

Urgenda, Milieudefensie, and the Impact of Climate Change Litigation on Global Trade Policy

Maria Saracino-Lowe*

Anthropogenic climate change is an increasingly urgent problem with devastating, unavoidable global impacts.¹ This has been emphasized most recently in the United Nations' Intergovernmental Panel on Climate Change's (IPCC) Sixth Assessment Report, released in 2021.² The IPCC, which is an intergovernmental organization responsible for "provid[ing] policymakers with regular scientific assessments on climate change,"³ described the scale of recent changes as "unprecedented," noting that "[h]uman-induced climate change is already affecting many weather and climate extremes across the globe."⁴ However, no matter what we do, the global surface temperature will increase until the middle of the century.⁵ At this point, the best course of action is to attempt to prevent the worst effects of climate change. The IPCC notes, however, that "[g]lobal warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades."⁶

Because climate change is a deeply urgent—perhaps existential—issue, a wide variety of actions have been taken to

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1. Henry Fountain, *5 Takeaways from the Major New U.N. Climate Report*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/climate/un-climate-report-takeaways.html>.

2. Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, at 8 (Aug. 6, 2021), https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf.

3. THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], <https://www.ipcc.ch/> (last visited Jan. 27, 2022).

4. Intergovernmental Panel on Climate Change [IPCC], *supra* note 2, at 8.

5. *Id.* at 14.

6. *Id.*

mitigate its effects. Treaties like the Kyoto Protocol and Paris Agreement represent commitments by states to reduce their greenhouse gas emissions.⁷ Intergovernmental organizations are also involved; the World Trade Organization (WTO) has committed to assisting the United Nations with its Sustainable Development Goals⁸ and has launched Trade and Environmental Sustainability Structured Discussions (TESSD) to address climate issues.⁹ Perhaps because of the urgency, climate change litigation has become increasingly popular,¹⁰ and recent rulings from the Netherlands have ordered parties to commit to decreasing their emissions faster than standards articulated in previous agreements.¹¹

The goal of this Note is to examine the tension between recent landmark climate change cases and the existing climate change regime.¹² Part I will define climate change litigation and highlight significant cases, summarize prominent international climate agreements, and discuss the background and history of the WTO. Part II will further examine the WTO's dispute settlement process, briefly analyze the current state of international climate policy amongst intragovernmental stakeholders, and propose a way to begin to reconcile the results of proliferating climate change litigation with WTO climate policy.

7. *What is the Kyoto Protocol?*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [UNFCCC], https://unfccc.int/kyoto_protocol (last visited Jan. 27, 2022).

8. *The WTO and the Sustainable Development Goals*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm (last visited Jan. 7, 2022).

9. U.N. High-Level Political Forum, *WTO Contribution to the 2021 HLPF*, at 21 (2021), https://sustainabledevelopment.un.org/content/documents/27479WTO_2021_HLPF_Input.pdf.

10. Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE AND THE ENV'T AND CTR. FOR CLIMATE CHANGE ECON. AND POL'Y, July 2021, at 5, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

11. Jeff Brady, *In a Landmark Case, a Dutch Court Orders Shell to Cut its Carbon Emissions Faster*, NPR (May 26, 2021, 11:08 AM), <https://www.npr.org/2021/05/26/1000475878/in-landmark-case-dutch-court-orders-shell-to-cut-its-carbon-emissions-faster>.

12. Emily Reid, *EU Climate Law and the WTO*, in RESEARCH HANDBOOK ON CLIMATE CHANGE AND TRADE LAW 352, 352 (Panagiotis Delimatsis, ed., 2016).

I. BACKGROUND

A. CLIMATE CHANGE LITIGATION, *URGENDA*, AND *MILIEUDEFENSIE*

Climate change litigation is a broad concept without a single, agreed-upon definition.¹³ However, when examining climate change litigation specifically in an international context, there are two generally accepted definitions.¹⁴ The first, narrower definition covers “litigation which *directly and expressly* raises an issue related to climate change or climate change policy.”¹⁵ A second, more broadly drawn way of defining climate change litigation covers cases where climate change is a secondary issue in the proceedings, encompassing cases where climate change is “not expressly mentioned.”¹⁶ This Note will address cases falling within the first, narrow definition.

Over the past several years, the number of climate change cases has risen sharply.¹⁷ Over 1,000 cases were filed between 2015 and 2021, with 191 filed between 2020 and 2021.¹⁸ This is a massive increase from the period before 2015, which saw only 834 cases from 1986–2014.¹⁹ Most commonly, defendants are national governments, and suits are brought because they have failed to meet their international treaty obligations or fulfill their duty to mitigate the effects of climate change.²⁰ While the most common parties in these cases are nongovernmental organizations (NGOs), intergovernmental organizations, and states, a growing number of cases have targeted private actors, including transnational corporations.²¹ In a 2021 report, the Grantham Research Institute on Climate Change and the Environment identified common claims and strategies used by litigants, which include seeking enforcement of climate-related commitments made by governments, human rights-based claims, and claims seeking to establish corporate liability to pay for “infrastructure investments for climate adaptation.”²² Other issues in climate change litigation involve determining standards of proof,

13. Ivano Alogna, Christine Bakker & Jean-Pierre Gauci, *Climate Change Litigation: Perspectives—An Introduction*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 1, 15 (Ivano Alogna, Christine Bakker & Jean-Pierre Gauci eds., 2021).

14. *Id.*

15. *Id.*

16. *Id.* at 16.

17. Setzer & Higham, *supra* note 10, at 4.

18. *Id.* at 10–11.

19. *Id.* at 10.

20. Alogna et al., *supra* note 13, at 18–19; Setzer & Higham, *supra* note 10, at 12.

21. Alogna et al., *supra* note 13, at 19; Setzer & Higham, *supra* note 10, at 15.

22. Setzer & Higham, *supra* note 10, at 6–7.

causation, and how to properly assess damages.²³

Claimants are not limited to a single strategic approach. Even before the Intergovernmental Panel on Climate Change (IPCC) released its 2021 report, climate advocates, sensitive to the worsening effects of global warming, have pushed for injunctive solutions to fight climate change.²⁴ One such case, *The State of the Netherlands v. Urgenda Foundation*, was first brought by a climate activist group in 2015.²⁵ In *Urgenda*, the Supreme Court of the Netherlands held that the Dutch government's failure to adhere to its own internal climate goals violated both Article 2 and Article 8 of the European Convention on Human Rights (ECHR).²⁶ This was the first case in which "authentic targets to reduce greenhouse gas emissions have been ordered upon a government by a court."²⁷

Urgenda was a class-action suit brought by 900 citizens of the Netherlands alongside the Urgenda Foundation, a Dutch nonprofit organization.²⁸ As a result of this approach, which blended the focus on having a government meet its climate commitments with a rights-based strategy, the Netherlands was ordered to cut its greenhouse gas ("GHG") emissions 25% below levels present in 1990 by the end of 2020.²⁹ *Urgenda* is now considered a "landmark" climate case, and since it was filed in 2015, 37 cases have sought to "build on [its] approach."³⁰

Another recent Dutch case, *Milieudefensie v. Royal Dutch Shell*, is a class action suit with 7 NGO plaintiffs that was decided in the Hague District Court during the summer of 2021—it took the ideas proposed

23. Christina Voight, *Climate Change and Damages*, in THE OXFORD HANDBOOK OF INT'L CLIMATE CHANGE LAW 465, 468, 483–85 (Kevin R. Gray, Richard Tarasofsky & Cinnamon Carlarne, eds., 2016); see also Jorge E. Vinales, *Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law*, 43 VAND. J. TRANSNAT'L L. 437, 498–501 (2010).

24. Ben Clapp & Casey J. Snyder, *Climate Change Litigation Trends*, 36 NAT. RES. & ENV'T 1, 3–4 (2021).

25. *Urgenda Foundation v. State of the Netherlands*, GLOBAL CLIMATE CHANGE LITIGATION DATABASE, <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> (last visited Jan. 26, 2022).

26. HR 20 december 2019, NJ 2020, 41 m.nt. J. Spier, ¶ 7.5.1 (De Staat Der Nederlanden/Stiching Urgenda) (Neth.) [Hereinafter *Urgenda Case*].

27. Michael D. Wilson, *Lorenzo's Answer*, 41 U. HAW. L. REV. 248, 256 (2019) (emphasis in original).

28. *Id.*; *Urgenda Foundation v. State of the Netherlands*, *supra* note 25.

29. *Urgenda Case* ¶ 7.5.1.

30. Setzer & Higham, *supra* note 10, at 23.

in *Urgenda* even further,³¹ and is considered particularly innovative.³² Using *Urgenda's* holding, the UN Guiding Principles (UNGPs), and the Paris Agreement as an analytical framework, the Hague District Court found that Royal Dutch Shell (RDS), an oil and gas company which was headquartered in the Netherlands at the time,³³ had violated their duty of care and ordered RDS to cut their greenhouse gas emissions to 45% below 2019 levels by 2030.³⁴ Further, the Hague District Court noted that although the Paris Agreement is not binding on RDS, there is “broad international consensus about the need for non-state action,”³⁵ and considered the goals of the Paris Agreement when determining RDS’s obligation to reduce emissions.³⁶ *Milieudefensie* is considered “a global first,” and despite RDS’s intention to appeal, the ruling has already impacted the private sector, with “[r]epresentatives of other businesses in high-emitting industries . . . confirm[ing] that they too will be increasing their climate change mitigation efforts.”³⁷ RDS plans to appeal, but it will need to adhere to the emissions target set by the Hague District Court throughout the litigation process.³⁸

A similar French case, *Notre Affaire à Tous and Others v. Total*, involves several NGOs and local government organizations seeking

31. Rechtbank Den Haag [Hague District Court] 26 mei 2021, C/09/571932 m.nt. rechtspraak.nl (Vereniging Milieudefensie/Royal Dutch Shell PLC) (Neth.) [hereinafter Royal Dutch Shell Case]; Benoît Mayer, *Milieudefensie v. Shell: Do Oil Corporations Hold a Duty to Mitigate Climate Change?*, OXFORD BUS. L. BLOG (June 7, 2021), <https://www.law.ox.ac.uk/business-law-blog/blog/2021/06/milieudefensie-v-shell-do-oil-corporations-hold-duty-mitigate-climate>.

32. Christine Bakker, *Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 199, 200 (Ivano Alogna et al. eds., 2021).

33. Royal Dutch Shell has since moved their headquarters to the United Kingdom and rebranded as “Shell Plc,” to “better position the oil and gas giant’s transition to a cleaner energy business.” Aaron Gregg, *Shell to Move Headquarters to U.K., Revamp Share Structure and Drop ‘Royal Dutch’*, WASH. POST (Nov. 21, 2021, 11:23 AM), <https://www.washingtonpost.com/business/2021/11/15/royal-dutch-shell-netherlands-uk/>.

34. Royal Dutch Shell Case ¶ 3.1; Mark Clarke et al., *Milieudefensie et al v. Shell: Climate Change Claimants Prevail Again in Dutch Court – This Time, Against Corporations*, WHITE & CASE (May 28, 2021), <https://www.whitecase.com/publications/alert/milieudefensie-et-al-v-shell-climate-change-claimants-prevail-again-dutch-court> (“The court ruled that, despite being non-binding as against RDS, the goals of the Paris Agreement—namely that global warming must be kept well below 2°C compared to pre-industrial levels—were relevant to determining the extent of RDS’s CO2 emissions ‘reduction obligation.’”).

35. Royal Dutch Shell PLC ¶ 4.4.26.

36. *Id.* ¶ 3.1.

37. Setzer & Higham, *supra* note 10, at 20.

38. Brady, *supra* note 11.

court assistance in ordering TotalEnergies SE (“Total”) to “undertake[] action to ensure [Total’s] activities align with a trajectory compatible with the climate goals of the Paris Agreement.”³⁹ This case has not yet been decided, but it serves to reinforce that there is a growing interest in litigation with the end goal of forcing corporations to better mitigate their impact on the climate crisis.

While outside the scope of this Note, it is also important to recognize that not all climate change litigation seeks to protect environmental regulations or ameliorate the effects of global warming.⁴⁰ Cases like *RWE v. Kingdom of the Netherlands*, for example, involve claims for “compensation for predicted losses caused by the introduction of climate-justified policy measures.”⁴¹

B. OVERVIEW AND HISTORY OF THE WORLD TRADE ORGANIZATION

The precursor to the World Trade Organization (“WTO”) was the General Agreement on Tariffs and Trade (“GATT”), a technically provisional agreement that entered into force in 1948 and was the “only multilateral instrument governing international trade . . . until the WTO was established in 1995.”⁴² GATT was established with the goal of “entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”⁴³ Some GATT provisions have been absorbed into the WTO and are still in force today.⁴⁴ One such example is GATT Article XX, which governs the exceptions to GATT that allow for countries to adopt certain protective measures as long as they are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same

39. *Notre Affaire à Tous and Others v. Total*, GLOBAL CLIMATE CHANGE LITIGATION DATABASE, <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> (last visited Jan. 26, 2022).

40. Setzer & Higham, *supra* note 10, at 26.

41. *Id.*

42. *GATT/WTO*, GOODSON L. LIBR. RSCH. GUIDES, <https://law.duke.edu/sites/default/files/lib/gatt.pdf> (last visited Jan. 27, 2022); *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm#rounds (emphasis added) (last visited Jan. 27, 2022).

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

44. Harro van Asselt, *Trade and Climate Disputes Before the WTO: Blocking or Driving Climate Action*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 433, 439 (Ivano Alogna et al. eds., 2021); *see, e.g.*, GATT art. XX.

conditions prevail, or a disguised restriction on international trade.”⁴⁵

While GATT did not have a “formal institutional body,” there was a small Geneva-based Secretariat that was created to adjudicate member disputes.⁴⁶ GATT also fulfilled a more formal, organizational function by facilitating 8 multilateral trade negotiations (“trade rounds”) over 47 years.⁴⁷ Facing a rapidly changing international trade landscape, GATT members convened the Uruguay Round in 1986.⁴⁸ This set of negotiations spanned 8 years and multiple continents, culminating in the 1994 Marrakesh Agreement which established the World Trade Organization.⁴⁹

The newly established WTO also incorporated three primary agreements: GATT 1994, an updated version of the original GATT, which covers trades in goods;⁵⁰ the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which covers intellectual property issues including copyright, trademarks, patents, geographical indications, industrial designs, layout-designs of integrated circuits, and trade secrets;⁵¹ and the General Agreement on Trade in Services (GATS), which covers all services except for those “supplied in the exercise of governmental authority”⁵² or related to air traffic rights.⁵³ The focus of this Note is on GATT 1994 – specifically, the exceptions outlined in Article XX.

Additionally, the WTO’s governing structure is significantly more robust than GATT. The organization is comprised of the Ministerial Conference, the General Council, the Council for Trade in Goods (Goods Council), the Council for Trade in Services (Services Council), the Council for Trade-Related Aspects of Intellectual Property Rights

45. van Asselt, *supra* note 44, at 439; GATT art. XX.

46. Felicity Deane, *The Context-Integrity of the Global Carbon Regime: The Relevance and Impact of the World Trade Organization*, in *ETHICAL VALUES AND THE INTEGRITY OF THE CLIMATE CHANGE REGIME* 73, 76 (Hugh Breakey & Vesselin Popovski, eds., 2016).

47. *The GATT Years: From Havana to Marrakesh*, *supra* note 42; *see also* *GATT/WTO*, *supra* note 42.

48. Deane, *supra* note 46, at 77.

49. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; *see also* Deane, *supra* note 46, at 76–77.

50. *Understanding the WTO: The Agreements*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Jan. 27, 2022).

51. *Overview: The TRIPS Agreement*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Jan. 26, 2022).

52. *The General Agreement on Trade in Services (GATS): Objectives, Coverage, and Disciplines*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Jan. 26, 2022).

53. *Id.*

(TRIPS Council), several subcommittees associated with each council, and Heads of Delegations (HODs), which hold informal meetings, often in smaller groups.⁵⁴ Despite this formalistic structure, the WTO is a “member-driven” organization, in which “[a]ll major decisions are made by the membership as a whole, either by ministers (who meet once every two years) or by their ambassadors or delegates (who meet regularly in Geneva).”⁵⁵ This Note is primarily concerned with the Ministerial Conference and the General Council.

The Ministerial Conference, the WTO’s head decision-making body, generally meets once every two years.⁵⁶ Ministerial Conferences involve every WTO member, and they have the authority to issue declarations and decisions related to any of the underlying WTO agreements.⁵⁷ The most recent Ministerial Conference (MC11) was held in Buenos Aires from December 10–13, 2017.⁵⁸ As of this writing, the Twelfth Ministerial Conference, which was originally set to occur in Nur-Sultan, Kazakhstan, in 2020, has been postponed indefinitely due to the ongoing COVID-19 pandemic.⁵⁹

The General Council, which is permanently located in Geneva, has a wide variety of responsibilities. Their primary objective is to “carry[] out the functions of the WTO, and tak[e] action necessary to this effect, in the intervals between meetings of the Ministerial Conference”⁶⁰ Additionally, the General Council meets as the Dispute Settlement Body and the Trade Policy Review Body.⁶¹ The underlying purpose of the Trade Policy Review Body is to increase transparency by regularly monitoring member states’ trade policies and practices.⁶² To facilitate this review, members submit reports on their trade policies in

54. *Whose WTO is it Anyway?*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#council (last visited Jan. 27, 2022).

55. *Id.*

56. *Ministerial Conferences*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Jan. 27, 2022).

57. *Whose WTO is it Anyway?*, *supra* note 54.

58. *Eleventh WTO Ministerial Conference*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm (last visited Jan. 27, 2022).

59. *Twelfth WTO Ministerial Conference*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (last visited Jan. 7, 2022).

60. *The WTO General Council*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm (last visited Jan. 27, 2022).

61. *Id.*

62. *Id.*; *Trade Policy Reviews: Ensuring Transparency*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (last visited Nov. 21, 2022).

conjunction with an independent report prepared by the WTO Secretariat.⁶³ As the Dispute Settlement Body (DSB), the General Council seeks to make international trade “more secure and predictable,” and cases are generally resolved in approximately 1.5 years.⁶⁴ The DSB is considered to be “one of the strongest and most sophisticated intergovernmental dispute settlement systems in public international law,”⁶⁵ having made 350 rulings since 1994.⁶⁶ If a member state receives an adverse ruling at the DSB, it can appeal to the Appellate Body to have its case heard by a three-member panel that “broadly represent[s] the range of WTO membership.”⁶⁷ A substantial portion of this Note will focus on the DSB and Appellate Body.

C. FROM THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE TO THE PARIS AGREEMENT: A BRIEF LOOK AT THE INTERGOVERNMENTAL RESPONSE TO CLIMATE CHANGE

Over the past several years, a wide variety of intergovernmental organizations and treaty regimes have developed a “complex web”⁶⁸ of international, climate-related obligations.⁶⁹ In addition to the WTO, this Note will focus on initiatives, panels, and working groups put forth by the United Nations as well as the “three core instruments” of international climate policy: the United Nations Framework Convention on Climate Change (1992), the Kyoto Protocol (1997), and the Paris Agreement (2015).⁷⁰

The United Nations Framework Convention on Climate Change (UNFCCC), which was the first international climate treaty, sought to “stabilize greenhouse gas concentrations ‘at a level that would prevent dangerous anthropogenic . . . interference with the climate

63. See generally *Trade Policy Reviews*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (last visited Oct. 17, 2022); *Trade Policy Reviews: Ensuring Transparency*, *supra* note 62.

64. *A Unique Contribution*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 27, 2022).

65. van Asselt, *supra* note 44, at 433.

66. *Id.*

67. *A Unique Contribution*, *supra* note 64.

68. Alogna et al., *supra* note 13, at 9.

69. *Id.* at 10.

70. *Id.*

system.”⁷¹ The UNFCCC was a “framework convention,”⁷² which “d[id] not contain any specific commitments of States.”⁷³ The Kyoto Protocol, which was adopted in 1997 and entered into force in 2005, took the UPCCC a step further by “establish[ing] concrete, legally binding GHG emission reduction targets for 36 states and the European Union as a regional organization”⁷⁴ These emissions targets constituted an approximately 5% reduction relative to 1990 levels between 2008–2012.⁷⁵ Emissions targets vary by country, with “industrialized countries and economies in transition,” bound to the 5% reduction target.⁷⁶ The Kyoto Protocol also established an Adaptation Fund (AF) to “finance concrete adaptation projects and programs in developing country Parties to the Kyoto Protocol that are particularly vulnerable to the adverse effects of climate change.”⁷⁷ Additionally, the Doha Amendment to the Kyoto Protocol, which was adopted in 2012, entered into force in 2020.⁷⁸ It requires parties to reduce greenhouse gas emissions by 18 percent or more compared to 1990 levels by 2020.⁷⁹

The Paris Agreement became effective in 2016, with the explicit goals of “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels . . . [i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience . . . [and] [m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”⁸⁰ Parties are required to report on their progress every five years, with developed countries “undertaking economy-wide absolute emission reduction targets,” and developing countries “enhancing their mitigation efforts, and . . . mov[ing] over time towards economy-wide emission reduction or limitation targets.”⁸¹

71. *What is the United Nations Framework Convention on Climate Change?*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [UNFCCC], <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change> (last visited Jan. 27, 2022); *see also* Alogna et al., *supra* note 13, at 10.

72. Alogna et al., *supra* note 13, at 10.

73. *Id.*; *see* Bakker, *supra* note 32, at 201.

74. Alogna et al., *supra* note 13, at 11.

75. *What is the Kyoto Protocol?*, *supra* note 7.

76. *Id.*

77. *Adaptation Fund*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [UNFCCC], <https://unfccc.int/Adaptation-Fund> (last visited Jan. 28, 2022).

78. *What is the Kyoto Protocol?*, *supra* note 7.

79. *Id.*

80. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2 § (a)-(c), Dec. 12, 2015, T.I.A.S. No. 16-1104, U.N.T.S. 54113.

81. *Id.* art. 4.

The United Nations established the Intergovernmental Panel on Climate Change (IPCC) in 1988 and tasked it with continually assessing and reporting on scientific developments on climate change.⁸² The IPCC has 195 member governments, each of whom sends representatives to annual Plenary Sessions to determine the scope of the IPCC's reports, the principles and procedures of the IPCC, and the composition and responsibilities of the three IPCC Working Groups and several Task Forces.⁸³ Working Group I assesses scientific research based on climate change,⁸⁴ Working Group II evaluates the vulnerabilities of economies and ecosystems to climate change,⁸⁵ and Working Group III attempts to mitigate the effects of climate change by limiting greenhouse gas emissions.⁸⁶ Further, the IPCC's Task Force on National Greenhouse Gas Inventories (TFI) develops the methodology and software designed to calculate and report on greenhouse gas emissions by country.⁸⁷ The IPCC was most recently in its sixth assessment cycle, with Working Groups publishing reports from August 2021 through September 2022.⁸⁸

II. ANALYSIS

A. THE WORLD TRADE ORGANIZATION'S DISPUTE SETTLEMENT BODY AS A LITMUS TEST FOR THEIR CLIMATE AND ENVIRONMENTAL POLICY

The World Trade Organization's ("WTO") binding dispute resolution system,⁸⁹ which is comprised of the Dispute Settlement Body ("DSB") and the Appellate Body ("AB"),⁹⁰ "has compulsory jurisdiction . . . [makes] binding decisions[,] and allows for sanctions

82. THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], *supra* note 3; *History of the IPCC*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], <https://www.ipcc.ch/about/history/> (last visited Oct. 17, 2022).

83. *Structure of the IPCC*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], <https://www.ipcc.ch/about/structure/> (last visited Oct. 17, 2022); *Working Groups*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], <https://www.ipcc.ch/working-groups/> (last visited Oct. 17, 2022).

84. *Working Groups*, *supra* note 83.

85. *Id.*

86. *Id.*

87. *The Task Force on National Greenhouse Gas Inventories (TFI)*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], <https://www.ipcc.ch/working-group/tfi/> (last visited Oct. 17, 2022).

88. *Reports*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], <https://www.ipcc.ch/reports/> (last visited Jan. 28, 2022).

89. van Asselt, *supra* note 44, at 433.

90. *Id.*

in case[s] of non-compliance.”⁹¹ Both the DSB and Appellate Body have handled a wide variety of environmental trade disputes, and even though they are not bound by precedent,⁹² it may be possible to track the course of the WTO’s environmental policy (or lack thereof) by examining prominent environmental trade dispute settlements. Many prior disputes have focused on environmental trade issues rather than specifically addressing climate change, but because discussions around climate change are becoming more prominent at the WTO, and are becoming an increasingly urgent intergovernmental discussion, past decisions may provide valuable insight.⁹³

The main provisions governing environmental exceptions to the General Agreement on Tariffs and Trade (GATT) were written in 1947 and are still in force today.⁹⁴ These exceptions are enumerated in GATT Article XX, which lists several exceptions meant to allow member parties to adopt certain measures so long as they do not allow for trade discrimination or restrictions.⁹⁵ Invoking these exceptions is rarely successful—since the WTO was founded, “there have only been two successful uses . . . out of 48 attempts to defend domestic policies challenged as illegal under WTO rules.”⁹⁶ Article XX subsections (b) and (g) govern environmental issues.⁹⁷ Article XX(b) allows for members to adopt or enforce measures that are “necessary to protect human, animal or plant life or health.”⁹⁸ The Appellate Body weighs the following factors when determining whether a given measure is “necessary”: “the contribution made by the environmental

91. *Id.* It is important to note, however, that the primary remedy is for the losing country to amend its trade policy to align with the DSB’s ruling. See *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Mar. 10, 2022).

92. Nilmini Silva-Send, *Climate Change Disputes at the World Trade Organization: National Energy Policies and International Trade Liability*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 195, 223 (2013).

93. van Asselt, *supra* note 44, at 440 (“While environment-related disputes have been a feature of the WTO since its creation, climate change was hardly discussed within the organization for a long time. Around 2007 this started to change . . . then-WTO Director-General Pascal Lamy suggested that “[t]he WTO tool-box of rules can certainly be leveraged in the fight against climate change, and “adapted” if governments perceive this to be necessary to better achieve their goals.”).

94. van Asselt, *supra* note 44, at 439; GATT art. XX.

95. GATT art. XX.

96. Daniel Rangel, *WTO General Exceptions: Trade Law’s Faulty Ivory Tower*, PUBLIC CITIZEN (Feb. 4, 2022), <https://www.citizen.org/article/wto-general-exceptions-trade-laws-faulty-ivory-tower/> (noting that the successful cases were “*U.S. – Shrimp* and *U.S. – Tuna-Dolphin*”).

97. See van Asselt, *supra* note 44, at 439.

98. GATT art. XX(b).

measure to the policy objective, the importance of the common interests or values protected by the measure[,] and the impact of the measure on international trade.”⁹⁹ Even if a measure is determined to be necessary under this test, it must still be weighed against “less trade restrictive” alternatives.¹⁰⁰ Article XX(g), in turn, allows for the adoption of measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”¹⁰¹ The WTO has interpreted measures “relating” to conservation as those with a “substantial relationship between the measure and the conservation of exhaustible natural resources.”¹⁰² That a measure “relates” to conservation also requires that it “establish[es] that the means . . . are ‘reasonably related’ to the ends,” and “must be applied ‘in conjunction with restrictions on domestic production or consumption.’”¹⁰³ As such, these specific Article XX exceptions are subject to stringent tests and seem to be interpreted narrowly by the DSB and Appellate Body, even though neither are bound by previous decisions.¹⁰⁴

This concept is exemplified by Felicity Deane’s assessment of *Shrimp–Turtle*, a 1998 Appellate Body decision which ruled that despite sea turtle protections being justified under Article XX(g), the resulting trade discrimination rendered the proposed measure invalid, reinforcing that “regardless of the values that underpin the measures, they must support the [mission] of the WTO, which includes the desire to eliminate discrimination in international trade.”¹⁰⁵

Further, *Canada–Unprocessed Herring and Salmon*, which was decided by a pre-WTO GATT panel in 1988, offered an interpretation of “relate to” in Article XX(g): “while a trade measure did not have to be ‘necessary’ or ‘essential’ to the conservation of an exhaustible natural resource, it had to be ‘primarily aimed at’ the conservation of an exhaustible natural resource in order for it to ‘relate to’

99. *WTO Rules and Environmental Policies: GATT Exceptions*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Oct. 17, 2022).

100. *Id.*

101. GATT art. XX(g).

102. *WTO Rules and Environmental Policies: GATT Exceptions*, *supra* note 99.

103. *Id.*

104. Silva-Send, *supra* note 92, at 223.

105. Deane, *supra* note 46, at 81; *see also India etc. versus US: ‘Shrimp–Turtle,’* WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/envire/edis08_e.htm (last visited Oct. 17, 2022).

conservation within the meaning of Article XX(g)."¹⁰⁶ While this standard seems easier to meet than the one articulated by current, published WTO guidance,¹⁰⁷ Canada was still unable to meet it. Having multiple articulated standards, even in pre-WTO GATT decisions, could imply a lack of consistent policy in environmental decision-making and a deep level of uncertainty as to whether an Article XX exception may apply. Further, Deane argues that even if Article XX was applied consistently, that would be merely a piece of the puzzle of interpreting WTO policy:

[T]he GATT exception provisions can only be used to excuse any measures that breach the GATT obligations, they do not go so far as to excuse breaches of other 'covered agreements.' As the GATT is only one agreement that is part of this institution's regulatory framework, it would be premature to conclude that the WTO generally aligns their values with those of multilateral environmental agreements in general.¹⁰⁸

Other scholars have taken a more measured view of the WTO's jurisprudence. Harro van Asselt notes, in *Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action*, that "[a]t first blush, some of the rulings—notably those related to renewable energy support measures in Canada, India, and the United States—may give credence to the claim that the WTO is blocking climate action. However, a closer look shows that WTO dispute settlement bodies were mainly concerned with the use of local content requirements."¹⁰⁹ He further argues that recent DSB rulings "suggest that WTO jurisprudence has indeed become more amenable to integrating environmental concerns."¹¹⁰ While the WTO may have begun using more environmentally-friendly language, both van Asselt and Deane agree: that the WTO's primary concern, above all else, is "free and non-discriminatory trade."¹¹¹

106. See Deane, *supra* note 46, at 80–81; see also Report of the Panel, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.6, L/6268 (Nov. 20, 1987), GATT B.I.S.D., at 12 (1988).

107. *WTO Rules and Environmental Policies: GATT Exceptions*, *supra* note 9999.

108. See Deane, *supra* note 46, at 81.

109. van Asselt, *supra* note 44, at 462.

110. *Id.* at 434.

111. See Deane, *supra* note 46, at 74.

1. WTO and the UN: Current State of International Climate Policy Amongst Intragovernmental Stakeholders in the EU and Beyond

In *EU Climate Law and the WTO*, which examines the relationship between the European Union's (EU) climate regime and WTO rules, Emily Reid highlights that the EU "seeks to use the market to develop climate law,"¹¹² implying a level of compatibility between EU climate law and WTO rules.¹¹³ One modern manifestation of this idea is the Sustainable Development Strategy,¹¹⁴ which "required . . . all future legislative proposals include an assessment of the social, environmental and economic costs,"¹¹⁵ and "support[ed] closer cooperation between the WTO, international environmental bodies, and the ILO."¹¹⁶ Another is the EU's Emissions Trading Scheme ("ETS"), a cap-and-trade scheme that covered 45% of GHG in the EU as of 2016,¹¹⁷ which serves as an example of a multinational, collaborative scheme to mitigate the effects of climate change.¹¹⁸ Under the ETS, by 2030 emissions will be reduced to 43% lower than 2005 levels.¹¹⁹ However, this has been outpaced by the rulings in *Urgenda*, which ordered The Netherlands to reduce emissions 25% relative to 1990 by 2020, and *Milieudefensie*, which ordered Royal Dutch Shell (RDS) to reduce their emissions 45% by 2030.¹²⁰

For their part, the WTO is assisting the United Nations (UN) with the implementation of the UN's Sustainable Development Goals (SDGs).¹²¹ These goals are an integral part of the UN's 2030 Agenda for Sustainable Development, which was implemented in 2015 with

112. Reid, *supra* note 12, at 352.

113. Reid states that the issue is not only one of policy but also of governance. *Id.* at 353 ("The very significant challenge of establishing a workable international regime to tackle climate change demonstrates the existence of profound questions regarding the architecture of the governance of climate law . . . [s]uch questions . . . raise long-standing questions of democratic legitimacy and accountability.").

114. *Id.* at 354.

115. *Id.* at 355.

116. *Id.*

117. Cap-and-trade systems allow companies that are able to cut emissions faster to sell their "cap" allowances to others that are not able to reduce emissions at the same rate. See *How Cap and Trade Works*, ENV'T DEFENSE FUND, <https://www.edf.org/climate/how-cap-and-trade-works> (last visited Jan. 7, 2022).

118. Reid, *supra* note 12, at 359–60.

119. *Id.*

120. *Urgenda Case* ¶¶ 7.1–7.5.1; *Royal Dutch Shell Case* ¶ 3.1; see Wilson, *supra* note 27, at 256.

121. *The WTO and the Sustainable Development Goals*, *supra* note 8.

the goal of eliminating global poverty.¹²² Echoing the EU's SDS, the UN articulates the SDGs as "integrated and indivisible and [a] balance [of] the three dimensions of sustainable development: the economic, social and environmental."¹²³ Many of the 17 SDGs address sustainability in some capacity, and several are directly relevant to environmental protection and climate change.¹²⁴ These are Goal 7, which seeks to "ensure access to affordable, reliable, sustainable, and modern energy for all,"¹²⁵ and Goals 12–15, which seek to "ensure sustainable consumption and production patterns . . . take urgent action to combat climate change and its impacts . . . conserve and sustainably use the oceans, seas, and marine resources for sustainable development [and] protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss."¹²⁶

The WTO is committed to supporting the SDGs, and has specifically emphasized its role in supporting SDG 14 by noting that "members have been negotiating global rules to curb harmful fisheries subsidies since 2001" but that there is "renewed urgency," regarding this issue.¹²⁷ WTO members were meant to have taken steps to completely implement this goal by the Twelfth Ministerial Conference—which took place in 2022 after multiple cancellations due to the ongoing COVID-19 pandemic—but regardless, the WTO continues to report on their progress to the UN's High-Level Political Forum ("HLPF") yearly.¹²⁸ The WTO's most recent report to the HLPF, published in July 2021, includes minimal information regarding an agreement on fisheries subsidies.¹²⁹ Instead, it emphasizes the newly launched Trade and Environmental Sustainability Structured Discussions ("TESSD"), which was meant to report to WTO ministers on "the trade-dimension of climate action (SDG 13), the circular economy (SDGs 12, 14, and 15), fossil fuel subsidy reform (SDG 12), and biodiversity and sustainable energy chains (SDGs 14 and 15)."¹³⁰ A preliminary agreement on fisheries subsidies, meant to curb "illegal,

122. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).

123. *Id.* at 1

124. *Id.* at 8.

125. *Id.*

126. *Id.*

127. *The WTO and the Sustainable Development Goals*, *supra* note 8.

128. *Id.*; *Twelfth WTO Ministerial Conference*, *supra* note 59 (noting that, after multiple cancellations, the Conference took place in June 2022).

129. *WTO Contribution to the 2021 HLPF*, *supra* note 9.

130. *Id.*

unreported, and unregulated fishing,” was reached at the Twelfth Ministerial Conference, and negotiations are set to continue through the upcoming Thirteenth Ministerial Conference.¹³¹

It appears that progress towards supporting the SDGs has been largely stymied due to logistical problems posed by the COVID-19 pandemic.¹³² However, the report also emphasizes that advancement in climate protection and increasingly stringent environmental measures should not be used as a form of “backdoor” protectionism, “requir[ing] that any detrimental treatment applied for environmental reasons be coherent, evenhanded, and justifiable – in essence, that WTO members do not resort to green protectionism.”¹³³ The WTO’s primary focus, of course, continues to be the liberalization of global trade.

B. IN THE AFTERMATH OF *URGENDA* AND *MILIEUDEFENSIE*, THE WTO
MUST ADOPT CONSISTENT, FORWARD-THINKING STANDARDS
RELATED TO CLIMATE

Intergovernmental collaboration to fight climate change has moved slowly while the effects of anthropogenic climate change have only become more apparent.¹³⁴ At this point, it is indisputable that human activity has led to ever-increasing amounts of carbon dioxide in the atmosphere, and even if emissions are drastically cut, we will not be able to prevent impacts from worsening.¹³⁵ Anthropogenic climate change has caused and continues to cause “extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones,”¹³⁶ and further, “[g]lobal surface temperature will continue to increase until at least mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless *deep reductions* in CO₂ and other greenhouse gas emissions occur in the coming decades.”¹³⁷ The situation is increasingly dire, and there is no time to waste.

Urgenda and *Milieudefensie* were not lawsuits filed against polluters that were taking no steps to mitigate the effects of climate

131. World Trade Organization, Ministerial Decision of 17 June 2022, WTO Doc. WT/MIN(22)/33.

132. *WTO Contribution to the 2021 HLPF*, *supra* note 9.

133. *Id.* at 23.

134. Fountain, *supra* note 1.

135. *Id.*

136. *Climate Change 2021: The Physical Science Basis – Summary for Policymakers*, *supra* note 2.

137. *Id.* at 14 (emphasis added).

change. Both RDS and the Dutch government were ostensibly already taking steps to reduce emissions.¹³⁸ However, both climate activists and the Dutch judicial system seem to have determined that neither party was acting *fast enough*.¹³⁹ Importantly, too, RDS is bound by the emissions target set by the court as they litigate *Milieudedefensie* through the Dutch legal system;¹⁴⁰ even if the court rules in RDS's favor and the injunction is ultimately temporary, this sends the message that the behavior of private companies, even those that operate transnationally, will bear the burden of adverse judicial decisions.

With the much-delayed Twelfth Ministerial Conference not offering much in terms of substantial climate discussion,¹⁴¹ there seems to be little concrete policy for WTO members to turn to when crafting climate policies or responding to rulings like *Urgenda* and *Milieudedefensie*. This is problematic because of the substantial overlap between members of the UN, WTO, and nations that have been subject to climate change rulings.¹⁴² The Netherlands is a prime example of this, being a member of both organizations and the respondent in *Urgenda*.¹⁴³ As noted by Felicity Deane in *The Context-Integrity of the Global Carbon Regime: The Relevance and Impact of the World Trade Organization*, this overlap is simultaneously very “significant” and very complex, and “therefore when nations look to implement policies that align with institutional goals they cannot do this in a way that will thwart the alternative institution’s objectives.”¹⁴⁴ This is not easily reconciled, and there does not appear to be a simple, clear answer to this issue, as “balancing . . . trade and non-trade concerns . . . may be further put to the test with the gradual strengthening of climate action to achieve the long-term goal of the Paris Agreement.”¹⁴⁵ As such, many nations could end up in a double-bind: having to implement a climate policy (for example, reducing emissions) ordered by a court,

138. See *Our Climate Target*, SHELL PLC, <https://www.shell.com/energy-and-innovation/the-energy-future/our-climate-target.html> (last visited Oct. 17, 2022).

139. See *Urgenda Case* ¶ 5.7.3; *Royal Dutch Shell Case* ¶ 2.3.6 (each case noting that continuing the current emissions standards would lead to adverse climate impacts).

140. *Royal Dutch Shell Case* ¶ 4.5.7.

141. See *Twelfth WTO Ministerial Conference*, *supra* note 59.

142. The vast majority of countries are members of both the United Nations and the World Trade Organization. See *Member States*, UNITED NATIONS [U.N.], <https://www.un.org/en/about-us/member-states> (last visited Jan. 9, 2022); *Members and Observers*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 9, 2022).

143. *Member States*, *supra* note 142; *Members and Observers*, *supra* note 142.

144. Deane, *supra* note 46, at 75.

145. van Asselt, *supra* note 44, at 434.

or abiding by liberal trade policies per their membership in the WTO.¹⁴⁶

Another point of tension, too, is whether it would be more effective for the WTO's DSB to continue operating as it has in the past, sparingly applying GATT Article XX(b) and (g) exceptions when they naturally arise as a result of a respective state's trade and policy priorities,¹⁴⁷ or whether it would be more effective for the WTO to take a "collaborative approach,"¹⁴⁸ and explicitly amend their priorities to be more in line with the goals outlined in the Paris Agreement.¹⁴⁹ One way forward would be for the WTO to adopt a consistent set of rules related specifically to climate. In a recent ministerial statement, TESSD recognized that "international trade and trade policy can and must support environmental and climate goals and promote more sustainable production and consumption, taking into account the importance of a just transition and making progress towards achieving the Sustainable Development Goals (SDGs)."¹⁵⁰ In the same statement, TESSD committed to meeting five times in 2022 to implement its work plan and continue policymaking.¹⁵¹ Accelerating the pace by which policies are formulated and adopted is of paramount importance, but it is also important that any policy acknowledge that emissions need to be *reduced sharply* to prevent the worst effects of climate change.¹⁵² Having a clear policy with an emphasis on mitigating the effects of climate change, which is then adopted by the WTO, could also mitigate the danger of countries who have been subject to climate change-related litigation being brought into international trade disputes at the DSB.

Another option, while not necessarily feasible, is for the WTO to do nothing. When the EU extended its ETS scheme to the aviation industry, the European Court of Justice found it lawful, and it was never brought up before the DSB,¹⁵³ with Reid noting that even though "it may breach provisions of both the GATT and GATS, these violations are justifiable on environmental grounds."¹⁵⁴ Similarly, the WTO can allow each country to litigate its own climate disputes, especially

146. *See id.* at 435.

147. *See generally* van Asselt, *supra* note 44.

148. *See* Deane, *supra* note 46, at 74.

149. *See generally* Deane, *supra* note 46.

150. World Trade Organization, Ministerial Declaration of 14 December 2021, WTO Doc. WT/CTE/W/249 (2021).

151. *Id.*

152. *Climate Change 2021: The Physical Science Basis – Summary for Policymakers*, *supra* note 2.

153. Reid, *supra* note 12, at 368.

154. Reid, *supra* note 12, at 368–69.

when national policies err on the side of an ambiguous violation of GATT (or any other WTO agreement), rather than a blatant one.

III. CONCLUSION

This Note highlights the difficulty faced by both nations and intergovernmental organizations as they attempt to balance their obligations under the “complex web”¹⁵⁵ of international climate agreements¹⁵⁶ against an increasing potential set of obligations created by rulings in climate change cases. While intergovernmental organizations like the WTO have increasingly moved towards addressing climate change,¹⁵⁷ any policies they set may run into conflict with obligations that have been newly created by climate-related court orders.

There is no easy solution to this problem, but the optimal way forward would be for the WTO to adopt a consistent set of rules related specifically to climate and for the organization to continue to collaborate with the UN on their Sustainable Development Goals. This would help to relieve pressure on any nations that find themselves in the difficult position of deciding whether to implement a climate policy ordered by a court or to abide by liberal trade policies required by their membership in the WTO.¹⁵⁸

155. Alogna et al., *supra* note 13, at 9.

156. *Id.*

157. *The WTO and the Sustainable Development Goals*, *supra* note 8.

158. van Asselt, *supra* note 44, at 435.