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Abbey Stemler

Scott Shackelford

Eric Richards

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Paris, Panels, and Protectionism: Matching US Rhetoric with Reality to Save the Planet

*Abbey Stemler, JD, MBA**

*Scott Shackelford, JD, PhD***

*Eric Richards, JD****

ABSTRACT

US rhetoric has not matched reality in the free trade or sustainability contexts, as may be seen by the ongoing debates surrounding a range of behaviors that violate international trade rules. The US government's failure to adhere to the rules that it was instrumental in crafting sets a particularly troubling precedent. These trade distortions reduce trust and respect among countries and undermine efforts to combat climate change. Simultaneously, we are witnessing a growing preference for "minilateral" agreements, as may be seen in the Obama Administration's push for the Trans-Pacific Partnership and US-EU Trade Pact. This trend is likely to continue as Donald Trump has signaled his intention to move away from

* Assistant Professor of Business Law and Ethics, Indiana University Kelley School of Business.

** Associate Professor of Business Law and Ethics, Indiana University Kelley School of Business; Director, Ostrom Workshop Program on Cybersecurity and Internet Governance; Research Fellow, Harvard Kennedy School Belfer Center on Science and International Affairs Cyber Security Project; Senior Fellow, Center for Applied Cybersecurity Research.

*** Professor of Business Law and Chair of East Asian Initiatives, Indiana University Kelley School of Business. Authors are grateful for the feedback and insights shared about this paper at the Big Ten Research Colloquium sponsored by Indiana University's Kelley School of Business.

multilateral trade deals and favor bilateral accords. The Chinese government has pursued a similar approach in the context of financial governance and, with its recent creation of the Asian Infrastructure Investment Bank, has also exhibited a willingness to circumvent existing global institutions. Concurrently, the international community has been engaged in negotiations under the umbrella of the United Nations (UN) Framework Convention on Climate Change to mitigate the threat of global climate change and similarly promote sustainability, most recently via the Paris Agreement.

This Article identifies a series of inconsistencies in US trade policies and completes a comparative case study of the ongoing disputes between China and the United States surrounding solar energy subsidies in hopes of finding opportunities for collective action that promotes both free trade and sustainability. It also pinpoints roadblocks to promoting both the free trade and sustainability movements, and through the lens of the literature on polycentric governance, discusses the trend towards—as well as the benefits and drawbacks of—minilateral and multilateral approaches to furthering sustainable development.

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I. INTRODUCTION

In late November 2015, Paris hosted one of the largest gatherings of world leaders in history.¹ Leaders were engaged in a multinational effort to mitigate the worst consequences of climate change.² Simultaneously, around the globe in Beijing, pollution reached its worst level of the year.³ Monitoring sites recorded pollutants filling the air at levels twenty times higher than considered safe by the World Health Organization.⁴ By the end of the 2015 Paris session, a “red alert” came into effect, resulting in Chinese schools shutting down and outdoor construction stopping.⁵ This episode highlights the fact that the opening up (*kai fang*) process of China’s trade borders and its integration into global markets have taken a substantial toll on the environment.⁶

1. See Coral Davenport & Gardiner Harris, *Citing Urgency, World Leaders Converge on France for Climate Talks*, N.Y. TIMES (Nov. 30, 2015), <http://www.nytimes.com/2015/12/01/world/europe/obama-climate-conference-cop21.html> [https://perma.cc/NDM7-CKX9].

2. See *id.*

3. Umberto Bacchi, *COP21: Beijing Chokes in Hazardous Pollution as President Xi Attends Paris Climate Summit*, INT’L BUS. TIMES (Nov. 30, 2015, 4:44 PM), <http://www.ibtimes.co.uk/cop21-beijing-chokes-hazardous-pollution-president-xi-attends-paris-climate-summit-1531160> [https://perma.cc/53KL-S59C].

4. *Id.*

5. *China Pollution: First Ever Red Alert in Effect in Beijing*, BBC NEWS (Dec. 8, 2015), <http://www.bbc.com/news/world-asia-china-35026363> [https://perma.cc/468E-9KVW].

6. See Justin Yifu Lin & Yan Wang, *China’s Integration with the World: Development as a Process of Learning and Industrial Upgrading* 12–13 (World Bank, Policy Research Working Paper No. 4799, 2008), <https://openknowledge.worldbank.org/bitstream/handle/10986/6336/WPS4799.pdf?sequence=1&isAllowed=y> [https://perma.cc/8GDP-LYAZ]. In his speech on the opening day of the Paris talks, Chinese President H.E. Xi Jinping stated that China learned its lesson from its hyper-quick economic development, and it is now vigorously making ecological endeavors to promote green, circular, and low-carbon growth. H.E. Xi Jinping, President, China, *Speech at the Opening Ceremony of The Paris Conference on Climate Change* (Nov. 30, 2015), http://www.chinadaily.com.cn/world/XiattendsParisclimateconference/2015-12/01/content_22592469.htm [https://perma.cc/3KZZ-RPJJ].

Fittingly, China and the United States—the world’s greatest economies and two largest emitters of greenhouse gases—were jointly instrumental in brokering the landmark Paris Agreement, which “commit[s] nearly every country to lowering planet-warming greenhouse gas emissions to help stave off the most drastic effects of climate change.”⁷ The call and response of Beijing and Paris exposes the complex intersection between global economic competitiveness and the health of global ecosystems, particularly as it relates to free trade and sustainable development.⁸ As the International Centre for Trade and Sustainable Development has noted, “[t]rade and sustainable development are intricately linked” and, as such, “trade can play a crucial role in countries’ social and economic development.”⁹ Similarly, “[a]s countries implement measures to address climate change, links to trade are discernible,” ranging from the dissemination of climate friendly technologies to restrictions on the trade of emission intensive goods.¹⁰ Balancing the three dimensions of sustainability—economic development, environmental protection, and societal health—is perhaps humanity’s greatest twenty-first century challenge.

Despite the euphoria surrounding the announcement of the Paris Accord, “[t]he new deal will not, on its own, solve global warming.”¹¹ After decades of multilateral negotiations (under the

7. Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html?emc=edit_na_20151212&nid=52536178&ref=cta&r=0 [https://perma.cc/UZL8-XB7E]. “In November 2014 in Beijing, Mr. Obama and Mr. Xi announced that they would jointly pursue plans to cut domestic greenhouse gas emissions. That breakthrough announcement was seen as paving the way to the Paris deal, in which nearly all the world’s nations have jointly announced similar plans.” *Id.*

8. The empirical phenomenon described by the environmental Kuznets Curve tells us that various indicators of environmental degradation tend to get worse in step with modern economic growth. BRUCE YANDLE, MAYA VIJAYARAGHAVAN & MADHUSUDAN BHATTARAI, *THE ENVIRONMENTAL KUZNETS CURVE* 1 (2002), <http://home.cerge-ei.cz/richmanova/UPCES%5CYandle2002EKC.pdf> [https://perma.cc/H726-GKBS].

9. INT’L CTR. FOR TRADE & SUSTAINABLE DEV. SUBMISSION, INFORMATION AND VIEWS RELATING TO MODALITIES FOR THE OPERATIONALIZATION OF A WORK PROGRAMME AND POSSIBLE FORUM ON RESPONSE MEASURES 1 (n.d.), <http://unfccc.int/resource/docs/2011/smsn/ngo/343.pdf> [https://perma.cc/2GBC-LG9L].

10. *Id.*

11. Davenport, *supra* note 7.

At best, scientists . . . say, it will cut global greenhouse gas emissions by about half enough as is necessary to stave off an increase in atmospheric temperatures of two degrees Celsius or 3.6 degrees Fahrenheit. That is the point at which, scientific studies have concluded, the world will be locked into a future of devastating consequences, including rising sea levels, severe droughts and flooding, widespread food and water shortages and more destructive storms.

auspices of both the World Trade Organization (WTO) and the UN Framework Convention on Climate Change (UNFCCC)), world leaders have yet to determine how best to preserve national economic development and the environment, in part due to differing conceptions of “sustainable development” around the world.¹² As a result, a country’s rhetoric often does not correspond with reality. This mismatch causes frustration and distrust among countries.¹³

To date, US rhetoric in particular has not matched reality in the free trade or sustainability contexts, in part because of the natural tension between the three dimensions of sustainable development. This may be seen in the recent disputes between the United States and China—the “G2”—with regard to solar panels.¹⁴ Indeed, the US government seems to be repeating history as it continually fails to live up to aspects of the international trade rules that it was so instrumental in drafting.¹⁵ This does more than undermine US moral authority as a leader and solver of global collective action problems like climate change. Simultaneously, it may well induce China to engage in similar behavior, threatening the ability of the G2 to jointly guide the international community as it seeks to promote sustainable development.¹⁶

As this Article posits, cooperation between China and the United States is essential to achieving sustainable growth because the traditional top-down, multinational regimes like the WTO and the UNFCCC, standing alone, are not equipped to solve such global problems. Instead, a new conceptual framework—in this case, polycentric governance—is required. Described as “a collective of

12. See *infra* note 23 and accompanying text.

13. For example, the United States tries to set an example by reducing demand for fossil fuels at home, but US energy companies are exporting more coal than ever before, mostly to countries with more lax environmental standards. Associated Press, *Not in My Backyard: US Sending Dirty Coal Abroad*, DAILYMAIL.COM, <http://www.dailymail.co.uk/wires/ap/article-2704738/Not-backyard-US-sending-dirty-coal-abroad.html> [<https://perma.cc/4UZ9-XX8P>] (last updated July 27, 2014, 11:01 PM).

14. See *China Pledges Further Support for Solar Industry*, REUTERS (Jan. 4, 2014), <http://uk.reuters.com/article/2014/01/04/uk-china-solar-idUKBREA0303520140104> [<https://perma.cc/44XK-9ENB>]; Dispute Settlement, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437 (Dec. 8, 2016), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds437_e.htm [<https://perma.cc/G2C3-SD7K>] (last visited Feb. 14, 2017).

15. See, e.g., Robert J. Carbaugh, *NAFTA and the U.S.-Mexican Trucking Dispute*, 4 J. INT’L & GLOB. ECON. STUD. 1, 2 (2011); *infra* Part III.

16. See, e.g., *Sustainable Development Goals*, SUSTAINABLE DEV., <https://sustainabledevelopment.un.org/?menu=1300> [<https://perma.cc/7NYG-S4RP>] (last visited Feb. 14, 2017).

partially overlapping and nonhierarchical regimes,”¹⁷ polycentric governance envisions a marriage of diverse top-down and bottom-up initiatives simultaneously addressing problems in the global commons. Over the past decade, particularly as the WTO’s Doha Round has faltered, the world has transitioned toward this multi-sectoral approach as evidenced by the growing reliance on bilateral investment treaties (BITs) and regional free trade agreements.¹⁸ The United States has opted for these minilateral arrangements, as suggested by the Obama Administration’s push for the Trans-Pacific Partnership (TPP) and the US-EU Trade Pact.¹⁹ The Chinese government is pursuing a similar approach, especially in the context of financial governance.²⁰

This minilateral wave is unlikely to replace umbrella organizations like the UNFCCC and WTO in the quest to mitigate the threat of global climate change and promote sustainability. Instead, the top-down multilaterals are likely to work in concert with emerging bottom-up minilaterals. This Article argues that such a polycentric approach is needed to promote both free trade and sustainability, but that in so doing, stakeholders—including the G2—need to address latent problems in their own policymaking to strengthen the international trade law enforcement regime that is vital to the creation of a level, global playing field. This Article identifies a series of inconsistencies in US trade policies and completes a comparative case study of the ongoing disputes between China and the United States surrounding solar energy subsidies in hopes of finding opportunities for collective action that promotes both free trade and sustainability. It also pinpoints roadblocks to promoting both the free trade and sustainability movements and, through the lens of the literature on polycentric governance, discusses the trend towards—as

17. Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 277 (2004).

18. Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement*, 34 BROOK. J. INT’L L. 304, 305 (2009) (“As a result of the failure of multilateral negotiations, the number of bilateral investment treaties (“BITs”), free trade agreements (“FTAs”), and regional trade agreements that include investment provisions has increased dramatically.”).

19. See Joe Schatz, *Obama: U.S.-EU Trade Pact Possible in 2016, but Not Congressional Approval*, POLITICO (Apr. 24, 2016, 11:48 AM), <http://www.politico.com/story/2016/04/obama-transatlantic-trade-deal-possible-in-2016-but-not-congressional-approval-222367> [<https://perma.cc/NGS8-BFT7>].

20. See Tammy Bender, *China’s Financial Minilateralism: A Boost or Threat to Traditional Multilateralism?*, CIGI (Dec. 17, 2014), <https://www.cigionline.org/articles/chinas-financial-minilateralism-boost-or-threat-traditional-multilateralism> [<https://perma.cc/KPX5-S4AU>].

well as the benefits and drawbacks of—minilateral and multilateral approaches to furthering sustainable development.

The Article is structured as follows. Part I introduces the concept of sustainable development in international law and traces past and present efforts to combat climate change. Part II describes the extent to which polycentric governance offers a useful, effective path to promote both free trade and environmental protection. Part III examines inconsistencies in past and current US behavior, particularly as they relate to global trade and the environment, in order to illustrate how they threaten coordinated action by the G2. Part IV reviews Chinese trade policy in an attempt to demonstrate the opportunities for, and threats to, Chinese and American cooperation. Finally, Part V presents a comparative solar panel case study in order to illustrate the hurdles that must be overcome in the quest for successful minilateral action by the United States and China.

II. SUSTAINABLE DEVELOPMENT AND CLIMATE CHANGE

This Part briefly introduces the concept of sustainable development in international law. It then reviews the history of climate change negotiations, followed by a brief discussion of the 2015 Paris Agreement. Each section places a special emphasis on the importance of G2 leadership to the success of efforts to address the threat of climate change.

A. Defining Sustainable Development

Sustainable development²¹ is defined in the UN Brundtland Report as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”²² The term is used in numerous contexts, often with varying meanings in the developed and developing worlds.²³ It is included in such far-flung agreements as the 1946 International Convention for

21. “On the surface, there is little difference between sustainable development and sustainability. . . .” *Sustainability and Sustainable Development Guide*, CIRCULAR ECOLOGY, <http://www.circularecology.com/introduction-to-sustainability-guide.html#WKN9UBCgQxV> [<https://perma.cc/7YJM-MS5U>]. The subtle difference is best illustrated by the quote “Sustainable development is the pathway to sustainability.” *Id.*

22. World Comm’n on Env’t and Dev., *Our Common Future*, ch. 2 ¶ 1, U.N. Doc. A/42/427, annex (1987); see also Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 78 (Sept. 25) (defining sustainable development as “[the] need to reconcile economic development with protection of the environment”).

23. See, e.g., JOHN PEZZEY, SUSTAINABLE DEVELOPMENT CONCEPTS: AN ECONOMIC ANALYSIS 55–62 (1992); *What Is Sustainable Development?*, IISD, <http://www.iisd.org/sd/> [<https://perma.cc/W78N-WSQQ>] (last visited Jan. 3, 2013).

the Regulation of Whaling and the 1983 International Tropical Timber Agreement.²⁴ Some commentators even regard sustainable development as having generated a discrete area of international law, consisting of “a corpus of international legal principles and treaties,” which merge with international commercial and environmental law.²⁵

Indeed, since the 1980s, the international legal community has attempted to create a single conceptual framework for sustainable development.²⁶ Yet results so far have been “mixed, both in terms of conceptual clarity and programmatic success.”²⁷ Some transparency, though, can be seen in reference to the five principal aims derived from the International Law Association’s (ILA) New Delhi Declaration on Principles of International Law Relating to Sustainable Development. These include: integrated policy assessment, environmental sustainability, intergenerational equity, robust political participation, and intergenerational responsibility.²⁸ These principles were designed to integrate international environmental law, human rights law, and development within the rubric of sustainable development.²⁹ More broadly, the principles echo the core elements of the Common Heritage of Mankind concept,³⁰ along with the three pillars of the sustainable development movement, namely economic development, social development, and environmental protection.³¹

However, the three pillars of sustainable development, also known as triple-bottom-line accounting or the “3Ps” (people, planet, profit) alternatively, are far from universal, as can be seen by

24. PETER H. SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE 8 (1990).

25. See, e.g., Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2115 (2005) (citing MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, AND PROSPECTS*, 268 (2004)).

26. See *id.*

27. See *id.*

28. See Int’l Law Ass’n, *New Delhi Declaration on Principles of International Law Relating to Sustainable Development, Part IV* (n.d.), http://cisdl.org/public/docs/new_delhi_declaration.pdf [<https://perma.cc/4XZG-T2JN>] [hereinafter New Delhi ILA]; see also Reed D. Benson, *Recommendations for an Environmentally Sound Policy on Western Water*, 17 STAN. ENVTL. L.J. 247, 255 (1998). See generally Nico Schrijver, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 49 NETH. INT’L L. REV. 299 (2002).

29. *Id.*

30. See KEMAL BASLAR, *THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW* xix–xx (1998) (describing the history of international efforts to bring the seabed, ocean floor, and outer space resources, such as the moon, within the CHM).

31. Jaye Ellis, *Sustainable Development as a Legal Principle: A Rhetorical Analysis*, in 2 SELECT PROC. EUR. SOC’Y INT’L L. 641, 644 (2008).

divergent state practices on the subject.³² For example, in the US context, sometimes the three pillars of sustainable development are granted equal attention, as seen in the rise of holistic sustainability reporting and benefit corporations, while at other times, there is more focus on environmental protection than economic development.³³ Conversely, in China, as with many emerging markets, the focus has long been on enhancing *economic* sustainability, primarily through rapid economic growth fueled by high levels of public investment, among other things.³⁴ Though there are some signs that, at least in China, perceptions are shifting toward a more balanced vision of sustainable development, this spectrum of approaches to such an important topic as free trade is emblematic of the difficulties involved with pursuing multilateral consensus.³⁵ For our purposes, when we refer to sustainable development we are referring to economic growth made more environmentally sensitive in order to raise living standards and avoid environmental degradation.³⁶

The lack of consensus about sustainable development has long stalled both global free trade and sustainability progress. This has been evidenced by the latency of the WTO's Doha Round, as well as a series of difficult climate summits, including the 2009 UNFCCC Copenhagen Accord.³⁷ And, while the 2015 Paris Agreement is generally recognized as a success, it has yet to be seen whether China and the United States will actually take the largely voluntary steps necessary to transition toward a low-carbon and climate-resilient

32. See, e.g., *About*, TRIPLE BOTTOM-LINE, <http://www.tbl.com.pk/about/> [https://perma.cc/3VV4-86YE] (last visited Feb. 14, 2017).

33. See, e.g., Barack Obama, President of the U.S., Remarks by the President on Sustainable Development Goals, U.N. General Assembly Hall (Sept. 27, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/27/remarks-president-sustainable-development-goals> [https://perma.cc/DA29-7HMB].

34. See, e.g., Stephanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 210 (2006), <http://chinesejil.oxfordjournals.org/content/5/1/185.full> [https://perma.cc/G96N-YEDV].

35. See, e.g., *China Air Pollution Season Kicks Off with a Cough and a Wheeze as Coal Plants Turn on for the Winter*, CBS NEWS (Oct. 21, 2013, 10:47 AM), http://www.cbsnews.com/8301-202_162-57608393/china-air-pollution-season-kicks-off-with-a-cough-and-a-wheeze-as-coal-plants-turn-on-for-the-winter/ [https://perma.cc/H7PQ-7MMK].

36. JOHN DREXHAGE & DEBORAH MURPHY, SUSTAINABLE DEVELOPMENT: FROM BRUNDTLAND TO RIO 2012, Int'l Inst. for Sustainable Dev. 10 (Sept. 19, 2010), http://www.surdurulebilirkalkinma.gov.tr/wp-content/uploads/2016/06/Background_on_Sustainable_Development.pdf [https://perma.cc/2R9R-GCCT].

37. See Chalamish, *supra* note 18, at 305; *Key Powers Reach Compromise at Climate Summit*, BBC NEWS (Dec. 19, 2009), <http://news.bbc.co.uk/2/hi/europe/8421935.stm> [https://perma.cc/X2NR-SH89].

future at all levels, especially when those steps threaten national self-interest.³⁸

B. Climate Change Negotiations

It is beyond the scope of this Article to summarize the long and, at times, convoluted history of climate change negotiations.³⁹ Rather, the point here is merely to juxtapose the bottom-up approaches to trade and sustainable development with the multilateral, top-down approach favored throughout much of the history of the UNFCCC and WTO processes.

In brief, the UNFCCC was born during the 1992 Earth Summit.⁴⁰ Its objective is to “stabiliz[e] . . . greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁴¹ The broad agreement necessary to effectuate such an ambitious, global goal meant that the 154 nations that originally signed onto the UNFCCC agreed only to a voluntary, non-binding aim of reducing atmospheric greenhouse gas concentrations to 1990 levels by 2000, a goal that many countries did not meet.⁴² In other words, it was an agreement to agree, which would be filled out through annual conference-of-the-parties (COP) gatherings that have taken place since the 1995 COP1 in Berlin and extending twenty years on to COP21 in Paris in December 2015.⁴³ There were high and low points during these COPs that are summarized for easy reference in Figure 1. Two stand-out COPs were COP3, at which time the Kyoto Protocol was

38. Clifford Krauss & Diane Cardwell, *Climate Deal's First Big Hurdle: The Draw of Cheap Oil*, N.Y. TIMES (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/business/energy-environment/climate-deals-first-big-hurdle-the-draw-of-cheap-oil.html?emc=edit_th_20160126&nl=todaysheadlines&nid=52536178&r=0 [<https://perma.cc/9VQG-KJB6>]. Falling oil prices threaten to undermine US and Chinese pledges to curb the use of fossil fuels. *See id.* Thus far, however, the leadership in both countries has not wavered. *See id.*

39. For such a concise history, see Scott J. Shackelford, *On Climate Change and Cyber Attacks: Levering Polycentric Governance to Mitigate Global Collective Action Problems*, 18 VAND. J. ENT. & TECH. L. 653, 666–79 (2016).

40. *See UN Conference on Environment and Development (1992)*, U.N., <http://www.un.org/geninfo/bp/enviro.html> [<https://perma.cc/C24X-GAKA>] (last visited Feb. 15, 2017).

41. *See* U.N. Framework Convention on Climate Change art. 2, *opened for signature* May 9, 1992, 31 I.L.M. 849, 854 (1992) [hereinafter UNFCCC]; DONALD A. BROWN, CLIMATE CHANGE ETHICS: NAVIGATING THE PERFECT MORAL STORM 138 (2013).

42. UNFCCC, *supra* note 41, art. 2; Shackelford, *supra* note 39, at 670; *History of Kyoto Protocol*, CTR. CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/international/negotiations/kyoto-protocol/history> [<https://perma.cc/9PYS-4YFR>] (last visited Feb. 15, 2017).

43. Shackelford, *supra* note 39.

adopted during the United States' "unipolar moment,"⁴⁴ and COP15, representing a low point in global climate governance with the disappointing 2009 Copenhagen Accord.⁴⁵

The Kyoto Protocol, which entered into force on February 16, 2005, when fifty-five nations had ratified it,⁴⁶ has been successful, at least in terms of participation; 191 nations have ratified the agreement as of September 2015, though several large emitters, including the United States, Australia, and Canada (which ratified the agreement but subsequently pulled out) remain outside the system.⁴⁷ Though far from perfect—Kyoto's Clean Development Mechanism has often been criticized⁴⁸—the Protocol does demonstrate the ability of the UNFCCC process to get results. Less praise is generally offered to COP15, which occurred more than a decade later in Copenhagen and featured political discord, such as that experienced between the BASIC group (Brazil, South Africa, India, and China)⁴⁹ and other power centers, including the United States, the European Union, and the G77.⁵⁰ Though an agreement featuring voluntary emissions

44. See, e.g., Fareed Zakaria, *Excerpt: Zakaria's 'The Post-American World,'* NEWSWEEK (May 3, 2008), <http://www.newsweek.com/excerpt-zakarias-post-american-world-89645> [<https://perma.cc/3VBQ-FHU9>] (suggesting that the United States no longer dominates in many areas seen to denote global power). But see Richard N. Haass, *The Age of Nonpolarity: What Will Follow* US Dominance, FOREIGN AFF. (May/June 2008), <https://www.foreignaffairs.com/articles/united-states/2008-05-03/age-nonpolarity> [<https://perma.cc/73NH-PPE5>] (arguing for the emergence of "a nonpolar international system . . . characterized by numerous centers with meaningful power").

45. See David Adam, *From Kyoto to Copenhagen*, WASH. MONTHLY (July/Aug. 2009), <https://www.unz.org/Pub/WashingtonMonthly-2009jul-2g00012> [<https://perma.cc/M2ZV-EV44>].

46. See *Kyoto Protocol Fast Facts*, CNN, <http://www.cnn.com/2013/07/26/world/kyoto-protocol-fast-facts/> [<https://perma.cc/YXG5-LKZS>] (last updated Mar. 31, 2015, 1:12 PM).

47. See Shackelford, *supra* note 39, at 672 (mentioning the United States, Canada, and Australia as emitters); see also *id.* (mentioning the United States and Canada as emitters).

48. See, e.g., Michael W. Wara, *Measuring the Clean Development Mechanism's Performance and Potential*, 55 UCLA L. REV. 1759 (2008).

49. Also known as the BRICS, this group is not only "an economic concept but increasingly . . . is also taking the form of a political entity." Haibin Niu, *A Chinese Perspective on the BRICS in 2015*, COUNCIL COUNCILS (Feb. 6, 2015), http://www.cfr.org/councilofcouncils/global_memos/p36088%20?cid=nlc-npbnews-2015_national_conference_confirmation_and_background—link48-20150602&sp_mid=48790069&sp_rid=a3plZ3VyYUBjZnIub3JnS0 [<https://perma.cc/A4ZC-5L6W>].

50. See *Key Powers Reach Compromise at Climate Summit*, *supra* note 37; see also *About the Group of 77*, GROUP 77 U.N., <http://www.g77.org/doc/> [<https://perma.cc/XSN2-ZPLP>] (last visited Feb. 15, 2017).

The Group of 77 is the largest intergovernmental organization of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.

Id.

pledges was reached, it did not really satisfy anyone.⁵¹ Still, the struggle to reach agreement across such an array of stakeholders and interests did lead to the development of more targeted forums, both in terms of membership and subject matter, in what could be considered a shift toward a polycentric approach to atmospheric management.⁵² This is manifest by the Paris Agreement's reliance on national voluntary pledges to reach its climate change mitigation goals.⁵³

51. See Rhys Gerholdt, *Copenhagen Accord Weekly Roundup: April 28, Climate Action*, U.S. CLIMATE ACTION NETWORK (Apr. 28, 2010), <http://blog.usclimatenetwork.org/climate-negotiations/copenhagen-accord-weekly-roundup-april-28/> [<https://perma.cc/W85E-KTXG>]; see also Roger Harrabin, *UN Climate Talks Extend Kyoto Protocol, Promise Compensation*, BBC (Dec. 8, 2012), <http://www.bbc.co.uk/news/science-environment-20653018> [<https://perma.cc/C7PQ-M83D>] (noting that the Russian delegation tried to slow progress at COP18 but ultimately their objections were put down by the Chairman); Matt McGrath, *Last-Minute Deal Saves Fractious UN Climate Talks*, BBC (Nov. 23, 2013), <http://www.bbc.co.uk/news/science-environment-25067180> [<https://perma.cc/J6DP-DT5X>].

52. See Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395, 395 (2011) (discussing the potential of polycentric governance to better address climate change given the failures of multilateral efforts); see also Dave Keating, *Climate Action Goes National*, POLITICO EUR. EDITION (Nov. 28, 2013), <http://www.europeavoice.com/article/imported/climate-action-goes-national/78871.aspx> [<https://perma.cc/X5GN-UA4X>] (“After the dramatic collapse of the Copenhagen summit in 2009, there has been a retreat from the idea that climate change is going to be fought through international action. The emphasis has shifted to ‘voluntary national measures’ loosely coordinated at the UN level.”).

53. See, e.g., Cameron McKenna, *Paris, Big Oil and Climate Change*, LEXOLOGY (Jan. 15, 2016), <http://www.lexology.com/library/detail.aspx?g=1ba42205-fc8a-411c-94da-d61acc409948> [<https://perma.cc/BS9R-T4XE>]. The voluntary nature of the commitments “was explicitly designed in response to the political reality in the United States. A deal that would have assigned legal requirements for countries to cut emissions at specific levels would need to go before the United States Senate for ratification. That language would have been dead on arrival in the Republican-controlled Senate, where many members question the established science of human-caused climate change, and still more wish to thwart Mr. Obama’s climate change agenda.” Davenport, *supra* note 7.

FIGURE 1: KEY DATES IN UNFCCC PROCESS⁵⁴

Year	Event
2015	COP21 Paris Agreement signed—the first global, legally binding commitment to curb greenhouse gas emissions.
2014	COP20 witnessed new pledges for the Green Climate Fund
2013	COP19/CMP9 adopted initiatives including the Durban Platform, the Green Climate Fund and Long-Term Finance, the Warsaw Framework for REDD Plus, and the Warsaw International Mechanism for Loss and Damage.
2012	Doha Amendment to the Kyoto Protocol adopted.
2011	Durban Platform for Enhanced Action drafted and accepted by the COP at COP17.
2010	Cancun Agreements drafted and largely accepted by the COP at COP16.
2009	Copenhagen Accord drafted at COP15 with countries later submitting emissions reductions pledges.
2005	Kyoto Protocol went into force.
2001	Marrakesh Accords adopted at COP7, “detailing rules for implementation of Kyoto Protocol, setting up new funding and planning instruments for adaptation, and establishing a technology transfer framework.”
1997	Kyoto Protocol formally adopted at COP3.
1995	COP1 took place in Berlin.
1992	UNFCCC was born during Earth Summit
1990	Intergovernmental Panel on Climate Change’s First Assessment Report released.

54. *Background on the UNFCCC: The International Response to Climate Change*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/items/6031.php [<https://perma.cc/EL87-Z4TA>] (last visited Feb. 15, 2017); see also Shackelford, *supra* note 39, at 675–76. For a more comprehensive timeline of the development of global climate change law and policy, see JOYEETA GUPTA, *THE HISTORY OF GLOBAL CLIMATE GOVERNANCE passim* (2014).

1. The Paris Agreement

The successful negotiation of the Paris Agreement (L'accord de Paris) in December 2015 offers hope for multilateral cooperation in combatting global warming. Several aspects of the agreement are telling. First, it was the product of the efforts of 195 nations.⁵⁵ Second, it requires action in some form from every country, rich or poor, including China.⁵⁶ While the deal by itself will not solve climate change, it provides a framework for effective action and thus is a cause for optimism. For instance, "the deal could be viewed as a signal to global financial and energy markets, triggering a fundamental shift away from investment in coal, oil, and gas as primary energy sources toward zero-carbon energy sources like wind, solar, and nuclear power."⁵⁷ Perhaps of greatest importance is the fact that the United States and China—the two largest greenhouse gas emitters—were instrumental in achieving global consensus, demonstrating the critical role played by minilateralism in furthering multilateral ends.⁵⁸

55. See *Paris Agreement*, EUR. COMMISSION, http://ec.europa.eu/clima/policies/international/negotiations/paris_en [https://perma.cc/W3HY-W6F5] (last visited Feb. 15, 2017).

56. Davenport, *supra* note 7. "Traditionally, such pacts have required developed economies like the United States to take action to lower greenhouse gas emissions, but they have exempted developing countries like China and India from such obligations." *Id.* Not all would agree that this is good thing. *Id.*

Poorer countries had pushed for a legally binding provision requiring that rich countries appropriate a minimum of at least \$100 billion a year to help them mitigate and adapt to the ravages of climate change. In the final deal, that \$100 billion figure appears only in a preamble, not in the legally binding portion of the agreement.

Id.; cf. Matthew Dalton & Syed Zain Al-Mahmood, *Rich, Poor Nations Tussle over Funds for Environment*, WALL ST. J., Dec. 9, 2015, at A11 (reporting that poor nations complain of too much red tape when trying to access funds for the emergencies resulting from global warming); Bjorn Lomborg, *This Child Doesn't Need a Solar Panel*, WALL ST. J. (Oct. 21, 2015), <http://www.wsj.com/articles/this-child-doesnt-need-a-solar-panel-1445466967> [https://perma.cc/F9BV-HCNY] (arguing that funding commitments to climate change are reducing resources available for more pressing problems like health care in poorer nations).

57. Davenport, *supra* note 7. Prior to the Paris meetings, the economic performance of green companies in the stock market has been a bust. Matt Krantz, *Investors Share Climate Burden*, PRESSREADER (Dec. 1, 2015), <http://www.pressreader.com/usa/the-arizona-republic/20151201/282144995268530>.

58. Davenport, *supra* note 7. "The two leaders met . . . just three months prior to the Paris meeting and strengthened their earlier pledges to take 'parallel steps to address climate change.'" William Mauldin & Colleen McCain Nelson, *Obama, Xi Advance Climate Deal*, WALL ST. J., Sept. 16, 2015, at A10. "The U.S. pledged last year to reduce carbon-dioxide emissions by between 26% and 28% by 2025, compared with 2005 levels, while China said it would make sure its emissions peak by 2030 or earlier." *Id.*

Under the terms of the Paris Agreement, countries must pledge to cut carbon emissions. In addition, they promise to meet every five years to publicly report on their actual performance. Thus, under the terms of the Paris Agreement, countries must pledge to cut carbon emissions. In addition, they promise to “report what they are doing, as well as publicly put forth updated plans, . . . designed to create a ‘name-and-shame’ system of global peer pressure, in hopes that countries will not want to be seen as international laggards.”⁵⁹ While all of this sounds good in theory, the real test will be whether the individual nations and their future leaders will actually follow through.⁶⁰

But for the deal to mean anything, they said, the celebratory moment must give way immediately to an era in which intensive efforts are made to squeeze emissions out of the world economy. That task will fall largely to businesses and investors, operating under emissions-reduction policies that countries have pledged to put into effect by 2020.⁶¹

However, businesses and their managers respond best to market-based incentives or disincentives. Thus, some painful choices must be made. After all, despite the fact that scientists claim “that industrial emissions of greenhouse gases [must] come to an end by roughly 2050,”⁶² the private sector is still building coal-burning power plants and “fossil-fuel companies are spending hundreds of billions a year looking for new reserves that cannot be burned if . . . [that] target is to be met.”⁶³ Still, there is hope. For instance, green technology (“greentech”) firms are leading the charge into a more sustainable twenty-first century. They joined the Obama Administration in what

59. See Davenport, *supra* note 7.

60. Its success “depends heavily on the views of the future world leaders who will carry out those policies. In the United States, every Republican candidate running for president in 2016 has publicly questioned or denied the science of climate change, and has voiced opposition to Mr. Obama’s climate change policies.” *Id.*

61. Justin Gillis, *Paris Climate Pact a Step, if Not a Cure*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/13/science/earth/climate-accord-is-a-healing-step-if-not-a-cure.html> [<https://perma.cc/3PDD-6F42>].

62. *Id.*

In China, . . . the government implemented a new rule that no matter how low world crude oil prices may fall, the price of gasoline and diesel will continue to be set as though the world price of oil were still \$40 a barrel. The goal is to prevent gasoline and diesel from becoming so cheap that China’s citizens would start consuming it indiscriminately. . . . China’s heavily state-owned refining industry will also not be allowed to keep the extra profits from buying crude oil cheaply and selling gasoline and diesel as though the crude oil still cost \$40 a barrel. Instead, the Chinese government will take the extra refining profit margin and put the money into a special fund for energy conservation and pollution control.

Krauss & Cardwell, *supra* note 38.

63. Gillis, *supra* note 61.

could be considered a polycentric push toward a more equitable climate regime.⁶⁴ Even the election of Donald Trump, who has signaled his intention to pull the United States out of the Paris Agreement (a decision that would require four years to come into force), cannot forestall global action on the issue, though it could curtail US government support for research and greentech incentives.⁶⁵

Drawing from the extensive literature on polycentric governance, this Part examines the feasibility and desirability of combining bottom-up, multi-sector approaches to sustainable trade with the more traditional top-down management structures of the WTO and UNFCCC. This includes a discussion of the elements necessary for a successful polycentric approach to the climate change problem.

C. A Polycentric Grounding

In one of her last papers, Nobel Laureate Elinor Ostrom argued that single policies adopted only on a global scale are unlikely to garner sufficient trust among stakeholders to successfully combat the effects of climate change.⁶⁶ Instead, she argued that a polycentric approach is necessary.⁶⁷ According to Professor Michael McGinnis, “[t]he basic idea [of polycentric governance] is that any group . . . facing some collective action problem should be able to address that problem in whatever way they best see fit.”⁶⁸ This could include using existing governance structures or crafting new systems.⁶⁹ In other words, “[a] system of governance is *fully polycentric* if it facilitates

64. See Katie Fehrenbacher, *Big Tech Firms, Food Companies Commit to White House Climate Change Pledge*, FORTUNE (Oct. 19, 2015), <http://fortune.com/2015/10/19/white-house-climate-pledge/> [https://perma.cc/753R-5N5R].

65. See Coral Davenport, *Diplomats Confront New Threat to Paris Climate Pact: Donald Trump*, N.Y. TIMES (Nov. 18, 2016), http://www.nytimes.com/2016/11/19/us/politics/trump-climate-change.html?_r=0 [https://perma.cc/52HG-8TWD]; *President Trump Prepares to Withdraw from Groundbreaking Climate Change Agreement, Transition Official Says*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/30/donald-trump-paris-agreement-climate-change-withdraw/> [https://perma.cc/KKU8-XR8Q].

66. See generally Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* (World Bank, Policy Research Working Paper No. 5095, 2009), <http://www.iadb.org/intal/inalcdi/pe/2009/04268.pdf> [https://perma.cc/D3A8-3VPP].

67. This argument is built on the work of numerous scholars, including Professor Andrew Murray’s analysis of polycentric cyber regulation. See ANDREW W. MURRAY, *THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT* 47–52 (2007).

68. MICHAEL D. MCGINNIS, *COSTS AND CHALLENGES OF POLYCENTRIC GOVERNANCE: AN EQUILIBRIUM CONCEPT AND EXAMPLES FROM US HEALTH CARE* 1 (2011), http://php.indiana.edu/~mcginnis/Beijing_core.pdf [https://perma.cc/USEU-JUFX].

69. *Id.* at 1–2.

creative problem-solving at all levels.”⁷⁰ This multi-level, multi-purpose, multi-functional, and multi-sectoral model⁷¹ challenges orthodoxy by demonstrating the benefits of self-organization⁷² and by examining the extent to which national and private control can, in some cases, coexist with communal management. It also posits that, due to the existence of free riders in a multipolar world, a single government or unit is unable to manage global collective action problems.⁷³ Instead, a polycentric approach recognizes that diverse organizations working at multiple levels can create different types of policies that can increase cooperation and compliance.⁷⁴ Polycentric regulation is not a simple response, but is a multifaceted one in keeping with the complexity of the crises in trade and sustainable development. It is through this lens that we view both the top-down UNFCCC process, as well as the bottom-up, national and regional approaches to trade and sustainability seen in the United States and China case studies discussed subsequently.

1. Polycentric Governance Principles

Although polycentric processes seem to be increasingly favored in both the trade and sustainable development contexts, the implications of this movement or policymakers and managers alike remains to be seen. To help better understand the contours for successful polycentric systems, we now examine several of the design principles that Professor Ostrom identified as essential for the management of common pool resources. This will, in turn, inform potential obstacles to a Chinese/American-led effort to forestall climate change.⁷⁵

70. *Id.* at 3.

71. *Id.* at 1 (defining polycentricity as “a system of governance in which authorities from overlapping jurisdictions (or centers of authority) interact to determine the conditions under which these authorities, as well as the citizens subject to these jurisdictional units, are authorized to act as well as the constraints put upon their activities for public purposes”).

72. Elinor Ostrom, *Polycentric Systems as One Approach for Solving Collective-Action Problems* 2 (Ind. Univ. Workshop in Political Theory & Policy Analysis, Working Paper Series No. 08-6, 2008), http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4417/W08-6_Ostrom_DLC.pdf?sequence=1 [<https://perma.cc/M6S5-62HT>].

73. See Ostrom, *supra* note 66, at 35.

74. Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 10 (2011); cf. Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 157 (2008) (discussing the legitimacy of polycentric regimes and arguing that “[a]ll regulatory regimes are polycentric to varying degrees”).

75. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 212 (1990).

A polycentric approach to sustainable trade demands “clearly define[s] boundaries for the user pool . . . and the resource domain.”⁷⁶ According to Professor Ostrom, “[t]he boundary rules relate to who can enter, harvest, manage, and potentially exclude others’ impacts. This element is essential because participants require assurance about trustworthiness and cooperation of the others involved.”⁷⁷ In other words, this principle evokes the importance of setting the ground rules for who can join a group or other collective effort to help guard against free riding. While this may be seen in the growth of regional accords that include a core group of invited participants, such as the TPP, Chinese perception that such a free trade agreement is an “Anyone but China” effort⁷⁸ does not bode well for future China-US cooperation.

“Proportional equivalence between benefits and costs”⁷⁹—Professor Ostrom’s second design principle—underscores the need for equity in a system so that some of the “users [do not] get all the benefits and pay few of the costs.⁸⁰ Indeed, arguments about equitable growth are at the center of disputes in the sustainable development context, such as that which may be seen in the UNFCCC atmospheric governance debates surrounding common but differentiated responsibilities.⁸¹ Similarly, in the trade context, equity frequently comes into play, as seen in WTO proceedings allowing members to prohibit dumping and other unfavorable trade practices.⁸² Of course, charges by China and other developing nations that the entire dumping regime was little more than a “bait-and-switch” tactic employed by the United States⁸³ only weakens US influence in crafting enforceable agreements to curb greenhouse gases. Similarly,

76. SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 32 (1998).

77. Elinor Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, in *GLOBAL ENVIRONMENTAL COMMONS: ANALYTICAL AND POLITICAL CHALLENGES IN BUILDING GOVERNANCE MECHANISMS* 105, 119 (Eric Brousseau et al. eds., 2012).

78. See David Pilling, *It Won't Be Easy to Build an 'Anyone but China' Club*, *FIN. TIMES* (May 22, 2013), <https://www.ft.com/content/08cf74f6-c216-11e2-8992-00144feab7de> [<https://perma.cc/HF8V-5EAB>].

79. Ostrom, *supra* note 66, at 13.

80. *Id.*

81. PIETER PAUW ET AL., *DIFFERENT PERSPECTIVES ON DIFFERENTIATED RESPONSIBILITIES: A STATE-OF-THE-ART REVIEW OF THE NOTION OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN INTERNATIONAL NEGOTIATIONS* 22 (2014), https://www.die-gdi.de/uploads/media/DP_6.2014.pdf [<https://perma.cc/AZY3-D7G9>].

82. See, e.g., ERIC RICHARDS & SCOTT SHACKELFORD, *LEGAL AND ETHICAL ASPECTS OF INTERNATIONAL BUSINESS* 161 (2014).

83. See *infra* text accompanying note 149.

charges of Chinese underreporting of its carbon output are equally problematic.⁸⁴

Professor Ostrom's third design principle calls for "collective choice arrangements . . . [that ensure] that the resource users participate in setting . . . rules."⁸⁵ It insists "that most of the individuals affected by a resource regime are authorized to participate in making and modifying the rules related to boundaries, assessment of costs . . . etc."⁸⁶ This principle implies the importance of engaged and proactive rulemaking by technical communities, the private sector, and the international community.⁸⁷ Such a "big tent" approach to policymaking is evident in the UNFCCC process, at least in terms of participation, as illustrated by the some 2,400 NGOs that participated in the 1992 Rio Summit and in many of the COPs held since then.⁸⁸ Trade talks are, by necessity, closed to encourage frank dialogue between the nations involved, but this also opens them up to criticism from stakeholders that feel alienated by the process. The United States and China, whether through the negotiation of a BIT or any other unilateral arrangement, are cautioned to actively involve all stakeholders. Precedent for this—at least after the formation of the agreement—is evidenced in the Korea-US Free Trade Agreement (KORUS), which instructs the trade partners to "seek appropriate opportunities for the public to participate in the development and implementation of cooperative environmental activities."⁸⁹

Trust, while important to the success of polycentric efforts to address the global problems like climate change, will not guarantee the absence of rule-breaking behavior.⁹⁰ Eventually, some level of active monitoring is also necessary.⁹¹ In self-organized communities,

84. Chris Buckley, *China Burns Much More Coal Than Reported, Complicating Climate Talks*, N.Y. TIMES (Nov. 3, 2015), http://www.nytimes.com/2015/11/04/world/asia/china-burns-much-more-coal-than-reported-complicating-climate-talks.html?emc=edit_th_20151104&nl=todaysheadlines&lid=52536178&r=0 [https://perma.cc/B4B9-KGCT] ("China . . . has been burning up to 17 percent more coal a year than the government previously disclosed, according to newly released data.").

85. BUCK, *supra* note 76, at 32.

86. Ostrom, *supra* note 77, at 120.

87. See George J. Siedel & Helena Haapio, *Law as a Source of Strategic Advantage: Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641, 656–57 (2010) (discussing the origins of the proactive law movement, which may be considered "a future-oriented approach to law placing an emphasis on legal knowledge to be applied before things go wrong").

88. See UN Conference on Environment and Development (1992), *supra* note 40.

89. Free Trade Agreement, Kor.-U.S., art. 20.6(4), June 30, 2007, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file852_12719.pdf [https://perma.cc/BF6G-76ZS].

90. Ostrom, *supra* note 77, at 120.

91. BUCK, *supra* note 76, at 32.

monitors are typically chosen among the members to ensure “the conformance of others to local rules.”⁹² Robust monitoring is available in the trade context through, for example, international arbitration,⁹³ more so than in the sustainable development context, which, until recently, has not been a high priority among business leaders.⁹⁴ Though there is a growing trend toward codifying a distinct field of corporate social responsibility law that is largely supportive of sustainable development, as may be seen by state and federal laws around conflict minerals and sustainable supply chains as well as sustainability initiatives from stock exchanges to require holistic reporting,⁹⁵ on balance, enforcement action remains relatively more rare. KORUS again provides a rough guide for future efforts to include a monitoring mechanism in a multilateral agreement, calling for the establishment of an Environmental Affairs Council which will meet annually to oversee the implementation of the parties’ obligations regarding environmental protection.⁹⁶

Effective conflict resolution mechanisms are also important to a polycentric approach to global problems. That is, they should be “readily available, low cost and legitimate,”⁹⁷ and, ideally, should incorporate “graduated sanctions.”⁹⁸ This latter point underscores Professor Ostrom’s caution not to allow “an infraction [to] pass unnoticed”⁹⁹—the cost of flouting agreed upon rules should be met with penalties that increase over time and with each occurrence. Currently, there is relatively little evidence that this design principle is playing out in the trade or sustainable development context, though it should be noted that reservations, at least, are not allowed in any of the “big three” climate agreements surveyed, including the Montreal

92. Ostrom, *supra* note 77, at 121.

93. For more on this topic, see RICHARDS & SHACKELFORD, *supra* note 82, at 159.

94. See Scott J. Shackelford & Ashley Walter, *Our Mini-Theme: Corporate Social Responsibility Is Now Legal*, BUS. L. TODAY, <http://www.americanbar.org/publications/blt/2015/01/intro.html> [<https://perma.cc/BW2C-U4GA>] (last visited Mar. 7, 2017).

95. See *About GRI*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> [<https://perma.cc/2GV3-6E6W>] (last visited Feb. 12, 2017) (describing GRI’s mission as helping “businesses, governments and other organizations understand and communicate the impact of business on critical sustainability issues such as climate change, human rights, corruption and many others”).

96. Free Trade Agreement, *supra* note 89, art. 20.6(1).

97. BUCK, *supra* note 76, at 32.

98. *Id.*

99. Ostrom, *supra* note 77, at 121.

Protocol, UNFCCC itself, or the Kyoto Protocol, highlighting the relative strength of this regime.¹⁰⁰

Finally, Professor Ostrom's polycentric model recognizes that robust systems generally have "governance activities . . . organized in multiple layers of nested enterprises."¹⁰¹ This nested-enterprise principle asserts that "governance activities should be organized in multiple layers of related governance regimes."¹⁰² The growing reliance on bilateral and regional (minilateral) accords working in concert with the WTO provide sound examples of this phenomenon in the free trade area.¹⁰³ And, as this paper posits, a multilevel system is also imperative in large ecological systems, like climate change efforts, where distinct local dynamics simultaneously exist.¹⁰⁴

2. The Importance of G2 Cooperation in a Polycentric Approach

The top-down approaches of the WTO and the UNFCCC are in need of complementary governance regimes. While the WTO has been effective in resolving trade disputes, its record in the area of sustainable development has long been criticized.¹⁰⁵ And the UNFCCC, while its goals are laudable, is dependent on voluntary compliance with no penalty (other than public shaming) for violators.¹⁰⁶ Minilateral, tariff-reduction initiatives like the Environmental Goods Agreement (EGA), discussed below,¹⁰⁷ are a step in the right direction. They would be even more effective if supplemented by modifications to international trade rules that would permit exporting nations to subsidize environmentally safe products without fear of countervailing duties.¹⁰⁸

100. For more on this topic of regime effectiveness in the climate change context, see Shackelford, *supra* note 39, at 704.

101. Ostrom, *supra* note 77, at 118 tbl.5.3.

102. *Id.* at 122.

103. For example, see Free Trade Agreement, *supra* note 89.

104. Ostrom, *supra* note 77, at 122.

105. "[P]otentially environmentally friendly provisions of the General Agreements on Tariffs and Trade (GATT) have been construed narrowly and thus provide little room for sustainable development principles to pay meaningful roles in trade disputes." Enrique Rene de Vera, *The WTO and Biofuels: The Possibility of Unilateral Sustainability Requirements*, 8 CHI. J. INT'L L. 661, 662 (2008). Yet, "for the . . . [WTO] to survive, environmental resources must be protected." Chelsea L. Braun, *Responsibility for the Rose: Environmental Policy and the WTO*, 82 UMKC L. REV. 537, 555 (2014).

106. See *Paris Agreement*, *supra* note 55.

107. See *infra* text accompanying notes 314-318.

108. In addition, "The WTO could . . . allow members to ban the importation of goods that they determine not to be produced in accordance with WTO-sanctioned environmental regulations. Or, the WTO could authorize members to place countervailing duties on goods that they determine to result from production processes not in conformance with WTO-sanctioned

Basically, to trigger the private sector buy-in that is essential for success, trade barriers on environmental goods must be lessened. This will “reduce the costs of green technologies, thereby supporting efforts to address global challenges such as climate change.”¹⁰⁹ This might be brought about through bilateral and multilateral agreements that create “a list of non-actionable subsidies, including subsidies for research and development assistance to adapt to new environmental requirements.”¹¹⁰ A bilateral trade agreement between the United States and China, with a strong environmental protection plank, strikes us as a reasonable step in the right direction.

Because of their economic clout, coupled with their high carbon emissions, China and the United States must lead this effort. Importantly, now more than ever China appears ready to partner with the United States in brokering environmental accords. In recent months, Chinese citizens have been in “open rebellion . . . [with] pollution . . . accounting for half of all public protests.”¹¹¹ It has become clear to Beijing’s leadership “that environmental degradation . . . [has] grown severe enough to challenge the party’s own governing mandate.”¹¹² In short, the time is right for US engagement with

environmental standards.” Braun, *supra* note 105, at 556–57. This would directly address the need to induce private action implicated by the “carbon-price” model. See *infra* note 307 and accompanying text.

109. Joshua Meltzer, *The Trans-Pacific Partnership Agreement, the Environment and Change*, in TRADE LIBERALIZATION AND INTERNATIONAL COOPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 1 (Tania Voon ed., 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Meltzer-TPP-Environment-Chapter_version-2.pdf [<https://perma.cc/56FN-2EV8>].

110. *Id.* at 30. (explaining that Article 8 of the WTO’s Subsidies and Countervailing Measures (SCM), which has since expired, originally contained a list of non-actionable subsidies; nevertheless, another complementary approach would be for developed nations like the United States to use their Generalized System of Preferences (GSP) programs to grant additional tariff reductions to exports from lesser-developed nations that adopt sustainable production methods); see RICHARDS & SHACKELFORD, *supra* note 82, at 148; de Vera, *supra* note 105, at 676 (“Under the GSP program, countries are permitted to extend preferential tariff reductions to exports from lesser-developed nations that adopt sustainable production methods.”); cf. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 95, WTO Doc. WT/DS246/AB/R (adopted Apr. 7, 2004) (holding that sustainable development is a permissible goal for increased tariff preferences under the GSP). The European Union already has pledged to use its GSP Plus program to provide “tariff reductions beyond the standard GSP reductions for countries that ratify and implement core international conventions relating to . . . [the] environment.” Michael Scaturro, *EU to Promote Sustainability, Tackle Corruption via Free Trade Agreements*, 32 Int’l Trade Rep. (BNA) No. 49, at 2133 (Dec. 10, 2015).

111. Andrew Browne, *For China “Mandate of Heaven” at Stake in Paris Talks*, WALL ST. J., Dec. 9, 2015, at A11. (“China’s intentions are clear. It is committed to increasing the share of nonfossil fuels [in] its primary energy mix to 20%, also by 2030, equivalent to the entire electrical-generation capacity of the US.”)

112. *Id.*

China on sustainability issues. In addition to the two countries' shared responsibility and concern with climate change,¹¹³ there are sound economic reasons why they should pursue a bilateral investment treaty (BIT).¹¹⁴ Importantly, the US Congress, through its US-China Economic and Security Review Commission (USCC), has "called for the expansion of trade promotion authority (TPA) to cover the prospective US-China Bilateral Investment Treaty."¹¹⁵ However, and as the next Part discusses, past and current US practices regarding its international trade obligations in general, and China in particular, threaten the prospects for such cooperation.

III. INCONSISTENCIES IN US TRADE POLICY

Joint leadership by the United States and China is crucial to the long-term success of the Paris Agreement. However, their ability to cooperatively lead the way is dependent upon their ability to generate a high level of mutual trust. This Part discusses how US failure to abide by past international commitments may undermine such trust, especially given the inevitable changes in policy priorities between presidential administrations.¹¹⁶

A. US Rhetoric Versus Reality

The United States has a checkered history of living up to its free trade rhetoric when global competition threatens entrenched

113. As a part of its stated desire to move forward on a BIT with the United States, China has expressed an interest in "expand[ing] mutually beneficial cooperation in . . . environmental protection." Cheryl Bolen, *US, China Agree to "Step Up" Work on Bilateral Investment Treaty*, 32 Int'l Trade Rep. (BNA) No. 39, at 1704 (Oct. 1, 2015).

114. Daniel C.K. Chow, *Why China Wants a Bilateral Investment Treaty with the United States*, 33 B.U. INT'L L.J. 421, 439 (2015).

[Foreign direct investment] from China is subject to US law, which allows the United States to block or unravel investment transactions that involve China with political pressure and opposition. A BIT between the United States and China could limit the ability of the United States to block or unravel such transactions.

Id. Simultaneously, a "well-designed BIT could create new investment opportunities for U.S. companies in China by allowing U.S. companies to invest in sectors that are now restricted." *Id.* at 423–24.

115. Len Bracken, *China Commission Seeks TPA Expansion to Cover US-China Investment Treaty*, 32 Int'l Trade Rep. (BNA) No. 46, at 2019 (Nov. 19, 2015). "The commission, which was created by Congress in 2000, is charged with monitoring and investigating the national security implications of the bilateral trade and economic relationship." *Id.*

116. See Greg Sargent, *The GOP Candidates Are Ignoring the Paris Climate Deal. That's a Good Thing*, WASH. POST (Dec. 16, 2015), <https://www.washingtonpost.com/blogs/plum-line/wp/2015/12/16/the-gop-candidates-are-ignoring-the-paris-climate-deal-thats-a-good-thing/> [<https://perma.cc/59EJ-6EGC>].

domestic interests. There are numerous examples of instances in which the United States has openly flouted its international trade law obligations when they come under fire from special interests groups at home.¹¹⁷ We argue that US failure to abide by the very rules it demands that others follow does more than set a bad example; it undermines the country's position as a moral leader on pressing global issues, including sustainable development.¹¹⁸ And, of equal importance, it encourages China to follow a similar path.

This shortcoming has been manifest in a variety of ways, both inside and outside the sustainable development context. For instance, the recent completion of negotiations for the TPP illustrates the United States' reluctance to fully commit to certain international norms. That treaty—yet to be ratified as of this writing—contains, in Article 29.2, a provision the United States regularly insists upon in its investment treaties. This is a security exception that stresses that a nation is not prevented from “applying measures that it considers necessary for the . . . protection of its own essential security interests.”¹¹⁹ While on one level a national security exception makes sense,¹²⁰ the US approach goes much further, with the country

117. This is nothing new. “The developing world has long accused the United States . . . of preaching free trade and forcing open markets in the developing countries while concurrently protecting . . . [its] domestic producers from foreign competition.” Eric L. Richards, Scott J. Shackelford & Abbey Stemler, *US Resistance to Global Trade Rules and the Implications for Cybersecurity and Internet Governance*, 24 MINN. J. INT'L L. 159, 159 (2015) (citing JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 244 (2002)). “This scene unfolds with increasing regularity in the United States. Political decision makers, while espousing free trade rhetoric, often replace globalization and the theory of comparative advantage with strategic intervention, whereby free trade policies are supplemented by varying combinations of export assistance and import barriers.” *Id.* at 160 (citing Alan O. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. INT'L ECON. L. 523, 564 (2004)).

118. It has been argued that the United States, while urging other nations to open their markets to free trade, simultaneously flouts WTO rules by subsidizing its domestic industry. In this way, “the authority of the US as a model for legal protection [of] international trade . . . is undermined.” Joseph M. Barbato, *Byrd Watching: Continuation of the Continued Dumping and Subsidy Offset Act*, 14 CURRENTS: INT'L TRADE L.J. 45, 50 (2005); cf. Gary G. Yerkey, *Protectionist Pressures in US Forcing Bush to Ignore WTO Obligations, EC Says*, 21 Int'l Trade Rep. (BNA) No. 1, at 33 (Jan. 1, 2004) (explaining that the EU Commission concludes that domestic protectionist pressures are “stronger than . . . [Washington's] willingness to seek internationally agreed solutions”).

119. Trans-Pacific Partnership art. 29.2(b), Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/F573-AGCB>].

120. Article XXI of the GATT permits a WTO member to take actions it “considers necessary for the protection of its essential security interests . . . or . . . for the maintenance of international peace and security.” General Agreement on Tariffs and Trade art. XXI (1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, <http://www.marxists.org/history/capitalism/gatt/ch21.htm> [<https://perma.cc/4J7G-M8EH>].

generally insisting “that this right is self-judging. That is, the country claims that it may subjectively determine what constitutes national security.”¹²¹ Although the United States now concedes that this national security exemption incorporates an obligation that each party “act in good faith,”¹²² recent cases involving Chinese investments in the United States cast some doubt on these assurances.¹²³ If the United States is suspected of making empty promises in the investment context, how can China (or other trade partners) trust US commitments made in other important arenas like climate change?

Chinese investors in the United States have long complained of the refusal by the US government to provide clear guidelines explaining what types of investments are likely to trigger the national security exception.¹²⁴ The US Committee on Foreign Investment in the United States (CFIUS)—the governmental agency charged with ensuring that foreign investments do not threaten national security—was accused of bowing to political pressure and arbitrarily blocking Chinese investments.¹²⁵ This dispute escalated when a US federal district court dismissed a lawsuit filed by Chinese investors who complained that the US government refused to provide any specific reasons why their purchase of a wind farm was a threat to national security.¹²⁶ Ultimately, however, the Circuit Court of Appeals for the District of Columbia faulted CFIUS and President Obama for failing to provide the investors with notice of evidence upon which they relied in making this finding. Specifically, the appellate court concluded that due process required that the investors be “given access to the unclassified evidence on which the . . . [government] relied and be afforded an opportunity to rebut that evidence.”¹²⁷

Indeed, it seems that when China enters the equation, the US government takes a more combative posture.¹²⁸ Consider the TPP.

121. KENNETH J. VANDEVELDE, *US INTERNATIONAL INVESTMENT AGREEMENTS* 196–99 (2009).

122. *Id.* at 212.

123. *See infra* notes 134–36 and accompanying text.

124. Lucy Hornby, *China Commerce Minister Seeks Clearer US Investment Guide*, *REUTERS* (Mar. 8, 2013), <http://www.reuters.com/article/2013/03/08/us-china-parliament-trade-idUSBRE92705K20130308> [<https://perma.cc/L6W9-PHYS>].

125. *See generally* Scott J. Shackelford, Eric Richards, Anjanette Raymond & Amanda Craig, *Using BITs to Protect Bytes: Promoting Cyber Peace and Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 *AM. BUS. L.J.* 1 (2015).

126. *See generally* *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 987 F. Supp. 2d 18 (D.D.C. 2013).

127. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 319 (D.C. Cir. 2014).

128. This anti-China focus has revealed itself in the area of cybersecurity where the Justice Department has engaged in aggressive espionage investigations and prosecutions aimed at ferreting out Chinese spies in the United States. Yet, in 2015, in two high profile cases

On November 5, 2015, the executive branch released the text of the agreement to the public and the President officially notified Congress of his intent to sign the deal.¹²⁹ In preparation for the uphill battle to gain congressional approval in an election year, the President, rather than extol the virtues of the free trade regime, announced: “If we don’t pass this agreement—if America doesn’t write those rules—then countries like China will.”¹³⁰ This was not the first time that President Obama used anti-China rhetoric to pitch the TPP.¹³¹

In contrast to this anti-China tone from the US leadership, China has displayed a more tactful posture. Zhang Xiangchen, China’s deputy international trade representative, told reporters that “no US officials have welcomed Chinese participation in the TPP, but Beijing welcomes the TPP initiative and hopes that it will be open and inclusive, eventually bolstering the multilateral trading system.”¹³² This statement, if true, reinforces the view that Beijing would like to

involving Chinese academics working in the United States, the Justice Department was forced to withdraw charges after it became clear that no illegal conduct had occurred. Matt Apuzzo, *US Drops Charges That Professor Shared Technology with China*, N.Y. TIMES (Sept. 11, 2015), http://www.nytimes.com/2015/09/12/us/politics/us-drops-charges-that-professor-shared-technology-with-china.html?emc=edit_th_20150912&nl=todaysheadlines&nliid=52536178&r=0 [<https://perma.cc/M6JX-U6LQ>]; Nicole Perlroth, *Accused of Spying for China, Until She Wasn’t*, N.Y. TIMES (May 9, 2015), <http://www.nytimes.com/2015/05/10/business/accused-of-spying-for-china-until-she-wasnt.html> [<https://perma.cc/HT4L-9SY3>] (“[M]ore than half of the economic espionage indictments since 2013 have had a China connection. . . . ‘They came across a person of Chinese descent and a little bit of evidence that they may have been trying to benefit the Chinese government, but it’s clear there was a little bit of Red Scare and racism involved,’ said Peter J. Toren, a former federal prosecutor who specialized in computer crimes and industrial espionage.”).

129. See Vicki Needham, *Obama Tells Congress He Will Sign TPP*, HILL (Nov. 5, 2015, 4:53 PM), <http://thehill.com/policy/finance/259322-obama-tells-congress-he-will-sign-the-tpp-pact> [<https://perma.cc/45QL-YGNE>].

130. See *Here’s the Deal: The Text of the Trans-Pacific Partnership*, MEDIUM, <https://medium.com/the-trans-pacific-partnership/here-s-the-deal-the-text-of-the-trans-pacific-partnership-103adc324500#.57hjirkqs> [<https://perma.cc/UK7M-LZ5T>] (last visited Mar. 7, 2017).

131. Jackie Calmes, *Trans-Pacific Partnership Deal Is Reached*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?emc=edit_na_20151005&nliid=52536178&ref=cta&r=0 [<https://perma.cc/TZ65-YR8G>] (“‘When more than 95 percent of our potential customers live outside our borders, we can’t let countries like China write the rules of the global economy,’ Mr. Obama said in a statement.”). Of course, this is not the first time foreign policy issues have been used to defend trade deals. “Such arguments can be easier to grasp than the mind numbing details of trade agreements. President Bill Clinton argued that the North American Free Trade Agreement would bolster Mexico and frustrate Japan’s ambitions in the Western Hemisphere.” Bob Davis, *The US-China Disconnect on Trade Deals*, WALL ST. J., May 4, 2015, at 8.

132. Len Bracken, *Beijing Looks for Speedy TPP Conclusion So Washington Can Focus on BIT Negotiation*, 32 Int’l Trade Rep. (BNA) No. 26, at 1160 (June 25, 2015).

see a speedy conclusion to the TPP so the US can focus on a US-China BIT.¹³³

Despite its suspicion of China, the Obama Administration did seem to understand the importance of closer cooperation with China.¹³⁴ After all, accompanying China's recent economic swoon are potential benefits to the United States as "big Chinese firms . . . [are] likely to invest more in the [United States] as returns on investment shrink in China and expand in the [United States]."¹³⁵ In fact, in the year prior to China's economic downturn, "Chinese companies plowed \$12 billion into the [United States], up from zero in the early 2000s, making it the fastest growing source of foreign direct investment in the country."¹³⁶ Thus, a major impetus for President Xi Jinping's visit to Washington in 2015 was to garner support for a BIT aimed at encouraging Chinese ventures in the United States and opening up access to foreign investment in China where it is barred or restricted.¹³⁷

The test will be how well the US government is able to balance its desire for greater China-US cooperation on environmental and trade policy with wariness over Chinese military and economic power. Tensions are mounting as the United States interjects itself in the middle of China's conflicts with its neighbors over territorial claims to islands in the South and East China Seas. Though recent US naval patrols in the contested waters were intended to be a cautious approach, they run the risk of provoking President Xi, especially since they occurred in the midst of his meeting with the Communist Party's Central Committee.¹³⁸

China's claim to the artificial islands has been described as that country's "intent to break free from what it sees as American encirclement—a system of alliances that reaches from the Korean peninsula through Japan and the Philippines. . . . [T]hey are symbols

133. *Id.*

134. Cheryl Bolen, *US, China to "Step Up" Work on Bilateral Investment Treaty*, 32 Int'l Trade Rep. (BNA) No. 39, at 1703 (Oct. 1, 2015). "The two countries will expand mutually beneficial cooperation in energy, environmental protection, science and technology, aviation, infrastructure, agriculture, health and other areas. . . ." *Id.* at 1704.

135. Bob Davis, *China Woes Could Be Good for US Economy*, WALL ST. J., Sept. 9, 2015, at A2.

136. Bonnie Cao & Ye Xie, *Chinese Companies Build Factories in US, but Investors Bring Tensions Along with Jobs*, 32 Int'l Trade Rep. (BNA) No. 36, at 1559 (Sept. 10, 2015).

137. *Id.* For more on the proposed US-China BIT and its implications (including in the cybersecurity context), see Shackelford et al., *supra* note 125, at 1-4.

138. Jeremy Page, Gordon Lubold & Adam Entous, *Navy Tests China over Sea Claims*, WALL ST. J., Oct. 28, 2015, at A1, A12. This meeting was viewed "as a test of Mr. Xi's political standing." *Id.*

of a thrusting nationalism under President Xi Jinping.”¹³⁹ Of course, for the United States, the stakes are equally high.¹⁴⁰ The hope is that the two powers will avoid escalation because they understand the need for cooperation. “But nationalism is the wild card. It’s inconceivable that Mr. Xi, a popular strongman, won’t respond in some way, and he’ll be under greater pressure to act if public opinion becomes inflamed.”¹⁴¹

The pressure on China’s leadership should not be underestimated. Chinese leaders are confronted by a need to manage internal crises, particularly the country’s pollution and slowing economic growth, while simultaneously facing the external threat posed by US attempts to contain Chinese influence in East and South Asia. Their response to these threats has been described as:

a dual strategy of “strike the mountain to shock the tiger” and “kill the chicken to scare the monkey.” The first strategy is an internal approach designed to take down a few powerful leaders to scare the lesser ones. The second strategy is an external approach in which leaders go after lesser powers to diminish the role or prevent the involvement of a greater power.¹⁴²

China’s assertion of dominance over the contested waters concerns the United States (the greater power) and Japan, the Philippines, and Vietnam (the lesser powers).¹⁴³ Thus, direct involvement by the United States in the territorial dispute, coupled with the China containment language behind US motivations for the TPP, only fuel nationalist flames within China. In particular, China’s leaders might well view the TPP as an “every country but China” treaty.¹⁴⁴ Ultimately, the United States must tread lightly because, despite China’s fears of encirclement, Beijing still recognizes the importance of a cooperative relationship with the United States on issues like investment and the environment.

The United States must be careful not to sabotage this opportunity. Recent history illustrates that China will fight back if provoked. For instance, in the international trade arena, it took the

139. Andrew Browne, *Horizon Shifts in Spratly Islands Dispute*, WALL ST. J., Oct. 28, 2015, at A12.

140. “For America, the stakes are equally high: Its future as a maritime power in the Asia-Pacific; the credibility of its security guarantees to its allies—all of them concerned about China’s growing military might, and the principle that territorial disputes must be resolved on the basis of law, not coercion.” *Id.*

141. *Id.*

142. J.M. Norton, *Why China Wants to “Strike the Mountain” and “Kill the Chicken,”* DIPLOMAT (Jan. 9, 2014), <http://thediplomat.com/2014/01/why-china-wants-to-strike-the-mountain-and-kill-the-chicken/> [<https://perma.cc/2773-TSB6>].

143. *Id.*

144. *Id.*

United States almost a decade to finally come into compliance with a string of WTO rulings condemning its practice of zeroing in on “dumping” investigations.¹⁴⁵ Simultaneously, the country also refused to comply with WTO panel decisions that held its practice of distributing the proceeds of antidumping tariffs to domestic producers to be WTO-illegal.¹⁴⁶ Even when compliance did occur, it seemed to be more a result of “a realization that reform was the only way to avoid retaliatory tariffs imposed on US exports by major trade partners.”¹⁴⁷

US use and abuse of antidumping laws has created several adverse results. First, “the very concept of antidumping relief [already] was under fire from much of the developing world.”¹⁴⁸ Those nations complained that the antidumping regime is part of a “bait-and-switch” scam foisted on the developing world by the major forces behind their creation—the United States and the European Union.¹⁴⁹ Basically, the critics claim that after convincing the WTO members to lower their tariffs in the name of free trade, the United States and European Union turned to the antidumping remedy to raise tariffs on imports from those same nations.¹⁵⁰ However, in the case of China, this device is returning to haunt both the United States and the European Union. This is because, “rather than challenging the legal standard originally put in place by the United States and EU, . . .

145. “Dumping refers to the selling of products in an export market for less than fair value (less than the price in the home market or less than cost).” ERIC L. RICHARDS & SCOTT J. SHACKELFORD, *LEGAL AND ETHICAL ASPECTS OF INTERNATIONAL BUSINESS* 161 (2014).

[Z]eroing may occur when an importing country averages a number of importations in determining if products are being sold below fair market value. . . . [R]ather than give full credit for the negative margins (the amount by which export prices exceeded normal value), the importing country would count any negative subgroup dumping margins as zero.

Id. at 162. This impermissibly inflates the dumping margin. *Id.*

146. Known as the “Byrd Amendment,” this statute was designed “to support companies threatened by overseas competition. However. . . when the anti-dumping duties bring imports up to market value, . . . the subsequent payments subsidize the American producers that are no longer at an unfair disadvantage.” Andrew Platt, Note and Comment, *The Fate of Domestic Exporters Under the Byrd Amendment: A Case For Resuscitating the Last-in-Time Treaty Interpretation*, 3 *BYU INT’L L. & MGMT. REV.* 171, 171 (2007).

147. Richards, Shackelford & Stemler, *supra* note 117, at 165 (citation omitted). “Once the WTO gave approval of the assessment of more than \$150 million annual trade sanctions on US exports, the Byrd Amendment was repealed.” *Id.* at 167–68 (citations omitted).

148. *Id.* at 166.

149. Mark Wu, *Antidumping in Asia’s Emerging Giants*, 53 *HARV. INT’L L.J.* 1, 3 n.3 (2012) (citing DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *THE GENESIS OF THE GATT* 144–46 (2008); 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* 1389–1691 (Terrence P. Steward ed., 1993)).

150. *Id.* at 3.

China . . . [has] embraced it.”¹⁵¹ Antidumping duties now account for more than 90 percent of the domestic protection measures employed throughout the world, and China, along with India, leads the world in using the device.¹⁵² Importantly, recent attempts by the United States to correct this imbalance to free trade face a major obstacle: “Most countries . . . [now] view the United States as the major impediment to serious antidumping reform.”¹⁵³

B. Double Standards in the Name of Sustainability

The United States also has a long history of noncompliance with global rules in the area of sustainable development. Generally, this takes the form of a failure to consult with trade partners and an insistence that all parties comply with the “US solution” to global problems. For example, more than two decades ago, the United States enacted legislation—the Marine Mammal Protection Act¹⁵⁴ (MMPA) and the Dolphin Protection Consumer Information Act¹⁵⁵ (DPCIA)—to limit the incidental killing of marine mammals (dolphins specifically) by tuna fleets. The MMPA imposed an embargo on imports of tuna from countries that harvest yellowfin tuna in the Eastern Tropical Pacific Ocean (ETP) with purse-seine nets.¹⁵⁶ The DPCIA forbids foreign and domestic use of “dolphin-safe” labels on tuna products harvested in the ETP with purse-seine nets.¹⁵⁷ In response to complaints from Mexico (and, later, the European Community), two GATT Dispute settlement panels—first in 1991 (Tuna I)¹⁵⁸ and second

151. *Id.* at 18–19.

152. *Id.* at 18.

153. *Id.* at 58 n.218 (citing Michael O. Moore, *Antidumping Reform in the WTO: A Pessimistic Appraisal*, 12 PAC. ECON. REV. 357, 373–74 (2007)).

154. 16 U.S.C. §§ 1361–1407 (2012).

155. *Id.* § 1385.

156. *Id.*

The MMPA was enacted by the US Congress to prevent serious injury or incidental killing of marine mammals in the course of commercial fishing, especially in the Eastern Tropical Pacific Ocean (ETP). The ETP was of special concern to Congress because dolphins and tuna inhabit the same areas in these waters. Knowing this, commercial fishermen in the ETP intentionally encircled the dolphins with purse-seine nets in order to catch the tuna swimming underneath.

Carol J. Beyers, Comment, *The US/Mexico Tuna Embargo Dispute: A Case Study of the GATT and Environmental Progress*, 16 MD. J. INT'L L. & TRADE 229, 233 (1992) (citations omitted), <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1421&context=mjl> [<https://perma.cc/DMT6-FY9H>].

157. *Id.* at 235.

158. Dispute Settlement Panel Report, *United States—Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991) (not adopted) [hereinafter Tuna I].

in 1994 (Tuna II)¹⁵⁹—concluded that the embargo violated GATT rules.¹⁶⁰ The Tuna I panel found the MMPA to be an impermissible quantitative restriction on tuna imports because the United States was unable to demonstrate that the measure was “necessary” for the protection of dolphins.¹⁶¹ More specifically, the panel chided the United States for failing to “pursue its dolphin protection objectives through measures consistent with [GATT], in particular through negotiation of international cooperative arrangements.”¹⁶² In Tuna II, the GATT panel reiterated that the US goal of protecting an exhaustible natural resource was in and of itself not sufficient to justify the imposition of the tuna embargo. To hold otherwise, in the panel’s view, would seriously impair the rights and obligations of all sovereign nations because it would permit the United States to “force other contracting parties [to the GATT] to change their policies within their jurisdiction, including their conservation policies.”¹⁶³

Tuna I and Tuna II were both decided by panels in the pre-WTO era. However, despite the passage of more than twenty years and the creation of the WTO, the US dolphin conservation regime still violates international trade rules. Recently, the WTO appellate body confirmed that the dolphin-safe labeling requirements mandated by the DPCIA discriminate against Mexican tuna imports from the ETP.¹⁶⁴ Despite a US promise to amend its labeling rules to come into compliance with the WTO appellate body decision,¹⁶⁵ on December 3,

159. Dispute Settlement Panel Report, *United States—Restrictions on Imports of Tuna*, 33 I.L.M. 839 (1994) (not adopted) [hereinafter Tuna II].

160. For a discussion of the Tuna I and Tuna II panel reports, see Eric L. Richards & Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295, 325–29 (2000).

161. Tuna I, *supra* note 158, at 1619–20.

162. *See id.* at 1620. The panel stressed that such an approach “would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.” *Id.*

163. *See* Tuna II, *supra* note 159, at 894.

164. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna Products*, ¶ 298, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012). More specifically, the panel concluded that the special rules for the ETP did not “stem from legitimate regulatory distinctions.” *Id.* ¶ 297. *See generally* Charlotte Blattner, *Global Animal Law: Hope Beyond Illusion: The Potential and Potential Limits of International Law in Regulating Animal Matters*, 3 MID-ATLANTIC J.L. & PUB. POL’Y 10 (2015); Jonathan Carlone, *An Added Exception to the TBT Agreement After Clove, Tuna II, and Cool*, 37 B.C. INT’L & COMP. L. REV. 103 (2014); Meredith Kolsky Lewis & Andrew D. Mitchell, *Food Miles: Environmental Protection or Veiled Protectionism*, 35 MICH. J. INT’L L. 579 (2014); Lauren Sullivan, *The EPIC Struggle for Dolphin-Safe Tuna: To Be Continued—A Case for Accommodating Nonprotectionist Eco-Labels in the WTO*, 47 VAND. J. TRANSNAT’L L. 861 (2014).

165. Bryce Baschuk, *US “Dolphin-Safe” Labels Still Illegal, Says World Trade Organization Panel*, 32 Int’l Trade Rep. (BNA) No. 47, at 2049 (Nov. 26, 2015).

2015, the WTO adopted an appellate body finding that the US rules still discriminated against Mexican tuna products.¹⁶⁶

The tuna disputes are not isolated incidents. In one of the earliest tests of the WTO's then newly created dispute settlement process, Venezuela challenged US Environmental Protection Agency (EPA) regulations designed to cap polluting compounds in gasoline at 1990 levels.¹⁶⁷ These regulations, promulgated pursuant to Title II of the Clean Air Act,¹⁶⁸ provided domestic refineries with three separate methods for determining their 1990 baselines.¹⁶⁹ Foreign refineries, on the other hand, were restricted to only one of the methods.¹⁷⁰ As a result, the WTO appellate body sided with Venezuela,¹⁷¹ concluding that the differential treatment constituted arbitrary or unjustifiable discrimination.¹⁷² While acknowledging that the United States faced administrative problems in verifying foreign baselines,¹⁷³ the panel did not believe those practical difficulties justified the discriminatory treatment.¹⁷⁴ Ultimately, the United States was faulted for failing to explore cooperative arrangements with Venezuela to address the administrative obstacles,¹⁷⁵ as well as for considering the costs on domestic refineries and disregarding those of their foreign counterparts when devising the baseline regulations.¹⁷⁶

Undaunted, the United States played a similar refrain several years later when it imposed an embargo on certain shrimp imports in an effort to prevent sea turtles from drowning in the nets of shrimp trawlers. US legislation—the Endangered Species Act of 1973

166. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 407, WTO Doc. WT/DS381/AB/R (adopted Dec. 3, 2015).

167. “[M]obile sources (primarily automobiles) . . . [were] the largest single source of air pollution in the United States.” Martin A. McCrory & Eric L. Richards, *Clearing the Air: The Clean Air Act, GATT and the WTO Reformulated Gasoline Decision*, 17 UCLA J. ENVTL. L. & POL’Y 1, 6–7 (1999).

168. Clean Air Act of 1990, § 211, 42 U.S.C. § 7545(k) (2012).

169. See McCrory & Richards, *supra* note 167, at 11–13.

170. The EPA claimed that administrative difficulties in verifying the accuracy of data from foreign refineries, in part, justified the distinction. *Id.* at 13–15.

171. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, 35 I.L.M. 603 (1996) (adopted Sept. 25, 1997).

172. *Id.* at 627.

173. *Id.* at 629–30.

174. *Id.* at 631.

175. *Id.* The fact that Congress had actually blocked such efforts by denying funding for the negotiations did not impress the panel. It stressed that the United States “carries responsibility for actions of both the executive and legislative departments of government.” *Id.* at 631–32.

176. *Id.* at 632.

(ESA)—listed sea turtles as an endangered species.¹⁷⁷ Regulations designed to implement the ESA required American shrimp trawlers to employ turtle excluder devices (TEDs) on their nets.¹⁷⁸ Responding to complaints from US shrimpers that the regulations placed them at a competitive disadvantage vis-à-vis foreign shrimp imports and from environmentalists that the protection was not sufficient,¹⁷⁹ Congress broadened their reach by: (1) requiring the US Secretary of State to negotiate international agreements to protect sea turtles and (2) blocking the import of shrimp that was harvested in a manner that threatened sea turtles unless the President certified that the harvesting nation had a regulatory program comparable to that of the United States.¹⁸⁰ When environmentalists argued that the United States was not strictly enforcing the embargo, the US Court of International Trade, rejecting arguments that such an action would have international law ramifications, ordered the government to comply with the law.¹⁸¹ Continued delays by the executive branch of government resulted in even more domestic litigation, with the court repeatedly stressing the priority that US domestic law has over the country's international law obligations.¹⁸²

In *United Import Prohibition of Certain Shrimp and Shrimp Products*, the WTO appellate body condemned the US approach.¹⁸³ In a scathing attack, the panel criticized the US statute's "intended and actual coercive effect on the specific policy decisions made by foreign governments."¹⁸⁴ While the legislation did attempt to correct the flaws of its earlier initiatives in the Tuna and Reformulated Gasoline cases by requiring the executive branch to negotiate with other shrimp-harvesting nations, the US government failed to follow through on

177. 50 C.F.R. § 223.205(a) (2017).

178. *Id.* § 223.206(d)(2)(i).

179. See Richards & McCrory, *supra* note 160, at 298 ("Environmentalists . . . protested that restrictions that were confined to the shrimping operations in United States waters would be largely ineffective since sea turtles migrate across national boundaries.")

180. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990 § 609, 16 U.S.C. § 1537 (2012).

181. *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 579–80 (Ct. Int'l Trade 1995).

182. See generally *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996); *Earth Island Inst. v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996); *Earth Island Inst. v. Christopher*, 948 F. Supp. 1062 (Ct. Int'l Trade 1996). The US Court of International Trade stated that "this . . . [court] is not the proper forum for foreign accommodation or circumvention." 948 F. Supp. at 1066.

183. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999).

184. *Id.* ¶ 161. The WTO appellate body panel described the US statute as a "rigid and unbending standard" that the United States sought to impose on other sovereign governments. *Id.*

this mandate.¹⁸⁵ The United States negotiated with and provided countries in the western hemisphere (mainly in the Caribbean), but not other countries, technical and financial assistance and longer transition periods for their fishermen to start using TEDs.¹⁸⁶ This failure to pursue comprehensive negotiations with all of the shrimp exporting nations violated international trade rules prohibiting discriminatory treatment. The importance of this omission is underscored by the fact that, soon after the appellate body report was issued, the US Department of Commerce revised its shrimp harvesting rules to permit shrimp imports as long as a country could show that it required a “comparably effective” regulatory program. Of equal importance, the United States expanded its efforts to negotiate an agreement with shrimp harvesting nations around the world and offered and began providing technical assistance on the design, construction, installation, and operation of TEDs.¹⁸⁷

Despite these efforts, Malaysia again brought an action before the WTO, asserting that the steps taken by the United States were still GATT-illegal because it had not actually concluded a treaty with the United States. This time, however, the appellate body sided with the United States, reasoning that the serious, good faith efforts to negotiate an international agreement by the United States were sufficient to overcome the earlier flaws of the sea turtle protection program.¹⁸⁸ The lesson seems clear: the WTO will permit US environmental measures—even those that impose restrictions on international trade—as long as they are nondiscriminatory and shaped by comprehensive negotiations with our international trade partners.

C. Losing Its COOL: Lessons Not Learned

On December 7, 2015, the WTO appellate body authorized Canada and Mexico to impose over one billion dollars in retaliatory tariffs on US goods because of meat labeling rules that discriminate

185. Although section 609(a)(1)–(5) of the statute instructs the State Department to negotiate agreements with foreign nations, section 609(b) simultaneously orders the executive branch to ban the importation of shrimp from nations that fail to meet the existing US standards. 16 U.S.C. § 1537. The Appellate Body condemned the “coercive effect” of this approach. See Appellate Body Report, *supra* note 183, ¶ 161.

186. Appellate Body Report, *supra* note 183, ¶ 175.

187. See Richards & McCrory, *supra* note 160, at 324–25.

188. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 5.137, WTO Doc. WT/DS58/RW (June 15, 2001).

against Canadian and Mexican imports.¹⁸⁹ The country-of-origin labeling law (COOL) was originally enacted to help food buyers avoid meat products from countries with substandard food safety rules.¹⁹⁰ However, five previous WTO panels, the latest in May 2015, concluded that the regulatory regime imposed unnecessary costs on the imported meat products.¹⁹¹ Curiously, while the United States amended the COOL rules after the panel first found it to be discriminatory, “a WTO panel [then] found that the amended COOL measures . . . were more harmful to foreign competition than the original rules.”¹⁹²

The stakes for the United States in this case are huge, particularly for a measure of questionable value to US consumers.¹⁹³ After all, “[e]xcluding the European Union, Canada is the [United States]’ largest trading partner with \$658 billion in total two-way goods trade in 2014. Mexico is the [United States]’ third-biggest trading partner with \$534 billion in total two-way good trade in 2014.”¹⁹⁴ That cost should be weighed against the WTO appellate body panel’s finding that “the burden on producers was too great given the small amount of information to be gleaned by consumers.”¹⁹⁵

Unfortunately, there is no certainty that the United States will come into compliance. As with the previous disputes, the executive

189. Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/RW, WT/DS386/AB/RW (Dec. 7, 2015); cf. Bryce Baschuk, *Canada, Mexico Allowed to Impose Sanctions of \$1B Until US Fixes Meat Labeling Rules*, 32 Int’l Trade Rep. (BNA), No. 49, at 2116 (Dec. 10, 2015).

190. Kelsey Gee & Paul Vieira, *WTO Hits U.S. over Labeling of Meat*, WALL ST. J., Dec. 8, 2015, at B3.

191. Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/R, WT/DS386/R (Nov. 18, 2011); Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 350, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012); Arbitration Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 73, WTO Doc. WT/DS384/24, WT/DS386/23 (Dec. 4, 2012); Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 8.3, WTO Doc. WT/DS384/RW, WT/DS386/RW (Oct. 20, 2014); Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 6.2, WTO Doc. WT/DS384/AB/RW, WT/DS386/AB/RW (May 18, 2015).

192. Bryce Baschuk & Catherine Boudreau, *WTO Rejects US Appeal of COOL Requirements Covering Meat-Labeling*, 32 Int’l Trade Rep. (BNA), No. 21, at 924 (May 21, 2015).

193. “We have long said that COOL is not just burdensome and costly to cattle producers, it is generally ignored by consumers and violates our international trade obligations,” said Philip Ellis, president of the National Cattlemen’s Beef Association.” *Id.*

194. *Id.*

195. See Carlone, *supra* note 164, at 129 (citing Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 347–50, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012)). “The WTO said . . . that the country-of-origin labels ‘impose a disproportionate burden on producers and processors of livestock that cannot be explained by the need to provide origin information to consumers.’” Tennille Tracy, *WTO Rules Against US Meat Labels*, WALL ST. J., May 19, 2015, at A5.

branch of the government—in this case, the US Department of Agriculture (USDA)—is left with little room to maneuver. According to former Agriculture Secretary Tom Vilsack:

[t]hose working on this inside the USDA have said there isn't much capacity to come into compliance with the WTO rules The WTO said we can't enforce the additional burden of segregation of livestock, but Congress said meat has to be labeled telling consumers it's a USA product, which requires segregation. We're stuck. We need congressional action.¹⁹⁶

D. Rhetoric Must Match Reality

The dilemma faced by the US Agriculture Secretary plays out repeatedly. That is, on a consistent basis, the United States has failed to comply with the very global trade rules that it was instrumental in creating. To demand that others comply with a rules-based system while simultaneously flaunting those very rules at the behest of special interests threatens the country.¹⁹⁷

In some instances, the executive branch has been stymied in its attempts to honor international commitments made by the US Congress.¹⁹⁸ Even in the Sea Turtle case, where Congress actually instructed the State Department to negotiate with US trade partners, the legislature was not sincerely attempting to achieve a true multilateral solution.¹⁹⁹ After all, that same statute “simultaneously directed the executive branch to ban shrimp imports from nations that did not meet US regulatory standards. Thus, . . . Congress sought to impose its own solution on the world trading community.”²⁰⁰

196. Rossella Brevetti, *Report Language Calls on Ag Secretary to Make COOL Recommendations*, 31 Int'l Trade Rep. (BNA) No. 50, at 2155 (Dec. 18, 2014).

197. “America’s commitment to freer trade looks laughable,’ reinforcing accusations from trading partners that Washington is backsliding on negotiated trade concessions because of its inability to resist the protectionist demands of domestic producers.” See Richards, Shackelford & Stemler, *supra* note 117, at 172 (quoting Kevin K. Ho, *Trading Rights and Wrongs: The 2002 Bush Steel Tariffs*, 21 BERKELEY J. INT’L L. 825 (2003)).

198. This occurred in the Reformulated Gasoline case where Congress blocked funding for US efforts to negotiate a reasonable solution with Venezuela. See McCrory & Richards, *supra* note 167, at 41. Further, after the United States promised to comply with the WTO appellate body decision in the Tuna Labeling dispute, see *supra* text accompanying note 151, Congress refused to act. This was not surprising. It has been observed that “Congress . . . has a history of not responding well when told to change domestic policies. In fact, it was Congress’ refusal to amend its legislation that landed the US at the WTO in the first place.” Marie Wilke, *Tuna Labeling and the WTO: How Safe Is “Dolphin-Safe?”*, BIORES (June 18, 2012), <http://www.ictsd.org/bridges-news/biores/news/tuna-labelling-and-the-wto-how-safe-is-dolphin-safe> [<https://perma.cc/8U29-UQ4R>].

199. See *supra* notes 182–83 and accompanying text.

200. Richards & McCrory, *supra* note 160, at 337 (citing Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990 § 609, 16 U.S.C. § 1537 (2012)).

Special interests and the resulting congressional struggle to supplant the executive branch in the field of international relations explain many of the problems the United States has faced in complying with international rules. In the Tuna, Sea Turtle, and COOL cases, unbending laws hindered the executive branch's efforts to comply with the country's obligations under GATT. It would seem that the balance between the executive and legislative branches must be reestablished to avoid a special interest-driven Congress from sabotaging international trade relations. In fact, the US Supreme Court long ago warned against this distortion of the doctrine of separation of powers in the global arena.²⁰¹

The role of special interests in the US political system is not the only explanation for the rigid and uncompromising nature of so many US interactions with its global partners. The fact is that this often overbearing approach is deeply rooted in US culture.²⁰² For instance, "of all of the nations of the world, the [United States] ranks the highest in terms of individualism."²⁰³ This is often manifested by an egocentrism, outspokenness, and acceptance of conflict (so long as it is believed that an adversarial path will lead to desired objectives).²⁰⁴ In addition, the country ranks high on the universalism scale,²⁰⁵ which translates into a willingness "to impose . . . [one's] values on others."²⁰⁶ Finally, "[i]nner-directed cultures, like the

201. "[L]egislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321 (1936); see Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite United States Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 994 n.147 (1996).

202. Eric L. Richards, *Contracting from East to West: Bridging the Cultural Divide*, 57 BUS. HORIZONS 677, 679 (2014). Culture is a shared system of meanings. It dictates what we pay attention to, how we act, and what we value. FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS* 13 (1998).

203. Richards, *supra* note 202, at 679.

204. *Id.*

205. "Universalism searches for sameness and similarity and tries to impose on all members of a class or universe the laws of their commonality." CHARLES HAMPDEN-TURNER & FONS TROMPENAARS, *BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES* 16 (2000).

206. Richards, *supra* note 202, at 679. Active efforts by US prosecutors to ferret out and punish corruption in global soccer have been viewed by some as an example of this predilection. For instance, Russian President Vladimir Putin has complained of US involvement in the investigation, and the Russian Foreign Ministry called on Washington to "stop trying to hold court far beyond your own borders using your own legal norms and (instead) adhere to accepted international legal procedure." Anna Arutunyan, *Putin Questions Involvement in FIFA Investigation by US*, USA TODAY, May 15, 2015, at 3B.

United States, tend to believe that they know what is right and often resort to threats or commands to coerce others to accept that view.”²⁰⁷

Continued US emphasis on power tactics at the expense of a freely negotiated, rule-oriented path does not bode well for success in effectively counteracting the climate change threat to the planet.²⁰⁸ As the US Supreme Court observed over forty years ago, “[w]e cannot have trade and commerce in world markets . . . exclusively on our terms.”²⁰⁹ However, changing this orientation will not prove easy. It may entail a retooling of the US governmental system to provide the executive branch with greater discretion over negotiating solutions to global problems, as well as a new orientation towards inclusion and consistency and away from hypocrisy.²¹⁰

IV. REFLECTING ON CHINESE TRADE POLICY

China is a newcomer to the global trade game; however, its impact on trade is unquestionably significant. This section provides a brief overview of Chinese trade policy and demonstrates opportunities for, and threats to, Chinese and American cooperation, particularly as they relate to global trade and sustainability.

A. Accession to the WTO

Accession to the WTO in 2001 gave a significant boost to China’s integration into the global economy.²¹¹ China is now the world’s largest exporter and has the largest GDP measured on a purchasing power parity basis,²¹² though the accuracy of its reported GDP figures has been called into question on numerous occasions.²¹³

207. Richards, *supra* note 202, at 679. Some cultures “believe that they can and should control nature by imposing their will upon it. . . . [This orientation is] describe[d] as inner-directed.” See TROMPENAARS & HAMPDEN-TURNER, *supra* note 202, at 141.

208. Andrew L. Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT’L ECON. L. 769, 797 (1998) (warning that a heavy-handed US approach will undermine reaching multilateral environmental accords).

209. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

210. See Richards & McCrory, *supra* note 160, at 338–39.

211. INT’L MONETARY FUND, CHINA’S GROWTH AND INTEGRATION INTO THE WORLD ECONOMY PROSPECTS AND CHALLENGES 16 (Eswar Prasad ed., 2004), <https://www.imf.org/external/pubs/ft/op/232/op232.pdf> [<https://perma.cc/PMM2-LEUL>].

212. Mike Bird, *China Just Overtook the US as the World’s Largest Economy*, BUS. INSIDER (Oct. 8, 2014), <http://www.businessinsider.com/china-overtakes-us-as-worlds-largest-economy-2014-10> [<https://perma.cc/6QHG-5R86>].

213. INT’L MONETARY FUND, WORLD ECONOMIC OUTLOOK: LEGACIES, CLOUDS, UNCERTAINTIES 13 (2014), <http://www.imf.org/external/pubs/ft/weo/2014/02> [<https://perma.cc/FFY9-BEEW>]. Chinese exports reached an all-time high of \$2.2 trillion or 27

Although China's growing presence in world trade and in the WTO has created some conflict, the fears that China would undermine the multilateral trading system have so far proven to be unfounded.²¹⁴ Despite this, there is still a desire, especially in US political circles, to find problems with China's positions on trade. For example, the US Trade Representative annually prepares a report on China's WTO compliance, in which it articulates a laundry list of complaints—from the number of state-owned enterprises in China to market access barriers for foreign goods and services.²¹⁵ Yet commentators largely agree that, on the whole, China has become a more responsible and useful member of the WTO from 2001 to 2015.²¹⁶

In order to join the WTO, China had to, and did, revise “numerous laws, regulations, and other measures affecting trade and investment.”²¹⁷ It “cut tariffs on over 5,000 products resulting in average tariffs coming down from 43.2 percent in the early 1990s to 9.8 percent after the transitional period.”²¹⁸ China also created a special body to help administer and review the more than 2,000 laws

percent of Chinese GDP in 2013. Joachim Monkelbaan, *Addressing the Trade-Climate-Energy Nexus: China's Explorations in a Global Governance Landscape*, 5 *ADVANCES CLIMATE CHANGE RES.* 206, 211 (2014).

214. HANNS GUNTHER HILPERT, CHINA'S TRADE POLICY DOMINANCE WITHOUT THE WILL TO LEAD 5 (2014), https://www.swp-berlin.org/fileadmin/contents/products/research_papers/2014_RP01_hlp.pdf [<https://perma.cc/XW7J-7CMB>].

215. The report is prepared pursuant to section 421 of the US-China Relations Act of 2000, 22 U.S.C. § 6951 (2012), which requires the US Trade Representative to report annually to Congress on China's compliance with commitments made in connection with its accession to the WTO. The report also incorporates the findings of the Overseas Compliance Program, as required by section 413(b)(2) of the Act, 22 U.S.C. § 6943(b)(2) (2012). U.S. TRADE REPRESENTATIVE, 2014 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 1 (2014), <https://ustr.gov/sites/default/files/2014-Report-to-Congress-Final.pdf> [<https://perma.cc/39E3-9WSZ>].

216. Claude Barfield, *The Dragon Stirs: China's Trade Policy for Asia—and the World*, 24 *ARIZ. J. INT'L & COMP. L.* 93, 107 (2007) (“Despite its very recent accession to the WTO, China has emerged as a leader among WTO developing-country Members in . . . multilateral trade negotiations.”); Kim F. Natividad, *Stepping It up and Taking It to the Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 *BERKELEY TECH. L.J.* 469, 495–98 (2008) (discussing China's expanded protection of intellectual property rights since joining the WTO); Julia Ya Qin, *The Predicament of China's “WTO-Plus” Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, 11 *CHINESE J. INT'L L.* 237, 237–40 (2012); Guobin Zhu & Rohan Price, *Chinese Immigration Law and Policy: A Case of “Change Your Direction, or End up Where You Are Heading”?*, 26 *COLUM. J. ASIAN L.* 1, 18 (2013) (discussing China's loosened immigration and visa restrictions).

217. U.S. TRADE REPRESENTATIVE, *supra* note 215, at 2.

218. Zhenyu Sun, *China's Experience of 10 Years in the WTO*, in *A DECADE IN THE WTO: IMPLICATIONS FOR CHINA AND GLOBAL TRADE GOVERNANCE* 11 (Ricardo Melendez-Ortiz, Christophe Bellmann & Shuaihua Cheng eds., 2011).

and regulations at issue, resulting in the abolition of more than 500 of rules that were found to be inconsistent with WTO requirements.²¹⁹

The country-wide push to achieve WTO compliance was facilitated in a number of ways—from WTO centers that were set up in Beijing, Shanghai, Shenzhen, and many other Chinese cities to study WTO rules and provide training for businesses and governments to the more than 3,000 books on the WTO and its rules that were published in 2002.²²⁰ The Chinese government even “sponsored a nationwide contest on WTO knowledge, with more than five million people participating.”²²¹ The final stage of the contest was broadcasted on China Central Television, and the winners were sent to Geneva to celebrate and meet with officials.²²²

China’s behavior in its early years as a member of the WTO was relatively benign.²²³ For example, in 2006, the United States threatened to file a complaint against China for duties on kraft linerboard. In response, China lifted the duties the next work day.²²⁴ With time, however, “the Chinese have mastered WTO procedures, including how to defend and proactively use them to protect and advance their national interests.”²²⁵ Currently, they initiate cases and comply with rulings.²²⁶ As stated by a leading German think tank, Stiftung Wissenschaft und Politik:

China behaves like an established actor in the WTO world trade system. It sometimes breaks rules and grants its own trade interests greater importance than the existence and stability of the system as a whole, but in general it respects the status quo and pragmatically pursues its own economic interests.²²⁷

China has taken impressive steps to implement its WTO commitments and, as a result, has established itself as an effective trading partner.²²⁸ However, as China develops its confidence and

219. “Many other regulations were amended, and if one includes laws and regulations at the provincial level, the total number of reviewed pieces exceeded 90,000. This was unprecedented in China’s history.” *Id.* at 12.

220. *Id.*; see, e.g., Gong Baihua, *Shanghai’s WTO Affairs Consultation Center: Working Together to Take Advantage of WTO Membership*, WTO, https://www.wto.org/English/res_e/booksp_e/casestudies_e/case11_e.htm [<https://perma.cc/C9EV-W8CK>] (last visited Mar. 9, 2017).

221. Sun, *supra* note 218, at 12.

222. *Id.*

223. *All Change*, *ECONOMIST* (Dec. 10, 2011), <http://www.economist.com/node/21541448> [<https://perma.cc/976C-ZAFW>].

224. *Id.*

225. *Id.*

226. *Id.*

227. HILPERT, *supra* note 214, at 5–6.

228. Seung-Youn Oh argued that China’s pattern of quick compliance is in fact part of its strategy to achieve its objectives while appearing to be a good WTO player. SEUNG-YOUN OH,

strength, criticism of China's protectionist trade policies are only going to intensify, especially if, like the United States, China's free trade rhetoric fails to match reality. In this section, the Article examines complaints the United States has made against China with regard to WTO compliance to assess China's position as a negotiating partner, especially when it comes to managing tensions between free trade and the climate.

B. China's WTO Compliance History

While it seems that China is a relatively consistent trading partner, the country still draws significant criticism and often presents a complex problem for its trading partners because of its level of state intervention.²²⁹ Criticisms related to Chinese trade policies arise from "export restrictions, subsidies, product standards, . . . customs valuation, trade-related investment measures, . . . and services regulation."²³⁰ According to World Bank economist, Chad P. Bown, the United States and other WTO members filed numerous lawsuits between 2006 and 2008, which suggests "an end to the no litigation standoff in the initial period following China's 2001 accession."²³¹ And, in recent years, China seems to be focused on state capitalism as seen by the auto parts and intellectual property disputes discussed below.²³²

The U.S. Trade Representative initiated a WTO case against China on March 30, 2006 for its discriminatory regulations on imported auto parts.²³³ The purpose of which "was to discourage

CONVENIENT COMPLIANCE: CHINA'S INDUSTRIAL POLICY STAYING ONE STEP AHEAD OF WTO ENFORCEMENT 1 (2015), <https://www.files.ethz.ch/isn/191745/13.05.2015.pdf> [<https://perma.cc/9XFL-JPH5>]. "By the time China removes the challenged measures, it often no longer needs them, since it has already achieved its goals and can still build up a reputation as a responsible WTO member by complying with the organization's rulings." *Id.*

229. "Increasingly, trade frictions with China can be traced to China's pursuit of industrial policies that rely on trade-distorting government actions to promote or protect China's state-owned enterprises and domestic industries." *Overview of US Report to Congress on China's WTO Compliance*, IIP DIGITAL (Dec. 13, 2011), <http://ipdigital.usembassy.gov/st/english/texttrans/2011/12/20111213154713su0.7869335.html> [<https://perma.cc/473D-XWM8>].

230. Razeen Sally, *Chinese Trade Policy a Decade After WTO Accession*, in *A DECADE IN THE WTO: IMPLICATIONS FOR CHINA AND GLOBAL TRADE GOVERNANCE* 22, 27 (Ricardo Melendez-Ortiz, Christophe Bellmann & Shuaihua Cheng eds., 2011).

231. Chad P. Bown, *China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement*, in *CHINA'S GROWING ROLE IN WORLD TRADE* 281, 329 (Robert C. Feenstra & Shang-Jin Wei eds., 2010).

232. See *infra* text accompanying notes 234–40.

233. WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33536, CHINA-US TRADE ISSUES 25 (2011), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1867&context=key_workplace [<https://perma.cc/7NP2-NB45>].

domestic producers from using imported parts and to encourage foreign firms to move production to China.”²³⁴ Ultimately, the WTO panel ruled on February 13, 2007 that “China’s discriminatory tariff policy was inconsistent with its WTO obligations.”²³⁵ China appealed the decision, but it was subsequently upheld and China complied with the rulings of the Dispute Settlement Body.²³⁶

Intellectual property protection is another controversial aspect of China’s trade policy. China committed as a part of its accession agreement to “improve protection of intellectual rights along the lines required by the Uruguay Round agreement on Trade Related Intellectual Property Rights (TRIPs).”²³⁷ But, while legal structures for intellectual property protection have improved somewhat, enforcement has left something to be desired.²³⁸ For example, when General Motors claimed that the Chinese Chery QQ was a copy of its Chevrolet Spark, it received little help from the Chinese government.²³⁹

Despite these lapses, China is taking steps to improve its IP enforcement mechanisms.²⁴⁰ As Zhenyu Sun from China Society for World Trade Organization Studies writes:

In the field of enforcement, China’s practice is unique in the world. On top of the judicial procedures that [intellectual property rights] owners may take to protect their rights, which are similar to those of other countries, China has taken additional administrative measures to protect IPR, deploying half a million local staff to monitor and impose punitive fines on offenders. The situation will be

234. *Id.*

235. *Id.*; see also WTO, CHINA AUTO-PARTS 1 (n.d.), https://www.wto.org/English/tratop_e/dispu_e/cases_e/1pagesum_e/ds342sum_e.pdf [<https://perma.cc/EXU6-AEHE>].

236. MORRISON, *supra* note 234, at 25.

237. Rachel McCulloch & Chad P. Bown, *US Trade Policy Toward China*, in CHALLENGES TO THE GLOBAL TRADING SYSTEM: ADJUSTMENT TO GLOBALIZATION IN THE ASIA-PACIFIC REGION 75 (Sumner La Croix & Peter A. Petri eds., 2007).

238. *Id.*

239. General Motors’ subsidiary, GM Daewoo Auto & Technology Co. Ltd., filed a lawsuit against Chery, the Chinese state-owned car producer. The General Counsel for GM Daewoo stated, “Despite our good faith efforts and the assistance of the Chinese Government in the past year, Chery has been non-responsive to mediation efforts, and has even stepped up efforts to export the vehicle to other markets.” Gong Zhengzheng, *GM Charges Chery for Alleged Mini Car Piracy*, CHINA DAILY (Dec. 18, 2004), http://www.chinadaily.com.cn/english/doc/2004-12/18/content_401235.htm [<https://perma.cc/RV63-CFW7>]. The lawsuit was filed after the State Intellectual Property office announced that there was insufficient evidence of infringement, despite the very close appearance of the two cars. *Id.* See also Other examples include enforcement of copyrights for film. See Sun, *supra* note 218, at 35. See also Kristina Sepetys & Alan Cox, *Intellectual Property Rights Protection in China: Trends in Litigation and Economic Damages* 1 (2009).

240. Sun, *supra* note 218, at 12.

improved further as more Chinese companies are having their patents and trademarks registered, and awareness of IPR protection continues to improve.²⁴¹

It appears that while compliance is not perfect, China does work to uphold its obligations as a global trading partner.

C. *Is China Flexing Its Muscles?*

As China becomes more confident, it has begun challenging US leadership in global trade in critical ways. “While China has been important to the world economy for decades, the country is now wielding its financial heft with the confidence and purpose of a global superpower.”²⁴² It has been aggressive in its push to “win diplomatic allies, invest its vast wealth, promote its currency and secure much-needed natural resources.”²⁴³ To implement this strategy, China launched the new Asian Infrastructure Investment Bank (AIIB). This China-backed institution “is seen as a challenge to the World Bank and Asian Development Bank, both of which count Washington and its allies as their biggest financial backers.”²⁴⁴ The AIIB, viewed as an attempt by China to “extend its influence,”²⁴⁵ is seen in the United States as a direct challenge to the influence the United States and Europe have wielded over the World Bank and International Monetary Fund (IMF) for the past sixty years.²⁴⁶ “Beijing has struggled to increase its influence within the World Bank, the Asian Development Bank and the world’s emergency lender, the International Monetary Fund. But as the founder and one of the new bank’s largest shareholders, Beijing will have the greatest say in which projects to pick.”²⁴⁷

241. *Id.*

242. Clifford Krauss & Keith Bradsher, *China’s Global Ambitions, With Loans and Strings Attached*, N.Y. TIMES (July 24, 2015), http://www.nytimes.com/2015/07/26/business/international/chinas-global-ambitions-with-loans-and-strings-attached.html?_r=0 [<https://perma.cc/8QHS-49B7>]. “Even the current stock market slump is unlikely to shake the country’s resolve. China has nearly \$4 trillion in foreign currency reserves, which it is determined to invest overseas to earn a profit and exert its influence.” *Id.*

243. *Id.*

244. Brenda Goh, *Three Major Nations Absent as China Launches World Bank Rival in Asia*, REUTERS (Oct. 14, 2014), <http://www.reuters.com/article/us-china-aiib-idUSKCN0ID08U20141105> [<https://perma.cc/J7WE-V6UJ>]. “The AIIB . . . aims to give project loans to developing nations.” *Id.*

245. *Id.*

246. Bob Davis, *China’s Vow to Forgo Veto Won Key Backers for Bank*, WALL ST. J., Mar. 24, 2015, at A7.

247. Ian Talley, *U.S. Looks to Work with China on Fund*, WALL ST. J., Mar. 23, 2015, at A7.

Much of the world, especially China, has long complained about Washington's inordinate power over worldwide investment decisions.²⁴⁸ Creation of the AIIB was not only a major coup for China,²⁴⁹ but also a tremendous embarrassment for the United States.²⁵⁰ Key US allies—the UK, France, Germany, and Italy—were persuaded to break with the United States and back the China-led effort after Beijing proposed “that no single country dictate decision making at the new bank, . . . making a sharp departure from the long-standing practice at US-backed institutional lenders.”²⁵¹ The United States, “with little leverage over the Chinese-led bank, is now proposing that the new entity cooperate in joint projects with Washington-backed institutions . . .[,] which use US-approved rules.”²⁵²

D. Lessons Learned

China's establishment of the AIIB and its embrace by the world's key trading nations, despite strong opposition from the United States, illustrate the changing world in which we live. They demonstrate the costs that attend past failures by the United States to play by international rules, as well as the fact that Washington is no longer in the position to unilaterally dictate the content of international law. The question is: does Washington understand this new paradigm and, if so, will it alter its behavior in order to help broker new polycentric mechanisms to foster free trade and sustainable development?

V. ENVIRONMENTAL GOODS DISPUTES: THE CONFLICT BETWEEN NATIONAL INTERESTS AND SUSTAINABILITY IN THE UNITED STATES AND CHINA

China's spectacular economic growth has not been without its negative externalities. Growth has taken a heavy toll on the Chinese

248. “The U.S. has had a lock on some big decisions at the IMF despite holding less than 20% of its voting shares, a structure that has drawn complaints from the rest of the world.” See Davis, *supra* note 249, at A7.

249. “Infrastructure needs around the world are enormous. Emerging countries need new ports, railways, bridges, airports and roads to support faster growth McKinsey & Co. estimates global infrastructure-investment needs through 2030 total \$57 trillion.” See Talley, *supra* note 250, at A7.

250. “The US suffered a diplomatic embarrassment . . . after several of its key European allies publicly rebuffed Washington's pleas to snub Beijing's invitation to join the bank and instead said they would be founding members.” *Id.*

251. See Davis, *supra* note 249, at A7.

252. *Id.*

environment by generating horrendous air and water pollution.²⁵³ In 2006, China passed the United States as the world's largest emitter of greenhouse gases.²⁵⁴ In response, the Chinese government moved to increase the amount of electricity generated from renewable sources to 15 percent by 2020.²⁵⁵ As a result, China has become a world leader in wind turbines and photovoltaics ("PV") cells, and China now leads the world in renewable energy investments.²⁵⁶ It is also estimated that Chinese producers represent approximately 80 percent of the global solar market.²⁵⁷

While China's actions toward the environment and its encouragement of the renewable energy sector appear to be a positive development, many observers suggest that those actions have prompted a "green energy race" between Washington and Beijing.²⁵⁸ This term deliberately invokes the "space race" between the Soviet Union and the United States which involved milestones in space after the the launch of the Sputnik satellite.²⁵⁹ The fear is that China will

253. The World Health Organization (WHO) estimated that air pollution in China results in the premature deaths of 656,000 Chinese each year. Gwynne Wiatrowski Guzzeau, *Indoor Air Pollution: Energy Problems in China's Residential Sector*, 11 GEO. INT'L ENVTL. L. REV. 439, 444 (1999) ("With more than 352 million people living in urban areas, China's cities have two to five times the World Health Organization's standards for concentrations of air pollutants, far exceeding China's own standards."); Joseph McMullin, *Do Chinese Environmental Laws Work? A Study of Litigation as a Response to the Problem of Fishery Pollution in China*, 26 UCLA PAC. BASIN L.J. 142, 146 (2009) ("More than half of the rivers in China are too polluted to serve as a source of drinking water, and seventy percent of the water in five of China's seven major river systems has been deemed unsuitable for human contact."); Kevin Holden Platt, *Chinese Air Pollution Deadliest in World, Report Says*, NAT'L GEOGRAPHIC NEWS (July 9, 2007), <http://news.nationalgeographic.com/news/2007/07/070709-china-pollution.html> [<https://perma.cc/9HAF-T4S7>].

254. Brad Knickerbocker, *China Now World's Biggest Greenhouse Gas Emitter*, CHRISTIAN SCI. MONITOR (June 28, 2007), <http://www.csmonitor.com/2007/0628/pl2s01-wogi.html> [<https://perma.cc/U8FF-TTBL>].

255. Joel B. Eisen, *China's Greentech Programs and the USTR Investigation*, 11 SUSTAINABLE DEV. L. & POL'Y 3, 3 (2011); Kat Cheung, *Integration of Renewables: Status and Challenges in China* 7–8 (Int'l Energy Agency, Working Paper, 2011), http://www.iea.org/publications/freepublications/publication/integration_of_renewables.pdf [<https://perma.cc/FN22-UEUP>]. Installed renewable electricity capacity was essentially non-existent in 2005, but has doubled every year since. *Id.* at 8.

256. See Pilita Clark, *China Heads Renewable Energy Spending*, FIN. TIMES, Jan. 15, 2013, at 17.

257. Jonathan Stearns, *EU Solar-Panel Industry Loses Bid to Revamp China Pact*, 33 Int'l Trade Rep. (BNA) No. 2, at 69 (Jan. 14, 2016).

258. Joel B. Eisen, *The New Energy Geopolitics?: China, Renewable Energy, and the "Greentech Race"*, 86 CHI.-KENT L. REV. 9, 10–11 (2011).

259. *Id.*

dominate the global market for renewables and greentech,²⁶⁰ which could potentially hurt US firms' ability to compete for this vital twenty-first century market.²⁶¹ Furthermore, to some, “losing” the race and falling behind the Chinese” will have serious consequences for national economic security.²⁶² Even senior military leaders lament that the United States is jeopardizing its future by not taking appropriate steps to address the “dire situation presented by climate change.”²⁶³ In this view, failing to transition to a clean energy economy will “leave the United States vulnerable to ceding its position as a major world power.”²⁶⁴ As a result, trade policies involving greentech are ideal candidates for protectionist agendas, despite the need for cooperative behavior. This section provides a comparative case study on trade disputes related to greentech as a vehicle for highlighting how nations are balancing the push for free trade and sustainable development.

A. *Shining a Light on the Solar Panel Trade War*

The tension between encouraging national environmental policies and the removal of protectionists trade barriers are not new, as seen in the Tuna and Shrimp cases discussed in Part III.²⁶⁵ However, the green energy race differs slightly because countries are using traditional industrial policy instruments (sector-targeted subsidies, local-content subsidies, and export restrictions) “to spur the development of renewable energy and environmentally friendly industries.”²⁶⁶

Despite pre-Paris conference comments by the Obama Administration that “the [United States] hopes that leading by

260. For the purposes of this article, “greentech” refers to renewable energy technologies such as solar and wind power. See Neal Dikeman, *What Is Clean Tech?*, CNET (Aug. 11, 2008, 9:17 AM), <http://www.cnet.com/news/what-is-clean-tech/> [<https://perma.cc/K7WD-RPYY>].

261. See Eisen, *supra* note 258, at 10–11 (“Many observers state that we are doing less than the Chinese to promote renewables and that we are in a competition with China. . . . Some fear that China will dominate the global market for greentech, exporting it to us and diminishing American companies’ ability to compete with Chinese firms.”). These fears have not materialized. In 2015, the solar energy industry grew nearly twelve times faster than the overall US economy. Julian Spector, *Solar Jobs Are Outpacing the US Economy by a Longshot*, CITYLAB (Jan. 14, 2016), <http://www.citylab.com/work/2016/01/solar-job-growth-american-economy-marco-rubio/424035/> [<https://perma.cc/NR7K-XF2R>].

262. Eisen, *supra* note 258, at 3.

263. *Id.*

264. *Id.*

265. Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. U. L. REV. 401, 404 (2014); See also *supra* notes 153–62 & 176–86 and accompanying text.

266. *Id.*

example will put it in a stronger position to negotiate international reductions at the Paris climate conference . . . and build on bilateral talks with China,”²⁶⁷ recent trade actions by the country give such rhetoric a hollow ring. At the same time that the Administration has promised in its Clean Power Plan to “[give] a head start to wind and solar deployment . . . by executive actions to scale up investment in clean energy innovation,”²⁶⁸ it has imposed crippling tariffs on imports of environmentally friendly products from China and other trade partners. For instance, Chinese production of cheap solar panels substantially reduced global prices and triggered a boom in the solar industry, even as it hurt US PV producers.²⁶⁹ Since 2012, the US Commerce Department, using US antidumping and anti-subsidy laws, has levied steep tariffs on the imports, forcing several of the US importing companies out of business.²⁷⁰ As we will see, this has caused China to retaliate, resulting in a trade war in which the competing priorities of free trade and sustainable development come into stark relief.

In late 2011, a group of US solar companies (led by SolarWorld Industries) filed a petition (“the Petition”) with the United States International Trade Commission (USITC) and the US Department of Commerce (“Commerce”), claiming that the Chinese Government’s is unfairly subsidizing renewables by “providing land, electricity, material inputs, and financing below-market rates, as well as direct

267. Dan Roberts, *White House Insists Tough New Carbon Restrictions Are Legal Under Clean Air Act*, GUARDIAN (Aug. 3, 2015, 4:29 AM), <http://www.theguardian.com/environment/2015/aug/02/obama-white-house-emissions-cuts-clean-air-act> [<https://perma.cc/E2PC-KQV2>] (commenting on President Obama’s goal of reducing carbon dioxide emissions from US power plants).

268. *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants*, WHITE HOUSE (Aug. 3, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards> [<https://perma.cc/GSX4-H8QU>].

269. Zachary Scott Simmons, *Subsidizing Solar: The Case for an Environmental Goods and Services Carve-Out from the Global Subsidies Regime*, 32 UCLA J. ENVTL. L. & POL’Y 422, 447 (2014); David P. Vincent, *The Global Cost of Green: Recent Trade Issues and Litigation Between the United States and China May Dissolve Global Green Cooperation*, 39 WM. & MARY ENVTL. L. & POL’Y REV. 141, 148 (2014); Kate Fehrenbacher, *China Is Utterly and Totally Dominating Solar Panels*, FORTUNE (June 18, 2015, 11:41 AM), <http://fortune.com/2015/06/18/china-is-utterly-and-totally-dominating-solar-panels/> [<https://perma.cc/E82J-JAUV>].

270. Mark Melnicoe, *China Mostly Quiet on Upholding of High Tariffs on Solar Panel Exports*, 32 Int’l Trade Rep. (BNA) No. 29, at 1280 (July 16, 2015). This action “has been criticized by some environmentalists . . . who note the desirability of low-priced panels in the solar industry, which despite decades of promise had remained a technology priced too high to compete with conventional forms of power generation.” *Id.*

financial support and preferential policies.”²⁷¹ China’s subsidies, the Petition claimed, were designed to give China an unfair advantage (as opposed to assist a nascent domestic industry, which is an acceptable form of anticompetitive behavior).²⁷² China, however, maintained that its lower prices on PV panels “are due to . . . China’s comparative advantages in manufacturing,” paired with its “excess capacity and market induced inventory clearing.”²⁷³

The companies asked Commerce to “levy tariffs on solar cells and modules” coming from China.²⁷⁴ The USITC ruled preliminarily in the petitioners’ favor and Commerce announced in March 2012 that it would enact preliminary tariffs of 2.90 percent to 4.73 percent against Chinese solar panel manufacturers.²⁷⁵ China presumably unphased by the low amounts, did not respond harshly to the measure.²⁷⁶ However, two months after Commerce’s initial announcement, the Department of Commerce stated that it would impose an antidumping duty on Chinese solar panel manufacturers of approximately 31 percent to 100 to 250 percent.²⁷⁷ The increase made the duties “among the largest ever levied against a product through a unilateral tariff and increased the cost of solar panels significantly.”²⁷⁸

271. Melanie Hart, *Shining a Light on U.S.-China Clean Energy Cooperation*, CTR. AM. PROGRESS (Feb. 9, 2012, 9:00 AM), <https://www.americanprogress.org/issues/security/reports/2012/02/09/11030/shining-a-light-on-u-s-china-clean-energy-cooperation/> [<https://perma.cc/ENN4-LL23>].

272. *Id.*

273. *Id.* “The market for solar panel manufacturing slowed down significantly in 2011, which Chinese firms claimed caused an excess amount of products, forcing manufacturers to sell at very low prices to clear out inventory.” Vincent, *supra* note 272, at 155.

274. Hart, *supra* note 274.

275. Wu & Salzman, *supra* note 268, at 437 (citing Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination, 77 Fed. Reg. 17,439, 17,456 (Mar. 26, 2012)).

276. Wu & Salzman, *supra* note 268, at 438. See also Keith Bradsher & Matthew L. Wald, *A Measured Rebuttal to China*, N.Y. TIMES, Mar. 21, 2012, at B1; Suntech Power Holdings Co., *Suntech Response to Preliminary Decision on CVD Tariffs in the Subsidy Investigation on PV Cells from China*, PR NEWswire (Mar. 20, 2012), <http://www.prnewswire.com/news-releases/suntech-response-to-preliminary-decision-on-cvd-tariffs-in-the-subsidy-investigation-on-pv-cells-from-china-143531726.html> [<https://perma.cc/KT66-G2TY>] (discussing Chinese solar cell importer Suntech’s reaction to the preliminary decision).

277. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Preliminary Determination of Sales at Less than Fair Value, Postponement of Final Determination and Affirmative Preliminary Determination of Critical Circumstances, 77 Fed. Reg. 31,309, 31,312, 31,321–23 (May 25, 2012); see also Keith Bradsher & Diane Cardwell, *Chinese Solar Panels Face Big Tariffs*, N.Y. TIMES, May 18, 2012, at B1; *Obama’s Tariffs on China’s Solar Products Will Cost U.S.*, BLOOMBERGVIEW (May 15, 2012, 7:00 PM), <https://www.bloomberg.com/view/articles/2012-05-15/obama-s-tariffs-on-china-s-solar-products-will-cost-u-s->.

278. Wu & Salzman, *supra* note 268, at 438.

China criticized the duties and argued that they indicated a concerning level of US trade protectionism.²⁷⁹ Beijing further responded in May 2012 by filing its own WTO dispute against the United States, which it eventually won.²⁸⁰ In July 2012, it also launched its own antidumping investigation into United States and South Korean imports to China of polysilicon, the main ingredient used in solar cells.²⁸¹ This investigation resulted in tariffs “as high as 57 percent for US polysilicon and 48.7 percent for South Korean polysilicon.”²⁸²

In December 2013, SolarWorld brought a second set of antidumping and anti-subsidy complaints against China and Taiwan.²⁸³ It claimed that this was to close a loophole in the outcome of the first trade case. The loophole allowed Chinese producers to import modules assembled in China from cells manufactured in other countries, notably Taiwan.²⁸⁴ In June and July 2014, Commerce set preliminary tariffs based on affirmative countervailing subsidy and anti-dumping investigations respectively.²⁸⁵ The United States thus

279. Head of MOFCOM Bureau of Fair Trade for Imports and Exports Comments on U.S. Preliminary Ruling of Anti-Dumping and Anti-Subsidy Investigation Against Imports of Solar Panels from China, MINISTRY COM. PEOPLE'S REPUBLIC CHINA (Dec. 6, 2011), <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201112/20111207864408.shtml> [<https://perma.cc/QD6Y-F4AN>].

280. See David Lawder, *China Complains to WTO That U.S. Fails to Implement Tariff Ruling*, REUTERS (May 13, 2016, 7:44 PM), <http://www.reuters.com/article/us-china-usa-trade-idUSKCN0Y420C> [<https://perma.cc/C9DJ-QRDM>]; Tom Miles, *Chinese WTO Suit Strikes Back at U.S. Duties*, REUTERS (May 25, 2012, 8:15 PM), <http://www.reuters.com/article/us-china-usa-trade-idUSBRE84O17D20120526> [<https://perma.cc/9FFH-TAN7>].

281. Wu & Salzman, *supra* note 268, at 439 (citing Leslie Hook, *China Launches Anti-Dumping Probe Against U.S.*, FIN. TIMES (July 20, 2012), <http://www.ft.com/intl/cms/s/0/3623df3a-d254-11e1-abe7-00144feabdc0.html#axzz2dwN6FgbO> [<https://perma.cc/6XQQ-KLTD>]).

282. Wu & Salzman, *supra* note 268, at 439 (citing Wayne Ma, *China Aims Duties at the US, South Korea*, WALL ST. J. (Asia ed.), July 19–21, 2013, at 17).

283. Edgar Meza, *SEIA Blasts SolarWorld Legal Action, Calls for Peaceful Resolution to US-China Trade Dispute*, PV MAG. (Jan. 6, 2014), https://www.pv-magazine.com/2014/01/06/seia-blasts-solarworld-legal-action-calls-for-peaceful-resolution-to-us-china-trade-dispute_100013822/#axzz3xJUyNRDy [<https://perma.cc/L745-8HHA>].

284. *One Year After Winning Trade Ruling, SolarWorld Works to Finish Job of Restoring US Competition*, SOLARWORLD (Dec. 31, 2013), <http://www.solarworld-usa.com/newsroom/news-releases/news/2013/solarworld-works-to-restore-us-competition> [<https://perma.cc/ZY5Y-GSJQ>].

285. U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., FACT SHEET: COMMERCE PRELIMINARILY FINDS COUNTERAVAILABLE SUBSIDIZATION OF IMPORTS OF CERTAIN CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS FROM THE PEOPLE'S REPUBLIC OF CHINA 1 (2014), <http://enforcement.trade.gov/download/factsheets/factsheet-prc-crystalline-silicon-photovoltaic-prod-cvd-prelim-060314.pdf> [<https://perma.cc/Z68V-2YJX>]; U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., FACT SHEET: COMMERCE PRELIMINARILY FINDS DUMPING OF IMPORTS OF CERTAIN CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS FROM CHINA AND TAIWAN 1 (2014),

expanded the tariffs resulting from the first set of cases and broadened the scope of the duties to any modules that undergo final assembly in China, regardless of manufacturing origin. Experts saw this as an unprecedented move.²⁸⁶ Paula Stern, former chairwoman of the International Trade Commission (ITC), sums up that sentiment: “Trade spats featuring the [United States] and China are nothing new, nor is the battle over government subsidies to Chinese solar manufacturers. What is new is the Commerce Department’s move to change the rules in the middle of the game, hurting the domestic solar industry, undermining [United States] climate change goals, and risking a prolonged trade dispute at the WTO.”²⁸⁷

US attacks on Chinese subsidization of its exports are certainly suspect.²⁸⁸ The antisubsidy laws that are used to stifle imports from the solar industry can easily be viewed as skewed in favor of protecting the domestic economic environment. For instance, in order to be subject to offsetting tariffs, the ITC must find that the dumped or subsidized imports cause or threaten to cause material harm to a domestic industry. Under the ITC statute, when the six ITC Commissioners are evenly divided on that issue, a finding of such harm will be declared.²⁸⁹ Thus, in a 2015 case, the US Court of Appeals for the Federal Circuit upheld antidumping duties and countervailing duties against utility scale wind towers from China despite the fact that three of the six Commissioners found there to be neither material injury nor a threat of such harm.²⁹⁰ In any event,

<http://enforcement.trade.gov/download/factsheets/factsheet-multiple-solar-products-ad-prelim-072514.pdf> [<https://perma.cc/KJ6P-ARHM>].

286. *A Benighted Policy on Solar Panels*, FIN. TIMES (July 5, 2014), <https://www.ft.com/content/067751a0-ecbe-11e3-8963-00144feabdc0> [<https://perma.cc/36N8-S2J4>].

287. Paula Stern, *Still Time to Avoid Collateral Damage in U.S.-China Solar Trade Dispute*, HILL (Dec. 5, 2014, 1:00 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/226044-still-time-to-avoid-collateral-damage-in-us-china-solar> [<https://perma.cc/XAD9-RTQT>].

288. See Bryce Baschuk, *U.S. Under Fire for WTO Case Against Indian Solar Program*, 32 Int’l Trade Rep. (BNA) No. 36, at 1531 (Sept. 10, 2015) (“International environmental groups [have] sharply criticized the Obama administration for its World Trade Organization challenge of India’s federal solar energy program.”). At the same time that President Obama has urged the rest of the world to invest in renewable energy sources like solar panels, and promised \$24 million in funding for eleven projects in seven states to develop new domestic solar technologies, it has relied on international trade rules to attack an Indian solar energy program that contains a domestic sourcing requirement. See *id.*

289. 19 U.S.C. § 1677(11) (2012).

290. See *Siemens Energy v. United States*, 806 F.3d 1367, 1368–69 (Fed. Cir. 2015). This case was even more interesting “because the divided vote was not a simple three-to-three split on the question of material injury to the domestic industry; instead, two Commissioners found present material injury and one Commissioner found threat of material injury, while three

rules and enforcement actions like this are not likely to assure China and other trade partners of this country's real commitment to either international trade law or climate change promises.

B. *The Path Forward*

The literature on polycentric governance—as well as the leading models that have been designed to effectuate it—demonstrate the utility of bottom-up governance, including minilateralism in addressing global collective action problems, be they in the trade or sustainable development contexts.²⁹¹ Defined classically as “a system of governance through great power collaboration,”²⁹² minilateralism holds the potential to “strengthen an increasingly polycentric field of global governance. It can inject political momentum into gridlocked international processes, provide new forms of collective leadership in a post-hegemonic world, and reconcile existing multilateral regimes with shifts in the global power balance.”²⁹³ Throughout this Article, we have assessed the threats to minilateralism—focusing on the G2—to better understand the potential for polycentric governance in the free trade and sustainable development contexts. This final section brings this analysis together, complete with translated implications for policymakers and managers.

As one example of G2 minilateralism, a US-China BIT with strong environmental measures could be a key building block to the formulation of a global sustainable development regime based on a polycentric governance model. The WTO Director-General himself has recognized that minilateral agreements and multilateral pacts can be mutually reinforcing.²⁹⁴ Further, the pressing nature of global environmental degradation, coupled with the relative inability of

Commissioners found that there was neither material injury nor threat of material injury.” *Id.* at 1369.

291. See Robert Falkner, *A Minilateral Solution for Global Climate Change? On Bargaining Efficiency, Club Benefits and International Legitimacy* 27 (Ctr. for Climate Change Econ. and Pol’y, Working Paper No. 222, 2015), http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/07/Working_Paper_197_Falkner.pdf [<https://perma.cc/H4JW-HNZF>].

292. *Id.* at 5 (quoting Miles Kahler, *Multilateralism with Small and Large Numbers*, in *MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM* 295, 304 (John G. Ruggie ed., 1993)).

293. *Id.* at 27.

294. Roberto Azevêdo, Director-General, World Trade Organization, Address at the Graduate Institute in Geneva, Switzerland (Sept. 28, 2015), https://www.wto.org/english/news_e/spra_e/spra82_e.htm [<https://perma.cc/5CSK-66QR>] (“The multilateral trading system has always coexisted with regional agreements—and proved to be mutually reinforcing. Rules and standards have been negotiated outside the GATT or the WTO before. What is important is that the multilateral system periodically updates itself, harmonizing and sometimes improving the outcomes reached in other negotiating fora.”).

domestic regulation²⁹⁵ and existing international institutions to combat its effects,²⁹⁶ calls for committed and creative governance solutions. The effective action problems inherent in climate change regulation²⁹⁷ require both public and private actors competing and collaborating with one another if they are to be offset. Polycentric governance provides this multi-stakeholder conceptual clarity.²⁹⁸

Simultaneously, the United States and its governmental institutions must begin to recognize how their cultural biases will undermine their ability to address global problems if unilateral governance in the G2, and more broadly, are to be effective as major components of a polycentric approach to fostering free trade and sustainability. This is particularly important in US interactions with

295. Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255, 261–62 (2015).

On a domestic level, environmental problems may be addressed through government regulation based on legal compliance or market-based legal incentives. Regulation based on legal compliance seeks to directly control environmental harms through command-and-control rules promulgated by administrative agencies, which establish performance standards or technology-based controls on pollution-causing activities Regulation based on market-based legal incentives seeks to indirectly control environmental harms by commoditizing negative environmental externalities (e.g., pollution) in order to create and manage market-based transactions. . . . Importantly, both of these forms of governance are premised on the effectiveness of legal rules to impel certain desired corporate conduct and the capacity of governmental regulators to carry out rulemaking, oversight, and enforcement powers vis-à-vis regulated market participants.

Id.

296. *Id.* at 262.

Environmental degradation, however, does not stop at national borders and therefore requires global solutions. Accordingly, a wide range of international and regional treaties and other agreements that seek to address environmental issues on a cross-border scale have been signed in the past forty years. . . . Despite this proliferation of international environmental conventions, the continued and worsening degradation of the environment along numerous indicators places into question the effectiveness of international environmental law.

Id.

297. *Id.* at 266. Such collective action problems stem from “the uneven distribution of harms resulting from climate change across the globe and vastly different time horizons and discount rates between most developed countries and developing countries like China.” *Id.*

298. *Id.* at 268–69.

[P]olycentric governance . . . is based on a collective array of overlapping, nonhierarchical regulatory actors. These regulatory actors—including state and nonstate actors operating at various jurisdictional levels—operate independently within their respective domains. . . . To address the collective action problems that hinder responses to climate change, polycentric governance relies on experimental efforts at multiple levels that both compete and collaborate with each other through “information networks and monitoring at all levels.”

Id.

China because on each of the cultural dimensions discussed above—individualism, universalism, and inner direction—Chinese culture is on the opposite end of the spectrum from the United States.²⁹⁹ Until the United States recognizes its cultural orientation and learns to reconcile its cultural biases with those of China and the rest of the world, significant agreement on climate change and other global issues will remain elusive.³⁰⁰

The ineffectiveness of attempts to find solutions to global problems might spur this need for cultural change. As Fons Trompenaars said, “Changes in culture happen because people realize that certain old ways of doing things do not work anymore.”³⁰¹ In particular, with regards to US-Chinese attempts to mitigate global crises like climate change, the two countries share a cultural trait that will be helpful in bridging their differences: “[B]oth societies exhibit a great deal of comfort with ambiguity. That shared cultural predisposition should serve them well as they navigate their cross-cultural differences.”³⁰²

If the world is going to mitigate and adapt to a changing climate, it is essential that the United States and China jointly lead the way. As former US President Barack Obama announced at a 2014 UN Climate Summit, “the [United States] and China have a special responsibility as the largest carbon-dioxide emitters to lead a new

299. See generally Richards, *supra* note 202, at 679–80. As a collectivist—rather than individualist society—the Chinese have distaste for confrontational tactics and a preference for harmony. See *id.* at 679. In contrast to the American culture’s universalist nature, China is largely a particularist society and therefore rejects the principle that one size fits all. See *id.* Finally, the Chinese tend to be outer-directed. See *id.* at 680. This means that they do not respond well to threats, believing instead that we are all part of nature and should accommodate one another’s needs. See *id.* In one manifestation of this lower key approach to gaining its objectives, Beijing recently established its first think-tank within the Washington beltway in an attempt to “enhance China’s ‘soft power’—the ability to further its interests through culture, media and academia.” Jeremy Page, *China Takes Island Dispute to US*, WALL ST. J. (Asia ed.), May 4, 2015, at 1. The hope is that the think-tank will “provide a platform for Chinese scholars and officials to try to influence US public debate on policy-making.” *Id.*

300. See Richards, *supra* note 202, at 682. “Understanding the importance of recognizing cultural differences is only half of the battle. First, one must actually discover those value distinctions. Yet, the most powerful values that define our culture are acquired so early in our lives that they might not be directly observable by others. In fact, they frequently remain unconscious to members of the very society that exhibits them. Very often, they are merely inferred from the way in which people behave under various circumstances.” *Id.* at 678–79 (citing GEERT HOFSTEDÉ & GERT JAN HOFSTEDÉ, *CULTURE AND ORGANIZATION: SOFTWARE OF THE MIND* 10 (2d ed. 2005)).

301. See FONS TROMPENAARS, *RIDING THE WAVES OF CULTURE* 23 (Irwin Publishing 1994).

302. See Richards, *supra* note 202, at 684.

effort to curb emissions.”³⁰³ Beijing responded by pledging that it would “make an even greater effort to address climate change and take on international responsibilities that are commensurate with [its] national conditions.”³⁰⁴ A key to success, however, will be the willingness and ability of the two great powers to achieve cooperative solutions. After all, as Chinese Vice Premier Liu Yandong said, “[c]onfrontation is a negative-sum game in which both sides will pay heavy prices and the whole world will suffer too.”³⁰⁵

Ultimately, the United States and China must lead the way “in imposing a price on carbon, because only that will take to scale the already significant technology breakthroughs that have happened with wind, solar, batteries, energy efficiency[,] and nuclear power.”³⁰⁶ While this will not be easy,³⁰⁷ recent events suggest that it is possible. For instance, in December 2015, fifty-three WTO members, including the United States and China, agreed on a timetable for the elimination of tariffs on an expanded list of information technology products (valued at more than \$1.3 trillion per year) over a three-year period.³⁰⁸ Because of the most-favored-nation principle, the tariff reductions brought about by this Information Technology Agreement

303. William Mauldin & Jeffrey Sparshott, *Obama Promises a Push to Cut Emissions*, WALL ST. J., Sept. 24, 2014, at A4.

304. *Id.* These words seemed sincere as evidenced by the fact that “half of China’s new electricity-generation equipment [the previous] year was renewable.” *Id.*

305. Felicia Swartz & Ian Talley, *U.S. Bluntly Warns China About Cybersecurity*, WALL ST. J., June 24, 2015, at A14 (quoting Chinese Vice Premier Liu Yandong who was admonishing the United States for taking a combative tone in the context of tensions over cyberspace and maritime security).

306. Thomas L. Friedman, *Paris Climate Accord Is a Big, Big Deal*, N.Y. TIMES, Dec. 16, 2015, at A35.

[L]everaging the Paris consensus to get a price on carbon in the big emitting countries is the ‘Holy Grail,’ the thing that tips everything. Because while renewables can win against new fossil fuel plants, old fossil fuel plants built without any pollution controls, and with all their capital expense amortized and still enjoying subsidies, can still run very cheaply—if you don’t count their massive carbon impacts.

Id.

307. Amy Harder, *Senate Takes a Stand Against Obama Carbon Rules*, WALL ST. J., Nov. 18, 2015, at A5. Two weeks before the climate change conference in Paris, the US Senate voted to repeal regulations designed to cut carbon emissions from power plants. *Id.* This occurred in spite of the fact that there were not sufficient votes to override a presidential veto. *Id.* It has been observed that: “Congressional Republicans nonetheless hope[d] to send a symbolic message sowing doubt among other nations that Mr. Obama will be able to take decisive steps to address the issue of climate change.” *Id.*

308. *WTO Members Conclude Landmark \$1.3 Trillion IT Trade Deal*, WORLD TRADE ORG. (Dec. 16, 2015), https://www.wto.org/english/news_e/news15_e/ita_16dec15_e.htm [<https://perma.cc/3FCE-QLEL>]. The original Information Technology Agreement was created in 1996. *Id.*

(ITA) will benefit exporters from all 162 WTO members,³⁰⁹ thereby stimulating the sale of information technology products around the world.

Following the template of the ITA, the United States and China are key participants in negotiations for an Environmental Goods Agreement (EGA) by seventeen WTO members.³¹⁰ The US Trade Representative described the EGA as a measure that will spur “innovation in green technologies.”³¹¹ The benefits of cutting tariffs on green goods have been lauded by WTO Director-General Roberto Azevedo, who observed: “The challenge is . . . to ensure that trade is an ally in the fight against climate change We need to create a virtuous circle of trade and environmental policies which promote sustainable production and consumption while being pro- growth and development.”³¹²

As with the ITA, the benefits of a completed EGA theoretically would be shared by all WTO members.³¹³ However, US trade partners, including China, might well question whether that rhetoric will match reality. After all, the United States has already been accused of using its antidumping and countervailing duty laws as a ruse to raise tariffs on imports after its trade partners have opened their markets to US goods.³¹⁴ A careful reading of the Trade Representative’s comments regarding the EGA does little to quiet this concern, as it primarily applauds the initiative as a means of facilitating the export of American-made, environmental goods.³¹⁵

309. Most-favored-nation treatment “requires that any privilege, advantage, or benefit granted to imports from one WTO member be extended to imports of similar products from all other WTO members.” See RICHARDS & SHACKELFORD, *supra* note 82, at 141.

310. Bryce Baschuk, *EGA Negotiators Await Further Clarity from China on Product Scope*, 32 Int’l Trade Rep. (BNA) No. 32, at 1377–78 (Aug. 6, 2015).

311. *Environmental Goods Agreement*, OFFICE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/other-initiatives/environmental-goods-agreement> [<https://perma.cc/9UWB-5BLV>] (last visited Feb. 12, 2017).

312. Bryce Baschuk, *WTO Chief Azevedo Says Trade Accords Can Curb Climate Change*, 32 Int’l Trade Rep. (BNA) No. 47, at 2050 (Nov. 26, 2015). “A successful EGA accord would help increase access to cutting-edge technologies at much lower costs while also ‘stimulating innovation and strengthening the green economy around the world,’ Azevedo wrote.” *Id.* at 2051.

313. See RICHARDS & SHACKELFORD, *supra* note 82.

314. See *supra* text accompanying notes 158–60.

315. See *Environmental Goods Agreement*, *supra* note 314 (highlighting the possibility that the EGA could “unlock[] opportunities for U.S. exporters”). Unfortunately, as of December 2016, these talks were stalled. Bryce Baschuk, *Environmental Trade Talks Collapse over Product List Discord*, 33 Int’l Trade Rep. (BNA) No. 48, at 1723 (Dec. 8, 2016).

VI. CONCLUSION

For the United States, the economic benefit of free trade pacts is estimated by the White House to be more than \$1 trillion, with the value of the proposed TPP project alone projected to be more than \$300 billion.³¹⁶ Appraisals of the economic benefit of a healthy, sustainable global ecosystem are more complicated to calculate, but those that have tried, such as the World Bank, have placed the figure in the trillions.³¹⁷ Similarly, the cost of forces disrupting these public goods such as trade disputes and climate change is incredibly high—a US-China trade war could cost tens of billions of dollars cumulatively,³¹⁸ while climate change has already been estimated to impact the global economy to the tune of some \$1.2 trillion annually, which works out to roughly 1.6 percent of global GDP.³¹⁹ Furthermore, the price tag of delaying action to stem climate change has been estimated at almost 1 percent—which, in the United States alone, would come to more than \$150 billion annually.³²⁰ In other words, the stakes are high, as are the opportunities in both free trade and sustainable development. To date, Donald Trump has signaled his intention to move away from multilateral trade deals and favor bilateral and minilateral accords, which could accelerate the trend toward polycentric governance in these fields.³²¹

316. See EXEC. OFFICE OF THE PRESIDENT, *THE ECONOMIC BENEFITS OF US TRADE* 5, 45 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_trade_report_final_non-embargoed_v2.pdf [<https://perma.cc/5NLP-YJT7>].

317. See, e.g., *New Study Adds up the Benefits of Climate-Smart Development in Lives, Jobs, and GDP*, WORLD BANK (June 23, 2014), <http://www.worldbank.org/en/news/feature/2014/06/23/study-adds-up-benefits-climate-smart-development-lives-jobs-gdp> [<https://perma.cc/PD4E-EBRS>] (estimating that changes in policies including regulations and taxes, improved industrial energy efficiency, and more energy efficient buildings and appliances could result in GDP growth of \$1.8–\$2.6 trillion per year by 2030).

318. See MORRISON, *supra* note 234, at i (“U.S.-China economic ties have expanded substantially over the past three decades. Total U.S.-China trade rose from \$2 billion in 1979 (when economic reforms began) to \$599 billion in 2015.”).

319. See Fiona Harvey, *Climate Change Is Already Damaging Global Economy, Report Finds*, GUARDIAN (Sept. 25, 2012, 11:00 PM), <http://www.theguardian.com/environment/2012/sep/26/climate-change-damaging-global-economy> [<https://perma.cc/BG3Q-N45M>].

320. See EXEC. OFFICE OF THE PRESIDENT, *THE COST OF DELAYING ACTION TO STEM CLIMATE CHANGE* 2 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/the_cost_of_delaying_action_to_stem_climate_change.pdf [<https://perma.cc/65KA-XNB9>].

321. See Nicky Woolf, Justin McCurry & Benjamin Haas, *Trump to Withdraw from Trans-Pacific Partnership on First Day in Office*, GUARDIAN (Nov. 22, 2016, 5:01 AM), <https://www.theguardian.com/us-news/2016/nov/21/donald-trump-100-days-plans-video-trans-pacific-partnership-withdraw> [<https://perma.cc/E9XT-KDQU>].

The US and China are the two largest and most influential economies in the world. Their economic performance and policies will go far to determine the prosperity and stability of the global economy and environment. The relationship between them, and their ability to work together, will play a vital role in determining both the short-term and longer-run shape and sustainability of the world economy. By heeding the lessons of effective multilateralism as shown in the polycentric framework—from graduated sanctions to trust-building measures such as monitoring—in both the free trade and sustainability contexts, the G2 can help usher in a more balanced approach to sustainability that includes both environmental protection and economic development. This should begin with the US-China BIT and extend to other areas of cooperation, including intellectual property rights to help greentech flourish; only then will rhetoric match reality in the United States and China, hopefully saving seven billion humans in the process.

