no legal obligation to accept such a request.

• There is no provision as such that clearly states how experts are to be appointed. In the past, experts have been appointed by the parties and the panel together. There have also been instances in which the panel has appointed experts based on a list of names received from the relevant international organisation.

to strengthen the TPRM to include a ‘required’ impact assessment of relevant domestic measures on climate change, and also on efforts to address climate change.93

While enhanced transparency may help build trust among WTO Members, the TPRM cannot serve as a basis for enforcement, dispute settlement, or as a means to seek new commitments from Members.94 However, using the TPRM as a first level (baseline) of information in the context of dispute settlement (especially for climate change measures, which can be complex and vastly different across countries) could be explored.95 The TPRM could also help in providing a standardised approach for measuring different climate change responses across countries.96 This could conceivably enhance comparability of climate measures undertaken by WTO Members. If the TPRM leads to information on whether or not a country’s actions are in line with the Paris Agreement, that may potentially lead to fewer challenges and reduce the burden on the already overcharged WTO dispute settlement system.97

However, at present there is no legal basis for any explicit mandatory inclusion of climate change aspects in the TPRM. Any provision mandating it will require an amendment of Annex 3 on the TPRM, subject to approval by the Ministerial Conference.98 This brings us back to the difficulties of implementing WTO amendments discussed under Option 1A.

Adopted in July 2017,99 the first-ever amendment of the TPRM decreased the burden of the TPRM process for Members by reducing the frequency of reviews. On the contrary, a mandatory impact assessment would likely lead to increased reporting burdens, making its approval less likely.

While a mandatory inclusion of climate-related impact assessment in the TPRs thus appears to be unlikely in the short term,100 voluntary inclusion of such information is possible and already happening, as evinced by the case of fossil fuel subsidies101 (see Option 5B in Section 3.5). Numerous instances of environment-related disclosures are also already found in TPRs. Broadly, the WTO membership

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95 Interview 8.
96 Interview 8.
97 Interview 8.
98 Interview 4.
100 Interviews 1, 2, 4, 5, 6.
101 Interview 2.
appears to be increasingly open to environmental or climate-related queries and revelations, albeit on a voluntarily basis. The openness of WTO membership may increase even further over time as trade issues become increasingly intertwined with climate change issues (as well as the Sustainable Development Goals (SDGs)). Whether that will create enough room for inclusion of any mandatory climate-related impact assessment in TPRs in the medium to long term remains to be seen.

Another option of procedural reforms could be to enhance coordinated efforts, in a systematic way, between the WTO and the UNFCCC for the implementation of the Paris Agreement. This could be achieved through more effective use of the existing forums, such as the WTO Committee on Trade and Environment and the UNFCCC’s ‘Improved Forum on the Impact of the Implementation of the Response Measures’. This could strengthen the knowledge base of both institutions and improve the mutual understanding of trade and climate regimes, especially as regards the respective objectives, principles and legal obligations. As interactions take place already, the existing scope available to each forum could be used more intensively, and/or the respective mandates could be broadened to create greater room for discussion of the trade impacts of climate policies or the climate impacts of trade policies.

As a forum for dialogue on trade and the environment, the WTO CTE is like an incubator for ideas. There have been instances where issues first raised in the CTE eventually evolved into fully-fledged negotiations, such as fisheries subsidies. However, climate change is not explicitly part of the WTO’s work programme under the CTE (or elsewhere). The CTE has a wider mandate on the environment, which includes the identification of the relationship between trade measures and environmental measures (in general, and not specific to climate change) in order to promote sustainable development. It also makes recommendations on whether any modifications of the WTO provisions are required, including the need for rules to enhance positive interaction between trade and environmental measures. Moreover, the Work Programme of the CTE under the Doha Round and beyond already includes issues such as the relationship between WTO rules and trade measures contained in multilateral environmental agreements (such as the Montreal Protocol on ozone-depleting substances or the Convention on International Trade in Endangered Species of Wild Fauna and Flora), and between their dispute settlement mechanisms, among others. Within this remit, several issues relating to climate change, such as the environmental benefits of removing trade restrictions in the energy and forestry sectors and the effect of energy efficiency labelling on market access, have been discussed in the CTE in the past.

As for institutional dialogue, the UNFCCC Secretariat already has an observer status within the CTE. The UNFCCC is often also invited in the Special Sessions of the CTE on an ad-hoc basis. However, there still is much scope to increase engagement with the UNFCCC Secretariat and, more generally, debating trade-related climate policies. One proposal to realise this is the creation of a separate WTO Committee on Trade and Climate Change. This could be done through a ministerial decision. However, there

Feasibility of Option 2B
(mandatory climate-related impact assessment in TPRM)

Option 2C Enhancing coordination between the WTO and UNFCCC through more intensive use of existing forums

SHORT TERM MEDIUM TERM LONG TERM

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102 Interviews 2 and 4.
105 Droege et al. (2016), p. 43.
110 The 1994 Ministerial Decision on Trade and Environment created the CTE (WTO, 1994).
is a risk that such a body would merely become symbolic, requiring resources and attention, and duplicating work already carried out by the CTE. A relatively straightforward option could be to redefine the mandate of the CTE to explicitly include climate change policy and coordination efforts with the UNFCCC bodies. Consequently, the CTE could be renamed as the Committee on Trade, Environment and Climate Change.\footnote{Droege et al. (2016), p. 43.}

Another proposal for improving information exchange and cooperation between trade and climate policymakers is to strengthen climate change expertise in the WTO Secretariat, through recruitment or training. New lawyers, economists and other professionals joining the WTO Secretariat are often interested in newer issues and could give traction to this agenda.\footnote{Interview 3.}

As for the UNFCCC, the ‘improved forum on the impact of the implementation of response measures’\footnote{UNFCCC (2011), paras. 88–94. For a chronological account of the forum, see \url{https://unfccc.int/index.php/topics/mitigation/workstreams/response-measures/chronology#main-content}.} (see Box 7) is the primary institutional space for ongoing discussions on trade-related matters.\footnote{Droege et al. (2016), p. 8.} Although the work programme of the forum does not directly tackle the climate-trade overlap, technical work on assessing the impacts of response measures suggests that trade-related impacts will be considered. In particular, the UNFCCC guidance on the impact assessment of response measures in developing countries mentions trade impacts from tariffs and BCAs.\footnote{UNFCCC (2016), p. 8.} The submissions to the UNFCCC Secretariat by the G77 and China\footnote{A recent submission in May 2018 has been cited by UNFCCC (2018), p. 6.} group have also covered trade aspects, including impacts of unilateral trade measures (which could include BCAs).\footnote{The G77 and China proposals call for conducting qualitative assessments and analysis of adverse impacts of response measures, including unilateral ones, in terms of their consequences for trade, among others. They also suggest developing methodologies and modelling tools (computable general equilibrium or hybrid) for assessing adverse impacts of response measures, including unilateral measures in terms of their trade consequences.} Under the improved forum, technical work on measuring and identifying the trade impacts of climate policy measures has now begun,\footnote{See \url{https://unfccc.int/process-and-meetings/conferences/bonn-climate-change-conference-april-2018/events-and-schedules/mandated-events/mandated-events-during-sb-48/in-forum-training-workshop-on-economic-modelling-part-1}.} but the modalities for its work programme are still under negotiation.\footnote{For an update up to May 2018, see UNFCCC (2018).}

\section*{BOX 7. About the improved forum on the impact of the implementation of response measures}

Recognising the importance of avoiding or minimising negative impacts of response measures, at the 16th Conference of the Parties (COP) in 2010 in Cancun, the UNFCCC Parties decided to create a forum on the impact of the implementation of response measures.

Subsequently, at COP17 in 2011 in Durban, the Parties adopted a related work programme under the two subsidiary bodies, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation. The Parties also established a ‘forum’ on the impact of the implementation of response measures, to be convened by the Chairs of the subsidiary bodies, to implement the work programme.

At COP21 in 2015 in Paris, Parties decided to continue and ‘improve’ the forum, and adopted the work programme on the impact of the implementation of response measures. This includes two areas: (a) economic diversification and transformation and (b) just transition of the workforce and the creation of decent work and quality jobs. The key objectives of the ‘improved forum’ are to provide a platform allowing Parties to share, in an interactive manner, information, experiences, case studies, best practices and views, and to facilitate assessment and analysis of the impact of the implementation of response measures, with a view to recommending specific actions.

Although some trade-relevant discussions over the years have taken place in the context of response measures, a systematic approach is still missing.\textsuperscript{120} Moreover, while WTO representatives have participated in the UNFCCC meetings, there is no clear coordination with the work carried out by WTO bodies.\textsuperscript{121} Against this background, the forum could go a long way in coordinating work with the WTO.\textsuperscript{122}

While coordinated actions by the WTO and the UNFCCC will not provide legal certainty, they could nonetheless help apply or interpret laws, and promote integration of climate concerns in trade matters, which may indirectly contribute to reducing legal uncertainty. Such efforts could also help scale down tension and foster more cooperative approaches while formulating climate policies in tandem with trade law. The forums could thus be used as a starting point for discussions of controversial issues at the trade-climate intersection. Once the ice is broken, this could eventually lead to more formal negotiations on reforms, including possible legal reforms.

Coordination through more effective use of existing forums is a pragmatic approach. However, to date, not much has happened on this front. For instance, over the past two decades, the status of the CTE has not changed much in the way it approaches climate change.\textsuperscript{123} Nonetheless, changes may be possible. Costa Rica, for instance, is in the process of forming a new group of WTO Members at the CTE on sustainable trade.\textsuperscript{124} Trade-related matters are also being discussed at the UNFCCC’s improved forum on implementation of response measures, with some UNFCCC Parties asking for more focused talks. Overall, therefore, this option seems to have a reasonably high potential\textsuperscript{125} in the short term.

\begin{itemize}
\item Feasibility of Option 2C (enhancing coordination through existing forums)
\end{itemize}

\begin{itemize}
\item SHORT TERM
\item MEDIUM TERM
\item LONG TERM
\end{itemize}

\subsection*{3.3 ACTIONS UNDER PLURILATERAL AND REGIONAL TRADE AGREEMENTS}

As for RTAs, several analysts have argued that they can potentially contribute to climate governance.\textsuperscript{127} Given that RTA negotiations involve only a handful of countries addressing a multitude of different issues, they allow for bargaining and the conclusion

\begin{itemize}
\item Article 126
\item Interview 2.
\item Interview 2.
\item Interviews 2, 3, 4, 6.
\item van Asselt (2017), p. 20.
\item See, e.g., Gehring et al. (2013); van Asselt (2017).
\end{itemize}
of new agreements. RTAs also offer opportunities for policy experimentation through which states can craft and test climate provisions at a limited scale with like-minded countries. Besides, RTAs are uniquely positioned to address various measures at the intersection of trade and climate change, such as the transfer of low-carbon technologies, emissions trading, BCAs and fossil fuel subsidies, to name a few.\textsuperscript{128} RTAs can further help in setting common rules for trade-related climate measures by aligning standards and regulations.\textsuperscript{129} Finally, climate measures agreed at the regional level may potentially be multilateralised\textsuperscript{130} at a later stage.

This section considers three policy options in the plurilateral and regional arena: (1) intensifying efforts under plurilateral approaches, particularly focusing on the Environmental Goods Agreement (EGA); (2) including climate-related provisions in prospective RTAs; and (3) reviewing and renegotiating existing RTAs with a view to include climate change considerations.

Climate-friendly provisions could be included in new plurilateral trade agreements. Plurilaterals struck under the aegis of the WTO, particularly the ‘inclusive’ type of agreements (see Box 8), could offer scope for a group of like-minded WTO Members to move ahead and agree on common rules addressing certain areas at the intersection of trade and climate change. This would bypass the hurdles caused by the slow pace of decision-making under the WTO.

Hufbauer and colleagues have proposed a plurilateral trade and climate code which would deal with a range of aspects at the intersection of climate and trade.\textsuperscript{131} The International Centre for Trade and Sustainable Development has suggested a ‘Sustainable Energy Trade Agreement’ covering the liberalisation of trade in climate-friendly goods and services.\textsuperscript{132}

\textbf{Box 8. Ways of adopting plurilateral agreements}

Plurilateral agreements can be created under the auspices of the WTO or outside of it. A plurilateral agreement under the WTO could be either:

- ‘exclusive’, i.e. a stand-alone deal (e.g. the Government Procurement Agreement); or
- ‘inclusive’, whereby benefits/concessions would be extended to all WTO Members on a most-favoured-nation (MFN) basis (e.g. Information Technology Agreement; and the Environmental Goods Agreement under negotiation).

An ‘exclusive’ plurilateral agreement under the WTO would offer the Members more flexibility as to what to cover within it, but would require consensus by all WTO members, making it politically challenging. In an ‘exclusive’ agreement, only members would benefit from trade liberalisation under the deal.

For an ‘inclusive’ plurilateral agreement under the WTO, a ‘critical mass’ of members is generally regarded as preferable to ensure that the Members reap sufficient benefits.


\textsuperscript{128} See Morin and Jinnah (2018), containing a review of 688 RTAs signed between 1947 and 2016.
\textsuperscript{129} Droege et al. (2016), p. 38.
\textsuperscript{130} See Baldwin (2014) on multilateralising regionalism. For multilateralising climate measures under RTAs, see Holzer and Cottier (2015).
\textsuperscript{131} Hufbauer et al. (2009).
\textsuperscript{132} ICTSD (2011).
A plurilateral initiative that has significant potential and has also made some concrete progress is the Environmental Goods Agreement, which is being negotiated under the aegis of the WTO as an ‘inclusive’ deal (see Box 8). Although the WTO Doha Round mandate includes the liberalisation of trade in environmental goods and services, multilateral negotiations have long since stalled. The plurilateral EGA therefore offers an alternative route to advance the goals of the Paris Agreement, as it can potentially help disseminate climate-related products and technologies by lowering tariffs on environmental goods. Given its ‘inclusive’ nature (see Box 8), once a ‘critical mass’ is reached, all WTO members could eventually benefit from improved access to the markets of the EGA participants.

In 2012, the 21 members of the Asia-Pacific Economic Cooperation (APEC) committed to reducing their applied tariffs to five per cent or less on a list of environmental goods by the end of 2015. Shortly thereafter, in 2014, 14 WTO Members launched negotiations on a plurilateral EGA, with three more members subsequently joining forces. This is being negotiated in line with WTO rules. The EGA builds on the APEC list of environmental goods. The latest list, released in August 2016 as part of the EGA negotiations, comprises goods from around 300 tariff lines, including several in the field of clean energy technology. The EGA and its benefits could eventually be extended on an MFN basis to all WTO Members, subject to the condition that WTO Members in the EGA represent a ‘critical mass’ of global trade in environmental goods. However, efforts to reach a deal on the EGA came to a halt in December 2016, when participants including the EU, the United States and China failed to reach a landing zone.

An inherent challenge of the EGA process is the lack of agreement on the definition of environmental goods. Many so-called ‘environmental’ goods have ‘dual’ or multiple uses, raising questions on how appropriate it is to call them such. Another question is how to define the ‘environmentally preferable’ products. All this has led to lengthy and heated debates as to which goods should be listed for the EGA, as negotiations are following a list-based approach.

Several suggestions have been made on extending the scope of the EGA. It has been recommended, for instance, that the list of goods under negotiation could cover goods and technologies for climate change adaptation, going beyond the current scope, which focuses on mitigation. Given its list-based approach, the EGA could have an in-built mechanism allowing to add new items and delete existing items. This would create room for updating the EGA’s list of goods in line with technological progress and the progressive commercialisation of more climate-friendly goods. A major reason why the EGA in its present form is limited in scope is that it was not conceived as a contribution to climate action.

Reviving the EGA talks can help deliver on both the Paris Agreement and trade liberalisation in times of increasing trade barriers. It seems likely that, for the time being, the EGA negotiations remain stalled, as in some key capitals the agreement does not seem to be a priority. Arguably, it may be possible to resume the negotiations following the 12th WTO Ministerial Conference in 2019. In short, while the EGA negotiations may be revived in the short to medium term, it remains to be seen whether the barriers mentioned above can be addressed.
Environmental provisions in RTAs have become increasingly far-reaching. Early RTAs were merely replicating the WTO’s environmental provisions. By now, however, there are multiple ways in which environment- or more specifically climate-related provisions are included in RTAs (see Box 9). Based on an extensive review, Morin and Jinnah argue that, despite their variety, climate-related provisions in RTAs continue to remain weak because (1) they are poorly designed from a legal perspective; (2) they have failed to diffuse across RTAs, especially compared with other environmental issues; and (3) they have not been taken up by large greenhouse gas emitters.

The EU has played a significant role on this front. The bloc started including environmental provisions in its RTAs with third countries in the mid-1990s. The sustainable development chapters of the EU free trade agreements (FTAs) have, in broad terms, worked well. Whereas all sustainable development chapters in recent EU FTAs include provisions on trade and climate change, those negotiated in the era of Paris Agreement (including the FTAs with Singapore, Vietnam, and Japan) would contain stronger and more detailed provisions in this area. These will (a) reaffirm a shared commitment to the effective implementation of the Paris Agreement, (b) commit the parties to close cooperation in the fight against climate change, and (c) commit the parties to agree on and carry out joint actions. In another significant move, in early 2018 the EU took the decision to refuse to sign trade deals with countries that do not ratify the Paris Agreement.

Recent RTAs negotiated by the EU systematically include provisions on sustainable development. Their aim is to maximise the leverage of increased trade and investment to fight against climate change, among other issues. The sustainable development chapters of the EU free trade agreements (FTAs) have, in broad terms, worked well. Whereas all sustainable development chapters in recent EU FTAs include provisions on trade and climate change, those negotiated in the era of Paris Agreement (including the FTAs with Singapore, Vietnam, and Japan) would contain stronger and more detailed provisions in this area. These will (a) reaffirm a shared commitment to the effective implementation of the Paris Agreement, (b) commit the parties to close cooperation in the fight against climate change, and (c) commit the parties to agree on and carry out joint actions.

Extending such practices, there are various ways to include climate-friendly provisions in RTAs undergoing negotiation, as well as in future RTAs (see Box 9).

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**Box 9. Including environment- and climate-friendly provisions in RTAs**

Climate change-related provisions could be included in RTAs either as part of the main text or as a side-agreement.

The North American Free Trade Agreement (NAFTA) was the first RTA to be accompanied by a side-agreement on the environment (not specifically on climate change). Subsequent RTAs have followed suit, either with side-agreements or with chapters and provisions relating to the environment and sustainability that are integrated into the text of the agreement itself.

While in some agreements they take the form of general statements of intent, many RTAs go further and include specific commitments to operationalise such statements. The concrete provisions could be expressed in various forms, such as:

- waivers or windows to avoid conflicts with climate change provisions (and other provisions related to sustainable development);
- deeper cooperation arrangements specified in side-agreements and other chapters of RTAs; or
- enhanced trade and investment in specific sectors of relevance to climate change, such as environmental goods and services, renewable energy, carbon markets, organic agriculture, sustainable transport, sustainably harvested forests, etc.

Source: Gehring et al. (2013), pp. 10–11.

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148 Gehring et al. (2013); Morin and Jinnah (2018).
149 Morin and Jinnah (2018).
RTAs can play an important role at a time of lower interest in WTO rule-making. Regionalism could also be a good avenue to promote regulatory cooperation and harmonisation across major economies without going through the slower multilateral process. For example, even though negotiations were halted in 2016, the Transatlantic Trade and Investment Partnership could have led to the harmonisation of carbon trading and biofuel policies across Europe and North America.\(^{155}\)

However, the political feasibility of including climate-friendly provisions in prospective RTAs may vary from one country or region to another,\(^ {156}\) particularly if the provisions are formulated in binding terms. If the climate-related provisions in RTAs are non-binding, the political feasibility may increase.\(^ {157}\) Overall, therefore, this option seems to have medium potential in the short term.

**Feasibility of Option 3B**
(including climate-friendly provisions in prospective RTAs)

\(^{155}\) Interview 3. See also Holzer and Cottier (2015).

\(^{156}\) Interviews 6, 7, 8 and 9. For instance, for the United States political feasibility could be medium only at least in the short term (Interview 9).

\(^{157}\) Interviews 5.


\(^{159}\) Financial Express (2018).

\(^{160}\) Sierra Club et al. (2018).

\(^{161}\) Interviews 4, 6, and 7.

\(^{162}\) Interviews 4, 6, 7 and 9. The US is an example (Interview 9).

This option could potentially be relevant for all countries that have entered into RTAs and are working on implementing the Paris Agreement. For instance, following the pioneering initiatives taken by the EU in advancing the climate change objectives of the Paris Agreement through RTAs (as discussed above), the bloc could intensify its review processes of existing RTAs.\(^ {158}\) Any such initiative could check the extent to which existing RTAs can support the implementation of the Paris Agreement and related NDCs. This could be followed by cooperation – or possible renegotiation – with the trade partners to correct possible disincentives or hurdles. Such review processes could also become part of regular reviews and/or wider reviews of RTAs. The recent renegotiation of the EU-Mexico Free Trade Agreement which aimed at updating the deal signed in 2000, is a case in point. In this case, both parties committed to effectively implementing their obligations under the Paris Agreement.\(^ {159}\) However, as shown by the ongoing renegotiation of the NAFTA,\(^ {160}\) there are concerns that re-opening an RTA could also sometimes risk weakening existing provisions on environment and climate change, depending on the agenda of the parties to the RTA.

While a review, or even a renegotiation, of the existing RTAs for climate change purposes may be a plausible proposition for countries or regions that are seeking to take a lead on climate action (e.g. the EU), this may not hold true for all countries. Given that renegotiating RTAs, in general, may be a politically difficult proposition\(^ {161}\) for some countries, their renegotiation for climate purposes may also not be a highly plausible option.\(^ {162}\) In addition, this depends to a large extent on the relative position of power of the negotiating party championing climate issues and concerns. Another practical risk is that the renegotiation of RTAs for climate purposes could trigger a broader review of the agreement, well beyond climate-related aspects. This possibility may
render countries reluctant to open up an RTA for review.

However, some RTAs may embed periodical review provisions or termination dates, which provide an explicit reason to review and renegotiate them after a specified time period. In case an RTA is undergoing such a review, it may be possible to reconsider its climate dimensions and take corrective actions accordingly. Overall, this option appears to be unlikely at least in the short term. Including climate-friendly provisions in new RTAs (Option 3B) is arguably easier to accomplish politically than reviewing and renegotiating existing RTAs.\textsuperscript{163}

### Feasibility of Option 3C (reviewing and renegotiating existing RTAs)

**SHORT TERM**

**MEDIUM TERM**

**LONG TERM**

### 3.4 BORDER CARBON ADJUSTMENTS

Border carbon adjustments are trade-related policy instruments to offset differences in the stringency of climate policies between trade partners. They do so by imposing a tax or other regulatory measure on imports based on their carbon content and/or by exempting exports from domestic carbon constraints. BCAs have been periodically discussed as a way to address concerns about emissions leakage (when climate action in one region merely shifts the incidence of emissions elsewhere) and to incentivise climate-laggard nations to adopt more ambitious climate policies.\textsuperscript{164} Because they differentiate goods based on their carbon footprint, however, BCAs affect trade and are seen as being at risk of violating WTO rules. Some consider them a form of green protectionism.

Several concrete changes to the trade regime have been suggested to facilitate the deployment of BCAs without violating trade rules. In this section we consider six options: (1) amending the General Agreement on Tariffs and Trade; (2) adopting a waiver for BCAs; (3) adopting an authoritative interpretation; (4) agreeing on a ‘peace clause’; (5) modifying the harmonised product classification system; (6) addressing BCAs in RTAs.

Although each of these options would contribute to greater legal certainty and coherence across regimes, the required political endorsement will likely be difficult to secure.\textsuperscript{165} Given the political sensitivity of BCAs, even informal avenues of cooperation, for instance to promote dialogue about their use, have faced resistance in the past. This was the case when Singapore attempted, and ultimately failed, to launch a discussion of BCAs in the WTO CTE.\textsuperscript{166}

Tactically, some of these options (the amendment to WTO law, the waiver, the authoritative interpretation and the peace clause) also harbour the risk of limiting future flexibility and making it more difficult to justify BCAs or other climate measures. A majority among legal scholars holds that appropriately designed BCAs aimed at preventing leakage can already pass muster under current WTO law.\textsuperscript{167} But any attempts to adopt these options might signal that BCAs are illegal without further steps, such as a waiver. Also, like other climate policy options, BCAs can take different shapes: any legal steps to allow a narrowly defined BCA could thus exclude variations on that specific design. Rather than helping promote climate action, these measures would then, \textit{e contrario}, serve to limit future latitude for domestic climate policies outside their scope.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{163} Interviews 1 and 3.
\item \textsuperscript{164} For more detail, see Mehling et al. (2017).
\item \textsuperscript{165} Interviews 1, 9, 13, 14, 15, 16.
\item \textsuperscript{166} WTO (2011).
\item \textsuperscript{167} See, e.g., Interview 1.
\item \textsuperscript{168} Interviews 14 and 16.
\end{itemize}
An effective way of addressing possible inconsistencies between BCAs and WTO law would be to seek an amendment of the GATT and other relevant WTO rules to explicitly allow BCAs. This could be implemented in direct and indirect ways.

Directly, a change to Articles III.2 (national treatment provision) and II.2.a (border tax adjustment provision) of the GATT (see Box 10) could positively state the permissibility of border adjustments for climate policies; similarly, an amendment to Articles I and III of the GATT (and potentially also Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM)) could explicitly exempt BCAs from relevant trade disciplines.

Indirectly, changes to WTO rules that would affirm the legality of BCAs could include a provision allowing reliance on processes and production methods (PPMs) to differentiate between otherwise ‘like’ products, or incorporating language into Article XX of the GATT to expressly cover climate policy measures in that provision’s exceptions. At present Article XX covers environmental exceptions, but not climate change-related exceptions per se (Box 11).

While each of these amendments could be a powerful way to address concerns about the legality of BCAs, their feasibility in the short and medium term is very limited. This is due to the controversial nature of BCAs and the high political and procedural hurdles imposed on changes to the WTO Agreements (see Option 1A in Section 3.1).

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**BOX 10. Relevant provisions in Article II and III of the GATT on border tax adjustment**

**Article II.2(a) of the GATT**

*Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III [footnote omitted] in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part.*

**Paragraph 2 of Article III (cited in Article II.2(a))**

*The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 [footnote omitted].*

**Paragraph 1 of Article III (cited in Article III.2)**

*The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production [footnote omitted].*

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170 On the areas of potential tension, see Mehling et al. (2017), pp. 36-40.
171 The ‘likeness’ of products under the WTO regime is a key element of addressing emissions through climate policy measures. Emissions are generally only part of the production process and cannot be found in the physical characteristics of a traded good (i.e. they are non-product-related PPMs). Differentiation of imports or exports based on their non-product-related PPMs (e.g. their ‘embedded carbon’) would need justification under the WTO rules. Droge et al. (2016), p. 14.
173 Interviews 1, 13, 14, 15, 16.
As scientific and political understanding of the urgency to deal with climate change evolves over time, the persistent and far-reaching asymmetry between a majority of progressive climate actors and a limited number of obstructionists might alter the perception of BCAs and the ability to muster sufficient political support for an amendment in the long term.

A further option to reduce legal uncertainty around BCAs is a temporary waiver of WTO obligations pursuant to Article IX.3 of the Agreement Establishing the WTO (see Option 1B in Section 3.1). Such a waiver could, for instance, suspend the application of Articles I and III of the GATT to differentiate products based on carbon content, coupled with an assurance of mutual restraint from legal disputes. In addition, a waiver could set out criteria and design principles for BCAs to ensure a more harmonized application.

Given their temporary nature, waivers have proven somewhat more amenable to WTO Members, but the requirement of ‘exceptional circumstances’ and the necessary voting threshold render them only moderately more viable than amendments of WTO law (see Option 1B in Section 3.1). Still, their temporary nature could make them an interesting option to facilitate a time-limited introduction of a BCA as a means to stimulate the debate among WTO Members and incentivise more symmetrical climate action. The need for BCAs would ideally diminish over time.

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175 Hufbauer and Kim (2009), p. 11.
Instead of an amendment to WTO rules, WTO Members could opt for an authoritative interpretation of relevant provisions in the GATT and other WTO Agreements that affect the legal status of BCAs. Such an authoritative interpretation could, for instance, declare that BCAs are consistent with obligations under the WTO Agreement, notably Articles I and III of the GATT, or that they fall within the scope of Article XX of the GATT. Importantly, an authoritative interpretation could become a means to correct a judicial interpretation against BCAs under the WTO dispute settlement system.\(^\text{177}\) While, according to Article IX.2 of the WTO Agreement, a three-fourths majority of WTO Members is required to approve an authoritative interpretation, once adopted this takes effect for all WTO members without requiring ratification (see Option 1C in Section 3.1). Still, overcoming the voting threshold will be difficult, rendering the feasibility of this option low in the short and medium term.

![Feasibility of Option 4C](image)

Feasibility of Option 4C
(authoritative interpretation for BCAs)

Less ambitious in scope than an amendment or authoritative interpretation is the adoption of a time-limited moratorium or ‘peace clause’. Based on this option, WTO Members would wait before challenging a BCA under the WTO dispute settlement system, or refrain from using countermeasures against the imposition of a BCA. Conversely, a peace clause could also be used to suspend the application of a BCA for a specified period of time, for instance three years, during which affected trade partners could enter into negotiations on how to strengthen climate action so that the BCA is not required.\(^\text{178}\) As a temporary instrument, the purpose of the peace clause would be to buy time to find a permanent resolution.

In terms of its political feasibility, however, a peace clause adopted at the international level would face significant obstacles (see Option 2A in Section 3.2). It could also be implemented with more limited scope at the national level, for instance if cooperating countries decide to include relevant language in their domestic climate legislation on a reciprocal basis.\(^\text{179}\) While the feasibility of such a decentralised approach might be greater, the scope will be far more limited.

![Feasibility of Option 4D](image)

Feasibility of Option 4D
(peace clause for BCAs)

A further option to implement changes in the international trade regime that improve prospects of a BCA would be to modify the product classification system used in trade negotiations, the World Custom Organization’s Harmonized Commodity Description and Coding System (HS), in order to account for different processes and production methods. The HS was developed by the World Customs Organization and contains a nomenclature of products in about 5,000 commodity groups. It serves more than 200 countries as a basis for their customs tariffs and for trade statistics. The HS covers over 98 per cent of internationally traded merchandise. This nomenclature is revised every five years and the last update entered into force on 1 January 2017. Conceivably, the HS classification could be revised to distinguish goods based on the carbon-intensity of their PPMs, offering a more solid foundation for differentiation with a BCA. This could provide a basis for assessing the emissions performance of traded goods (i.e. their carbon content) as far as information is available. This idea has been brought up in the context of the Environmental Goods Agreement, as discrimination of goods based on their environmental performance would be needed in order to design a tariff system that favours clean technologies (e.g. allowing duty-free trade in solar panels).

In practice, however, such an amendment to the HS would prove difficult or even impossible to apply for all products where general distinctions of carbon content are technically not feasible. An example that could work would be to differentiate steel produced from blast oxygen furnaces (high energy intensity) or from electric arc furnaces (low energy intensity). However, for aluminium this could be more difficult, as it would mean differentiating based on the energy source used to power the aluminium smelting (renewable energy or fossil energy sources).

Politically, it also does not appear viable in the short term and beyond. Article 16 of the International Convention on the Harmonized System requires consensus for amendments to the nomenclature, and any Contracting Party is allowed to veto changes proposed by the Council based on recommendations of the Harmonized System Committee. Also, amendments to the HS are only made every five years, and the latest round was concluded in 2017, meaning that the next opportunity will only arise around 2022. This option therefore faces a similar hurdle as an outright amendment of WTO law, but the latter avoids the foregoing technical difficulties. One factor in favour of this option is ongoing progress with carbon disclosure and footprinting methodologies, which may over time reduce the technical barriers to a more differentiated HS nomenclature.

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183 Interview 15.
184 Interview 13.
At present, any legal or procedural changes in the trade regime that require consensus among, or approval by, a large majority of countries (such as the WTO membership) appears politically unfeasible. This is due to divisions about the urgency of and the adequate response to climate change, the controversial nature of BCAs, as well as the broader setbacks in international trade negotiations. A more viable option might therefore lie in seeking progress at a plurilateral or regional level among like-minded countries. The advantage of such an approach is that non-participating countries cannot block the negotiations. Countries negotiating a regional trade agreement, for instance, could specify the permissibility and legal conditions of BCAs, and commit to mutual restraint in terms of challenging BCAs that meet these conditions.\textsuperscript{185} Parties could also explicitly declare the right to invoke Article XX of the GATT to justify BCAs.\textsuperscript{186} Beyond setting out basic principles and conditions for BCAs, they could further adopt a code of conduct or good practice\textsuperscript{187} specifying permissible design elements and applications, notification and cooperation procedures, and even an institutional structure to facilitate capacity-building, oversight, implementation, and review of BCAs.\textsuperscript{188}

Although no coalition has so far emerged to advance BCAs, appeals to consider them as a policy option have repeatedly surfaced in several countries.\textsuperscript{189} This suggests potential political support for more formal cooperation on BCA design and implementation. Until such a coalition emerges, however, it remains unclear whether endorsement of BCAs among like-minded countries would have meaningful benefits for the climate, as these countries would in all probability already have largely aligned climate policies. For maximum effectiveness, this form of cooperation would have to involve all major emitting countries, including some – such as the United States – which are not currently endorsing ambitious climate action. Still, over time, a coalition approach could create a nucleus around which other countries might converge, eventually shifting the political and legal discussion around BCAs.\textsuperscript{190}

Prospectively, such cooperation could even result in a plurilateral agreement under Annex 4 of the WTO Agreement, formally integrating this decentralised option into the international trade regime. While adoption of such a plurilateral agreement would still require consensus among all WTO Members (cf. Article IX.9 of the WTO Agreement), it might be more feasible than an amendment of WTO rules or an authoritative interpretation because it would not diminish the rights of non-subscribing WTO Members.\textsuperscript{191}

The adverse environmental, economic and social implications of the sizable subsidies handed out by governments for the production and consumption of fossil fuels are increasingly clear. The sheer size of these subsidies is a significant burden to the public purse. Although estimates by different international organisations vary, even the most conservative amounts are huge. For instance, a relative conservative estimate by the Organisation for Economic Co-operation suggests that fossil fuel subsidies added up to US$ 373 billion in 2015.\textsuperscript{192} These fossil fuel subsidies also divert investment from other, often more pressing, development objectives such as health care and education. Moreover, by promoting the burning of fossil fuels, they contribute to climate change through increased greenhouse gas emissions, leading to climate change impacts.\textsuperscript{193}

\textsuperscript{185} Interview 15.
\textsuperscript{186} Interview 14.
\textsuperscript{187} On this notion, see Holzer (2014), pp. 258–260; Hufbauer et al. (2009), pp. 103–104.
\textsuperscript{188} For some conceptual proposals, see Mehling et al. (2017), pp. 44–50.
\textsuperscript{189} For examples, see Mehling et al. (2017), p. 15.
\textsuperscript{190} Interview 16.
\textsuperscript{191} Hufbauer and Kim (2009), p. 11; Interview 12.
\textsuperscript{192} OECD (2018).
change and help lock in carbon-intensive energy systems. Importantly, by affecting fossil fuel prices, subsidies can have distorting impacts on trade and investment.

As the main international organisation to discipline subsidies, attention has been drawn to the potential role of the WTO in addressing support to fossil fuels. As WTO Members are slowly making progress in the negotiations to create new disciplines for another type of environmentally harmful subsidies, those for fisheries, a range of options has been put forward to address through the WTO fossil fuel subsidies too. However, the implementation of any of these options will likely face the same political and legal hurdles that made WTO action on this issue challenging thus far. These include the fact that WTO law at present ‘under-captures’ fossil fuel subsidies compared to renewable energy subsidies. This is because fossil fuel subsidies are often not ‘specific’ in the sense of the WTO Agreement on Subsidies and Countervailing Measures, and adverse trade effects caused by them are difficult to prove. Perhaps this is why fossil fuel subsidies have not been challenged before the WTO dispute settlement system.

Nonetheless, opportunities to start addressing fossil fuel subsidies within the WTO and other international trade agreements are plentiful. This section reviews six options in particular: (1) promoting technical assistance and capacity-building; (2) strengthening the transparency of fossil fuel subsidies; (3) adopting a pledge-and-review system for fossil fuel subsidies; (4) adopting a political declaration; (5) amending the WTO Agreement on Subsidies and Countervailing Measures; and (6) adopting a new Agreement on Fossil Fuel Subsidies.

The WTO Secretariat has a long-standing experience of building capacity and providing technical assistance to developing countries (and particularly Least Developed Countries) on trade-related matters (see Box 12). Fossil fuel subsidies could therefore be mainstreamed in existing capacity-building initiatives by the WTO Secretariat, as well as initiatives undertaken in partnership with other international organisations.

BOX 12. WTO activities on technical assistance and capacity-building

The WTO aims to help developing countries participate more effectively in global trade through trade-related technical assistance. Such assistance is aimed at government officials implementing or negotiating trade agreements, as well as broader audiences, and covers a variety of areas, including trade policy formulation and implementation, compliance with WTO obligations and WTO negotiations. Activities include training courses, workshops and outreach. Technical assistance is provided through the WTO Secretariat, and overseen by the WTO’s Committee on Trade and Development.

In addition to technical assistance, the WTO Secretariat partners with other organisations to implement capacity-building initiatives. One such initiative is the multi-agency Enhanced Integrated Framework for Least Developed Countries. Besides the WTO Secretariat, the Framework is supported by the United Nations Conference on Trade and Development, the International Trade Centre, the United Nations Development Programme, the International Monetary Fund (IMF) and the World Bank. It already has two focal areas that could be linked to fossil fuel subsidies, namely ‘Trade and Environment’ and ‘Sustainable Development Goals’.

Sources:
https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm;

193 See, e.g., Asmelash (2015); De Bièvre et al. (2017); Trachtman (2017); Verkuijl et al. (2017).
194 Verkuijl et al. (2017).
195 Verkuijl et al. (2017); ICTSD (2018).
196 https://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm.
In terms of potential effects, capacity-building could help WTO Members identify fossil fuel subsidies that they need to notify, strengthening the transparency around this issue (see also Option 5B). One of the key challenges for fossil fuel subsidy reform is getting clarity on what actually constitutes a ‘fossil fuel subsidy’. Although there is growing agreement among experts on how to define and measure fossil fuel subsidies, capacity-building efforts may assist governments in identifying specifically those subsidies that fall under the definition set out by the WTO ASCM.

Conceivably, technical assistance could also help build capacity to reform subsidies, as knowledge about their existence is a key precondition for reform. However, the WTO Secretariat would be a relatively new actor in the area of capacity-building in this sector.

International and non-governmental organisations such as the World Bank (and its Energy Sector Management Assistance Programme), the IMF and the Global Subsidies Initiative are already active in this field. Coordination would be needed to avoid a duplication of efforts, otherwise the added value of the WTO’s involvement would be questionable.

Moreover, without a clear mandate from Members, it would be difficult for the Secretariat to focus technical assistance specifically on fossil fuel subsidies, as opposed to subsidies in general. In addition, the potential feasibility of this option is limited in that technical assistance and capacity-building by the WTO Secretariat have to be linked to the implementation of the WTO Agreements. Although there are WTO obligations applying to subsidies in general (e.g. notification under Article 25 ASCM), there are no specific obligations related to fossil fuel subsidies. Members could ask for assistance from the Secretariat in notifying subsidies under the ASCM or to train investigating authorities that apply countervailing measures to subsidised products. However, providing technical assistance for subsidy reform is very likely outside the WTO Secretariat’s mandate, and would require specific expertise and resources that other international and non-governmental organisations possess.

Technical assistance and capacity-building for fossil fuel subsidies may be more feasible if carried out as part of a broader effort to improve general compliance with the ASCM obligations. Moreover, if any new agreement on disciplines specifically focused on fossil fuel subsidies were to be adopted (see Options 5E and 5F), it may be possible to link technical assistance and capacity-building to those disciplines.

Overall, however, the feasibility of this option seems low in the short term, but may be higher in the medium to long term. The utility of this option is limited to the extent the Secretariat would not duplicate initiatives taken by other organisations.

Feasibility of Option 5A (technical assistance and capacity-building)

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198 Beaton et al. (2013).
199 http://www.esmap.org/.
200 Interview 2.
201 This would likely require a ministerial decision. Interview 23. At present, the mandate for technical assistance states that: ‘The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system.’ WTO (2001), para. 38.
202 Interviews 17, 20, 21, 22. Of course, like-minded Members can also agree among themselves to engage in capacity-building and technical assistance; but this can also be done outside the auspices of the WTO. Interview 22. Another option is for the Secretariat to work together with other international organisations, such as the United Nations Environment Programme. Interview 25.
203 WTO Members may, under certain conditions outlined in the ASCM, impose countervailing duties to offset the injury caused by subsidised imports. Under this option, investigating authorities could be trained to identify the injury caused by fossil fuel subsidies provided by another Member.
204 Interviews 17, 21.
205 Interview 22.
Under the ASCM, WTO Members are obliged to notify their subsidies.\footnote{ASCMArticle 25.} However, the notification record of fossil fuel subsidies is patchy (in line with broader notification deficiencies).\footnote{Interview 20.} To improve notifications, Members could, alone or with other Members, start to voluntarily notify fossil fuel subsidies under the ASCM. Self-reporting could help governments and other stakeholders better understand what subsidies are being granted, and track efforts to reform them over time. Although, as the Group of 20 (G20) experience has demonstrated,\footnote{Interview 20.} self-reporting may mean that only a limited number of subsidies are notified, it is a first step towards more transparency.

Beyond strengthening notifications on a voluntary basis, Bacchus suggests to strengthen the enforceability of existing notification obligations by ‘[m]andat[ing] full disclosure of fossil fuel subsidies under WTO rules’.\footnote{Interview 17.} This option would likely require an amendment (see Option 5E), as Article 25 of the ASCM (on notification) does not specify which types of subsidies should be notified beyond those meeting the definition of Articles 1–2,\footnote{Aldy (2017); Smith and Urpelainen (2017).} and does not specify any consequences for incomplete notifications. While mandatory disclosure would require an amendment, another option already possible within existing rules is counter-notification, with one Member bringing to the attention a measure by another Member that should have been notified.\footnote{Verkuijl et al. (2017).}

In addition to notifications under the ASCM, fossil fuel subsidies (and their reform) have also been discussed in Trade Policy Reviews (TPRs) under the TPRM (see also Option 2B in Section 3.2). Members alone, or working together, could continue to raise issues related to fossil fuel subsidies in this process. Going further, the Trade Policy Review Body could ask the Secretariat to pay attention to fossil fuel support in its discussion of subsidies for the energy sector, drawing on external sources such as G20 peer reviews.\footnote{SDG 12.c is the ‘rationalization of inefficient fossil-fuel subsidies that encourage wasteful consumption ... including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts’ (UN, 2015). To put SDG 12.c in practice, indicators are being developed to help measure progress. One of these indicators focuses specifically on measuring fossil fuel subsidies. Interview 17.} While some Members have encouraged the Secretariat to do so,\footnote{Interviews 17, 20, 25.} fossil fuel subsidies are not yet systematically evaluated.

Generally, improved transparency could help shed light on the subsidies provided, especially by countries that are not reporting or undergoing reviews in other forums. Moreover, transparency can help avoid the emergence of disputes, instead generating dialogue and promoting clarity, as well as options for reform.\footnote{Wolfe (2013), p. 22.} However, any effort to strengthen transparency should ensure that it does not duplicate data collection efforts already taking place in other international organisations and forums,\footnote{Shaffer et al. (2015); Verkuijl et al. (2017). In October 2016, 89 Members had not yet filed their 2015 notifications and 63 Members had failed to file their 2013 notifications. The Chair of the SCM Committee lamented ‘discouragingly low compliance’ and admitted that ‘chronic low compliance caused a serious problem in the proper functioning of the [ASCM]’ (WTO, 2016b).} including in the SDGs process.\footnote{ASCMArticle 25.}

In terms of feasibility of transparency initiatives, options related to using the TPRM seem most feasible in the short term.\footnote{ASCMArticle 25.} Countries belonging to the Friends of Fossil Fuel Subsidy Reform already seek to consistently raise the issue in their questions and statements under the TPRM, usually with a view of encouraging progress by other Members.\footnote{ASCMArticle 25.} Although the WTO Secretariat could seek to collect more systematically data on fossil fuel subsidies without formal approval of Members, it does require resources.\footnote{ASCMArticle 25.} In addition, if the Secretariat were to start doing so only for fossil fuel subsidies, it would likely raise questions from WTO Members.

Self-notification could be a next step on the way to a mandatory system, but it would require some Members to take the lead and be confident that their notifications would not necessarily lead to a
challenge before the WTO dispute settlement system. The Friends of Fossil Fuel Subsidy Reform could be one such group. The feasibility of counter-notifications is limited in that they are likely to trigger detailed scrutiny of the counter-notifying Member’s own notifications.

Lastly, any mandatory obligation to disclose fossil fuel subsidies would likely run into significant opposition, at least in the short- to medium-term. A key question is whether the EU would be able to get united behind such an option. EU Member States have diverging views about fossil fuels, as countries like Poland are very dependent on coal production, while countries like France have almost stopped using coal. This creates differences of opinion within the EU on how to respond to proposals to bring fossil-fuel subsidies to the WTO. Generally, new notification requirements would likely only be accepted if accompanied by new rules focused specifically on fossil fuel subsidies, as can be seen in the cases of agriculture and fisheries subsidies (the latter still under negotiation). Nonetheless, transparency of fossil fuel subsidies could be addressed in proposals to improve notifications on subsidies in general (e.g. as tabled by the European Union in 2018) or notifications in general (e.g. as tabled by the United States in 2017).

Strengthening transparency under the WTO could receive a boost if progress is made as part of the SDGs process. Under SDG 12.c.1, the United Nations Environment Programme (UNEP) is leading efforts to develop a methodology for measuring fossil fuel subsidies. If this methodology is adopted, UNEP would be responsible for collecting data on UN Members for the period 2020–2030. This could reinforce efforts under the WTO, including on notifications. More generally, increasing available data on Members’ subsidies can exert a positive influence on transparency under the WTO. Another way to pursue this objective at the WTO is by strengthening transparency through regional trade agreements.

In short, strengthening transparency through the WTO is feasible in the short term on a voluntary basis, specifically through the TPRM process, where issues related to fossil fuel subsidies can be raised by some Members. However, strengthening fossil fuel subsidy notifications will likely require some Members to set the example, or will need to be linked to broader proposals on strengthening notifications. Under this option, the obligation to notify fossil fuel subsidies (or specifying consequences if that is not done) offers a strong incentive to improve notifications, but this is least likely to be feasible in the short term, as it would require an amendment of the ASCM, or would need to be tied to new rules.

Feasibility of Option 5B (strengthening transparency)

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<th>SHORT TERM</th>
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220 The Friends are an informal group comprising nine countries – Costa Rica, Denmark, Ethiopia, Finland, New Zealand, Norway, Sweden, Switzerland and Uruguay – that seek to promote fossil fuel subsidy reform.
221 Interviews 19, 21, 23.
222 Interview 17.
223 Interview 21.
224 Interview 20.
225 EU (2017).
227 Interviews 21, 24.
228 Interviews 17, 18.
229 Interview 22.
230 Interview 17.
There is another option to strengthen transparency. WTO Members, again, acting alone or in a small group with other Members, could make a non-binding pledge to eliminate or progressively reduce their fossil fuel subsidies. They could then follow up reporting progress and reviewing each other’s advances.\textsuperscript{231} The regular pledge of subsidy reform could make it part of a bargaining process, allowing Members to trade-off commitments to reform fossil fuel subsidies with other trade-related commitments.\textsuperscript{232}

The rationale of this option would be to extend existing pledge-and-review processes on fossil fuel subsidies (notably the voluntary peer reviews under the G20 and APEC) to other WTO Members. The adoption of (voluntary) commitments by states to reform or remove fossil fuel subsidies can increase the reputational costs of reneging on that commitment.\textsuperscript{233} The process itself could even be seen as a confidence-building exercise that could pave the way for binding disciplines on fossil fuel subsidies, through which countries could show that they are undertaking reform and get acknowledgement for their achievements through an institution such as the WTO.\textsuperscript{234}

The feasibility of this option may be constrained given that making voluntary pledges is not a common process in the context of the WTO. Moreover, Members may fear being challenged before WTO dispute settlement if they fail to fulfil their pledges.\textsuperscript{235}

Like other options, the feasibility would increase if a small group of countries rather than the whole WTO membership were involved.\textsuperscript{236} The group could seek to enact this informally, by launching such a process on the margins of a WTO meeting.\textsuperscript{237} However, if it were to be a formal initiative under the WTO, the option would likely need the support of at least G20 and APEC members to avoid a duplication of efforts.\textsuperscript{238} While these groups have made commitments to phase out and rationalise inefficient fossil fuel subsidies, getting their members, including the world’s largest economies, to follow-up under the umbrella of the WTO presents a significant political hurdle. Another challenge would be to convince WTO Members that the WTO rather than, for instance, the United Nations’ High-Level Political Forum on Sustainable Development\textsuperscript{239} is an appropriate venue for extending pledge-and-review to countries other than the G20 and APEC members.\textsuperscript{240}

The short-term feasibility of pursuing this option within the WTO therefore seems low, but a small group of Members acting outside the formal process on a voluntary basis would increase its chances.

Feasibility of Option 5C
(pledge-and-review)

\begin{tabular}{|c|c|c|}
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OPTION 5C & Pledge-and-review of fossil fuel subsidies & \\
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\textsuperscript{231} Verkuijl et al. (2017).
\textsuperscript{232} Trachtman (2017), p. 18.
\textsuperscript{233} Smith and Urpelainen (2017).
\textsuperscript{234} Interview 20.
\textsuperscript{235} Interview 22.
\textsuperscript{236} Interview 20.
\textsuperscript{237} Interview 24.
\textsuperscript{238} Interview 17.
\textsuperscript{239} The High-Level Political Forum is a UN body that plays a key role in the follow-up and review of Agenda 2030, including the SDGs. See https://sustainabledevelopment.un.org/hlpf/.
\textsuperscript{240} Interview 19.
A further option is for WTO Members, or a subset thereof, to adopt a political declaration on fossil fuel subsidies. Such an initiative could take the form of statements of intent regarding fossil fuel subsidies in the context of the WTO. For instance, although discussions in the CTE occasionally touch upon the issue, Members could agree to continue discussing fossil fuel or wider energy subsidies within the CTE, and specify that the CTE’s mandate should include discussions on how they could be reformed within the WTO. Moreover, WTO Members could more generally state their support for addressing the issue under the WTO. The 2017 ‘Fossil Fuel Subsidies Reform Ministerial Statement’, adopted by 12 Members at the 11th Ministerial Conference (MC11) of the WTO, is an example. The statement reaffirms the signatories’ commitments to sustainable development under the 2030 Agenda, and recognises that WTO Members have made relevant pledges in the context of, among others, the G20, APEC and the Paris Agreement. It also seeks to build the case for action under the WTO, suggesting that ‘trade and investment distortions caused by fossil fuel subsidies reinforce the need for global action including at the World Trade Organization’, and arguing that the WTO ‘can play a central role in achieving effective disciplines on inefficient fossil fuel subsidies’. As such, the countries adopting the statement ‘seek to advance discussion in the [WTO] aimed at achieving ambitious and effective disciplines on inefficient fossil fuel subsidies that encourage wasteful consumption, including through enhanced [WTO] transparency and reporting that will enable the evaluation of the trade and resource effects of fossil fuel subsidies programmes’.

While the declaration adopted at MC11 is an important expression of commitment of the 12 signatories, it does not generate any legal effects. This may also explain why it was relatively easy to adopt. However, the number of signatories was relatively limited. Friends members that are also EU Member States (Denmark, Finland, Sweden) were not able to sign up because the EU as a whole did not sign up. In terms of feasibility, the question therefore is whether more countries will be willing to sign up to it in the future. A separate Communiqué by the Friends of Fossil Fuel Subsidy Reform (released, outside the trade context, in 2015) was endorsed by other countries outside the group (including G7 members Canada, France, Italy, the United Kingdom and the United States). This shows that more countries are supportive of the issue, but it remains to be seen whether they are also willing to address the issue in the context of the WTO.

Mobilisation of other countries by the existing signatories will be needed. The challenge will be to move the issue forward by becoming more concrete, while at the same time also attracting more support. Nonetheless, it can be seen as positive that the initial declaration was signed by 12 Members. In comparison, the first statement in the WTO on the need to address fisheries subsidies was made by only one Member, New Zealand, in 1998. In the case of fisheries subsidies, however, initial political declarations were followed up by concrete proposals. This would need to happen as well for the political declaration on fossil fuel subsidies. In short, while the feasibility of (further) political declarations on fossil fuel subsidies is high, questions remain about the number of Members prepared to sign up, and whether future text can go beyond the MC11 ministerial statement taking concrete steps towards the adoption of commitments or disciplines on fossil fuel subsidies at the WTO.

241 WTO (2017b). The statement was made by Chile, Costa Rica, Iceland, Liechtenstein, Mexico, the Republic of Moldova, New Zealand, Norway, Samoa, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Uruguay.
242 WTO (2017b), para. 2.
243 WTO (2017b), paras. 9–10.
244 WTO (2017b), para. 10.
245 Interview 20. Trade is an exclusive competence of the EU (Article 3 of the Treaty on the Functioning of the European Union), meaning only the EU – through the European Commission – can act in international trade negotiations. As such, EU Member States could not separately sign up to the ministerial statement without the support of the full EU membership.
246 FFFSR (2015).
247 Interviews 17, 21.
248 Interview 19.
249 Interview 24.
250 Interview 21.
Making the International Trade System Work for Climate Change: Assessing the Options

Another way of addressing the issue through the WTO would be to change existing disciplines for fossil fuel subsidies. This could be done, for instance, changing the category of prohibited subsidies under Article 3 of the ASCM. Some have suggested that fossil fuel support should be included as a category of prohibited subsidies (in addition to export subsidies and local content subsidies). Any such provision need not apply to all fossil fuel subsidies, but could be limited to a specific sub-set, for instance based on particular trade-related or environmental effects. This, in turn, may require a change to the ‘adverse effects’ criterion of the ASCM, which currently only focuses on adverse trade effects. Pereira proposes a prohibition for ‘the most egregious kinds of subsidies’ to fossil fuels, including those for new coal-fired power plants, for new fossil fuel exploration and extraction, or for infrastructure for the fossil fuel industry. Even if limited in scope, a prohibition could provide a strong signal, backed by the WTO’s dispute settlement system, pushing countries to phase out this specific support.

Multilateral and regional negotiations on fisheries subsidies could be used as an example of how to distinguish between different types of measures in this regard. For instance, the targeting of subsidies used to support illegal, unreported and unregulated fishing in the Trans-Pacific Partnership (TPP) draft demonstrates how trading partners can agree on a specific category of prohibited subsidies. The TPP seeks to link subsidy prohibitions to ‘negative effects’ (based on ‘the best scientific evidence available’) on overfishing. Similarly, in the WTO negotiations on fisheries subsidies, it was suggested to prohibit a wide range of measures taking into account the particular characteristics of the sector.

Any prohibition could take into account the type of Member and provide for special and differential treatment, e.g. exempting least developed countries or linking to provisions on technical assistance and capacity-building. Exemptions could also be made for countries that can prove subsidies are needed to support low-income communities, or prohibitions could be phased in gradually for some or all countries.

Expanding the category of prohibited subsidies would amount to an amendment, and would as such be subject to the constraints outlined under Option 5A. But even before an amendment could be agreed upon, there would need to be a negotiating mandate. Given that no new negotiating mandates have been agreed since the Doha Round, and with a reluctance of a group of WTO Members to address new issues when the existing negotiating mandate has not been concluded, it is unlikely that discussions on amending the ASCM would start any time soon. Even in the case of fisheries subsidies, negotiations have continued for almost 20 years, and have not been concluded yet.

More generally, a challenge would be to get the prohibition right. While proposals focusing on a specific set of fossil fuel subsidies may be successful, it would be difficult, for instance, to achieve common ground on which subsidies are ‘the most egregious’ or under which conditions exemptions may apply. A historical example also suggests that prohibitions lead to calls for exemptions. The 1951 Treaty of Paris, which created the European Coal and Steel...
Community (the precursor to the EU) prohibited all coal (and steel) subsidies, but within little more than a decade, derogations from that prohibition had become commonplace.²⁵⁹

Having said that, the possible conclusion of negotiations on fisheries subsidies disciplines may offer an important precedent, and generate momentum towards disciplines on fossil fuel subsidies in the longer run.²⁶⁰ While the prospects for an amendment are therefore low in the short- to medium-term, they may improve in the long-term.

Although new disciplines for fossil fuel subsidies could be incorporated into the ASCM through an amendment, another option is to adopt a separate WTO Agreement on Fossil Fuel Subsidies. This could be concluded as a plurilateral agreement among a subset of WTO Members.²⁶¹ The advantage of a focused approach would be the limitation of the risk to open up other issues and subsidies within the same discussion.

The prospects of a specific agreement, even a plurilateral one, depend very much on some of the major countries (in terms of trade flows and size of these subsidies) getting on board (e.g. China, EU, Japan, US). At present, securing their participation is likely to be difficult.²⁶² However, the critical mass needed for an Agreement on Fossil Fuel Subsidies is ultimately a political decision by its proponents.²⁶³ Even if plurilateral negotiations are launched, it may be hard to reach an agreement, as ongoing negotiations among seemingly like-minded countries on the Environmental Goods Agreement and the Trade in Services Agreement show.²⁶⁴ Another challenge for a plurilateral approach is that countries may wonder why they should participate when other Members are continuing to subsidise fossil fuel consumption and production. It would be important for those countries to be convinced of the benefits of reforming subsidies, knowing that others may not take the same action.²⁶⁵ The agreement could cover energy subsidies, or energy sector reform²⁶⁶ more broadly, giving countries with an interest in renewable energy subsidies an incentive to participate. While it would be more complex, it may also be more politically palatable.²⁶⁷

Finally, while the fisheries subsidies negotiations – if successful – may offer a useful precedent, it is important to remember that those negotiations started almost 20 years ago, and the political context has changed. This may mean that it will not be possible to simply follow the same track for fossil fuels. In short, any new Agreement on Fossil Fuel Subsidies seems likely only in the medium to long term.

²⁵⁹ Interview 21. See also Steenblik et al. (2018).
²⁶⁰ Interview 22.
²⁶¹ ICTSD (2018).
²⁶² Interviews 20, 25.
²⁶³ Interview 17.
²⁶⁴ Interview 23.
²⁶⁵ Interview 22.
²⁶⁶ Interview 25.
²⁶⁷ Interview 20.
This report has analysed a range of policy options to improve coherence between the international trading system and climate action in greater depth than the existing literature has done so far. The objective of this exercise has been to shed light on what options may be worth exploring further by trade and climate policymakers, non-governmental organisations and international organisations interested in ensuring that the international trading system helps to achieve the goals of the Paris Agreement.

In general, all options involving legal changes at the WTO – namely an amendment, a waiver, an authoritative interpretation and a peace clause – appear to be difficult, at least in the short term (i.e. less than five years). Underpinning the political challenge to any such legal change are the geopolitical developments that have taken place in 2017–2018, including looming trade wars between the United States and other countries following increased tariffs on a number of goods imposed by the Trump administration. However, given the rare precedents, it is clear that reforming WTO disciplines has always been challenging.

All four ways of adding legal clarity to WTO law with respect to climate policy involve complex political processes, and are hard to implement in practice. The consensus requirement makes reaching even basic agreement on pursuing any of the options dealing with legal changes at the WTO difficult, let alone adopting them. But it also raises the more fundamental question of whether there is a need for legal reform at the WTO for climate purposes in the first place. Arguably, flexibilities are already available under existing WTO law, which Members could avail themselves of if they had a genuine – rather than a protectionist – intent towards climate measures.

### 4.1 KEY FINDINGS

In general, all options involving legal changes at the WTO – namely an amendment, a waiver, an authoritative interpretation and a peace clause – appear to be difficult, at least in the short term (i.e. less than five years). Underpinning the political challenge to any such legal change are the geopolitical developments that have taken place in 2017–2018, including looming trade wars between the United States and other countries following increased tariffs on a number of goods imposed by the Trump administration. However, given the rare precedents, it is clear that reforming WTO disciplines has always been challenging.

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Furthermore, the legal changes discussed here run the risk of backfiring against their intended objectives. Any explicit attempt to introduce legal changes could wake up sleeping dogs, narrowing down the already existing wiggle room for WTO Members.

Given the hurdles of a legal reform of the WTO regime, the policy options that focus on ushering in procedural changes in trade— as well as climate-related institutions and practices—appear to be politically more promising in general. For instance, including climate-related technical expertise in the WTO dispute settlement may not only help clarifying the technicalities of the climate measures under scrutiny, but also expedite the dispute resolution process. Given that a legal window for including climate-related technical expertise in dispute panels already exists, the implementation of this option may not face insurmountable political barriers in the near term, notwithstanding the ongoing impasse at the Appellate Body over the stalled appointment of judges. Procedural reform could also mean making more effective use of the existing forums under the WTO and UNFCCC. Doing so could help to apply and interpret laws and promote integration of climate concerns in trade matters, which eventually improves legal certainty. As for the WTO Trade Policy Review Mechanism, while the mandatory inclusion of climate-related impact assessments may not be feasible any time soon, particularly in the absence of a legal basis under WTO law, voluntary disclosures could be achievable in the near term.

Advancing climate change objectives among a smaller set of like-minded countries is an avenue worth exploring further, either through plurilateral or regional trade agreements. Although plurilateral talks on the Environmental Goods Agreement made some initial strides, negotiations have stalled since December 2016. The EGA still stands a reasonably narrow down the already existing wiggle room for WTO Members.

Many of the considerations that apply to general changes to the multilateral trade regime also extend to the specific area of border carbon adjustments. If anything, their controversial nature would make taking any step requiring consensus or approval by all or a vast majority of WTO Members even more challenging. Also, a substantial body of academic literature suggests that, depending on their underlying intent and nuances of their design and implementation, BCAs could very well be legally viable already under current WTO law. While additional steps, such as an amendment of WTO rules, a waiver or an authoritative interpretation may increase legal certainty in the short term, these could also convey that BCAs are illegal in the absence of such changes, and narrow down the flexibility afforded to WTO Members under the existing legal framework. Overall, the current gridlock in multilateral trade negotiations suggests that any meaningful progress on BCAs as a tool of climate policy will most likely take shape at a regional level, with a coalition of like-minded countries advancing the concept on a reciprocal basis. Such cooperation may, over time, become a catalyst for broader and eventually reciprocal basis. Such cooperation may, over time, become a catalyst for broader and eventually multilateral action. But again, the short-term prospects for coordination on BCAs under the multilateral trade regime are dim.

Finally, with regard to fossil fuel subsidies, it is notable that some options are already being pursued by WTO Members, namely improving transparency by flagging fossil fuel subsidy reform in the WTO’s Trade Policy Reviews, and adopting political declarations. These options can be regarded as initial steps to address fossil fuel subsidies through the WTO. Such steps can be taken by small groups of WTO Members working together (including, but not necessarily
limited to, the Friends of Fossil Fuel Subsidy Reform), and do not require action by the entire WTO membership. Further options in this regard in the short to medium term include new actions by small groups of WTO Members, such as adopting a pledge-and-review model, and slowly building critical mass for addressing fossil fuel subsidies through international trade agreements, such as through future political declarations.

However, in line with our findings on the general and BCA-specific options, any initiative requiring consensus among all WTO Members will be challenging. This includes options that would likely require a (ministerial) mandate, such as technical assistance related to fossil fuel subsidies or their reform by the WTO Secretariat or collecting data related to fossil fuel subsidies in the TPR process. Legal reform is, not surprisingly, the most difficult of all options. However, here a distinction should be made between options that require the agreement of the entire WTO membership (e.g. amending the WTO Agreement on Subsidies and Countervailing Measures to include fossil fuel subsidies under the category of ‘prohibited’ subsidies), and options that can be pursued by a smaller group of like-minded countries (e.g. a new plurilateral Agreement on Fossil Fuel Subsidies under WTO). But, if the ongoing negotiations on fisheries subsidies are anything to go by, developing new disciplines on fossil fuel subsidies will be a long-drawn process.

By sketching which options may be feasible in the short term, we have offered an indication what is worth exploring in more detail in the near future. This also shows that the options considered more desirable (e.g. from the perspective of environmental effectiveness or legal certainty) by governments or non-governmental organisations, but seem infeasible in the short term, require more political capital and research. The discussion in this report is therefore not meant to arrive at a conclusion on which options should be prioritised or discarded. As is the case for many other issues in trade negotiations, all options may need to remain on the table as political windows of opportunity may open (or close) unexpectedly, and the pursuit of some initiatives (or even just their consideration, as in the case of BCAs) might improve the prospects of other solutions.

So while we have offered some suggestions on which options may look more promising in the short term, this does not mean that other options should be forgotten altogether. Starting with the low-hanging fruit of seemingly feasible options can indeed make other options more feasible in the medium term.

### 4.2 Future Directions and Research Questions

While this report has analysed a wide range of policy options in some detail, more can be done to explore the options listed here, especially the ones that seem most promising in the short term. Such analyses could focus on environmental effectiveness, administrative implications for relevant countries and international organisations (including the WTO Secretariat), and legal design, among other things. For instance, the increased coordination between the WTO and the UNFCCC has high potential. This could happen through more effective use of existing forums such as the WTO’s Committee on Trade and Environment and the UNFCCC’s Improved Forum on Response Measures. However, further analysis is needed to better understand what form any such future coordinated efforts may take.

Turning to plurilateral and regional forums, it is worth investigating when and how the EGA negotiations could be revived by analysing the political climate in some of the key capitals on this issue. Until the EGA negotiations resume, the interim window may also be used to come up with research-based practical policy recommendations on how to maximise the potential of the EGA deal to contribute to the Paris Agreement.

As for legal changes at the WTO the technicalities of operationalising them to inform future policymaking need further elaboration. For instance, to implement a peace clause, it is essential to define what constitutes a ‘climate measure’ or ‘climate action’. A research question worth exploring in this context is how to single out those measures that legitimately seek to implement the Paris Agreement or otherwise promote climate goals.
With regard to BCAs, further analyses could explore the prospects and potential content of a regional effort to coordinate on their design and implementation. For instance, this could involve elaborating a template for a code of conduct or best practices for like-minded countries to advance BCAs at a regional level and on a reciprocal basis.

Finally, with regard to fossil fuel subsidies, a question that research has only just begun to explore is how well the existing ones are covered by the WTO Agreement on Subsidies and Countervailing Measures. Further inquiries could offer more insights into what an eventual Agreement on Fossil Fuel Subsidies may look like. This could draw on lessons from past and ongoing negotiations on subsidies at the WTO, including agricultural and fisheries subsidies. Furthermore, such research could explore what it means to differentiate between fossil fuel subsidies on the basis of their environmental and/or trade effects.

272 Verkuijl et al. (2017); Slattery (2018).
273 See, for an initial discussion, Pereira (2017) and Trachtman (2017).
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Views expressed by interviewees are personal, and do not necessarily represent those of the governments or organisations they are affiliated with.

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