

The Case for and Design of a **CLIMATE PEACE CLAUSE**



In the face of increasing use of trade rules to challenge climate policies and the great urgency for governments to put in place measures to address the climate crisis, this discussion paper puts forward a proposal to begin to address the clash between the trade and climate regimes.

We hope it will prompt discussion and, most importantly, action by governments to take steps to ensure that trade rules support — and certainly not hinder — governments' ability to address the climate crisis.

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I. Climate Peace Clause Overview

As proposed here, a Climate Peace Clause is a time-bound, self-enforcing commitment from governments to refrain from using dispute settlement mechanisms in international trade agreements to challenge other countries' climate mitigation and/or clean energy transition measures. A Climate Peace Clause would apply to any measure which the adopting country claims, with some factual basis, has an objective of mitigating greenhouse gas emissions and/or supporting the transition to a clean energy economy. In effect, a Climate Peace Clause would protect measures within its scope from trade challenges by other Climate Peace Clause signatories. A Climate Peace Clause would be limited in two key respects: it would not apply to challenges brought under the environmental and labor chapters of trade agreements, and it would not affect the use of domestic remedies, such as countervailing duties and anti-dumping measures, to protect domestic industries against unfair foreign trade practices. Given the climate emergency and the imperative for governments to swiftly put in place robust policies to address the crisis, a Climate Peace Clause is necessary to ensure that measures intended to address climate change are not discouraged by trade agreements.

There are three key facts driving this proposal for a Climate Peace Clause. First, the current terms of trade and investment agreements pose numerous direct conflicts with climate mitigation and clean energy transition goals and policies. Second, this legal arrangement is no longer viable, given the need for immediate widespread action to reduce greenhouse gas concentrations in the atmosphere and for countries to transition to clean energy economies. And third, revising numerous existing trade agreements to support countries' adoption of climate mitigation and energy transition policies will take significant time. Thus, a Climate Peace Clause is a temporary, near-term measure that could be adopted relatively swiftly to help reverse the current paradigm in which climate is subordinate to trade while offering countries time and space to align trade rules with the imperative to address the climate crisis.

It is important to note that a Peace Clause is not a new tool in the trade realm. The World Trade Organization's (WTO) Agreement on Agriculture included a "due restraint" provision (Article 13), commonly known as a peace clause, which provided for a trade ceasefire against countries' domestic agricultural support and other policies. It was written to expire at the end of 2003.¹ Then, in 2013 at the WTO's Bali Ministerial, in the face of a

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deadlock in WTO negotiations on public food stockholding and other matters, countries agreed to enact a new agricultural peace clause, which is designed to protect food security measures in developing countries.²

Finally, recognizing the rise in and grave threats of investor-state dispute settlement (ISDS) claims challenging climate policies, to be most effective a Climate Peace Clause should be accompanied by measures to address this. Specifically, governments should also commit to withdraw consent from ISDS claims,³ not enter into any new trade and investment agreements that include ISDS, and terminate bilateral investment treaties (BITs) — treaties specifically designed to protect foreign investors which commonly include ISDS — and ISDS provisions in free trade agreements.⁴

II. The Need for a Climate Peace Clause

Allowing the planet to warm more than 1.5°C compared to preindustrial levels risks “crisis after crisis for the vulnerable people and societies” and “irreversible loss of the most fragile ecosystems,” according to climate scientists in the Intergovernmental Panel on Climate Change (IPCC).⁵ Recognizing the catastrophic implications of inaction, in 2015, over 196 nations adopted the Paris Climate Agreement — a legally binding international treaty that sets a goal of limiting global warming to well below 2°C and preferably 1.5°C. To meet that goal, the world has until 2030 — less than a decade — to cut climate pollution by about half, according to the IPCC.⁶

The global community is far off track to meet that goal.⁷ Closing the gap will require governments to dramatically ratchet up climate action and ensure the rapid transition of energy, industrial, and transport systems. Yet trade and investment rules, written long before governments had committed to tackle climate change, are increasingly being used to directly challenge and indirectly discourage governments’ climate and renewable energy policies.

In the 1990s, the WTO became notorious as a venue for governments to challenge other governments’ conservation policies.⁸ For example, U.S. Clean Air Act regulations on gasoline⁹ and turtle-safe shrimp fishing rules protecting endangered sea turtles¹⁰ were among the cases successfully challenged at the WTO, causing the U.S government to roll back the measures. Today, the “next generation of trade and environment conflicts,”

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as Mark Wu of Harvard Law School and James Salzman from Duke University describe, “are driven by the rapid rise of green industrial policies — the application of traditional industrial policy instruments to spur the development of renewable energy and environmentally friendly industries.”¹¹

To further illustrate this point with respect to state-to-state cases, just at the WTO and within the last decade:

- Japan and the European Union successfully challenged Ontario, Canada’s feed-in tariff program to support renewable energy;¹²
- The U.S. successfully challenged India’s national program that incentivized local solar production;¹³
- India successfully challenged renewable energy programs in eight U.S. states that included “buy-local” rules;¹⁴
- Indonesia challenged the European Union’s restrictions on palm-oil based biofuels;
- Malaysia, following the Indonesia v. EU case, brought a case against the EU, France, and Lithuania, claiming that the “EU renewable energy target” violates WTO rules by discriminating against palm-oil based biofuels;¹⁵
- Trade scholars are already questioning the trade legality of the EU’s Carbon Border Adjustment Mechanism;¹⁶ and
- The European Union¹⁷ and South Korea,¹⁸ among other countries, have threatened a trade case against the tax credit for electric vehicles and other measures included in the United States’ Inflation Reduction Act.

There are multiple harms from the increasing use of trade rules to challenge climate policies, which a Climate Peace Clause would help address. These include:

1. ***Direct threats to climate policies:*** Because governments are obligated under trade-agreement rules to ensure their domestic policies conform with trade-pact rules, governments may be required to weaken or remove climate measures should a dispute settlement body find them in violation of a country’s trade obligations.

2. **Legal uncertainty and delay:** The increasing number of cases creates significant legal uncertainty and attendant delay for governments contemplating climate measures, and does so at a moment when delayed action poses catastrophic and shared global risks.
3. **Chilling effect:** The mere *threat* of timely and costly trade litigation may deter governments from adopting climate measures or move policy makers to shape policies in a way that they think will make them less likely to be challenged and/or more defensible on trade grounds. As a result, governments may fail to adopt policies altogether or may undermine their effectiveness for climate purposes.

III. Climate and the International Trade Regime

To understand how we came to a place in which trade rules threaten climate action, and therefore why a Climate Peace Clause is needed, it is important to understand three factors. First, governments face greater liability for not adhering to their trade obligations relative to their climate obligations. Second, some core trade rules are fundamentally at odds with climate policy. Third, the treatment of the environment, including climate change, within the international trade architecture can be best understood as fraught and ambiguous.

Imbalanced Incentives

Trade obligations and agreements, unlike existing climate obligations and agreements, are enforceable through sanctions, including tariffs, that can cost a nation millions, and sometimes billions, of dollars. The threat of financial penalties for countries that are found to violate their trade obligations, but not their climate obligations, creates an incentive for countries to prioritize adhering to trade commitments over climate commitments.

In addition, this imbalance in incentives may cause countries to refrain from issuing robust climate measures that risk running afoul of trade rules in order to avoid potential financial penalties or costly trade litigation. This risk is particularly acute with developing countries whose economies are more vulnerable to such penalties.

Trade Rules at Odds with Climate Measures

Most major trade agreements now in effect were written long before governments were

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actively contemplating how to tackle climate change. Some of the core terms replicated in many such pacts are fundamentally at odds with the types of actions that governments must take to significantly reduce greenhouse gas emissions and transition to clean energy economies. In fact, the WTO Secretariat even recognizes that “certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby impact on the WTO rights of other members.”¹⁹

While a full list of trade rules that could be at odds with climate policies is too extensive for this discussion paper, we provide a few illustrative examples. Trade rules currently hinder countries’ efforts to:

- ***Prioritize importing goods with low embedded emissions and/or penalize goods with high embodied emissions:*** The General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), which are two of the many agreements enforced by the WTO, sets various principles including that WTO signatory countries are forbidden from discriminating in their treatment of “like” products or services from different trade partners (GATT Article I - “Most Favored Nation” and GATS Article II - “Most Favored Nation”) or between its own products and like foreign products (GATT Article III - “National Treatment” and GATS Article XVII - “National Treatment”). Policies such as domestic taxes, licensing, or other domestic standards that differentiate physically-alike end products or services based on the processes through which they were produced can run afoul of these rules.

This concept is extended in more detail to other agreements. For example, Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) requires countries to ensure that technical regulations or standards do not treat imported products any less favorable than “like” domestic products or of “like” products from another country.²⁰ Moreover, under TBT Article 2.2, countries must ensure that technical regulations are not “prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade.”²¹

This issue of “like” products is particularly problematic for climate policy, as the emissions associated with a good often stem from the production process —

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termed a product's embodied carbon or lifecycle emissions — and are not reflected in the physical characteristics of the final product. WTO tribunals generally have ruled that such “process and production methods” cannot be considered to differentiate physically like goods, though have sometimes allowed it under specific circumstances. It is therefore unclear whether two products that are physically alike and alike in their end use, but not in their embodied emissions intensity, would be considered “like products” under the WTO. Similarly, carbon-energy-exporting countries have claimed that countries cannot treat electricity generated from renewable sources differently than electricity generated from burning carbon fuels, which governments often do via renewable portfolio standards or tax credits. To that end, a government measure which differentiates and penalizes a product or service produced with a higher emissions intensity than a comparable product could well run afoul of the WTO rules.

This, in fact, is a core issue at stake in Indonesia's challenge of the EU renewable energy program, which stipulates that palm oil-based diesel could not be counted toward the EU emission reduction target.²² Indonesia is arguing that climate regulations that distinguish between higher and lower emissions intensity, and privilege lower emissions over high-emissions products, violate TBT Articles 2.1 and 2.2 as well as the GATT Article II National Treatment rules.²³

- ***Subsidize renewable energy:*** The WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement) sets rules constraining governments' use of subsidies. The SCM defines subsidies very broadly, including any direct transfer of funds (e.g., loans, grants, equity infusion, loan guarantees), fiscal incentives such as tax credits, and any form of income or price support.²⁴ The SCM also lays out two categories of subsidies: those that are “actionable,” or subject to WTO challenge, and those that are “prohibited.” Actionable subsidies are subsidies that adversely impact the interests of another WTO member.²⁵ According to the WTO, “most subsidies, including production subsidies, fall under the ‘actionable’ category.”²⁶ Prohibited subsidies are subsidies which are contingent, in whole or part, on conditions, including export performance or the use of domestic over imported goods.

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In effect, this means that most subsidies — including subsidies necessary to mitigate climate change and/or transition to a clean energy economy — can either be challenged or are directly prohibited by WTO rules.²⁷ This is particularly problematic for climate policy. Increasing use of government subsidies to support renewable energy production has led to direct and indirect subsidization of domestic production of goods that are sold and used domestically and also exported, which has resulted in an increase of WTO disputes related to subsidies in climate policy.²⁸

- ***Ban carbon-intensive or energy-inefficient products or services:*** WTO rules pertaining to both goods and services prohibit quantitative restrictions, which are measures that limit the quantity of a product or service that may be imported or exported. Article XI of the GATT (“General Elimination of Quantitative Restrictions”) specifically prohibits quotas or other limits on the volume of goods that can be imported or exported.²⁹ GATS Article XVI (“Market Access”) forbids limits on the total value of the service in the form of quotas or other means.³⁰ In practice, this means that a government ban of certain carbon-based fuels or a phase-out of electricity delivery generated by non-renewable sources could well run afoul of the WTO rules.
- ***Diversify and expand reliable supplies of clean energy goods, including by building domestic production capacity.*** Concerns around energy security; supply chains which are unstable, energy intensive, and/or include exploitative labor practices; and the emissions associated with long-distance trade are among the many reasons that countries may seek to diversify their sourcing of green technologies and materials, including by building up new domestic capacity. In addition, incentivizing local production of green technologies is a powerful way of creating the green jobs necessary to transition to a clean energy economy. Yet, the foundational concept of “national treatment,” as established in Article III of the GATT and replicated in bilateral and multilateral trade agreements, essentially means that imported products cannot be treated any less favorably than “like” domestic products. In effect, this means that many of the policies typically used to generate demand for domestically-made goods and investment in producing them, such policies which provide benefits for domestically-produced equipment or that

condition tax or other benefits on the use of domestic equipment to produce energy, are likely to run afoul of national treatment obligations, as is evidenced from the mounting list of trade cases³¹ challenging policies that incentivize domestic production.

Inadequate Protections for Environmental Measures

Defenders of the current trade system argue that WTO members can rely on the environmental exceptions in Article XX of the GATT or Article XIV of the GATS to protect environmental measures that otherwise conflict with trade obligations “provided that a number of conditions”³² are met. For several reasons, however, these exceptions are both fundamentally inadequate and exceptionally difficult to utilize.

First, a WTO country can only raise a defense for an environmental measure *after* that measure has been challenged and found to be inconsistent with WTO rules³³ — at which point the country has likely already been embroiled in years-long trade litigation. This is untenable from the perspective of moving swiftly to address climate change, as it both deters and delays climate action. And, at a minimum, it creates great legal uncertainty for governments considering climate policies and the likelihood of substantial costs, even if the policy is eventually upheld.

Second, these exceptions are extremely difficult for countries to successfully invoke. To apply an exception, trade tribunals must find that three conditions, or thresholds, have all been met:

- *Threshold 1:* The domestic policy in question fits within the boundaries of at least one of the exceptions, such as GATT Article XX (b) which covers policies necessary to protect human, animal or plant life or GATT Article XX (g) relating to the conservation of exhaustible natural resources;^{34, 35}
- *Threshold 2:* To invoke GATT Article XX (b) or GATS Article XIV(b) concerning the protection of human, plant or animal life, the domestic policy in question must pass the “necessity test,” with trade arbitrators judging whether the measure in question is “necessary” to protect human, animal or plant life or health or whether a less trade restrictive policy could suffice; and
- *Threshold 3:* The measure must satisfy the requirements of what is called the

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“chapeau” to GATT Article XX or GATS Article XIV, including that the policy is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,” and is not “a disguised restriction on international trade.”³⁶

Due to the stringency of the conditions a country must meet to successfully utilize the exceptions, as well as free-trade leanings of trade tribunalists, the chances of protecting an environmental policy under the GATT Article XX or GATS Article XIV general exceptions are exceedingly low. In fact, in the WTO’s more than 26 years of existence, there have been only *two* successful uses of the general exceptions of GATT Article XX and GATS Article XIV, out of 48 attempts to defend domestic policies challenged as illegal under WTO rules.³⁷

The unequal incentives for countries to conform to their trade obligations over their climate commitments, outdated trade rules, and inadequate protections for environmental measures all undergird the need for a Climate Peace Clause. In addition to reducing the risks of trade challenges to climate mitigation and transition measures, a Climate Peace Clause would create incentives and much-needed space to resolve the tensions between current trade law and the imperatives for climate action while climate mitigation and transition measures are protected.

IV. Climate Peace Clause Design and Implementation

A. Scope and Coverage

In this proposal, the scope of policies that would be covered by a Climate Peace Clause includes any measure whose objective is to mitigate greenhouse gas (GHG) emissions and/or support the transition to a clean-energy economy, whether directly or indirectly.³⁸ This broad scope is necessary to ensure that a sufficiently broad universe of potential climate mitigation actions are protected. Given the very wide variety of potential climate mitigation policies and measures that different countries may favor, any attempt to list or more narrowly define the types of measures covered would almost certainly exclude some. Moreover, as actions effective in tackling climate change will continue to evolve, it is important that a Climate Peace Clause be sufficiently flexible to accommodate current and future needs.

Benefits of a Climate Peace Clause, in Sum

With less than a decade to turn the corner on the climate crisis, we cannot afford for governments to act timidly for fear of costly trade challenges. A moratorium on the use of trade agreements to challenge other countries' climate mitigation and/or clean energy transition measures would:

- Help governments safeguard existing climate mitigation and transition measures by protecting them from trade challenge;
- Create the space for governments to adopt the bolder policies that justice and science demand without fear or threat of trade challenges;
- Highlight the importance of updating international trade law to support, rather than hinder, climate mitigation measures across the world; and
- Incentivize and offer countries time to work together and resolve the tensions between current trade law and the imperative for climate action.

As just an illustrative list, the types of trade-related climate measures to be protected would include among others: measures prioritizing or discriminating against products based on their sustainability or embodied GHG emissions; rejections of fossil fuel permits or development; removal of fossil fuel subsidies; quantitative restrictions on fossil fuels; policies including subsidies, government procurement policies, and domestic content preferences to ramp up the production and distribution of renewable energy and clean energy goods such as electric vehicles, heat pumps, solar panels, and wind turbines; and policies to create and/or protect jobs that facilitate a transition to a clean energy economy.

As described below, however, given the need to ensure that climate mitigation does not come at the expense of worker rights and other forms of environmental protection, both

the labor and environmental chapters of trade agreements and frameworks must be exempt from the scope of a Climate Peace Clause.

Finally, it is important to note that a Climate Peace Clause would not impact the ability of governments to pursue domestic remedies used to protect domestic industries against unfair foreign trade practices. Thus, it does not extend to a commitment to refrain from using domestic trade remedies such as countervailing duties (*e.g.*, unilateral trade measures imposed to remedy the effect of subsidies received by foreign industries) or anti-dumping measures (*e.g.*, AD-CVD cases).

Put simply, countries must be free to adopt the climate and clean energy policies of their choosing — but nothing in a Climate Peace Clause would give nations new rights to dump subsidized goods in foreign markets or to export products made in violation of their labor and environmental obligations.

B. Determining the Objective of a Measure

To determine whether a measure's objective is to mitigate climate change and/or transition to a clean energy economy, and therefore whether it falls under the scope of a Climate Peace Clause, a measure must meet two conditions.

First, the adopting country indicates, directly or indirectly, either in the policy itself (*e.g.*, in legislation, regulation or a government policy declaration) or explanatory government materials (*e.g.*, press statement) that climate mitigation and/or a clean energy transition is a purpose of the measure, including an explanation of how the measure or policy fits into wider decarbonization efforts and/or climate commitments.

Second, there must be some evidence and/or some factual basis for the claim that the measure seeks to mitigate emissions and/or transition to a green economy. This could be discerned, for example, from the architecture, structure or context in which the measure was adopted (*e.g.*, if the measure is part of a broader climate policy).

With this approach, a country would not need to demonstrate the degree to which the measure advances the claim. In fact, questions of the degree of contribution of the measure to the objective pursued, whether it is effective enough, whether a less trade-

restrictive measure exists, or whether conditions prevailing in different countries are the same, would not be relevant. This errs on the side of inclusiveness of climate mitigation and transition policies, and avoids interfering with a country's political process and selection of a measure based on whether there were alternatives that would be more effective or less restrictive to trade.

It is important to note that, given the broad scope and the fact that most measures will have multiple effects and thus objectives, statements that the measure also serves other purposes would not be relevant and/or disqualifying. For example, if a government states that a policy is designed to deliver "high-paying jobs" in a particular domestic industry, as well as reduce greenhouse gas emissions, that policy would still fall under the scope of a Climate Peace Clause.

C. Enforcement

To avoid establishing a new, likely cumbersome and time-intensive dispute settlement process, invocation of the Climate Peace Clause should be self-judging. This means that it is the responsibility of the signatories of the Climate Peace Clause to judge when it is appropriate to respect their commitments to observe the truce inherent in the Peace Clause.

D. Labor and Environmental Exceptions

Given the need to ensure that climate mitigation does not come at the expense of worker rights and other forms of environmental protection, but rather complements those important issues, both the labor and environmental chapters of trade agreements and frameworks should not be subject to a Climate Peace Clause. This would protect the right of states and, as allowed, independent actors to bring disputes over alleged violations of labor and environmental obligations.

E. Commitments Towards Developing Countries

Developed countries, which are the largest historic emitters of greenhouse gas emissions, should be first to commit to a Climate Peace Clause. If a Climate Peace Clause is established between a developed country and a developing country whose economy would be adversely impacted by the Peace Clause (e.g., if that developing country

economy relies on revenues from exports of fossil fuels or emissions-intensive products that would be reduced as a result of a climate measure in a developed country), a Climate Peace Clause should include commitments from the developed country to provide support, such as technical assistance, financing, and/or transfer of green technologies, to the developing country.

V. Duration

A Climate Peace Clause should have a fixed-term of at least ten years, renewing automatically until countries have addressed the ways in which trade and investment policies could undermine climate action. This approach both provides certainty for countries seeking the benefits of the Climate Peace Clause and incentivizes countries to work together and resolve the tensions between current trade law and the imperative for climate action.

VI. Venues for Climate Peace Clause Agreement

A Climate Peace Clause could be proposed unilaterally by countries ready to show leadership at the intersection of trade and climate. However, a Peace Clause will be most effective with multiple signatories.

While a Climate Peace Clause could be agreed within the WTO, the WTO's infamously slow process would likely take *significant* time, thereby unnecessarily delaying the start of a Climate Peace Clause beyond this critical moment in which countries must adopt climate mitigation measures in order to avoid the worst consequences of climate change.

Therefore, a Climate Peace Clause should be established in multiple fora other than the WTO, including between a coalition of countries of the willing, through joint declarations between countries, and within the texts of pending bilateral and regional trade agreements such as the Indo-Pacific Economic Framework, the U.S.-EU Trade & Technology Council, the Americas Partnership for Economic Prosperity, and the U.S.-Kenya Strategic Trade and Investment Partnership.

VII. Investor-State Dispute Settlement

Beyond exposing countries to state-to-state trade challenges, many free trade agreements and bilateral investment treaties afford foreign corporations, including fossil fuel corporations, with broad rights and the power to privately enforce those rights. The enforcement regime, called Investor-State Dispute Settlement (ISDS), grants foreign corporations the right to directly sue a government before a private trade tribunal over laws and policies that the investor alleges have reduced the value of its investment, infringed on its stable regulatory environment, or reduced the value of the firm's expected future profits. Within the environmental arena, corporations have used ISDS to challenge scores of energy, land-use, and pollution control measures passed by democratically-elected governments.

As of January 2021, investors launched a total of more than 1,100 cases against more than 120 governments.³⁹ To illustrate just a few of the environmentally-focused ISDS cases in the last decade:⁴⁰

- Canadian firm TC Energy sued the U.S. government for \$15 billion under the North American Free Trade Agreement (NAFTA) to recover “damages that it has suffered” over the Biden administration’s refusal to grant it permits for the Keystone XL Pipeline.⁴¹ The Keystone XL pipeline was a project designed to increase the flow of high carbon intensity tar sands oil from Canada through the U.S. to markets throughout the world. The case is ongoing.
- U.S. oil and gas firm Lone Pine Resources sued the government of Canada for \$250 million under NAFTA over a bill that instituted a moratorium on shale gas exploration and development, including fracking, under the St. Lawrence River.⁴² The case is still ongoing.
- U.S. oil company ExxonMobil’s subsidiary, Mobil Investments Canada, Inc., sued the government of Canada over a policy that required oil extraction firms to commit a small percentage of their earnings to support research and development on environmental safeguards for offshore extraction and alternative energy. The case ended in a settlement with Canada agreeing to cap the research and development requirement. The settlement also grants ExxonMobil a CAD \$35 million credit to apply against the corporation’s future research and development obligations.⁴³

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In the United States, administrations from both major political parties have recognized the dangers of investor-state dispute settlement and have taken steps to eliminate ISDS from new trade agreements. Other countries are also recognizing the threats of ISDS and beginning to extract themselves from the system. For example, in 2019 the European Union member states agreed to terminate all intra-EU BITs.⁴⁴ In 2022, France⁴⁵ and Germany⁴⁶ joined Italy, Spain, and other European nations in exiting another ISDS-enforced treaty, the Energy Charter Treaty. And, South Africa, Indonesia, India, Ecuador, and Bolivia have all begun to terminate their BITs — without negative implications for foreign direct investment inflows.⁴⁷

Given the direct threats to climate policies through both ISDS cases and the threat of such cases, and the growing recognition among governments that, unlike state-to-state dispute settlement, ISDS is both unjustifiable and unnecessary in any situation, a Climate Peace Clause should be accompanied by commitments from governments to:

- Withdraw consent from ISDS claims;
- Refuse entry into any new trade and investment agreements that include ISDS; and
- Terminate ISDS provisions in existing free trade agreements and bilateral investment treaties.⁴⁸

VIII. Conclusion

The global community is running out of time to address the climate crisis, and countries need every policy tool in the toolbox to reduce emissions and ramp up renewable energy without fear of costly challenges based on trade rules. A Climate Peace Clause would give countries the policy space to maintain and enact the climate policies needed to meet or exceed their domestic and international commitments. A Climate Peace Clause would also create space for countries to work to permanently remove the threats that outdated trade rules pose to the climate action our communities urgently need. We encourage governments to begin the work internally and with stakeholder consultations to flesh out and commit to a Climate Peace Clause.

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Endnotes

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https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd18_peace_e.htm

² World Trade Organization. (November 2014). *The Bali decision on stockholding for food security in developing countries*. https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm

³ A country can withdraw consent for investors to bring claims in their country unilaterally or, as more effective options, on a bilateral, plurilateral, or multilateral basis. While scholars at Columbia Law School point out that the effectiveness of withdrawal of consent is not certain, as investors would likely challenge the legality of withdrawal of consent, and arbitrators could find in their favor, it has the potential for curtailing claims and sends a strong signal against the use of ISDS. Because of the legal uncertainty, withdrawal of consent should be a first step, followed by termination. For more information, see Johnson, Lise; Coleman, Jesse; and Guven, Brooke. Columbia Center on Sustainable Investment. (April 2018). *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law*. <https://ccsi.columbia.edu/content/clearing-path-withdrawal-consent-and-termination-next-steps-reforming-international>

⁴ Bilateral Investment Agreements include what is referred to as a “hangover clause” — a period of time, often at least 10 years, during which the BIT’s obligations continue to apply even in the case of BIT termination. To be effective in protecting climate policies, BIT termination should be done in a way that evades this liability — for example by first amending the language to remove the hangover clause and then terminating the agreement. For an example of a hangover clause, see the US-Argentina Bilateral Investment Agreement, Article XIV, paragraph 2. https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp

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²³ See DS593: European Union — Certain measures concerning palm oil and oil palm crop-based biofuels. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm.

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²⁵ For more information on what adverse impacts includes, see WTO: https://www.wto.org/english/tratop_e/scm_e/subs_e.htm

²⁶ https://www.wto.org/english/tratop_e/scm_e/subs_e.htm

²⁷ The SCM Agreement included a one-time exception for “assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms,” which phased out in 1998. WTO SCM Agreement Art 8.2(c)

²⁸ Id.

²⁹ GATT Article XI. General Elimination of Quantitative Restrictions. https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_gatt47.pdf

³⁰ GATS Article XVI. Market Access. https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXVI

³¹ Among the WTO cases against renewable energy policies that create green jobs include: [UK — CfD \(DS612\)](#), [US - Renewable Energy \(DS510\)](#); [Canada — Feed-In Tariff Program \(DS426\)](#); and [Canada - Renewable Energy \(DS412\)](#).

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³⁴ World Trade Organization. Article XX Exceptions. https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_gatt47.pdf

³⁵ Notably, the GATS, which covers energy and transportation services, does not even include an exception to protect policies relating to conservation of exhaustible natural resources.

³⁶ WTO. *GATT Article XX General Exceptions*. https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_gatt47.pdf

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³⁷ Rangel, Daniel. Public Citizen's Global Trade Watch. (February 2022). *WTO General Exceptions. Trade Law's Faulty Ivory Tower*. https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper_-1.pdf

³⁸ Countries committing to a Climate Peace Clause may decide to allow for the additional inclusion of measures whose primary objective is not climate change mitigation, but which will help address the effects of the climate crisis, such as the protection of biodiversity, adaptation measures, and controls on non-GHG pollutants.

³⁹ United Nations Conference on Trade and Development. (September, 2021). *Investor-State Dispute Settlement Cases: Facts and Figures 2020*. https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf

⁴⁰ For a full listing of cases, see: United Nations Conference on Trade and Development. *Investment Policy Hub/Investment Dispute Settlement Navigator*. <https://investmentpolicy.unctad.org/investment-dispute-settlement>

⁴¹ TC Energy. (July 2021). *TC Energy commences NAFTA claim following revocation of Keystone XL Presidential Permit*. <https://www.tcenergy.com/announcements/2021/2021-07-02-tc-energy-commences-nafta-claim-following-revocation-of-keystone-xl-presidential-permit/>

⁴² The formal notice of intent submitted by Lone Pine Resources Inc. on November 8, 2012, can be found here: <http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf>. For a summary of the legal conflict, also see: Solomon, Ilana. (November 2012). *Fracking causes friction between trade and environment* http://www.huffingtonpost.com/ilana-solomon/fracking-causes-friction-_b_2146939.html

⁴³ Public Citizen Global Trade Watch. (January, 2021). *Table of Foreign Investor-State Cases and Claims under NAFTA and other U.S. "Trade" Deals*. <https://www.citizen.org/wp-content/uploads/2021.01.08-Investor-State-Chart-Jan-2021.pdf>

⁴⁴ European Commission. *EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties*. https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en

⁴⁵ Nelsen, Arthur. The Guardian. (October 2022). *France Becomes the Latest Country to Leave the Energy Charter Treaty*. <https://www.theguardian.com/world/2022/oct/21/france-becomes-latest-country-to-leave-controversial-energy-charter-treaty>

⁴⁶ Moens, Barbara. Politico EU. (November 2022). *Germany to Leave Energy Charter Treaty*. <https://www.politico.eu/article/germany-to-leave-energy-charter-treaty/>

⁴⁷ Public Citizen. (April 2018.) *Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows*. <https://www.citizen.org/article/termination-of-bilateral-investment-treaties-has-not-negatively-affected-countries-foreign-direct-investment-inflows/>

⁴⁸ As noted above, Bilateral Investment Agreements include what is referred to as a "hangover clause" — a period of time, often at least 10 years, during which the BIT's obligations continue to apply even in the case of BIT termination. To be effective in protecting climate policies, BIT termination should be done in a way that evades this liability — for example, by first amending the language to remove the hangover clause and then terminating the agreement. For an example of a hangover clause, see the US-Argentina Bilateral Investment Agreement, Article XIV, paragraph 2. https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp