Sustainable Development Law & Policy

Volume 17 | Issue 1 Article 4

The Paris Agreement and the International Trade Regime: Considerations for Harmonization

Charles E. Di Leva

Xiaoxin Shi

The Paris Agreement and the International Trade Regime: Considerations for Harmonization

Charles E. Di Leva and Xiaoxin Shi***

I. Introduction

The Paris Agreement[1] broadens the international commitment to protect the climate under the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.[2] This commitment is largely represented through the Agreement's requirement that both developed and developing countries have shared obligations to reduce greenhouse gas (GHG) emissions.[3] As a testament to the international community's commitment, the Agreement entered into force ahead of expectations on November 4, 2016.[4]

The Paris Agreement creates binding obligations on all Parties to establish procedures to pursue their nationally determined course of actions to achieve GHG emission reduction targets established through domestic ("bottom-up") processes, rather than globally agreed binding numerical emission reduction targets in the Kyoto Protocol for "developed countries."[5] Specifically, the Agreement requires Parties to institute a continuous planning process to mitigate and adapt to climate change impacts, documented in a "nationally determined contribution every five years."[6] National emission reduction targets and the proposed policy instruments to achieve them are documented in the intended nationally determined contributions (INDCs) or, once a country has ratified the Paris Agreement, their nationally determined contributions (NDCs).[7] The Paris Agreement allows for adjustments of the emission reduction targets and proposed policy instruments.[8] These adjustments will emanate from a continuous national planning process.[9] While Parties are expected to "maintain successive nationally determined contributions," they can make such adjustments at any time "with a view to enhancing [the Party's] level of ambition"[10] to cope with climate change.

Among the 164 INDCs submitted,[11] nearly half of the countries explicitly propose to increase their use of renewable energy by providing financial incentives such as a trade-in-tariff systems; about one-third of the countries specifically mention improving industrial processes as a strategy to reduce GHG emissions; three countries propose to impose a carbon tax; and two countries propose to imposing labeling standards and restrictions on importation of appliances that are energy inefficient.[12] It is our view that these types of climate mitigation measures will impact global trade to varying degrees. Because of the imminence of the implementation of some countries' measures, there is a resurgence of attention to the "trade versus environment" question.[13]

This paper posits that there is no direct conflict between the Paris Agreement and regional or international trade agreements. These trade agreements and their case law, as well as the language of the Paris Agreement indicate that fulfilling a state's obligations under the Paris Agreement and acting pursuant to their NDCs should not automatically lead to the assumption that there is a trade and environment conflict. However, Parties need to be cognizant of their trade agreement obligations that are fundamental to the protection of free trade and investor expectations. This paper aims to help understand the space where countries could implement INDCs and NDCs without violating the principles of trade agreements.

II. Trade-Related Initiatives to Reduce Greenhouse Gas (GHG) Emissions Post Paris Agreement

1. The Paris Agreement: Mandatory National Planning Process, Non-Binding GHG Emission Reduction Targets

The Paris Agreement is a procedurally oriented instrument that, unlike the UNFCCC Kyoto Protocol, does not include specific regulatory parameters. It requires Parties to implement a course of actions that lead to a unspecified amount of GHG emission reduction, recognizing the need to hold "the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels."[14] The Paris Agreement requires Parties to, *inter alia*, institute a continuous planning process of determining national GHG emission reduction targets, as well as mitigation[15] and adaptation[16] measures. Specifically, Parties "shall" communicate the GHG emission reduction targets and mitigation measures in "a nationally determined contribution every five years"[17] and communicate adaptation measures "as a component of or in conjunction with other communications or documents, including . . . a nationally determined contribution."[18] A Party "may at any time adjust its existing nationally determined contribution,"[19] making the mandatory national planning process a continuous one.

Additionally, the Paris Agreement does not prescribe the exact content of NDCs. Instead, Parties determine the mitigation measures to be undertaken to collectively achieve the temperature goal of the Paris Agreement. Decision 1/CP.20, part of the "Lima Call for Climate Action," suggests a list of items that a NDC should address.[20] Paragraph 14 of the Decision provides

* Chief Counsel, Environment and International Law Unit, Legal Vice Presidency, The World Bank

** Legal Analyst, Environment and International Law Unit, Legal Vice Presidency, The World Bank

that INDCs "may include, as appropriate, inter alia," quantifiable information on the reference point, planning processes, time periods for implementation, just to name a few.[21] Most INDCs provide only a nation-wide emission reduction target, accompanied by generally defined mitigation strategies. For example, Indonesia's INDC states that it is committed to reduce 26% of GHG emission against the business as usual scenario by 2020[22] and will reduce emissions through forest conservation, increased renewable energy use, as well as improved waste management.[23] Realization of such strategies that are stated only in general terms requires further regulatory and/or legislative actions.

Depending on Parties' ambitions, they may use an existing legal framework or propose new legislation to reduce GHG emissions. For example, South Africa proposes in its NDC to develop policy instruments such as a carbon tax, desired emission reduction outcomes for sectors, and company-level carbon budgets to reduce GHG emissions.[24] In contrast to South Africa, the United States emphasizes in its NDC that the U.S. economy-wide GHG emission reduction target is based on an examination of the "opportunities under existing regulatory authorities."[25] The United States ratified the Paris Agreement as an executive agreement without advice and consent from the Senate, which had ratified the UNFCCC.[26] Such ratification process reflects the rationale that the Paris Agreement does not legally require the United States to take action beyond its obligations under the UNFCCC and, as a Party to the UNFCCC, the U.S. Executive Branch has sufficient legal authority under existing law for developing and implementing necessary mitigation measures to achieve the national commitment.[27] Moreover, the Paris Agreement does not provide requirements on the substance of INDCs and NDCs that are more specific than those in the Decision 1/CP.20, part of the "Lima call for climate action."[28] The Agreement provides only general requirements that a successive NDC "will represent a progression beyond" the Party's current NDC[29] and that the NDCs should be "ambitious."[30] As such, the GHG emission reduction targets in the NDCs are not considered to be legally binding, at least under U.S. law, and Parties have considerable flexibility in deciding the actions they would take to contribute to the global goal of GHG emission reduction.[31] Therefore, the Paris Agreement affords Parties considerable flexibility in developing NDCs based on national circumstances.

2. Post Paris Agreement: More Ambitious National Actions to Reduce GHG Emissions

The Paris Agreement employs a procedure-based approach coupled with a mechanism to help Parties implement their NDCs. The consequence of Parties not achieving the claimed GHG emission reduction targets, however, lacks the type of sanction for non-compliance that existed under the Kyoto Protocol.[32] As set forth in Article 15 of the Paris Agreement, challenges in fulfilling the NDCs are to be dealt with through a "mechanism" that is designed "to *facilitate* implementation and *promote* compliance" (emphasis added).[33] The Article 15 mechanism has four elements. First, the INDCs and NDCs are public documents.[34] Second, a technical expert review of the supporting information provided by Parties on the implementation and progress of the INDCs and NDCs is required.[35] Third, the Paris Agreement requires a global "stocktake" in 2023 "of collective progress towards achieving the purpose of [the Paris] Agreement and its long-term goals" and every five years thereafter,[36] which provides the basis for Parties to adjust their actions.[37] Finally, an expert-based committee facilitates compliance by taking measures that are "transparent, non-adversarial and non-punitive."[38] Therefore, although Parties enjoy discretion in deciding their emission reduction targets and means to achieve these targets, the procedural obligations under the Paris Agreement enhance the public exposure of Parties' commitments and hence incentivize compliance by Parties.

As of November 2016, 163 INDCs have been submitted.[39] The emission reduction strategies stated in INDCs typically include increasing renewable energy in the energy mix, improving industrial processes, incentivizing energy efficiency, and improving solid waste management.[40] Some INDCs present more specific policy instruments to reduce GHG emissions.[41] Four types of these policy instruments are of particular relevance to the issue of design and implementation that does not violate the principles of fair trade under international agreements. We explore these principles in the following sections of this paper. The first category of instrument is the use of tax and tariff, including tax or tax reduction measure based on CO_2 emission or energy efficiency of the product,[42] a tax measure based on the energy consumption in the production process such as utilities,[43] a feed-in-tariff to incentivize renewable energy investments,[44] and an import duty on goods that are energy-inefficient such as used vehicles.[45] The second category is a financial requirement on certain investments to contribute funds for climate change mitigation.[46] The third category is the development of energy efficiency standards for appliances.[47] The fourth category is the use of technical standards for reducing GHG emissions from industrial processes.[48] These policy instruments are likely to have impacts on international trade as they distinguish products based on factors that some may contend are not based on the "likeness" of a product.[49] In addition, at least some countries may proceed to quickly lay out the specifics of these policy instruments given their declaration of ambitious national commitments under the Paris Agreement. Depending on the nature of these relatively new policy instruments and the manner in which they are implemented, they might interfere with what some trading partners or foreign investors would claim as their "reasonable expectations." The following sections of this paper explore the boundaries on climate-related policy instruments under major regional and international trade agreements.

III. The Interface Between the Paris Agreement and International Trade Agreements

This section discusses the interface between the Paris Agreement and international trade agreements by examining the relevant requirements and cases under the bilateral trade agreements, General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), and Agreement on Technical Barriers to Trade. An examination is necessary because neither the Paris Agreement nor the 1992 United Nations Framework Convention on Climate Change (UNFCCC), under which the Paris Agreement was negotiated, defines such interface explicitly. Instead, both the Paris Agreement and the UNFCCC indicate the expectation of harmonious interaction with trade agreements.

Specifically, Article 3 of the UNFCCC provides that in achieving its objective, Parties "*should* cooperate to promote a supportive and open international economic system" (emphasis added) and "[m]easures taken to combat climate change, including unilateral ones, *should not* constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade" (emphasis added).[50] The wording "should" suggests that compliance with the UNFCCC provides no categorical exceptions to the trade restrictions that would otherwise be inconsistent with international trade agreements.[51] Similarly, the preamble of the Paris Agreement states that Parties "[r]ecogniz[e] that Parties may be affected . . . by the impacts of the measures taken in response to [climate change]" and "[e]mphasiz[e] the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty."[52] These clauses suggest that Parties need to take into account the potential trade and economic implications of climate change mitigation actions and examine whether the regulatory actions would violate international trade agreements to which they are also Parties.

1. Cases under the North American Free Trade Agreement (NAFTA)

Bilateral and multilateral investment treaties typically afford foreign investors the protection against expropriation, unjustifiable and arbitrary treatment, and discriminatory treatment compared with other foreign or domestic investors,[53] as well as the right of private parties to bring a claim against states on these substantive rights.[54]

The interface between these treaties and their Parties' environmental regulations is still largely an issue to be sorted out on a case-to-case basis. An OECD survey found that language referring to environmental concerns is common in multilateral investment treaties but rare in bilateral investment treaties.[55] Among the investment treaties that contain language on environmental concerns, most of them do so by including general language recognizing the issue of environmental protection or reserving policy space for environmental regulations.[56] The survey found only one treaty that explicitly excludes the environmental provisions as a basis for investor-state claims.[57]

This section discusses case law under the North American Free Trade Agreement (NAFTA) to illustrate the potential limitations on environmental regulations due to protection of investors' substantive rights. NAFTA Chapter 11 provides five fundamental principles for investor protection: National Treatment (Article 1102), Most-Favored-Nation Treatment (Article 1103), Minimum Standard of Treatment (Article 1105), Expropriation and Compensation (Article 1110), and Performance Requirements (Article 1106). NAFTA Article 1106(6) provides exceptions to the environment-related limits that Parties can place on, or use to regulate investors[58]: a party may adopt "environmental measures" that, *inter alia*, are "necessary to protect human, animal or plant life or health"[59] or "necessary for the conservation of living or non-living exhaustible natural resources"[60] provided that "such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment."[61]

NAFTA Article 1114 (2) addresses the "leakage" issue. It provides that a party "*should not* waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic health, safety or environmental] measures as an encouragement for the establishment, acquisition, expansion or retention in territory of an investment" (emphasis added).[62] Additionally, to strengthen the environmental framework under NAFTA, Canada, the United States, and Mexico signed the North American Agreement on Environmental Cooperation, establishing the Commission for Environmental Cooperation (CEC) to advise on and strengthen cooperation to solve potential conflicts between environmental protection and investment protection[63] Specifically, under NAAEC Article 10(7), if a party considers that the other party's regulatory action violates NAFTA Article 1114(2), the CEC "shall" facilitate agreement between disputing parties within three years by providing recommendations on assessing the environmental impacts of proposed investment, consultation between parties, and mitigation of the adverse environmental impacts.[64] However, the implementation of NAAEC Article 10(7) has been criticized, including by a former CEC official, as being unsuccessful.[65]

Investors' expectations of operating in a stable legal and business environment as protected by trade agreements may well be an important consideration when countries proceed in promulgating ambitious regulations or other measures to achieve the emission reduction targets in (I)NDCs. Because the consistency of these regulations or other measures with the trade regime's "most-favored-nation treatment" and "national treatment" provisions are discussed in more detail in the context of the General Agreement on Tariffs and Trade,[66] the discussion of case law under NAFTA focuses on the minimum standard of treatment (Article 1105), expropriation and compensation (Article 1110), and performance requirements on investors (Article 1106).

1.1 Article 1105 Minimum Standard of Treatment

NAFTA Article 1105 Minimum Standard of Treatment protects investor interests in operating in a stable legal and business environment. [67] Importantly, Article 1105 is not a guarantee against regulatory change, whether or not the change is material.[68] Article 1105(1) requires a Party to accord investors of another Party "treatment in accordance with international law, including fair and equitable treatment and full protection and security."[69] The Tribunal in *Mobil Investments Inc. and Murphy Oil Corporation v. Government of Canada* held, after referring to a line of NAFTA Tribunal cases, that Article 1105(1) prohibits "conduct . . . that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes [an investor] to sectional or racial prejudice, or [lacks] due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in any administrative process."[70] To find an Article 1105(1) violation, the Tribunal held that there should be clear and explicit representations by the state to induce the investment, reasonable reliance by the investor, and subsequent repudiation by the state.[71]

Further, a differentiated effect on foreign investors compared with domestic investors, without more, does not lead to a finding of Article 1105(1) violation. In *Methanex Corporation v. United States of America*, the Tribunal rejected an Article 1105(1) claim of a Canadian distributor of methanol that challenges a California ban on the use or sale in California of the gasoline additive MTBE, which is produced from methanol.[72] In its Article 1105(1) claim, Methanex, the Canadian distributor of methanol, relied on the alleged discriminatory motive of the California government for promulgating the ban. Methanex argued that the ban was driven by a discriminatory motive to protect the U.S. ethanol industry.[73] Methanex argued that if the ban was truly driven by California's concern over chemical leakages from underground storage tanks for gasoline,[74] California would not have banned only one chemical component of gasoline, i.e., MTBE, while allowing other chemicals to leak into the environment.[75] It further argued that instead of banning MTBE, California could have sought a remedy to the leaking underground storage tanks at a less cost.[76]

The Tribunal rejected Methanex's argument for several reasons. First, Methanex failed to present sufficient evidence at the hearing to establish the discriminatory intent of California government.[77] Secondly, the Tribunal found that the discriminatory intent, even if it was established, is not an element in determining Article 1105(1) violation.[78] The Tribunal reasoned that Article 1105(1) does not mention "discrimination" and therefore does not preclude differentiated treatment of foreign investors.[79] Thirdly, the Tribunal held that discrimination alone, without more, does not lead to a finding of Article 1105(1) violation.[80] Specifically, under the holding of *Mobil Investments*, conduct that violates Article 1105(1) should be discriminatory *and* have exposed the claimant to "sectional or racial prejudice."[81] A similar outcome in a matter involving renewable energy regulation recently occurred in *Mesa Power Group, LLC v Canada,* where a NAFTA Tribunal supported the Government of Canada's position that Ontario's renewable energy regulation did not constitute a violation of the US investor's expectation under Article 1105.[82] Moreover, it added that tribunals should give a "good level of deference to the manner in which a states regulates its internal affairs."[83]

A more recent ruling provided a different outcome for the party claiming a violation of the fair and equitable treatment requirement. In *Windstream Energy LLC v. Canada,* a NAFTA Tribunal found that, while the Government of Ontario had not carried out an expropriation, its conduct toward the investment of a US wind power company consisted of a violation of the "fair and equitable treatment" requirement of Article 1105(1).[84] In this case, the Tribunal found as "unfair and inequitable" the manner in which an application for an offshore wind power facility by a U.S. based company was handled by the Government of Ontario, in particular, once the Government decided post-application to impose a moratorium on offshore wind. The Tribunal faulted the government for failing to act in a timely and transparent manner in the handling of the application. It held that "the failure of the Government of Ontario to take the necessary measures …within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA."[85]

1.2 Article 1110 Expropriation and Compensation

The manner in which countries implement new regulations and the timing of doing so are also key aspects to consider in implementing the commitments of INDCs and NDCs without violating trade agreements. Climate-related regulatory action should be cognizant that under Article 1110 of NAFTA, nationalization or expropriation of a foreign investment is permissible only when doing so is "(a) for a public purpose; (b) on a non-discriminatory basis; in accordance with due process of law and Article 1105(1); and on payment of compensation . . . [that is] equivalent to the fair market value of the expropriated investment."[86]

The Tribunal in *Methanex Corporation v. United States of America* elaborated the standard of Article 1110. In finding that California's ban of MTBE did not violate Article 1110, the Tribunal noted that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process . . . is not deemed expropriatory and compensatory unless specific commitments had been given by the regulating government to the . . . investor contemplating investment that the government would refrain from such regulation."[87] This case suggests that the factors relevant to the determination of whether the regulation is non-discriminatory and promulgated with due process include the timeline of legislation, whether there was scientific study, whether there was a public hearing, participation of stakeholders, and whether the complainant investor participated in the legislative process.[88]

In contrast, the Tribunal in *Metalclad Corporation v. The United Mexican States* found an Article 1110 violation based on a regulatory taking that took place after the government had made a commitment to allow the investor to proceed with the contemplated investment.[89] In this case, Mexico issued COTERIN federal and state construction and operating permits for a proposed landfill.[90] Federal officials assured Metalclad that no municipal permits were needed for undertaking the landfill project.[91] In reliance on such government representation, Metalclad acquired COTERIN for the sole purpose of developing and operating a landfill site[92] and started construction.[93] Five months later, the municipality ordered the cessation of construction due to lack of a municipal construction permit.[94] Federal officials then told Metalclad that a municipal permit was necessary and the municipality would issue the permit as a matter of course.[95] Metalclad applied for a municipal construction permit and resumed construction.[96] After the landfill was constructed and had undergone inauguration, the municipality denied Metalclad's permit application.[97] Metalclad submitted the NAFTA claim for arbitration.[98] Thereafter, the municipality issued an Ecological Degree declaring a protected area for rare cactus encompassing the landfill site.[99]

The *Metalclad* Tribunal first found the conduct of the Mexican government violated Article 1105 Minimum Standard of Treatment by leading Metalclad to believe that it was fully authorized to construct and operate the landfill under the federal and state permits;[100] by denying Metalclad's municipal construction permit application without prior notice of the administrative proceeding and an opportunity to appear;[101] by denying the *construction* permit based only on reasons that were unrelated to construction or physical aspects of the landfill;[102] and by promulgating a regulation that effectively and permanently prevented the use of Metalclad's investment.[103] The Article 1105 violation, taken together with the lack of a "timely, orderly, or substantive basis" for the municipality to deny Metalclad's permit application, was found to constitute an indirect expropriation.[104] Although there appears to be a significant overlap between the Tribunal's reasoning for finding an Article 1110 violation and the reasoning for finding an Article 1105 violation, the facts in this case illustrate the relevant aggravating factors for finding expropriation.

As indicated in both the *Methanex* case and the *Metalclad* case, whether the state had the substantive basis for taking the regulatory action at issue is relevant in finding Article 1105 and Article 1110 violations. Such substantive basis could lie not only in existing requirements under domestic law but also in the state's obligation under international treaties. The *Chemtura Corporation v. Canada* case illustrates the latter situation where the state's international obligations negated the finding of unfair treatment.[105] In the *Chemtura* case, an American investor challenged the Canadian government for terminating registrations of Chemtura's products based on findings of a health risk review.[106]

The Tribunal found the Canadian government agency did not act in bad faith by launching a risk review process based on two sets of evidence.[107] First, the ban of the same product in other countries established the existence of the public health concerns based on which the Canadian government initiated the risk review and termination of registration.[108] Second, the Canadian government undertook the risk review to fulfill its obligation under Annex II of the Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, which requires Canada to assess the use of such product at issue no later than two years after the Protocol entered into force.[109] Under this reasoning, the Paris Agreement and a state's commitment in INDCs and NDCs to curb GHGs emissions could provide legal grounds for a state's regulatory actions aiming at emission reduction, weighing in favor of finding satisfaction of the required treatment of foreign investors under NAFTA.

1.3 Article 1106 Performance Standards on Investors

As discussed previously in Section II.2 of this paper, requiring investments in certain sectors to contribute funds for domestic climate change mitigation is one of the specific measures proposed in some INDCs.[110] Unless properly instituted, however, such a measure might arguably constitute a prohibited requirement on foreign investors to purchase or accord preference to domestic goods or services under NAFTA Article 1106(1)(c), which prohibits the state from imposing on "investors of a Party or of a non-Party" requirements "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory."[111]

In *Mobil Investments Inc. and Murphy Oil Corporation v. Government of Canada*, the Tribunal found the Canadian government's regulation inconsistent with NAFTA Article 1106(1)(c).[112] The Canadian government requires offshore petroleum projects to contribute a certain percentage of their revenue to research and development ("R&D") and education and training ("E&T") as part of a Benefits Plans that project proponents must prepare *as a condition for project approval*.[113] Specifically, the R&D and E&T requirement constitutes an obligatory expenditure requirement, although the regulation allows project proponents to decide the specifics of the expenditure modalities in the Benefits Plans so long as the regulatory expenditure level for R&D and E&T is met.[114]

The Tribunal found the R&D and E&T expenditure requirement constitutes "service" under Article 1106.[115] Additionally, the R&D and E&T requirement constitutes a "requirement" within the meaning of Article 1106 because it is a *precondition* for project approval, as opposed to an *incidental effect* of the regulation with respect to the purchase, use, or accordance of a preference to domestic goods or services.[116] Finally, the Tribunal found that to fulfill this requirement in practice, the project proponent would unavoidably have to give preference to domestic goods or services, even though the regulation does not explicitly state so.[117]

2. Cases under the General Agreement on Tariffs and Trade (GATT)

At the outset, it is important to note that the World Trade Organization (WTO) recognizes the importance of environmental protection and sustainable development in the field of international trade.[118] These mutually supportive concepts were embedded in the preamble to the 1994 Agreement Establishing the WTO, which states that WTO members recognize "that their relations in the field of trade and economic endeavor should . . . allow for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment."[119] The Parties to the WTO also established a Trade and Environment Committee to, *inter alia,* help facilitate harmonization between these two regimes.[120]

Our research did not find any WTO case that challenges a provision of, or actions taken directly pursuant to a multilateral environmental agreement (MEA), despite that there are reported to be hundreds of MEAs and at least twenty of them contain provisions that affect trade.[121] These provisions include those that addressed trade in endangered species, ozone depleting substances, and hazardous wastes.[122] However, these measures, which are typically product or commodity specific, are unlikely to impact the global economy to the same degree as regulations and standards based on GHG emissions, which often deal with the production process of certain products. Moreover, these globally agreed MEA measures are specific, typically defining the regulatory scheme that ratifying countries shall incorporate into national law.[123] In contrast, the Paris Agreement is a procedure-based instrument that lets Parties choose their own means for achieving their climate friendly ambitions, rather than tackling directly the issue of compatibility between international environmental standards and trade treaties. As such, it is important to address some key provisions in WTO agreements that the Parties taking action under the Paris Agreement may need to keep in mind.[124]

The non-discrimination principle of the GATT prohibits discrimination between "like products" based on their countries of origin. Specifically, under Article I, all "like products" from foreign countries shall be given "most-favored-nation treatment."[125] Under Article III, products from foreign countries shall be given "no less favorable" treatment than domestic "like products" under "all laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution or use."[126]

2.1 Article I Most-Favored-Nation Treatment

In general, border measures are likely to violate the "most-favored-nation treatment" requirement under Article I to the extent that they are activated based upon the country of origin of the products.[127] In this context, because the international community has not established a uniform trade measure such as a global carbon tax, as it did, for example, with the possibility of trade sanctions under the Montreal Protocol, one might envision a GATT challenge if an importing country were to levy a tax on imported products measured by the amount of GHG emissions or energy consumed in the production process.[128] Article I may well countenance a scheme whereby an importing country establishes a tax scheme on imported goods that reflects the carbon taxes that their own "like products" are subject to in the countries of origin of the imported goods, if any.[129] Alternatively, the importing country could apply the same tax on all "like products" regardless of the exporting country and request the exporting countries to rebate to their exporters the GHG-related tax paid to the importing country.[130] In case the exporting country refuses to do so, the exporters would face a different tax on products from that country and therefore violation of Article I appears inevitable.

A similar issue might arise where an importing country would impose a higher tax or tariff on automobiles that release or consumed higher amounts of GHGs in their manufacture. The scheme would have to be tested on whether the products are "like products" given their different GHG emissions in the production process. Early GATT cases indicate that likeness is found based on product characteristics, end uses, consumer preferences, and tariff classification.[131] The process and production methods (PPMs) of the product, such as the GHG emissions during production of the automobile, do not necessarily affect these factors that influence the finding of "likeness." It is noted that, however, the amount of GHG emissions during production process might affect the "consumer preference" factor in the likeness determination.

For the environmental community, such WTO case rulings raise the concern that trade measures could not be based solely upon the GHG emissions in the production process without violating Article I, unless the GHG emissions correlates with the physical characteristics of the final product. However, even if there is an Article I violation due to differentiated treatment among "like" automobiles, such treatment might be justified under Article XX exceptions (b) and (g), which are discussed further in later sections.[132]

2.2. Article III National Treatment

Article III applies to internal measures, such as a GHG-related tax or an energy-efficiency standard on certain products. Article III:2 requires that imported products shall not be subject to internal taxes in excess of those applied to like domestic products.[133] The Appellate Body held in *Japan–Taxes on Alcoholic Beverages* that to find a violation of Article III, there should not only be a finding that directly competitive or substitutable products are not similarly taxed, but also the dissimilar taxation "must be more than *de minimis.*"[134]

Article III:4 requires imported products be provided no less favorable treatment as "like" domestic products.[135] The *Canada–Measures Relating to the Feed-In Tariff Program* case provides an example where a facially neutral feed-in tariff (FIT) program was found to have violated Article III:4 for tying the program's benefits with the requirement of using domestic content in energy production, even though participation in the FIT program is made based on contracts between the government and private entities.[136] The FIT Program was implemented in 2009 to increase the mix of electricity from certain renewable sources in the Ontario electricity system.[137] Generators participating in the FIT Program are paid a guaranteed price under twenty-year or forty-year contracts with the government.[138] In addition, when building solar or wind power electricity generation facilities with production capacity of more than 10kW, the generator *must* ensure that the facilities satisfy the "Minimum Required Domestic Content Level"; a requirement on the purchase or use of products of Canadian origin or from a Canadian source.[139] In other words, compliance with the "Minimum Required Domestic Content Level" is a prerequisite for generators using solar PV and wind power to participate in the FIT Program and thereby benefit under the FIT Program.[140]

"No less favorable" treatment, however, does not require identical treatment.[141] The Appellate Body held in *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products* that the mere existence of distinctions in treating like products does not necessarily lead to a finding of less favorable treatment.[142] Such differentiated treatment is potentially permissible under Article III:4 if the differentiation is based on factors other than country of origin, such as market share of the importer.[143] Importantly, the "less favorable treatment" determination is made based on an individual case of the imported products. In this determination, the argument that the regulatory program at issue is generally non-discriminatory by "balancing more favorable treatment of some imported products against less favorable treatment of other products" is irrelevant.[144]

A frequently contested issue in finding Article III violation is the "likeness" of products. Relevant factors in the determination of likeness include: the products' end-uses in a given market, consumers' tastes and habits, the product's properties, nature and quality, tariff classification,[145] and the existence of competitive relationship between the products in the marketplace.[146] This is not an exhaustive list because the Appellate Body expressly refrained from defining the "precise scope of the word 'like.'"[147] Restrictions on products based on their production process might be upheld under Article III to the extent that such restrictions go to the physical characteristics and market competitiveness of the product.[148]

2.3 Article XX Exceptions for Environmental Protection

2.3.1 Article XX chapeau: prohibition of arbitrary or unjustifiable discrimination and disguised trade restriction

As is demonstrated by our discussion below, an important GATT provision that can underpin trade and environmental harmonization is that regulations that would otherwise violate the non-discrimination principles set out in GATT, including Articles I and III, could be justified under GATT's Article XX exceptions. The chapeau of Article XX stipulates that the regulatory actions justified under the exceptions under Article XX shall not be "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade."[149] In determining whether a regulatory action meets these requirements, the Appellate Body of the World Trade Organization (WTO) considers (i) whether less discriminatory courses of action are available;[150] (ii) whether the regulating country made good faith effort to negotiate on a continuous basis with *all* affected trading partners *before* imposing trade restrictions, even if no agreement was reached;[151] (iii) whether the same factors are examined in designing restrictions on foreign products and in designing restrictions on domestic products;[152] (iv) and whether the regulation takes into account different conditions in trading partner countries and when necessary, maintains some flexibility given such differences.[153] The party invoking the exceptions under Article XX bears the burden of demonstrating that the challenged regulatory action, in its application, is consistent with the chapeau.[154]

In *United States–Standards for Reformulated and Conventional Gasoline*, Brazil and Venezuela successfully challenged a U.S. regulation for being inconsistent with Article III:4 on national treatment[155] and unjustifiable under Article XX exceptions.[156] The challenged regulation, promulgated as part of the gasoline program under the Clean Air Act, required conventional gasoline sold by domestic refiners, blenders, and importers in the United States to be as clean as 1990 baseline levels.[157] The 1990 baselines can be individually established based on actual 1990 data of the regulated entity or statutorily established by the U.S. Environmental Protection Agency (EPA) based on the average gasoline quality in the United States in 1990.[158] Refiners of domestically produced gasoline are required to establish individual baselines calculated based on the methodology provided by the EPA unless actual 1990 data are unavailable.[159] About 97% of U.S. refiners established individual baselines.[160] Importers of gasoline are instead required to apply the statutory baseline, except in the rare case that they could establish an individual baseline.[161] The U.S. challenged the WTO Panel's finding that these baseline establishment provisions are not justified under Article XX.[162]

The Appellate Body found these baseline provisions failed to meet the prerequisites of the chapeau of Article XX.[163] It found that the existence of more than one less discriminatory alternative to the baseline determination provisions, such as imposing the statutory baseline to both domestic and imported gasoline.[164] The U.S. EPA argued that differentiated treatment between domestic and foreign refiners was warranted because verifying and enforcing individual baselines on foreign refiners would be administratively difficult.[165] The Appellate Body, however, agreed with the Panel's finding that the U.S. failed to provide sufficient justification for denying foreign refiners individual baselines given the "reasonably available" means to verify and assess data relating to imported goods.[166] The Appellate Body suggested that the United States should have initiated negotiation with Venezuela and Brazil to resolve the administrative problems in applying individual baselines on foreign refiners, although reaching an agreement is not required.[167] In addition, the Appellate Body noted that the United States considered compliance costs for domestic refiners, yet did not consider the same for foreign refiners.[168] Based on these omissions, the Appellate Body found the discriminatory effect of the baseline establishment provisions was not "merely inadvertent or unavoidable."[169]

The rigidity and inflexibility in the application of the regulation at issue across different affected countries also contributes to the finding of "arbitrary or unjustifiable discrimination."[170] This finding was also the case in *United States–Import Prohibition of Certain Shrimp and Shrimp Products*.[171] A group of Asian developing countries, India, Malaysia, Pakistan, Thailand, successfully challenged a U.S. regulation to protect sea turtles as constituting arbitrary discrimination between countries where the same conditions prevail.[172] The regulation at issue required all U.S. shrimp trawl vessels to use Turtle Excluder Devices (TEDs) or tow-time restrictions in certain specified areas.[173] It also imposed a world-wide import ban, starting on May 1, 1996, on imported shrimp harvested with commercial fishing technology which adversely affects sea turtles unless (i) the harvesting nation is certified by the United States to have a program regulating the incidental taking of sea turtles in shrimp harvesting that is comparable to that of the United States, and the average rate of incidental taking by the vessels of the shrimp exporting country is comparable to that by U.S. vessels; or (ii) the fishing environment of the shrimp exporting country does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting.[174]

The Appellate Body found the regulation to be rigid and inflexible and that it constituted "unjustifiable and arbitrary discrimination" for three main reasons.[175] First, in practice, in determining the comparability of regulatory programs, U.S. government officials relied only on whether the exporting country's regulatory program requires the use of TEDs.[176] Considering *both* the language of the regulation and the practice in applying the regulation, the Appellate Body found the regulation was coercive in that it required other shrimp exporting countries to adopt regulations that are "essentially the same" as that applicable to U.S. vessels, without considering whether such regulations would be appropriate for those countries.[177] Second, only exporting countries, not individual vessels, could be certified. As such, shrimp caught using methods identical to those used in the United States had been banned from U.S. market only because they were caught in waters of countries that had not been certified by the United States.[178] Third, the effective date of the import ban did not take into account the fact that different exporting countries would require different phase-in periods to develop or obtain transfer of the required TED technology.[179]

The Panel and Appellate decisions in *United States–Import Prohibition of Certain Shrimp and Shrimp Products* and the subsequent *United States — Shrimp: Implementation Phase* further clarify the requirement of seeking cooperative agreements through negotiations before imposing trade restrictions. The United States did negotiate the Inter-American Convention for the Protection and Conservation of Sea Turtles and concluded the Convention in September 1996.[180] However, the United States only proposed to negotiate similar agreements with other affected exporting nations after concluding the Inter-American Convention, and therefore after the effective date of the import ban (i.e., May 1, 1996).[181] The Appellate Body found the United State's failure to negotiate with all affected trading partners such as the group of Asian countries in this case was unjustifiable discrimination.[182]

To address the Appellate Body's finding on the issue of failure to seek cooperative agreements with trading partners, the United States subsequently engaged in negotiations at a "sustained pace" with countries in the Indian Ocean region.[183] It also sought to meet the policy objective of protecting sea turtles through the mechanisms under other international treaties, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[184] Both the Panel and the Appellate Body in *United States — Shrimp: Implementation Phase* found the United States had fulfilled its obligation to negotiate and that concluding an agreement is not a condition of avoiding a finding of "unjustifiable discrimination."[185]

2.3.2 Article XX(b) and (g) exceptions

Exceptions under Article XX(b) and (g) are likely to be of particular relevance to the design of climate related policy instruments. Under Article XX(b) regulatory actions that would otherwise violate the GATT non-discrimination principle can be justified if they are "*necessary to* protect human, animal or planet life or health" (emphasis added),[186] provided that such actions are not arbitrary or an unjustifiable discrimination or disguised restriction on trade, as stipulated in the chapeau of Article XX. Finding the regulatory action as "necessary" requires a showing that there are no "reasonably available" measures that are "consistent or less inconsistent with" the GATT.[187]

Article XX(g) provides that the regulations that would otherwise violate the GATT non-discrimination principle would be justified if they are "*relating to* the conservation of *exhaustible natural resources* if such measures are made effective *in conjunction with restrictions on domestic production or consumption*" (emphasis added) and meeting the requirements stipulated in the chapeau of Article XX.[188] To be considered as "relating to" conservation, the regulation must be "primarily aimed at" the conservation of an exhaustible natural resource. However, the regulation does not need to be essential for the conservation is not required.[189] The term "exhaustible natural resources" has been held to include both non-living and living natural resources.[190] In defining the scope of "exhaustible natural resources," the Appellate Body may but does not have to draw on other treaties.[191] The Appellate Body in the *EC–Biotech* case clarifies that these treaties are relevant in interpreting the trade agreement not necessarily because they are legal rules,[192] but because they provide "evidence of the ordinary meaning of terms" of GATT (or other WTO agreements).[193]

Critical to the analysis of measures that may aid in implementing Paris Agreement obligations is that clean air has been recognized as an "exhaustible natural resource" within the meaning of Article XX(g).[194] In holding so in *United States–Standards for Reformulated and Conventional Gasoline*, the Panel relied on the ordinary meaning of the term "exhaustible natural resources" without referring to other environmental treaties.[195] Further, the Panel found clean air is exhaustible even though it is renewable.[196] The fact that at least at this moment, the international community and all of its major GHG emitting countries, have recognized in the Paris Agreement the "need for an effective and progressive response to the urgent threat of climate change,"[197] can only serve to fortify the Panel's reasoning that measures to protect the atmosphere merit the protection afforded under Article XX.

3. Cases under the Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement") authorizes "technical regulations" that restrict trade so long as they do not create "unnecessary obstacles to international trade" and are not "more trade-restrictive than necessary to fulfill a legitimate objective" such as "protection of human health or safety, animal or plant life or health, or the environment."[198] The standard of determining whether a measure is "necessary" is similar to that in finding GATT Article XX exceptions,[199] which considers the existence of less restrictive measures, and the effectiveness of the measure at issue in relation to the policy objective pursued.[200]

Annex 1 of the TBT Agreement defines a "technical regulation" as a document that specifies "product characteristics or their related processes and production methods, including the applicable administrative provisions, in which compliance is mandatory," or requirements on "terminology, symbols, packaging, marking or labeling . . . as they apply to a product, process or production method."[201] The issue that is likely to be contested is whether a specification on a product's production process constitutes a valid "technical regulation" under the TBT Agreement. A challenge under the TBT is most likely to arise if there is question whether a process-based specification is made strictly in relation to a product's characteristics. If the process-based specification is indeed applicable to product's physical characteristics, it can be considered as within the "applicable administrative provisions" under Annex 1 and therefore within the ambit of TBT Agreement.[202]

In *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, the European Union imposed a Seal Regime, which provides that "any person wishing to import and/or place seal products . . . must have such products certified by a recognized body . . . [and] the products must be accompanied by an attesting document . . . indicat[ing] whether the products result from hunts conducted by Inuit or other indigenous communities, or from hunts for the sustainable management of marine resources."[203] The WTO Appellate Body held that these requirements do not prescribe or impose any characteristics on the products themselves, but only establish the criteria on the identity of the hunter and the type of the hunt.[204] Therefore, these provisions of the Seal Regime are not a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

As discussed earlier, a labeling system for appliances is one of the specifically proposed mitigation measures in INDCs. Labeling requirements indicating energy efficiency, which is one type of physical characteristic of a product, have been adopted in many countries.[205] However, our research has not identified any country that has imposed a mandatory labeling requirement to indicate GHG emissions during the production process of the product.[206] One could envision exporters challenging such a requirement as a TBT violation by alleging that such a requirement is not an inherent element of the final product, and thereby not a physical characteristic of the product. However, given that the international community has agreed that GHGs must be reduced, it seems easier to contend that products that are responsible for emitting more GHGs than other products are, in fact, not "like products". For example, one could contend that if GHG output during production were irrelevant, there would be no need for a global agreement to reduce GHGs. Of course, imposition of such a requirement would still need to satisfy the transparency and fairness principles set forth above.

IV. Conclusion

The Paris Agreement is the first global agreement in which both developed and developing countries are obligated to undertake actions to mitigate and adapt to climate change impacts. Harmonious with this aspiration, trade agreements and their case law explicitly recognize the right of states to impose environmental restrictions on trade to conserve clean air and protect public health. Nevertheless, the substantive requirements in trade agreements may, in some instances, limit the forms and means of implementation of climate-related regulations.[207] Based on the review of the case law under NAFTA, GATT, and the TBT Agreement, there are a few general principles that countries should follow in pursuing regulatory actions to reduce GHG emissions.

When countries move forward with a potentially diverse array of regulatory and policy instruments to implement the Paris Agreement, they will need to remain cognizant of the longstanding trade regime principles that seek to ensure transparency and fairness. The purpose of these due process and fairness requirements is to ensure that investors and trading partners operate in a stable legal and business environment. Generally, the regulatory process should be protective of investors' expectations in reliance on previous commitments or representation made by the government; afford investors opportunities to participate and be heard in the administrative or regulation making process; and be within the legal mandate afforded by domestic law and/or applicable international treaties.

Trade agreements generally do not allow differentiated treatment of like products based solely on the products' countries of origin, with exceptions.[208] Regulating governments need to pay particular attention to two aspects of this general principle when contemplating climate-related regulations that could, for instance, incentivize the reduction of GHG emissions in manufacturing and industrial processes. First, the "likeness" determination among products should be generally based on their physical characteristics and usage. Further, consumer preference toward the products at issue could be a relevant factor in determining "likeness," at least under the GATT case law. As such, if the public attaches more value to the environmental cost when purchasing products, there is likely to be a stronger argument that GHG emission in the products' lifecycle is a differentiating factor among these products. In this light, it is important to recognize the potential evolution of the concept of "like products" given countries' commitment to achieve the global GHG emission reduction target in the Paris Agreement.

Second, differentiated treatment among like products does not necessarily implicate discrimination and/or trade protectionism. The potential violation of the non-discrimination principle of major trade agreements is likely to arise when the primary basis for differentiated treatment is the products' countries of origin.[209] For example, an importing country may wish to design different treatment of certain imported products based on the GHG emissions in the exporter's production process. The importing country might find defending such differentiation challenging if it cannot account for the GHG emissions from the production process of the imported products due to a lack of data and administrative difficulties in accounting and monitoring. A solution to deal with this deficit could be to invest in an equivalent assessment of the relevant GHG related regulations on a country-to-country basis, and to reflect such country-based assessment in the level of differentiated treatment among imported like products. However, unless done in convincing and rigorous fashion, pursuing this approach could run afoul of the non-discrimination principle in trade agreements.

It is important to note that both the NAFTA and GATT provide important exceptions, under which countries could potentially justify such GHG trade measures to protect public health and the clean air as an exhaustible natural resource. However, in doing so, the enacting country may be required to:

- engage in meaningful negotiation with affected foreign countries in an effort to harmonize their environmental policies and resolve the administrative difficulties in designing and enforcing the contemplated regulation on foreign entities;
- pursue/consider and rule out less restrictive alternatives;
- ensure that the same considerations are given to all regulated entities, domestic and foreign ones, in designing the regulation; and
- consider building in the regulation some level of flexibility when the regulatory conditions and capacity of trading partners with regard to the issue at hand are highly different.[210]

Moreover, these requirements on the enacting country could require a lengthy and costly rule-making process. This process might delay the adoption of some of the policy instruments declared in the INDCs and NDCs. Additionally, countries may not necessarily be able to avoid going through such extensive negotiation and rule-making process by embedding the GHG-related requirement in a government program, implemented through contracts between the government and participating foreign investors.[211] The mere fact that such a requirement is imposed on participating investors as a condition of domestic investment as opposed to the traditional command-and-control schemes does not necessarily eliminate the restrictive nature of such government requirement, especially when the requirement is a nonnegotiable precondition for investment approval.[212] A recent GATT case seems to have expanded the reach of trade agreements to this type of regulatory programs implemented on a contractual basis. [213]

In sum, the Paris Agreement itself does not directly modify the interface between trade agreements and international environmental agreements. However, we anticipate new developments in the case law to further delineate such interface as Parties to the Paris Agreement enact requirements to pursue national commitments and address the urgent global threat of climate change proclaimed by almost 200 countries. While cases adjudicated under major trade agreements have provided a foundation for justifying trade restrictions driven by these climate-related considerations, countries should still remain cognizant of the need for fairness, transparency, and proactive engagement when pursuing GHG emission reduction targets that potentially affect trade.

Endnotes

1 United Nations, *Paris Agreement*, Paris 12 December 2015, Entry into Force, Reference: C.N.735.2016. Treaties=XXVII.7.d. (Depositary Notification) (October 5, 2016), https://treaties.un.org/doc/Publication/CN/2016/CN.735.2016-Eng.pdf [hereinafter Paris Agreement.

2 Under the UNFCCC and its Kyoto Protocol, the obligation of limiting GHG emissions is specifically defined for countries that are listed in Annex I of the UNFCCC and Annex B of the Kyoto Protocol. These two lists include developed countries and countries that are undergoing the process of transition into a market economy.

3 *See, e.g.*, Paris Agreement, *supra* note 1, at Art. 4, ¶3 ("common but differentiated responsibilities"); *id.* at Art. 4, ¶4,

> "Developed country Parties shall continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."

4 As of November 2016, over 110 countries have already ratified the agreement representing approximately 75% of global greenhouse gas emissions. *See* UNFCC, *NDC* Registry, http://unfccc.int/focus/ndc_registry/items/9433.php.

5 *See generally Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Annex B, page 20.

6 Paris Agreement *supra* note 1, at Art. 4, ¶9.

7 *Id.* at Art. 4, ¶9.

8 *Id.* at Art. 4, ¶11.

9 *See infra* notes 15-21 (citing various articles of the Paris Climate Agreement).

10 Paris Agreement *supra* note 1, at Art. 4, ¶11.

11 UNFCCC, *INDC Submissions* (Last visited, Mar. 26, 2017), http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx

12 *See infra* notes 39-55 (providing citations for countries' NDCs for the Paris Agreement).

13 *See* Coral Davenport, *Diplomats Confront New Threat to Paris Climate Pact: Donald Trump*, N.Y. Times (November 19, 2016); Rodolfo Lacy Tamayo, Mexico's under secretary for environmental policy and panning told in an interview that a carbon tariff against the United States is an option for Mexico for defending the quality of life of Mexican people, protecting the environment and Mexican industries.

14 Paris Agreement, *supra* note 1, at Art. 2, ¶1(a).

15 *Id.* at Art. 4, ¶2.

16 *Id.* at Art. 7, ¶9.

17 *Id.*

18 *Id.* at Art. 7, ¶11.

19 *Id.* at Art. 4, ¶11.

20 *See* Decision-/CP.20, Lima Call for Climate Action, ¶14.

21 *Id.*

> "Information to be provided by Parties communicating their intended nationally determined contributions, in order to facilitate clarity, transparency and understanding, may include, as appropriate, inter alia, quantifiable information on the reference point (including, as appropriate, a base year), time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions and, as appropriate, removals, and how the Party considers that its intended nationally determined contribution is fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the Convention as set out in its Article 2."

continued on page 50

[196] *See* TBT Art. 2.2 (stating that "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.").

[197] *See* T.P. Stewart, *US Is Correct In Blocking WTO Appellate Body Appointment*, Law360 (May 27, 2016), http://www.law360.com/articles/801553/us-is-correct-in-blocking-wto-appellate-body-appointment (summarizing, with approval, the US position that the Appellate Body needs to be reined in after exceeding its mandate in a series of disputes featuring decisions adverse to US trade policy)

[198] *See* WTO News, *WTO Appoints two new Appellate Body Members* (Nov. 23, 2016) https://www.wto.org/english/news_e/news16_e/disp_28nov16_e.htm (announcing the appointment of two new Appellate Body members).

> It is notably that the US succeeded in blocking the re-appointment of Seung Wa Chang, who was replaced by Hyun Chong Kim. Chang had been criticized for his role in four decisions that, in the United States' view, "raised systemic concerns about the disregard for the proper role of the appellate body and the WTO dispute settlement system." *See* Bryce Baschuk, *U.S. Blocks Korean Judge from WTO Appellate Body*, Int'l Trade Daily (May 24, 2016), https://www.bna.com/us-blocks-korean-n57982072872/).

[199] *See* EC/Fur Seals, *supra* note 125.

Endnotes: The Paris Agreement and the International Trade Regime: Considerations for Harmonization

continued from page 29

[22] Intended Nationally Determined Contribution, Republic of Indonesia, 5, http://www4.unfccc.int/submissions/INDC/Published%20Documents/Indonesia/1/INDC_REPUBLIC%20OF%20INDONESIA.pdf.

[23] *Id.* at 2.

[24] South Africa's Intended Nationally Determined Contribution, 6, http://www4.unfccc.int/ndcregistry/PublishedDocuments/South%20Africa%20First/South%20Africa.pdf.

[25] Intended Nationally Determined Contribution, the United States, 2, http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf.

[26] United Nations Framework Convention on Climate Change, Senate Consideration of Treaty Document 102-38, https://www.congress.gov/treaty-document/102nd-congress/38.

[27] Daniel Bodansky, *Legal Options for U.S. Acceptance of New Climate Agreement*, Center for Climate & Global Solutions (May 2015), http://www.c2es.org/publications/brief-legal-options-us-acceptance-new-climate-change-agreement.

[28] *See generally* COP 21, Decision CP.21 on Adoption of the Paris Agreement, Section III, ¶27.

> The information to be provided by Parties communicating their nationally determined contributions, in order to facilitate clarity, transparency and understanding, may include, as appropriate, inter alia, quantifiable information on the reference point including, as appropriate, a base year, time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions and, as appropriate, removals, and how the Party considers that its nationally determined contribution is fair and ambitious, in the light of its national circumstances. The language mirrors that in paragraph 14 of Decision 1/CP.20, part of the "Lima call for climate action." *Id.*

[29] Paris Agreement, *supra* note 1, at Art. 4, ¶3.

[30] *Id.* at Art. 3.

[31] *See* Christina Voigt, *The Compliance and Implementation Mechanism of the Paris Agreement*, Rev. of European Community & Int'l Environmental L. 25(2), 161-173, 161 (2016) (stating that the Paris Agreement establishes "mainly administrative, procedural obligations of a legally binding nature, leaving the substantive content [of NDCs] to a large extent to the discretion of parties").

[32] *See generally* Kyoto Protocol, Art. 18 (stating that "meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance").

[33] *See* Todd D. Stern, *Seizing the Opportunity for Progress on Climate* (October 14, 2014), http://www.state.gov/s/climate/releases/2014/232962.htm*l*.

> The legal form of the Paris Agreement turned out to be the same as what the U.S. and New Zealand envisaged: there would be a "legally binding obligation to submit a 'schedule' for reducing emissions, plus various legally binding provisions for accounting, reporting, review, periodic updating of the schedules, etc."; "[b]ut the content of the schedule itself would not be legally binding at an international level." *Id.*

[34] Paris Agreement, *supra* note 1, at Art. 4, ¶ 12.

[35] *Id.* at Art. 13, ¶¶ 4, 5, 11.

[36] *Id.* at Art. 14, ¶ 2.

[37] *Id.* at Art. 14, ¶ 3.

[38] *Id.* at Art. 15, ¶ 1-2.

[39] *See* INDCs as communicated by Parties, *http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx* (last visited November 20, 2016).

[40] *See e.g.*, Egyptian Intended Nationally Determined Contribution 10-12.

[41] *See e.g.*, Intended Nationally Determined Contribution of Chile Towards the Climate Agreement of Paris 2015.

[42] *See e.g.*, Intended Nationally Determined Contribution of Chile Towards the Climate Agreement of Paris 2015, 17 (the Tax Reform Law 20.780, promulgated in October 2014, which imposes a tax on the initial sale of lightweight vehicles inversely proportional to vehicle performance in terms of CO_2 emission, and starting from January 1, 2017, an annual tax benefit lien on CO_2 produced by facilities whose stationary sources have an aggregate thermal power equal or higher than 50 thermal megawatts); South Africa's Intended Nationally Determined Contribution 6 (developing several policy instruments, including carbon tax, to reduce GHG emission); Saint Lucia Intended Nationally Determined Contribution under the United Nations Framework Convention on Climate Change 8 (proposing to reduce tax and duty for importers of fuel efficient vehicles and alternative energy vehicles and taxes on higher engine capacity vehicles).

[43] *See e.g.*, Intended Nationally Determined Contribution of the United Arab Emirates 2-3.

[44] *See e.g.*, Intended Nationally Determined Contribution of the Government of Malaysia 3 (the Tenth Malaysia Plan (2011-2015) introduced a feed-in-tariff mechanism in conjunction with the Renewable Energy Policy and Action Plan (2010) to help finance renewable energy investment, incentivize green technology investments, and promote projects' eligibility for carbon credits); Intended Nationally Determined Contribution of Mozambique to the United Nations Framework Convention on Climate Change 9 (Renewable Energy Feed-In Tariff is one of the proposed measures to reduce GHG emissions).

[45] Saint Lucia Intended Nationally Determined Contribution under the United Nations Framework Convention on Climate Change 8 (proposing to introduce a new levy to control importation of used vehicles).

[46] *See e.g.*, Republic of Guinea Intended Nationally Determined Contribution under the United Nations Framework Convention on Climate Change, 12 (Guinea proposes to evaluate the feasibility of establishing a financial mechanism for the mining sector to fund the contribution to the fight against climate change).

[47] *See e.g.*, Intended Nationally Determined Contribution of the United Arab Emirates 3 (United Arab Emirates introduced efficiency standards for air-conditioning units, eliminating the lowest-performing 20% of units on the market, and is introducing efficiency standards for refrigeration and other appliances); Republic of Sudan Intended Nationally Determined Contributions 5 (proposing to establish a labeling system for electrical appliances).

[48] *See e.g.*, Intended Nationally Determined Contribution of the Government of Malaysia, 3 (The National Biofuel Industry Act 2007 requires mandatory use of the B5 domestic blend of 5% palm biodiesel and 95% fossil fuel diesel).

[49] *See* sections 2.1 and 2.2 (providing further discussion on the topic).

[50] The 1992 United Nations Framework Convention on Climate Change, Art. 3(5).

[51] Edith Brown Weiss, *Integrating Environment and Trade*, 19(2) J. Int'l Economic L. 367-36, 367 (2016).
[52] Paris Agreement, *supra* note 1, Preamble.
[53] Julianne J. Marley, *The Environmental Endangerment Finding in International Investment Disputes*, 46 N.Y.U.J. Int'l L. & Pol. 1003, 1006 (2014).
[54] *Id.*
[55] Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Papers on International Investment, 5 (2011) https://www.oecd.org/daf/inv/investment-policy/WP-2011_1.pdf.
[56] *Id.* at 5-6.
[57] Belgium/Luxembourg-Colombia BIT, Article 7(5) (2009) (providing that the dispute settlement mechanisms of the treaty shall not apply to an obligation undertaken in accordance with the environmental provisions of the treaty).
[58] Madison Condon (2015) *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 Va. Envtl. L.J. 102, 107 (NAFTA reproduced the General Agreement on Tariffs and Trade Article XX environmental exceptions).
[59] NAFTA Article 1106(b).
[60] *Id.* at 1106(c).
[61] *Id.*
[62] NAFTA Article 1114(2).
[63] *See* North American Agreement on Environmental Cooperation [hereinafter NAAEC].operation (oint.ked it was $2k single, $4k joint. There is a phase out that'BA requirements of job. So ifArt.Art.10 [hereinafter NAAEC].
[64] *Id.* at Article 10(7).
[65] See Geoffrey Garver, *Forgotten Promises: Neglected Environmental Provisions of the NAFTA and the NAAEC*, *in* Hoi L. Kong, L. Kinvin Wroth, NAFTA and Sustainable Development: History, Experience, and Prospects for Reform (2015) 15-36.
[66] *See* discussion at 2.1.
[67] NAFTA, Art. 1105 (applies only to Parties to NAFTA).
[68] Mobil Investments Inc. and Murphy Oil Corporation v. Government of Canada, ICSID Case No. ARB(AF)/07/4, 72 (2012) [hereinafter *Mobil Investments v. Canada*].
[69] NAFTA Article 1105(1).
[70] *See Mobil Investments v. Canada*, *supra* note 68 at, 71.
[71] *Id.* at 71-72.
[72] Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, Part I–Preface, ¶ 1 (2005) [hereinafter *Methanex v. United States*].
[73] *Id.* at *Part II – Chapter D, ¶¶* 25, 27.
[74] *Id.* at ¶ 24.
[75] *Id.*
[76] *Id*.
[77] *Id.* at Part III – Chapter B.
[78] *Id.* at Part IV – Chapter C, ¶ 14.
[79] *Id.* (noting that Article 1105(2) mentions discrimination in the context of differentiated treatment between nationals and aliens with respect to measures relating to losses suffered by investments owing to armed conflict or civil strife; this reinforces the argument that Article 1105(1) does not prohibit differentiated treatment of foreign investors).
[80] *Id.* at Part IV – Chapter C, ¶ 26.
[81] *Id.*
[82] *Mesa Power Group, LLC v Canada,* PCA Case No. 2012-17/UNCITRAL, Award, (24 March 2016), at ¶ 502.
[83] *Id* at ¶ 505.
[84] *Windstream Energy LLC v. Canada,* PCA Case/UNCITRAL, Award (27 September 2016), at ¶ 379.
[85] *Id.,* at ¶ 380.
[86] NAFTA Article 1110(1), (2).
[87] *See Methanex v. United States*, Part IV–Chapter D ¶¶ 7, 9 (finding that no such commitments were given to Methanex that California would not restrict the use of those compounds for environmental and/or health reasons).
[88] *Id.* at ¶¶ 9-10, 14.
[89] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, 25-28 (2005) (stating that "NAFTA includes not only open, deliberate and acknowledged takings of property . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State").
[90] *Id.* at 23.
[91] *Id.* at 24.
[92] *Id.* at 23.
[93] *Id* at 14.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 16.
[98] *Id.* at 17.
[99] *Id.*
[100] *Id.* at 25.
[101] *Id.* at 26.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 29.
[105] *Chemtura Corporation v. Government of Canada*, Award, 37 (NAFTA 2010), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-14.pdf.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *See* Paris Agreement, *supra* note 1, at ¶4.
[111] NAFTA Article 1106(1)(c).
[112] Mobil Investments v. Canada, *supra* note 68 at 112.
[113] *See id.* at 13-20, 33 (holding that a project operator has "no choice but to accept conditions imposed unilaterally" by the government, including the contribution of funds for R&D activities).
[114] *Id.* at 107.
[115] *Id.* at 112.
[116] *Id.* at 109-11 (citing *S.D. Myers, Inc. v. Government of Canada*, where S.D. Myers had to carry out a major part of its proposed business in Canada under an export ban; however, the Tribunal found no violation of Article 1106 because the export ban was not an express condition attached to a regulatory approval).
[117] *Id.* at 108 (finding that the regulation at issue requires local expenditures in practice: e.g., "endowing a university chair, furnishing a classroom, or providing scholarships are all requirements that accord, or are likely to accord, a degree of preference to local educational facilities or individuals"; "an in-house research facility would seem to require according a preference to local goods and services in order to undertake its construction and operation.").
[118] *See generally* WTO, Trade and Environment, https://www.wto.org/english/tratop_e/envir_e/envir_e.htm.
[119] Agreement Establishing the World Trade Organization, Preamble, *https://www.wto.org/english/docs_e/legal_e/04-wto.pdf*.
[120] *See generally* Uruguay Round Agreement, Decision on Trade and Environment, *https://www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm*; Kent James, Trade Policy and the Environment, "Who's Afraid of the WTO", at 117. Oxford University Press (2004).
[121] Kent James, *Trade Policy and the Environment, "Who's Afraid of the WTO"*, 119, Oxford U. Press (2004).
[122] *See* United Nations Environment Programme, *Trade-Related Measures and Multilateral Environmental Agreements*, 27-29 (2007), http://unep.ch/ETB/areas/pdf/MEA%20Papers/TradeRelated_MeasuresPaper.pdf.
[123] *See generally* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Art. VI, Art. VII, Art. VIII (specifying the certificate and permit requirements for trading listed spices, types of exceptions, and enforcement measures that ratifying countries shall put in place).
[124] *See Understanding the Two: Cross-Cutting and New Issues, The Environment: A Specific Concern, World Trade Organization*, https://www.wto.org/English/thewto_e/whatis_e/tif_e/bey2_e.htm. We also do not want to overstate the potential for conflict between these two regimes. The WTO Trade and Environment Committee makes the important point that if a dispute arises over an action taken under an MEA and the countries involved are party to the MEA, "they should try to use the environmental agreement to settle the dispute."
[125] General Agreement on Tariffs and Trade (GATT), at Art. I:1.
[126] *Id.* at Art. III:1.
[127] *See* Patrick Low, Gabrielle Marceau, Julia Reinaud, *The Interface between the Trade and Climate Change Regimes: Scoping the Issues*, WTO 1, 4 (Jan. 12, 2011).

128 *See* Coral Davenport, *Diplomats Confront New Threat to Paris Climate Pact: Donald Trump*, New York Times, (Nov. 19, 2016), https://www.nytimes.com/2016/11/19/us/politics/trump-climate-change.html?_r=0.
129 *See* Jennifer Hillman, *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?*, German Marshall Fund, 1, 11, (2003), https://www.scribd.com/document/155956625/Changing-Climate-for-Carbon-Taxes-Who-s-Afraid-of-the-WTO#download; Low, *supra* note 127.
130 *See* Hillman, *supra* note 129.
131 Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos- Containing Products* WT/DS135/AB/R, (*adopted* Mar. 12, 2001) [hereinafter EC – Asbestos].
132 *See* discussion at 2.3.
133 GATT Art. III:2.
134 Appellate Body Report, *Japan — Taxes on Alcoholic Beverages, Report of the Appellate Body*, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/Ab/R, (Oct. 4, 1996) 1, 30 [hereinafter Japan–Alcohol].
135 GATT Article III:4.
136 Panel Report, *Canada–Certain Measures Affecting the Renewable Energy Generation Sector, Canada — Measures Relating to the Feed-In Tariff Program, Report of the Panels*, WT/DS412/R, ¶ 8.2, 80 (Dec. 19, 2012) [Canada–Energy] (finding that the Art. III:4 violation was made by determining the claim under the Art. 2.1 of the Agreement on Trade-Related Investment Measures (TRIM); TRIM Art. 2.1 stipulates, "without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994."). Note that these are not government purchases procured under the WTO Agreement on Government Procurement (GPA). The GPA is not addressed as part of this paper. As revised in April 2014, the GPA allows government purchasing agents to have greater choice based on environmental characteristics. For example, revised paragraph X,6 states "[f]or greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment." WTO Agreement on Government Procurement (GPA) (1994) (revised Apr. 2014).
137 Canada–Energy, *supra* note 136, at ¶ 7.64, 50.
138 *Id.* at ¶ 7.64, 50.
139 *Id.* at ¶ 7.157, 76.
140 *Id.* at ¶ 7.164 – 7.166, 79-80 (noting that Canada did not appeal the Panel's finding that the FIT Program is inconsistent with GATT Article III:4).
141 Japan–Alcohol, *supra* note 134, at 30.
142 EC – Asbestos, *supra* note 131 (stating that "a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favorable treatment" than that accorded to the group of "like" domestic products.").
143 *Id.*
144 Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, [hereinafter U.S.–Gasoline] WT/DS2/AB/R, 36 (quoting United States–Section 337 of the Tariff Act of 1930," BISD 36S/345, para. 514, adopted on November 7, 1989).
145 Org. of Am. States [OAS] Panel Report, *Japan — Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, L/6216–34S/83 (adopted on Oct. 13, 1987), 1, 23 [hereinafter Japan-Customs Duties].
146 E.C.–Asbestos, *supra* note 131 at 37.
147 *Id.*
148 *See* Low, *supra* note 127.
149 GATT, Art. XX.
150 Low, *supra* note 127, at 7.
151 Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, AB-2001-4, WT/DS58/AB/R, 63, 80-81 [hereinafter U.S. – Shrimp]; U.S. – Gasoline, *supra* note 144, at 26-27; Low, *supra* note 127 (stating that the chapeau contains the obligation of good faith, namely, a country should engage in serious efforts to negotiate and conclude an agreement to address concerns before resorting to trade restrictions).
152 U.S. – Gasoline, supra note 144, at 28.
153 U.S. – Shrimp, *supra* note 151, at 64.
154 U.S. – Gasoline, *supra* note 144, at 22-23.
155 *Id.* at 29.
156 *Id.*3341, Report, e,eport, rimp]l Report]ked it was $2k single, $4k joint. There is a phase out that'BA requirements of job. So if
157 *Id.* at 4-5.
158 *Id.* at 5.
159 *Id.* at 34-35.
160 *Id.* at 36-37.
161 *Id.* at 37.
162 *Id.* at 9 (in particular, the United States argued that the baseline establishment rules should be justified under Article XX(g)).
163 *Id.*3341, Report, e,eport, rimp]l Report]ked it was $2k single, $4k joint. There is a phase out that'BA requirements of job. So if (the Appellate Body did not distinguish between an "arbitrary or unjustifiable distinction" and "disguised restriction.").
164 *Id.* at 25.
165 *Id.* at 25-26.
166 *Id.* at 26-27.
167 *Id.* ("it appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil, or if it had, not to the point where it encountered governments that were unwilling to cooperate.").
168 *Id.* at 28.
169 *Id.*
170 U.S. – Shrimp, *supra* note 151, at 63-73.
171 *Id.*
172 *Id.* at 55-76.
173 *Id.* at 2.
174 *Id.* at 2-3.
175 *Id.* at 72-73.
176 *Id.* at 64 (this practice was admitted in statement by the United States at the oral hearing).
177 *Id.* at 64-65.
178 *Id.* at 65.
179 *Id.*at 71-72.
180 *Id.* at 66.
181 *Id.*
182 *Id.* at 70.
183 *Id.* at 85.
184 *Id.* at 21-23.
185 *Id.* at 36-38.
186 GATT, Art. XX(b).
187 U.S. – Gasoline, *supra* note 144, at 38.
188 GATT, Art. XX(g).
189 *See* Panel Report, *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, 12, L/6268 – 35S/98, (*adopted* Mar. 22, 1988) [hereinafter Canada – Salmon].
190 *See* US-Gasoline, *supra* note 144.
191 *See* US-Shrimp *supra* note 151, at 48 (stating that "the words of Article XX(g), 'exhaustible natural resources" . . . must be read . . . in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.").
192 Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, 341, WT/DS291/R, WT/DS292/R, WT/DS293/R (Oct. 10, 2006).
193 *Id.* at 341-42 (stating that the Panel did not find the other treaties, such as Convention on Biological Diversity, relevant to the interpretation f the WTO agreements at issue).
194 *See* US-Gasoline, *supra* note, 144 at, 8, 19 (affirming Panel's finding that clean air is an exhaustible natural resource); *Id.* at 44.
195 *See id.* at 44 (stating that clean air can be "depleted," is a resource because it has "value," and is natural).
196 *Id.*; Appellate Body Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products, 47 AB-1998-4, WT/DS58/AB/R (1998) (holding "that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive").
197 Paris Agreement, *supra* note 1, Preamble.
198 Agreement on Technical Barriers to Trade, Article 2.2.
199 Low, *supra* note 127.
200 *See generally* Caroline E. Foster, *Arbitration and the Turn to Public Law "Standards of Review": Putting the Precautionary Principle in the Crucible*, 3 J Int. Disp. Settlement **3**, 525-58 (2012).
201 Agreement on Technical Barriers to Trade, Annex 1.1.
202 *Id.*
203 Appellate Body Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, 113, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).
204 *Id.* at 114.

[205] *See, e.g.*, *EnergyGuide Labels,* Fed. Trade Commission (last visited December 8, 2016), https://www.ftc.gov/news-events/media-resources/tools-consumers/energyguide-labels.

[206] *See The Trade and Environment Committee, and Doha Preparations*, WTO, (2001) https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief11_e.htm. The WTO Trade and Environment Committee "needs further discussion [on] how to handle–under the Technical Barriers to Trade Agreement–labeling used to describe whether for the way a product is produced (as distinct from the product itself) is environmentally friendly."

[207]

[208] *See e.g.*, GATT Art. XX.

[209] *See generally* GATT Art. I, Art. III.

[210] *See generally* U.S.–Gasoline, *supra* note 151; U.S. – Shrimp, *supra* note 151.

[211] *See generally* Canada–Energy, *supra* note 136. However, it is important to note the greater flexibility that governments have to require environmental characteristics of products purchased by governments themselves if they are engaged with parties to the revised WTO Agreement on Government Procurement (April 2014). *Supra,* note 151.

[212] *Id.*

[213] *Id.*

Endnotes: Fighting the Wrong Fight: Why the MLP Parity Act is a Misguided Attempt at Achieving Renewable Energy Capital Raising Parity

continued from page 35

[5] Felix Mormann, *Beyond Tax Credits: Smarter Tax Policy for a Cleaner, More Democratic Energy Future,* 31 Yale J. On Reg. 303, 310-11 (2014).

[6] *See Master Limited Partnership,* Investopedia, http://www.investopedia.com/terms/m/mlp.asp (last visited Nov. 13, 2016) (discussing that an MLP may also be structured as a limited liability company with units consisting of membership interests in the LLC).

[7] John Goodgame, *Master Limited Partnership Governance*, 60 Bus. Law. 471, 473-74 (2005).

[8] *See Master Limited Partnership*, *supra* note 7 (noting that regardless of whether the entity is a partnership or an LLC, it does not pay any tax itself and instead reports its earnings to its owners who pay their respective tax shares).

[9] *See* Mormann, *supra* note 6, at 310-11 (noting that conversely, in a typical corporate form, the corporation is subject to corporate tax and the investor is again taxed on dividends it received). This is commonly referred to as double taxation. As a result, using a flow through entity rather than a corporation circumvents the problem of double taxation. *Id.*

[10] *See id.* at 341 (stating that items of income and expense in a corporation must be split pro-rata based upon each owner's shareholding percentage). This is not the case in a flow through entity. *Id.* Instead, separate items of income and expense can be allocated differently in accordance with the partnership agreement. *Id.* As an example, a corporation with $100 of income and two 50/50 shareholders must attribute that income 50/50. *Id.* However, a partnership is free to allocate $75 to one partner or in any other allocation it sees fit. *Id.* This flexibility allows the ability of management to create incentive structures such as the carried interest. *Id.*

[11] *Id.* at 342.

[12] I.R.C. § 7704(d)(1)(E) (2016).

[13] *See* Mormann, *supra* note 6, at 340.

[14] *See* Michael R. Braverman & Stephen C. Braverman, *Chasing Yield: How the Worldwide Glut in Capital is Financing Energy Investment,* 29 Nat. Resources & Env't 3, 6 (2014).

[15] *See* Richard L.Ottinger & John Bowie, *Innovative Financing for Renewable Energy,* 32 Pace Envtl. L. Rev. 701, 742-43 (2015).

[16] *See* Braverman & Braverman, *supra* note 15, at 3, 6.

[17] *Id.* at 6.

[18] *Id.*

[19] *See id.*

[20] *See Topic 404-Dividends,* IRS (Sept. 20, 2016) https://www.irs.gov/taxtopics/tc404.html (explaining that the return of capital reduces the basis of the stock and increases the amount of the taxable gain when the stock is sold).

[21] *See, e.g.*, Interview with David K. Burton, Partner, Akin Gump Struass Hauer & Feld LLP (May 11, 2015).

[22] *See* Marley Urdanick, *A Deeper Look Into Yieldco Structuring,* Nat'l Renewable Energy Laboratory (Sept. 3, 2014), https://financere.nrel.gov/finance/content/deeper-look-yieldco-structuring.

[23] Sean T. Wheeler, *Comparison of Typical MLP and Yieldco Structures,* Latham & Watkins, LLP, http://www.lw.com/thoughtLeadership/lw-mlp-yieldco-comparison (last visited Nov. 13, 2016).

[24] *See id.*

[25] *See Yieldco Induced Highs,* Chadbourne, http://www.chadbourne.com/Yield-Co-Induced-Highs-07-09- 2015_projectfinance (last visited Nov. 13, 2016).

[26] *See* Kimble McCraw, *Energy Finance 101: An Intro to Yield Cos,* Third Way (July 24, 2014), http://www.thirdway.org/report/energy-finance-101-an-intro-to-yield-cos (recognizing that from a strictly economic point of view, there is no doubt that the MLP is the more tax efficient structure). There are some benefits of the yieldco however. *Id.* One such benefit is that because it is not a flow-through entity, the investor receiving cash dividends simply receives a 1099-DIV and pays tax on the portion of the distributions that are treated as dividends (if any). *Id.* In contrast, the investor in an MLP receives a schedule K-1, which is a form reporting his share of the MLP's income. *Id.* He then must pay the tax on that income. *Id.* Because the MLP may have complex operations in multiple states, this can make tax compliance very complex, time consuming and costly. *Id.*

[27] *See id.* (revealing there is some evidence that investors had ignored the long-term consequences of investing in the yieldco and were simply focused on the short-term economics).

[28] Press Release, Senator Christopher Coons (D-DE), Coons, Moran, Poe, Thompson Bill Will Level the Playing Field for Renewable Energy (June 24, 2015), http://www.coons.senate.gov/newsroom/releases/release/mlp-act.

[29] *See id.*

[30] *See* Paul Gaynor, *Great Opportunity for Congress on Energy,* The Hill (June 19, 2014), http://thehill.com/blogs/congress-blog/energy-environment/209801-great-opportunity-for-congress-on-energy.

[31] *See* Robert Rapier, *The MLP Parity Act is a No-Brainer for Renewable Energy,* Energy Trends Insider (May 29, 2014), http://www.energytrendsinsider.com/2014/05/29/the-mlp-parity-act-is-a-no-brainer/; *see also* Robert Rapier, *Renewable Parity Push Renewed,* Investing Daily (July 21, 2015), http://www.investingdaily.com/23245/renewables-parity-push-renewed-2/.

[32] *See* Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice—Does Green Discriminate?* 46 Tex. Tech. L. Rev. 1067, 1088 (2014).

[33] *See, e.g.*, Nick Juliano, *GOP Dismissive as Obama Revives Efforts to Shift Incentives from Fossil Fuels to Renewables,* Governors' Wind & Solar Energy Coalition (Feb. 3, 2015), http://www.governorswindenergycoalition.org/?p=11661.

[34] Dennis J. Ventry, Jr., *Tax Shelter Opinions Threatened the Tax System in the 1970s,* Tax Analysts (May 15, 2006), http://www.taxhistory.org/thp/readings.nsf/ArtWeb/CC7054D5ADE17F64852571A20068ED13.

[35] *See* Robert Metz, *Market Place; The Apache Partnership,* N.Y. Times, Mar. 5, 1981, http://www.nytimes.com/1981/03/05/business/market-place-the-apache-partnership.html.

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id*. (explaining that a new limited partnership was formed for the sole purpose of owning interests in the thirty-three other limited partnerships). An appraiser was hired to determine the value of the holdings of each of the thirty-three limited partnerships and investors in each then had the option to trade their investment in the old limited partnership for an investment in the new limited partnership in a proportion determined by the appraiser. *Id.* The new limited partnership was coined the master limited partnership. *Id.* The response was overwhelming with eighty-six percent of individual investors tendering their limited partnership interests for interests in the new MLP. *Id.*

[40] Marvin F. Milich, *Master Limited Partnerships,* 20 Real Est. L.J. 54, 56-57 (1991).

[41] *See id.* at 58.

[42] *See* Toni Mack, *Disincorporating America*, Forbes, Aug. 1, 1983, at 76.