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STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT

A Proposed G20 Initiative for the International Trade and Investment Regimes on Sustainable Development and Climate Change

Daniel C. Esty

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Policy Brief

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7 Chemin de Balexert, 1219 Geneva, Switzerland
Tel: +41 22 917 8492 – E-mail: ictsd@ictsd.ch – Website: www.ictsd.org
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Daniel C. Esty, Hillhouse Professor of Environmental Law and Policy at Yale University. The author gives thanks to Yume Hoshijima for research assistance.

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LIST OF ABBREVIATIONS AND ACRONYMS

AfT	Aid for Trade
AIIB	Asian Infrastructure Investment Bank
DFQF	duty-free and quota-free
FDI	foreign direct investment
GATT	General Agreement on Tariffs and Trade
GHGs	greenhouse gases
INDCs	intended nationally determined contributions
NGO	non-governmental organisation
SCM	Agreement on Subsidies and Countervailing Measures
SDGs	Sustainable Development Goals
SIA	sustainability impact analyses
TBT	Agreement on Technical Barriers to Trade
WTO	World Trade Organization

INTRODUCTION

Sustainability moved decisively towards being a core value of the global community in 2015. In September, the United Nations General Assembly adopted a new 2030 Agenda for Sustainable Development including 17 Sustainable Development Goals (SDGs) that provide depth and clarity to the international community's ambitions for economic, environmental, and social progress over the next 15 years. In addition, 195 countries came together in Paris in December and concluded a new climate change accord that lifts the trajectory of the global response to the build-up of greenhouse gases (GHGs) in the atmosphere and commits the nations of the world to significant actions to reduce the threat of climate change. The breadth and depth of these commitments to make sustainability a fundamental element of the global community's "collective journey"[1] creates both challenges and opportunities for the international trade and investment regimes.

As a critical forum for global economic governance, the G20 (with strong leadership from China as the host nation for the 2016 G20 Summit) could provide important direction to the World Trade Organization (WTO), countries engaged in regional and bilateral trade and investment agreements, and managers of both public and private banks and funds that seek to promote economic development on the importance of conducting their activities in a manner that reinforces the SDGs and the 2015 Paris Climate Change Agreement. This paper offers an array of ideas on how to weave the concept of sustainability into the fabric of international cooperation on trade, investment, and development – including the institutions of global economic governance.

In advancing this agenda, the G20 has an opportunity to address some of the tensions that are inherent in the concept of *sustainable development* and to provide a framework for operationalising the world community's commitment to a sustainable future. Absent such efforts, there exists a real risk that the trade and investment regimes will advance principles and practices that conflict with the SDGs and with the actions required to fulfil the global community's goal of mitigating the risk of dangerous anthropogenic climate change, as well as the "intended nationally determined contributions" (INDCs) to reducing GHGs submitted by 188 nations.

China is particularly well-positioned to play a leadership role in developing and promoting this proposed initiative as it has powerfully demonstrated in recent decades how economic success can advance the sustainability agenda – and has long been committed to a peaceful and mutually beneficial development agenda that pursues "win-win" solutions to advance a "harmonious world." In fact, a commitment to operationalise the concept of sustainability within economic development strategies and institutions would be a logical extension of former Chinese President Hu Jintao's vision of a "scientific outlook on development,"[2] which has been reaffirmed and extended by China's present leadership including President Xi Jingping.

SUSTAINABILITY AS A CENTRAL PILLAR OF GLOBAL COOPERATION IN THE 21ST CENTURY

One reason for the success of the negotiations leading to the SDGs and the 2015 Paris Climate Change Agreement was a willingness to leave behind 20th century frameworks and assumptions. In both cases, the world community united around a concrete action agenda that goes beyond past talks and targets and moves towards a multidimensional "solutions" strategy for global cooperation. Both agreements draw all nations into the pursuit of ambitious global efforts with a clear emphasis on every country playing a role on the basis of "common but differentiated responsibility" and "respective capabilities." And both offer an integrated vision of how international cooperation should proceed with a clear recognition that economic, environmental, and social priorities must be pursued in parallel.

Furthermore, both the SDGs and the new Climate Agreement recognise that real progress on these challenging agendas of sweeping scope will require more than the signatures of presidents and prime ministers on a UN declaration. Success depends on building a "bottom up" implementation strategy of much broader engagement than has been emphasised in the past, drawing mayors, governors, premiers, CEOs, and civil society leaders into the conversation and ensuring that cities, states, and provinces, as well as the business community and the NGO world, all play a role in delivering the results that have been called for. The same spirit of broader engagement and emphasis on a solutions orientation that meets the "on the ground" needs of people everywhere would be useful in energising global economic governance and integrating sustainability into the trade and investment regimes as a core principle and guide to action.

1 G.A. Res. 70/1, at 1 (Sept. 25, 2015).

2 Press Release, Xinhua, Scientific Outlook on Development becomes CPC's theoretical guidance (Nov. 8, 2012), http://news.xinhuanet.com/english/special/18cpcnc/2012-11/08/c_131958919.htm.

SUSTAINABILITY IN THE INTERNATIONAL TRADING SYSTEM

While global governance related to sustainability reached a high water mark in 2015, the WTO continues to struggle. In a number of nations across the world, critics of freer trade have cast doubt on the value of recent trade agreements and have celebrated the demise of the Doha Round of negotiations. These critics suggest that trade liberalisation tends to diminish economic prospects in some countries and for some workers, and that the economic growth produced by trade often comes at the price of environmental degradation. There is a long literature that evaluates such claims both in theory and practice.[3] While the depth and substance of these claims can be debated, what is beyond doubt is that many people, organisations, and political leaders around the world have come to believe that the trading system diminishes, rather than enhances, prospects for sustainable development.

If a global commitment to international economic integration is to be revitalised and trade liberalisation and free flowing foreign investment are again to be seen as critical engines of economic growth – and thus potentially important drivers of sustainable development – the arguments of the critics must be addressed. In particular, the G20 should confront the fear that the trading system and the institutions of international economic governance, including the WTO, will undermine, rather than reinforce, the recently sharpened focus on sustainability as a core concern of the global community. To put a finer point on this observation: a G20 initiative to demonstrate that the trading system will be managed in a manner that takes sustainability seriously could enhance the system's legitimacy in a very important way.

The foundations for such an initiative are already in place. The 1994 Agreement that created the WTO makes clear in its Preamble that sustainable development is to be a core principle of the organisation.[4] The Marrakesh package of agreements contains numerous other references to various dimensions of sustainability as well as the need to protect the environment.[5] But the critics remain worried that the trading system's vision of *sustainable development* is more focused on development than sustainability, and is more concerned about economic growth than environmental progress. More broadly, they doubt that global economic governance will be managed in a way that advances the SDGs and the commitments of 188 nations to control their GHGs and reduce the threat of climate change.

The G20 could confront these fears head-on with an initiative to embed the concept of sustainability more deeply into the principles and practices of the WTO and all future trade agreements whether bilateral, regional, or multilateral. Such a Sustainability Initiative might include a number of elements.

SUSTAINABILITY ENDORSEMENT

As a clear signal of the G20 nations' commitment to sustainability as a core principle of international cooperation, the September Summit could adopt a resolution declaring that the institutions of international economic governance should be guided in all of their work by the SDGs and the 2015 Paris Climate Change Agreement.

WTO SUSTAINABILITY COMMITMENT

The G20 might further suggest that the trade regime formalise this commitment through a WTO General Council interpretive statement reiterating the importance of sustainable development as a goal, acknowledging the 2015 international agreements that heighten the global community's focus on sustainability as a core principle, and indicating (perhaps using section 104 of the North American Free Trade Agreement[6] as a rough guide) that WTO practice, including dispute settlement panels, will seek to interpret and advance trade principles in a manner that is consistent with the SDGs and climate change commitments. This statement could include an express acknowledgment that, in the event of a perceived inconsistency between a country's obligations under WTO rules and its obligations under the Paris Climate Change Agreement or the 2015 sustainable development agenda, the WTO will interpret the GATT rules (notably

3 *See, e.g.*, Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (1994); Robert Howse, *The Use and Abuse of International* Law *in WTO Trade/Environment Litigation*, in The WTO: Governance, Dispute Settlement and Developing Countries (Merit E. Janow, Victoria Donaldson & Alan Yanovich, eds., 2008); Jeffrey A. Frankel & Andrew K. Rose, *Is Trade Good or Bad for the Environment? Sorting Out the Causality*, 87 Rev. Econ. Stat. 85-91 (2005).

4 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

5 *See, e.g.*, Trade and Environment Decision of 14 April 1994, 1867 U.N.T.S. 133; Agreement on Agriculture, Apr. 15, 1994, 1867 U.N.T.S. 410; Decision on Trade in Services and the Environment, Apr. 15, 1994, 1867 U.N.T.S. 93.

6 The North American Free Trade Agreement, § 104, Dec. 17, 1992, 32 I.L.M. 289 (stating that in the case of "any inconsistency" between the agreement and "specific trade obligations" contained in several explicitly named multilateral environmental agreements, the trade obligations in the environmental agreement "shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.")

Article XX), and any other trade or investment obligations, in a manner that permits the SDG initiatives or GHG controls to go forward, so long as the country has chosen policy options that treat international and domestic interests similarly and has not overlooked obvious ways to reduce inconsistencies with its WTO obligations.

Second, the G20 might suggest a WTO General Council interpretive statement that explicitly places the SDGs and Paris Climate Change Agreement within the exemptions listed in Article XX of the GATT. Given the multilateral consensus behind both of the 2015 agreements, activities undertaken in implementing these agreements might be presumptively covered by Article XX(b) (measures "necessary to protect human, animal or plant life, or health") or XX(g) (measures "relating to the conservation of exhaustible natural resources"). Such a clarification would allow nations to pursue climate change actions and sustainability projects with less fear of interference from the international trade system.

But the language would need to be carefully crafted to avoid creating a new structure that protects hidden trade barriers in the guise of sustainability.

SUSTAINABILITY IMPACT ASSESSMENTS

The 2016 G20 Summit could break new ground with a call for the undertaking of "sustainability impact analyses" as an analytic underpinning for all new trade agreements – building on a similar commitment that the EU has launched. Such "SIAs" might require governments at the launch of negotiations to identify: (a) opportunities to enhance efforts to make progress on the SDGs or to implement the 2015 Climate Change Agreement, (b) tensions or risks that might arise from expanded trade or investment under the proposed topics for negotiation, and (c) a game plan for fulfilling the opportunities and mitigating the risks that have been highlighted. Such a requirement, modeled on the Environmental Impact Assessments required by many nations,[7] would further ensure the alignment of trade practice and future trade liberalisation efforts with the logic of sustainability as a defining feature of international cooperation.

SUPPORT FOR SUSTAINABILITY-ENHANCING MARKET ACCESS

The G20 Summit might further agree to participate in and expedite trade negotiations that would expand the flow of goods, services, and capital that support the implementation of the climate change and SDG agendas. For example, the Environmental Goods Agreement, which would reduce tariffs for environmental and energy technologies that support implementation of climate change commitments and the SDGs, does not enjoy universal participation among G20 members. Participation by the entire G20 could promote broader support for trade liberalisation in this critical sector. Such an initiative would fit nicely in the post-Doha world of trade liberalisation through sectoral agreements that can garner broad support.

The G20 could also provide new momentum for the various WTO programmes that promote export sectors in developing countries (and thus the prospect of sustainable development) including: duty-free and quota-free (DFQF) market access, Aid for Trade (AfT), and the Enhanced Integrated Framework for Least Developed Countries. Although the WTO Ministerial Conferences at Bali (2013) and Nairobi (2015) made substantial progress on these fronts, further work is needed to expand sustainable development opportunities for the world's poorest countries.

PROHIBITION ON SUSTAINABILITY-THREATENING POLICIES

The G20 could also push for an agreement on "pollution haven" provisions in future regional trade agreements that would prohibit countries from relaxing environmental standards to attract investment (similar to Section 114 of the North American Free Trade Agreement[8]). Such provisions would strengthen efforts to advance the SDGs and the INDCs that stand at the heart of the 2015 Paris Climate Change Agreement. By reducing the incentive to attract foreign direct investment (FDI) by defecting from the recently made sustainability commitments, the trading system would be seen as explicitly reinforcing the new climate accord, the SDGs, and other multilateral environmental agreements.

SUSTAINABILITY-ENHANCING RULES

The 2016 G20 Summit might also take up the call for a broader agenda of "sustainability-enhancing rules interpretations" at the WTO and in other trade and investment agreements. Such an initiative – designed to ensure that trade regime practices do not inhibit global, regional, national, or local efforts to reduce GHGs or advance programmes to meet the SDGs – might advance reinterpretations of both core WTO principles and those in related agreements. With respect to core principles, a rules interpretation that moves away from the problematic product/process distinction and acknowledges that in a

7 *See* Chris Wood, Environmental Impact Assessment: A Comparative Review (2002).

8 The North American Free Trade Agreement, § 114, *supra* note 6, 32 I.L.M. 289.

world concerned about climate change, *how* goods get produced can be as important as *what* gets made would be seen as important step towards reconciling longstanding trade and environment tensions.

In this spirit, the G20 nations might invite the WTO (perhaps through the Committee on Trade and Environment) to produce a study that analyses the rules and procedures of the international trading system and identifies those that might negatively impact the global climate and sustainable development regimes. Such a "consistency" review would help the global community limit transboundary pollution spillovers and potential races towards the bottom.

With respect to specific agreements concluded under the WTO, the G20 could push for interpretations of the Agreement on Subsidies and Countervailing Measures (SCM) and the Agreement on Technical Barriers to Trade (TBT) that advance sustainable development and climate change objectives. For example, the SCM Agreement might be interpreted to require the phase-out of fossil fuel subsidies, widespread market distortions estimated to total about $500 billion/year[9] that the G20 has previously condemned as leading to "wasteful consumption," and to outcomes that "distort markets, impede investment in clean energy sources and undermine efforts to deal with climate change."[10] As former WTO Director-General Pascal Lamy has noted, "[D] iscussion on the reform of fossil-fuel subsidies has largely bypassed the WTO. This is a missed opportunity."[11] Fossil fuel subsidies could be regulated as an anticompetitive dual pricing scheme under Articles 1.2, 2, and 5 of the Agreement on Subsidies and Countervailing Measures,[12] promoting more efficient markets and a faster energy transition.

Conversely, the SCM Agreement might be interpreted to maximise opportunities for nations to subsidise renewable energy investments and other activities that promote INDC and SDG attainment. We recognise that G20 members, including China, Canada, the EU, India, Japan, and the United States, have had past disagreements about how to handle renewable energy subsidies.[13] These conflicts are counterproductive because they increase regulatory risks for clean energy investors and produce uncertainty in the clean energy marketplace - raising the cost of capital and reducing the flow of funds to both energy efficiency projects and renewable energy investments. A clear interpretation of the SCM Agreement that allows for domestic renewable energy subsidies under defined circumstances (that avoid hidden protectionism and anti-competitive practices), while retaining strong anti-dumping protections, would facilitate the energy transition anticipated by the 2015 Paris Climate Change Agreement.[14]

Similarly, the TBT Agreement should be interpreted to enable and not inhibit energy efficiency standards, mandatory efficiency labeling, and similar regulations. Thus, the G20 Summit might call for Section 2.2 of the TBT Agreement - which recognises "protection of human health or safety, animal or plant life or health, or the environment" as a "legitimate objective" exempted from the TBT disciplines – to be interpreted to include policies and programmes aimed at attainment of INDCs and promotion of the SDGs.

While some would see these rules refinements and reinterpretations as narrow and "technical," they would - as a package – go a considerable distance towards reconciling longstanding trade and environment tensions and enhancing the legitimacy of the WTO in a world where sustainability has become a fundamental value.

SUSTAINABILITY IN DEVELOPMENT ASSISTANCE

In addition to initiatives focused on the trading system, the G20 nations might also seek to align global flows of capital and aid with the requirements of the 2015 sustainability agenda. Once again, China is well-positioned to lead such an effort. Indeed, China might catalyse such a commitment by having the Asian Infrastructure Investment Bank (AIIB) produce model sustainability guidelines, which could then be adopted for other sources of economic development funds, both public and private. Alternatively, China could produce the model guidelines in the context of its Belt and Road Initiative, which aims to enhance regional trade by promoting

9 David Coady, Ian Parry, Louis Sears & Baoping Shang, *How Large Are Global Energy Subsidies?* 31 (International Monetary Fund Working Paper No. 15/105, 2015) (noting that the International Energy Agency estimated that fossil-fuel consumption subsidies were $548 billion in 2013 and that the International Monetary Fund estimated that "pre-tax" fossil fuel subsidies were $492 billion in 2011. The IMF considers a typical subsidy as a "pre-tax" subsidy and the absence of a socially optimal carbon charge as a "post-tax" subsidy.)

10 Group of 20, Leaders' Statement, The Pittsburgh Summit, Sept. 24-25, 2009.

11 Pascal Lamy, Director-General, WTO, Remarks to the Workshop on the Role of Intergovernmental Agreements in Energy Policy (Apr. 29, 2013), http://www.wto.org/audio/wks24042013_dgpl.mp3.

12 Timothy Meyer, *Energy Subsidies and the World Trade Organization*, 17 Am. Soc'y. Intl. L. Insights 22 (2013).

13 *See, e.g.*, Request for Consultations by China, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/DS452/1 (Nov. 7, 2012); Request for Consultations by Japan, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector,* WTO Doc. WT/DS412/1 (Sept. 16, 2010); Request for Consultations by the United States, *India – Certain Measures Relating to Solar Cells and Solar Modules,* WTO Doc. WT/DS456/1 (Feb. 11, 2013).

14 *See generally* Steve Charnovitz, *Green Subsidies and the WTO* (World Bank Group Policy Research Working Paper No. 7060, 2014) (discussing how green subsidies can be violative of SCM Agreement obligations).

infrastructure development. The AIIB and the Belt and Road Initiative both seem poised to provide substantial capital to help ensure that developing countries have the requisite roads, bridges, and ports necessary for export-oriented economic development, and thus provide a critical place for the new global commitment to sustainability to be prominently embedded.

The broader argument for bringing a focus on sustainability to development assistance builds on a recognition that the mandates created by the new climate change accord and the SDGs will demand unprecedented amounts of investment. The Addis Ababa Action Agenda, adopted by the UN General Assembly in July 2015, describes a $1 trillion to $1.5 trillion annual funding gap in developing countries for infrastructure needs *alone*.[15] At the same moment, there is a savings glut in some places and large pools of capital looking to be deployed.[16] Combined with new sources of public finance like the Asian Infrastructure Investment Bank, these funds provide an ideal starting point for a G20 initiative that would aim to expand development assistance through a new model that uses limited public resources to leverage private capital. But the long-term benefit of the projects undertaken will be judged by their environmental impacts as well as their contributions to economic growth. So the undertaking of Sustainability Impact Analyses in advance of the commitment of funds to any development project would be a breakthrough.

The SIA obligation should apply to all multilateral development banks and national aid programmes – and be encouraged for all private investors. Only if the sustainability impacts of new economic activity are carefully and deliberately managed can the world community be confident that these financial flows and investments are consistent with the 2015 sustainable development and climate change objectives.

The energy and environmental effects of proposed projects and investments must be rigorously and transparently assessed by reference to clearly specified SIA standards that account, in particular, for long-term implications. Existing development banks must strengthen their standards, and the new Asian Infrastructure Investment Bank can play a particular role by developing innovative approaches to impact assessments.

SUSTAINABILITY IN NATIONAL AND LOCAL ECONOMIC STRATEGIES, PROGRAMMES, AND PROJECTS

One final element of the 2016 G20 Sustainability Initiative might be a commitment from all of the assembled countries to ensure that their national as well as regional and local economic initiatives will be undertaken in ways that reinforce, and do not undermine, the SDGs and the 2015 Paris Climate Change Agreement. Given the importance of these strategies alongside international efforts, such a commitment would ensure alignment on the principle of sustainability as an underpinning of 21st century policies at every scale.

G20'S SPECIAL ROLE

The logic of having the G20 advance the proposed Sustainability Initiative reflects not only the group's role as the *de facto* global economic governance steering committee, but also the group's enormous economic and demographic clout. Moreover, the G20 nations include all of the world's major GHG emitters and collectively account for 75% of global GHG emissions.[17] In addition, the G20 nations provide 94% of the official development assistance that flows to the developing nations of the world through multilateral development banks and national aid programmes.[18] And the G20 nations are home to the companies that represent 65% of foreign direct investments across the world.[19] Thus, the G20 nations, both

15 G.A. Res. 69/313, 14 (Aug. 17, 2015).

16 Ben S. Bernanke, *Why Are Interest Rates So Low, Part 3: The Global Savings Glut,* Brookings Institution (April 1, 2015, 11:00 AM), http://www.brookings.edu/blogs/ben-bernanke/posts/2015/04/01-why-interest-rates-low-global-savings-glut.

17 Alex Morales, *Here's What the G-20 Nations Are Pledging on Climate Change,* Bloomberg (October 4, 2015), http://www.bloomberg.com/news/articles/2015-10-04/here-s-what-the-g20-nations-are-pledging-on-climate-change.

18 Group of 20, Saint Petersburg Accountability Report on G20 Development Commitments (2013).

19 United Nations Conference on Trade and Development, UNCTADSTAT, http://unctadstat.unctad.org/, (last visited Feb. 26, 2016) (showing proportion of global FDI stock originating from G20 countries).

individually and as a group, are the "pivotal states" when it comes to setting the global economic agenda.[20]

The G20's commitment to making sustainability a core principle in economic decision making at the global, regional, national, and local scales could transform the future for every citizen of the planet. In the SDGs and the 2015 Climate Change Agreement, the world community spoke loudly, clearly, and repeatedly about the need to transform the foundations of international cooperation, including the policy frameworks that guide trade, investment, and development assistance. The G20 could take the next step and operationalise this commitment to sustainability as a core principle of international economic relations and, in doing so, help to ensure the success of the global commitment to a sustainable future that delivers on the promise of a world transformed by 2030 along the 17 dimensions highlighted by the SDGs, and diminishes the threat to progress and prosperity across the planet posed by climate change.

20 See Daniel C. Esty, *Pivotal States and the Environment*, in The Pivotal States 290 (Robert Chase, Emily Hill & Paul Kennedy, eds., 1999).

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