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Political Economy, Markets, and Institutions

Globalizing Regulation: A New Progressive Agenda for Trade and Investment

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The past two decades have witnessed growing concern about the challenges governments face in regulating multinational corporations. Trade and investment agreements play a crucial role in setting the regulatory regime that governs these transnational activities. The multilateral trade and investment regime has been experiencing a period of crisis, with the collapse of proceedings at the World Trade Organization's appellate body and the failure of the Doha Development Round. During this period, states have turned to unilateral, bilateral and regional channels in lieu of multilateral progress. Bilateral and regional agreements contain a much higher degree of regulatory coordination among members, including a growing number of binding standards on labor, the environment and human rights which apply to multinational corporations operating across the trading blocs. This paper reviews three cases of states, or groups of states, endeavoring to impose binding regulation on multinational corporations through the trade and investment regime. This paper argues, that these efforts, while partial, form the basis for a new multilateral trade and investment regime that holds corporations accountable. It shows that during the multilateral system's period of crisis, as states in both the Global North and Global South have pursued their own strategies and shown a shared commitment to increasing their regulatory capacity, the policy consensus among practitioners at the multilateral level has shifted towards accommodating these efforts. Together, this paper argues, these developments lay the groundwork for a new multilateral model of trade and corporate accountability.

The past two decades have witnessed growing concern about the challenges governments face in regulating multinational corporations. From the financial crisis to the Volkswagen emissions fraud to the Rana Plaza factory fire, corporate malfeasance can have devastating social and environmental consequences. Pressing global challenges, from combating climate change to securing human rights, require the regulation of corporate practices. Yet today's multinational corporations necessarily straddle the jurisdiction of individual states. Efforts to hold parent corporations legally liable for the actions of their foreign subsidiaries have faltered (Castermans and van der Weide 2009). While some scholars argue that corporations should adopt voluntary codes of practice (Locke 2013; Ruggie 2013), and some states have sought to incentivize "corporate social responsibility" (Knudsen and Moon 2017), these efforts have been hampered by their lack of enforcement mechanisms (Berliner and Prakash 2014; Karp 2014). Indeed, scholars such as Susanne Soederberg (2009) and Stephen Wilks (2013) have argued that this ability to transcend binding nation-state regulation is the root of contemporary corporate power.

Trade and investment agreements play a crucial role in enabling corporations to operate internationally and setting the transnational regulatory regime that governs these activities. Both political economists of trade and international law scholars have written extensively on the relationship between trade and investment and state regulation of corporations. Some scholars find that a state with strong regulation can leverage its economic influence to tighten standards on its trading partners (Vogel 1995; Prakash and Potoski 2006). Others argue that trade and investment agreements lead states to converge on the regulatory standards of the most lenient trading partner (Eskeland and Harrison 2003; Andonova, Mansfield, and Milner 2007; De Ville and Siles-Brügge 2014). Comparatively less attention has been paid, however, to trade and investment agreements themselves as tools to strengthen regulatory control

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over labor, the environment, or human rights. This is in part because historically, under trade law, only states could bring complaints against one another, and few states have acted to bring these types of social and environmental complaints to formal dispute resolution (European Commission 2008; Beharry and Kuritzky 2015; Slater 2015). At the same time, under investment treaties, investors alone may bring complaints against states, a provision corporations have frequently used to dismantle regulation, arguing that social or environmental policies violate their property rights (Legum 2010; Beharry and Kuritzky 2015; Edwards 2016). As a result, although states do possess sovereign powers to regulate foreign direct investment (FDI) into their territory, multinational corporations have been able to use investment law to undermine that sovereignty. The consensus of this body of trade and investment scholarship, then, shares with the literature on corporate power a pessimism about the scope for social and environmental regulation under conditions of globalization.

Over the past decade, meanwhile, the multilateral trade and investment regime has experienced a period of crisis, with the collapse of proceedings at the World Trade Organization's appellate body, the failure of the Doha Development Round, and growing political opposition to globalization thwarting the completion of large trade and investment agreements. This article considers this period of crisis in global economic governance, coinciding as it does with the aftermath of the global financial crisis and the escalation of the climate crisis, as an opportunity. During this period of upheaval, I argue, individual states have experimented—sometimes successfully—with new strategies to bring multinational corporations to account under international trade and investment law as an alternative to retreating from globalization. Global economic governance actors are beginning to recognize these strategies as legitimate. In so doing, they are forging the blueprint for a new multilateral approach to regulating global corporations.

This article proceeds as follows: The first section sets out the policy context of recent threats to and changes in the global trade and investment regime. The second, third, and fourth sections consider three policy areas—labor, human rights, and the environment—where individual states or regional blocs have sought to tighten regulation on multinational corporations via trade and investment rules, and evaluate their success in doing so. The fifth section reviews how the global economic governance order is responding to and incorporating these policy innovations. This section argues that these developments represent the basis for a new multilateral regime, and sets out recommendations for the role multilateral organizations can play in supporting its success.

I. THE MULTILATERAL ORDER IN CRISIS

Over the last fifteen years, the global trade and investment regime has faced three overlapping challenges. First, the World Trade Organization's Doha Development Agenda talks, which were to complete the process of setting international rules for several key areas of trade policy and address the needs of developing countries in particular, collapsed in 2008 and have not been successfully revived. The collapse of these talks, over the issue of agricultural subsidies, led to a wave of political recriminations. In particular, the unwillingness of developed countries to part with agricultural subsidies while requiring substantial liberalization from developing countries fueled perceptions that the multilateral trade regime was shrinking the "policy space" afforded to developing countries to grow their economies, entrenching inequality. This set the stage for a political backlash against the trade regime in the Global South.

Second, the financial crisis, followed by the eurozone crisis and the "jobless recovery" in many rich countries, brought to the fore long-standing grievances about economic insecurity in the Global North. These grievances contributed to the resurgence of populist politics, including growing political opposition to free trade (Davenport 2016). For some, this opposition focused on the power the international trade and investment regime grants to multinational corporations, including the role of private actors in the development of transnational regulatory standards, and the ability of corporations to challenge—through investor-state dispute settlement (ISDS)—regulations imposed by individual states. For example, during his 2016 presidential campaign, Bernie Sanders committed that "As president, I will not approve any trade agreement that gives foreign corporations the right to undermine American democracy through the disastrous Investor State Dispute Settlement system" (Tucker 2016). This populist critique drew on long-standing findings by scholars of both "private governance" and trade and investment that such private standards are less effective at achieving meaningful social or environmental policy gains than regulations imposed by states (Bartley 2018; Crane et al. 2019) and that states rarely succeed at protecting such regulations in ISDS proceedings (Cutler 2020). This culminated in the successful efforts of civil society organizations in North America and Europe to thwart the completion of the Transatlantic Trade and Investment Partnership over concerns about how US corporations might use the treaty's ISDS procedures to challenge European regulation (Tencer 2016).

Third, the resurgence of populist politics in the United States drew upon both popular anxiety about national economic decline and policymakers' frustration with the increasing inability of the United States to dominate the decision-making of international organizations due to the rising influence of emerging powers. This, as Kristen Hopewell has argued, was the primary driver of the escalation of trade-related hostilities under the Trump administration. These hostilities included the decision to renegotiate the North American Free Trade Agreement (NAFTA) and withdraw from the Obama-negotiated Trans-Pacific Partnership, the imposition of new sanctions on China, and the unilateral withdrawal of negotiated concessions for developing countries at the World Trade Organization (WTO) (Hopewell 2021). These hostilities culminated in the refusal to seat judges for the WTO's appellate body, leaving countries to pursue disputes through tit-for-tat sanctions instead, and plunging the trade regime into crisis.

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Moreover, without a functioning appellate body or the revival of its rule-making talks, the WTO has been unable to begin to address the grievances of either Global South states or Global North civil society about the regime's existing flaws. As one emerging market diplomat reports, "The system is going to wither away because of the impasse in filling these vacancies. We are even failing to preserve what we already have."[1] This concern about multilateral "failure" reflects the prevailing view of multilateral international organizations (IOs) as the prime diffusers of global policy norms (Park 2006; Park and Vetterlein 2010), whose waning control heralds norm fragmentation. This article, however, shows that IOs still have a role to play as consolidators and guarantors of agendas set by their member states.

Indeed, during this period, states have turned to bilateral and regional channels in lieu of multilateral progress on trade and investment. Notably, bilateral and regional agreements contain a much higher degree of regulatory coordination among members, including a growing number of binding standards on labor, the environment, and human rights (Lim, Mosley, and Prakash 2015; Greenhill, Mosley, and Prakash 2009; Cao, Greenhill, and Prakash 2013; European Commission 2008). Erin Hannah, Silke Trommer, and Adrienne Roberts have documented the growth in free trade agreements that have dedicated chapters on gender equality (Hannah, Roberts, and Trommer 2021). Damian Raess and Dora Sari show a substantial increase in agreements with enforceable labor obligations, including rules about collective bargaining rights, child labor, and forced labor (Raess and Sari 2018). In contrast to a decade ago, when the Organisation for Economic Co-operation and Development (OECD) reported that similar clauses for environmental rights were rare (Gordon and Pohl 2011), Clara Brandi et al. have shown that an increasing number of agreements now include trade-linked environmental components, in which countries earn market access in exchange for environmental compliance (Brandi et al. 2020). The proliferation of these standards represents a recognition that while states are the legal parties to the treaties that structure the trade and investment regime, the acts of trading and investing are carried out by corporations. Attaching responsibilities to corporations through standards represents an attempt, Michael Addo has argued, to reckon with this reality and extricate international economic policy from "the shadow of Westphalia" (Addo 1999).

Moreover, where social and environmental chapters of trade agreements have often relied on nonbinding mediation for enforcement, the new generation of treaties increasingly allows for these provisions to be subject to binding arbitration, and for violators to face economic sanctions (European Commission 2008; Yannaca-Small 2010; Dawar and Evenett 2007). This is made possible, in part, by the increasing number of "megaregional" agreements that combine both trade and investment provisions. This is significant because while trade law permits states to bring disputes only over alleged violations (and few states have chosen to do this over social and environmental issues), investment law reserves the right to bring disputes for investors, who have used this power to dismantle regulation. By creating hybrid systems that combine elements of both systems, the new agreements weaken the ability of investors to subvert states' "right to regulate" and increase the ability for states to enforce regulation on foreign corporations (Slater 2015; Beharry and Kuritzky 2015).

Indeed, these new treaties are already building a new body of case law as a result of environmental and other rights disputes coming before trade and investment arbitral bodies (Douglas 2013; Gantz 2013; Acharya 2016; Slater 2015; International Labor Organization 2013). Moreover, research shows that countries do comply with requirements to alter their regulations as a condition of joining new trade blocs, and that corporations do comply with regulatory judgments issued against them by trade and investment panels (Yackee 2012).[2] Finally, the recent defeat of Philip Morris in its suit against Australia suggests new appetite for restraints on corporate power among the international community of arbitrators.[3] As a policy advisor to an environmental advocacy group recounts, "The crisis is an opportunity [for us]. As the global trade slowdown has produced uncertainty in the business community, and as the environmental crisis approaches planetary boundaries, instability is forcing businesses and states to think more sustainably."[4]

That thinking, this article will show, is producing a new multilateral consensus for sustainable trade and investment. The emerging bilateral trade and investment policies set during this period of multilateral stalemate originated from individual states, rather than at the secretariats of established IOs. Yet this article will show that this ad hoc process can nevertheless produce emerging global norms while leaving a considerable role for multilateral IOs in consolidating, refining, and implementing them. In this way, it aims to move past a binary opposition between bilateral and multilateral approaches to global governance.

II. LEARNING FROM FAILURE ON LABOR RIGHTS

While labor chapters have been commonly included in preferential trade agreements for three decades, these chapters have been predominantly nonbinding. While exporting countries must agree to them in principle in order to gain market access, importing jurisdictions have limited ability

1 Field interview, diplomat, permanent mission to World Trade Organization, Geneva, October 2019.

2 See, for example, *World Duty Free v Kenya* ARB/00/7 (2006); Inceysa Vallisoletana S.L. v El Salvador ARB/03/26 (2006).

3 See UNCITRAL, PCA Case 2012-12.

4 Interview, policy advisor to international environmental advocacy group, October 9, 2019.

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to enforce raising standards in practice, though there is evidence that standards may diffuse more indirectly through "California effects"(Greenhill, Mosley, and Prakash 2009).

This section traces the efforts of policymakers in the United States to more directly enforce labor standards on US trading partners. These efforts originate in the failure of the labor "side agreement" to the North American Free Trade Agreement to provide for concrete mechanisms to raise labor standards in the bloc (Brown 2005). This prompted political anxiety in the United States about the impact of cheaper labor and laxer enforcement in Mexico on American manufacturing jobs and wages. While the labor side agreement did not produce de facto changes in labor standards as its proponents had claimed, it did, as Rodrigo Fagundes Cezar has argued, create an expectation that future US trade agreements would include labor chapters and that such chapters should raise standards (Cezar 2020). As these standards were found wanting, the expectation that they should succeed pushed US trade negotiators toward stronger standards (Inside Trade 2017a).

Initially, this took the form of including commitments similar to those in the NAFTA side agreement—that states enforce their own labor laws—in the main body of treaties, as in the US-Cambodia Trade Agreement (1999–2004). These measures had limited impact on labor standards in practice, however, for two reasons. First, exporting states, whose position in global supply chains depends in part on the ability of lead firms to reduce labor costs by relocating production, were reluctant to adopt strict enforcement (Martin and Maskus 2001). Second, an obligation to enforce existing law was of limited value to workers in countries where existing labor laws are weak (Greenhill, Mosley, and Prakash 2009). Third, these treaties provided for nonbinding mediation between states should these commitments not be met, but not for any binding sanctions on violating states (Smith et al. 2020). Moreover, importing states were rarely willing to initiate disputes over labor violations, giving rise to concerns that the main function of labor chapters was as a symbolic concession to domestic protectionists (Hafner-Burton, Mosley, and Galantucci 2019).

The Dominican Republic-Central American Free Trade Agreement (CAFTA-DR, 2005) represents an important break from this model of labor enforcement. Like the treaties that preceded it, CAFTA-DR's labor and environmental chapters require only the enforcement of each member state's own labor and environmental laws.[5] However, CAFTA-DR is among the first treaties in which these chapters are subject to binding arbitration,[6] and it gave rise to the first labor case to reach binding arbitration (Inside Trade 2016). After a group of Guatemalan workers were fired for unionizing, a Guatemalan court ordered their reinstatement, given that the right to organize is protected in Guatemalan law, but the court order was not enforced. Guatemalan unions then collaborated with the American AFL-CIO union to persuade the US government, under the Obama administration, to sue under CAFTA-DR, alleging a failure of enforcement on Guatemala's part. This alliance between labor unions in different countries is notable as unions in the region have historically viewed their counterparts in other countries as competitors, with labor unions in richer countries taking historically protectionist positions on regional trade (Wolf 2020). The emergence of such transnational civil society networks campaigning for more stringent regulation *within* the trade regime—as opposed to against the trade regime or against globalization more broadly—is a significant development (Landau and Howe 2016). The new multilateral consensus on trade, investment, and regulation that this article tracks depends as much on such transnational civil society networks as it does on networks of states.

The case was ultimately decided in Guatemala's favor, however, with the arbitral panel declaring in its report that although the workers in question had been wronged, the treaty did not offer a clear enough labor protection to make the flouted court order a treaty violation (Inside Trade 2017b). In particular, the treaty placed the burden of proof on the United States to show that Guatemala's lax enforcement had impacted US-Guatemalan trade, so that clear evidence of a violation of labor law was not, in and of itself, sufficient to justify trade remedies (Claussen 2018). Notably, the report names the specific companies involved in the dispute and gives details of the alleged offenses, leaving open the possibility of further civil or criminal enforcement, even as, by definition, individual companies were not parties to the treaty and could not be held directly accountable under its dispute mechanisms. However, as Rodrigo Fagundes Cezar has argued, the long time period over which the case moved through the arbitral system, from 2008 to 2017, made it virtually impossible for the original affected workers to pursue justice against the original corporate violators (Cezar 2020). Cases like these have prompted some scholars to call for mechanisms for labor unions to bring cases more directly—rather than relying on states to do so—and for standards of proof that take labor violations themselves, rather than merely impact on trade, seriously as justifications for remedy (Beharry and Kuritzky 2015; Claussen 2018; Cezar 2020).

Even as the Guatemalan dispute moved slowly through the arbitral system, however, the Obama administration was negotiating the Trans-Pacific Partnership (TPP), a megaregional agreement with both trade and investment provisions bringing together twelve North American, South American, and Asian countries. Growing evidence that the approach taken in both NAFTA and CAFTA-DR had proved insufficient to raise labor compliance influenced the novel approach taken in TPP, which was, if ratified, to effectively

5 See CAFTA-DR, 2005: Art. 16.2.1, Art. 17.2.1.

6 See CAFTA-DR, 2005: Art. 16.6.7, Art. 17.10.7.

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supersede NAFTA since all three NAFTA members would be covered in the new agreement.[7] In particular, negotiators expressed concern that demanding merely the enforcement of existing laws would be insufficient in the case of Vietnam, the only communist country in the bloc, whose domestic labor laws specifically prohibit the formation of independent labor unions (Ravenhill 2017). As a result, the United States negotiated a side agreement with Vietnam in which the latter agreed to preemptively revise its domestic labor laws in line with International Labour Organization (ILO) standards protecting the right to collective bargaining as a condition of joining TPP, with the United States acting as a guarantor of Vietnam's compliance to other treaty members. Unlike the NAFTA side agreement, however, the main text of the TPP made this side agreement, as well as the treaty's own labor chapter, subject to binding arbitration and economic penalties. Vietnam could have faced economic sanction or expulsion from the bloc over labor violations on its soil. As Howe and Landau have argued, the possibility of such a dispute arising was small, but the potential for the condition placed on Vietnam's ascension to provoke preratification reform was considerable (Howe and Landau 2016).

While the Trump administration abandoned this agreement as part of its wider retreat from international trade, portions of the treaty's approach to labor protection, as well as lessons learned from the US defeat in the CAFTA-DR dispute, were subsequently incorporated into the US-Mexico-Canada Agreement (USMCA), which came into force in 2020. In particular, negotiators focused on ensuring in USMCA that labor provisions contained not only strong de jure standards but also the capacity for meaningful de facto enforcement, to avoid a repeat of the Guatemala result. They also focused on collective bargaining rights, and not just workplace treatment, as the core of labor protection (Cezar 2020). As Kathleen Claussen has argued, the direct product of the shadow of Guatemala was the shifting of the burden of proof in USMCA disputes to the respondent state, to prove that its enforcement practices (or lack thereof) do not undermine a level playing field in trade, rather than on the state bringing the suit to demonstrate trade-related harms (Claussen 2018). Moreover, the treaty lowers the substantive threshold for labor violations, such that individual incidents of violence, threats, and intimidation, rather than a sustained pattern of violation, are sufficient to constitute a breach (Claussen 2018). In addition, the new agreement provides for individuals to submit evidence of violations anonymously—an important protection for vulnerable workers—and streamlines the stages of dispute resolution to allow for faster results (Lester and Manak 2019).

Most significantly, however, the USMCA introduces a new rapid response mechanism (RRM) for addressing denials of collective bargaining rights at individual worksites by private entities without going through the full state-state dispute procedures. Under this mechanism, US or Canadian civil society bodies such as unions can bring complaints about specific facilities in Mexico to the US or Canadian governments, which can alert Mexico. If Mexico does not take rapid steps to address any violation once alerted, a panel of labor law experts—in contrast to the trade policy experts who form most arbitral panels—is assembled, which has the ability to verify the labor practices at the specific worksite through on-site inspection. Where this panel identifies labor law violations, the state that initially called for the RRM to be initiated has the ability to impose trade penalties not on the host state of the violating facility but on the private company itself—for example, by placing tariffs or other fines on products made at that site. This, as Claussen has argued, shifts labor standards from a component of state-state cooperation to a supranational enforcement mechanism, in which civil society groups and workers can exert control over private firms by working *through* the domestic customs authorities of individual states (Claussen 2019). Indeed, in July 2021 the Biden administration initiated the RRM over a General Motors plant in Mexico that was denying workers the right to hold a vote on unionization, and secured a union ballot for the workers at that facility within two months of the initial complaint (Ngo 2021). In February 2022 workers at the plant successfully elected new union representation (Solomon 2022). This outcome, different in both its speed and its application to a specific facility from the failures of NAFTA and CAFTA-DR, demonstrates the shift, through the United States' own preferential agreements, toward a new transnational jurisdiction over corporate labor conduct. This jurisdiction may even extend beyond the boundaries of the states that are party to USMCA. In June 2022 the United States initiated a similar RRM claim over labor rights violations at Teksid Hierro, a Mexican subsidiary of the Dutch Stellantis, which owns the Fiat and Chrysler car brands (Hurley 2022). If successful in securing collective bargaining rights for Teksid Hierro workers, this RRM claim will have extended the reach of the new regulations to a European multinational.

The pathway from NAFTA to USMCA is one of gradual escalation from nonbinding standards for state regulation to binding enforcement of obligations on individual businesses. Where previous scholarship on nonbinding standards has focused on their ability to exert informal influence on state policy, this case study showcases their ability to build toward binding enforcement by raising public expectations of compliance and thereby creating legitimacy for stronger measures. In the process, however, the pool of workers who were to benefit from these strengthened rules narrowed, as the TPP would have raised standards in Asia as well as the Americas, a scope that USMCA does not have. In the interim, many of TPP's Asian members have joined the Regional Comprehensive Economic Partnership (RCEP), alongside China, which has similar restrictions on labor unions as Vietnam does. As a result, RCEP

7 Field interview, former US Trade Representative official, December 2016.

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does not include such labor protections and presents a significant challenge to the emerging norm. Nevertheless, the acceptance of a hard labor standard in the narrower North American treaty leaves open the possibility that its member states could impose the rule on future bilateral and regional agreements with Asian partners. Indeed, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), brokered by the remaining eleven TPP members after US withdrawal, retains the bulk of TPP's labor rules, albeit without the United States as compliance guarantor (Chang-Hee 2018). This could be remedied by the reentry of the United States into the trading bloc under a new administration.

III. HARDENING HUMAN RIGHTS

Since the 1990s human rights activists globally have sought to address corporate complicity in human rights violations, both as direct perpetrators or as auxiliaries to state crimes. These efforts have historically taken two forms: first, an ongoing, as yet unsuccessful campaign for a global "business and human rights" treaty that would bind states to regulate corporate human rights impacts; and second, the Guiding Principles on Business and Human Rights, a nonbinding UN resolution under which states commit to regulate corporations and provide guidelines for corporations to monitor and mitigate their own impacts (Ruggie 2013). Human rights themselves are defined for these purposes broadly in terms set by existing United Nations treaties, but unlike international criminal law or international trade and investment law, international human rights treaties also lack binding enforcement mechanisms (Karp 2014).

This section considers a novel attempt by South Africa to harden the enforcement of human rights standards on corporations, particularly multinational corporations, through trade and investment law. This effort originates in a unique set of human rights regulations adopted in South Africa following the fall of the apartheid regime. These policies, collectively known as Broad-Based Black Economic Empowerment (BBBEE), require firms to empower racially disadvantaged populations through increased shareholdings (reaching a 26 percent threshold), employment and promotion, and local development as a condition of receiving government contracts (including state mining licenses). BBBEE policies also encourage the use of a rating system to enable firms to consider BBBEE status in their dealings with one another (Tangri and Southall 2008). Each of these criteria carries a points value, and companies are permitted to outperform targets on some metrics to compensate for lackluster performance on others. Companies' ability to play different aspects of this regulatory regime off one another, to pick the low-hanging fruit of compliance and defer more substantial reform, has long been a sore point for regulators, even as companies express frustration with the internal contradictions of the regulatory regime (Atal 2017). The 26 percent share ownership target has been particularly controversial, and multinational companies have often balked at compliance altogether.[8]

Several foreign investors, representing mining and wildlife tourism operating companies, used the investor-state dispute settlement provisions of three of South Africa's bilateral investment treaties (BITs), with Italy, the Benelux countries, and Switzerland, to challenge the BBBEE regulations as a form of expropriation (Schlemmer 2016). The South African state defended its policies, unusually, in moral rather than economic terms. In the Luxembourg dispute, for example, investors conceded that they were being offered compensation for the shares they were required to transfer to black South Africans, but argued that the sale price was unfair because post-apartheid regulation had reduced the value of their shares. The South African government, in its response, did not address this alleged depreciation. Instead, they argued that the government would be justified in choosing to penalize foreign investors if this were necessary to achieve its redistributive justice goals: "the difference in treatment would fall well within the Respondent's margin of appreciation for determining which measures are reasonable and justifiable in advancing critical public interests" including "ameliorating the disenfranchisement of H[istorically] D[isadvantaged] S[outh] A[fricans] and other negative social effects caused by apartheid in general." Finally, the South African legal team argued that the apartheid-era market value of mining assets was irrelevant insofar as apartheid-era economic regulation was definitionally an "instrument of white privilege" that "clearly could not withstand the coming to power of a democratically elected government."[9]

These arguments were grounded in South Africa's Constitution, which is rights-based and particularly centers the redress of historical injustice in its conception of human rights. Two of its founding principles are "Human dignity, the achievement of equality and the advancement of human rights and freedoms" and "non-racialism and non-sexism." Property rights are protected in the bill of rights, but they are not listed among these fundamental founding principles. Moreover, the articulation of property rights in the Constitution explicitly allows for expropriation "for a public purpose or in the public interest" and defines the public interest as including "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources." These arguments were unsuccessful in both of the investment tribunals, as well as in a separate case brought domestically by white South African investors, leading South African lawyers to conclude that the BITs, as written, could overrule not only specific domestic legislation but also the South African

8 Interview, staff member, investment promotion authority Invest SA, October 2, 2019.

9 Excerpts from *Piero Foresti, Laura de Carli & Others v The Republic of South Africa;* Case No ARB(AF)/07/1.

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Constitution itself, and therefore that the treaties might be unconstitutional.[10]

As a result, since 2012 South Africa has begun withdrawing from BITs with European countries that represent the bulk of its ISDS opponents and that account for the bulk of its inbound FDI (Schlemmer 2016). Subsequently, South Africa introduced a new investment policy in two pieces of legislation, the Protection of Investment Act (2015) and the International Arbitration Act (2017). The first act sets out many of the standard protections for investors that are customary in investment treaties, including the right to physical security of property, the right to national treatment, and the right to repatriate funds. Unlike many BITs, however, it does not include any explicit protection against expropriation, and it reserves for "the government or any organ of state" the right to

> take measures, which may include— (a) redressing historical, social and economic inequalities and injustices; (b) upholding the values and principles espoused in section 195 of the Constitution; (c) upholding the rights guaranteed in the Constitution; (d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; (e) fostering economic development, industrialisation and beneficiation; (f) achieving the progressive realisation of socio-economic rights; or (g) protecting the environment and the conservation and sustainable use of natural resources.[11]

This broad policy carveout is intended to explicitly enforce domestic human rights law, as espoused in the Constitution and as intended to redress historic injustice, on both domestic and foreign investors. Furthermore, in lieu of providing recourse to international investor-state arbitration, the act sets out a three-stage dispute resolution mechanism. Investors may first pursue mediation, with the South African government appointing a mediator; second (or first, if the investor chooses), sue the government in domestic South African courts; or third, if domestic remedies are exhausted, petition their home state to bring the South African government to international state-state arbitration. The accompanying International Arbitration Act (2017) provides for the expansion of South Africa's capacity in international commercial arbitration, which may, due to the joint-venture partnerships BBBEE incentivizes, also host cases that center on BBBEE and other regulations.[12]

Despite substantial investor resistance to the introduction of the new policies, which came into force in 2019, the withdrawal of the BIT protections has not had a damaging impact on South Africa's inbound FDI. FDI stock has risen overall over the decade during which the BITs were withdrawn and the new policy introduced, while FDI flows from key European countries fell in the years after BIT withdrawal but have now returned to their preexisting levels. Lawyers for the government note that in practice, investors have not actually left South Africa. "It's been 10 years, and in the end, it's quite obvious that investors voted with their money and where did the money go? Well, it stayed put," says one government trade policy advisor, noting that this was true even during the transitional period, between 2010 and 2018, when investors in South Africa had no explicit protection at all.[13] Lawyers for investors and companies agree. "Our experience is that people aren't necessarily going to turn away from South Africa...I haven't really seen an impact on any actual decisions," says one lawyer for the mining industry.[14] The investment promotion authorities similarly recount, "Once the investor has made up their mind that this is what they are going to do, if they decided that's the country I want to invest in on the basis of its natural resources or other business imperatives, they are unlikely to withdraw."[15]

South Africa's unique position in mineral supply chains may have played a role in investors' reluctance to follow through on threats to withdraw. In particular, the country is home to 91 percent of the world's platinum reserves, and responsible for 73 percent of global platinum production.[16] Platinum is among the world's least reactive metals, significantly resistant to corrosion. As a result, it is used as a catalyst in chemical reactions as part of the production of many products. South African platinum is particularly sought by international investors as the next largest producers are Zimbabwe and Russia, two states that have been historically difficult for foreign investors to operate in. Given that platinum represents South Africa's largest export, its strategic position may account for the resilience of overall FDI during this period of upheaval in the country's investment policy. This strategic position is particularly important as European mining companies represented the bulk of litigants in the arbitration disputes about the post-apartheid regulations. In retaining their investment, these companies are subjecting themselves to the domestic enforcement of the same regulations overruled at the international level.

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10 Interview with legal advisor, South African Department of Trade and Industry, October 2019.

11 Protection of Investment Act 22 of 2015 (2015), available at https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf.

12 International Arbitration Act 15 of 2017 (2017), available at https://www.gov.za/sites/default/files/gcis_document/201712/41347internationalarbitrationact15of2017.pdf.

13 Interview, trade policy advisor and diplomat, South African mission to the World Trade Organization, October 11, 2019.

14 Interview, corporate lawyer advising mining clients, October 7, 2019.

15 Interview, staff member, investment promotion authority Invest SA, October 2, 2019.

16 Data source: *Global Platinum Mining to 2022*, Research and Markets, December 2018.

South Africa's approach is novel both because it mounts a human rights defense of corporate obligations to promote racial justice and because it carves out a route for individual states to impose these obligations on multinational corporations in investment law, a hard and binding area of law with the potential to impose financial penalties on firms. At the same time, as a result of the unique role of human rights law in South Africa's exit from apartheid, including its pioneering role in the development of transitional justice and postconflict reconciliation, South African lawyers remain influential in international legal circles. This has allowed South Africa to advocate for its approach to the problem of regulating multinational business in international fora where other states are wrestling with similar challenges. "Many countries want to do the same thing, and so they are kind of using us as 'Okay what have you learned? What have the lessons been? Has it improved?'" says one South African diplomat.[17] Indeed, officials from other countries have begun to express similar concerns about the challenges of carving out policy space to regulate multinational corporations, beyond the scope of what international trade and investment law permits. India, for example, similarly beset by ISDS challenges to its domestic regulations, has given notice of intent to withdraw from treaties and begun trying to negotiate new investment treaties in which a right-to-regulate clause similar in the one in South African domestic law is to be included in the treaties themselves.[18] Ecuador has similarly terminated nine BITs after being subjected to ISDS over its domestic environmental regulations and is seeking similar reforms (Olivet 2017). Finally, the European Union, which is home to many of the companies seeking to challenge human rights regulation in South Africa and other emerging markets, has itself announced that it will impose human rights conditionality in its own trade and investment agreements (Beattie 2020).

This generalization of South Africa's approach is similar to the "California effect" previously documented in environmental regulation, in which California, and other important end markets for goods, can impose regulatory standards on trading partners. South Africa's experience suggests that such effects may exist for human rights regulation, and for supplier countries, as well. This finding contrasts with previous literature suggesting that firms in strategic supply chains are more insulated from such challenges to their power (Johns and Wellhausen 2016) but echoes literature suggesting that the ability of emerging markets to exert this kind of "voice" in international economic law depends on their relative indispensability to global markets (Mossallam 2018).

IV. A CLIMATE EXEMPTION TO GATT

As mentioned in the previous section, the European Union has recently announced commitments to include human rights conditions in its future trade and investment treaty negotiations. In this, the European Union is following the lead of emerging markets, like South Africa, that have already sought to impose human rights conditions and the right to regulate for human rights on foreign investors. In the area of environmental conditionality, however, the European Union has been the leading policy entrepreneur. While the European Union is not a state but rather a regional economic bloc, for the purpose of trade and investment law it is analogous to a state since all member states cede authority over external trade and investment relations to the European Commission, which negotiates treaties for the whole bloc. Its resulting international agreements, therefore, are still preferential trade agreements and bilateral investment treaties, rather than multilateral global rules, and it can be subjected to direct state-state dispute as a single unit under World Trade Organization rules.

This section considers EU efforts to apply "extraterritorial" environmental standards to imported products and services sold within its single market. These standards, the European Union argues, are vital to addressing the global challenge of climate change. Twenty-seven percent of global carbon emissions are embedded in trade flows (Yamano and Guilhoto 2020), and the emissions footprints of individual states can deceptively conceal responsibility for importing carbon-intensive goods (Wiedmann and Lenzen 2018). To address this, the European Union has introduced environmental standards for products and services in the aviation, energy, timber, shipping, and other industries, which apply equally to imports. Most recently, its 2019 Green Deal and 2021 trade strategy both envision a carbon border adjustment mechanism (CBAM), which would levy a charge on carbon-intensive imports (Tucker and Meyer 2021).

These measures have been challenged under WTO rules by the United States, Russia, South Africa, Brazil, Argentina, India, and China, which have argued that since emissions from production and transport of goods and services are not visible in the final product, they do not affect the quality or safety of imported products as assessed by consumers. "Product quality" and "safety" are among the small number of reasons that the Generalized Agreement on Tariffs and Trade (GATT) permits states to discriminate against imported goods (Havel and Mulligan 2012; Gehring and Robb 2018; Dobson 2018). Restricting the market access of or imposing fines on high-emissions products would therefore not easily fall within the consumer protection exemptions that international law has historically recognized

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17 Interview, South African diplomat, Mission to the United Nations, October 13, 2019.

18 Interview, Indian diplomat, October 28, 2019.

as a legitimate reason for states to place restrictions on imports.

While the European Union does impose environmental regulation against domestic producers, its external carbon-based import restrictions can still be discriminatory in practice, and scholars of environmental law have argued that they need to be discriminatory in order to be effective. Otherwise, as a trade analyst in Brussels puts it, "If the carbon coefficient is flat across industry and country, but two firms in the same country have not invested equally in greening their own production, when imports from that country are carbon-taxed, the 'responsible' firm gets penalized."[19] In practice, the "right to regulate" exceptions in Article 20 of GATT allow states capacity to regulate their own nationals, but not to constrain market access for multinationals in a targeted way, even where conditions of production differ dramatically between states. This has been the case in EU losses during disputes with Argentina, Indonesia, and Malaysia about palm oil and biofuels (T. Meyer and Tucker 2021).

The European Union has argued for the need to constrain market access for unsustainable goods in order to protect the development of nascent domestic alternative and renewable products. However, such economic components of environmental policy, including industrial policy to promote sustainable production, are not permitted by existing WTO rules. Indeed, one legal advisor to the European Parliament concedes that part of the EU's justification for such policies involves the benefits to domestic industry "with the hope that it will yield significant revenue to finance economic recovery and debt reimbursement. Will this not make it difficult to justify in the WTO both under Article XX GATT or under a possible Waiver?"[20] On these grounds, trade negotiators from developing countries have challenged EU environmental regulations as an illegitimate check on their economic growth. Emerging economies like South Africa and China have argued that these measures merely place the cost of compliance on suppliers that cannot afford expensive carbon inspections, thereby cutting developing countries off from European markets (Dobson 2018; Gehring and Robb 2018). As one Indonesian negotiator, facing the consequences of an EU restriction on Indonesian palm oil, argues:

> Based on the US-Mexico Tuna Dolphin Dispute, [the EU border carbon] proposal is in violation of WTO rules, which preclude a member state from implying the implementation of a trade policy related to natural resources in terms of cross-border issues. Nonetheless, the implications of Article XX for environmental issues can only be used to safeguard the environment within the jurisdiction of a member state, and they cannot be extended to the jurisdictions of other member countries because it gives the appearance of enforcing rules on them.[21]

Nevertheless, it is precisely with the goal of enforcing rules and standards on corporations in foreign countries that environmental advocates have encouraged the European Union to impose the border adjustment.

The majority of such cases have resulted in the WTO finding that the body imposing climate-based import restrictions (sometimes called "border carbon adjustments") is at fault, and authorizing either compensation to the injured party or countermeasures, such as retaliatory tariffs, against the regulating country (Silva-Send 2013; Dobson 2018). These disputes themselves, as Tim Meyer and Todd Tucker have noted, run counter to environmental needs, as states are much more likely to bring disputes to protect incumbent fossil fuel industries than new renewable firms (T. Meyer and Tucker 2021). At the same time, the creation of such "environmental clubs" in which sustainable producers gain preferential market access does not necessarily decrease trade overall, which may constitute a defense of such policies (Brandi et al. 2020). In addition, more recently, some investors have brought suit against such measures through investor-state dispute resolution; states have, under current rules, no comparable tort under which they can bring suit against noncompliant investors (Douglas 2013).

This context would seem to make the prospects for the European Union's climate agenda dim. However, since 2015 there have been two significant changes: first, the agreement of the Sustainable Development Goals in 2015; and second, the signing of the Paris Agreement in 2016. Together, they have opened a new avenue for states to pursue environmental restrictions at their borders in compliance with existing law. The WTO already allows that states may be granted an exemption to GATT in order to comply with their legal obligations under other international treaties. The Paris climate agreement is not a binding treaty, but WTO officials nevertheless acknowledge that both the Paris Agreement and the SDGs represent the kind of broad multilateral accord with which the WTO, itself a key institution of the rules-based multilateral order, could not sustainably remain in conflict. As the European Commission's director-general for trade argued in 2019, "These agreements can create obligations under trade law to ratify and comply with Kyoto or Paris."[22] Indeed, rather than argue that such measures would contradict the WTO, the organization is eager to suggest that its rules can accommodate these climate policies. A counselor at the WTO agrees: "You could conceive that you would have a government imposing trade measures that are pursuant to commitments that they have undertaken in environmental agreements…could be under

19 Interview, trade analyst for European Commission, Brussels, April 8, 2021.

20 Interview, legal advisor to European Parliament, April 8, 2021.

21 Interview, Indonesian trade negotiator, April 10, 2021.

22 Denis Radonnet, EU DG-Trade, remarks to World Trade Organization annual meetings, October 2019.

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Paris, could be under SDGs. So then, so then there needs to be that clarification as to what would prevail, but I think that the WTO agreements are flexible enough to allow for it."[23]

Moreover, at a time of resurgent populism and backlash against globalization and free trade, WTO officials argue that preventing the European Union—the largest free trade bloc in the world,[24] representing 15 percent of global exports and 14 percent of global imports—from achieving its signature foreign policy objective is a dangerous risk for the legitimacy of the trade regime. Indeed, the European Union has itself declared an intention to ensure its proposed mechanism is WTO-compliant (Tucker and Meyer 2021). Nevertheless, there are practical risks, as the climate policies adopted by the European Union come into trade conflict with those adopted by other Paris signatories, including the United States, and the economic development interests of emerging markets, who regard such standards as an imposition on their own regulatory sovereignty (Blümer et al. 2020). For this reason, Tucker and Meyer have argued that the European Union, the United States, and other countries seeking to address the carbon footprint of international trade should agree on a common external tariff on imports as a basis for broader multilateral consensus (Tucker and Meyer 2021), while Simon Lester has similarly called for a coordinated carbon tax (Lester 2020).

In response to the frequency of disputes over EU regulation, the ambiguity surrounding trade law in this area, growing concern about climate change, and the legal obligations on its member states under Paris, the WTO has launched new negotiations to establish the specific conditions under which states may cite climate concerns to justify trade restrictions. The European Union is not only represented on the WTO Committee on Trade and Environment, which will decide the new policy, but the EU's own Green Deal has formed the base proposal from which the multilateral negotiations flow (World Trade Organization 2021). While some member states have raised concerns about how these policies will impact development, others have used the talks to develop their own border adjustment policies and cited their obligations under Paris in the talks. Some developing countries have used the talks to "test drive" proposed clean production regulations against the standard imposed by the European Union, a target export market.[25] In practice, then, WTO officials concede, the multilateral talks serve the purpose of allowing one of the organization's largest members to reconcile its membership with its other policy priorities—in this case, environmental sustainability.

V. AN EMERGING MULTILATERALISM OF REGULATION

These efforts by individual states, while partial, form the basis for a new multilateral consensus on the need for stronger transnational regulation of corporate practices, from the carbon footprint of production to protection for labor and human rights. This consensus reflects, first, the growing number of states that have accepted the efforts of their trading partners to impose these standards in trade and investment agreements and policy—as seen in the case of European investors in South Africa, or Mexico's and Vietnam's acceptance of the US labor demands. The cases considered here are too few to represent a comprehensive survey of the emerging trade and investment landscape. However, they demonstrate the process by which stronger regulatory agendas adopted by individual states can diffuse through trade and investment policy to global partners.

Second, this consensus reflects the growing willingness of civil society organizations, including the American labor federation AFL-CIO and the European environmental NGOs such as Greenpeace, to push for the achievement of their policy objectives through international trade and investment law, a sharp break from the historically antitrade position of these organizations. Third, it reflects the growing recognition among multilateral bodies in the trade and investment regime that the obligation to regulate that states face under international development and environmental policy requires reform of multilateral rules. Indeed, recent court decisions in Germany and the Netherlands suggest that states' domestic court systems are interpreting these treaties as binding in this respect, while international courts are exploring the possibility of prosecuting climate-related crimes under existing treaties (D. Meyer 2021). This principle, if extended beyond the environment, may also invoke labor and human rights obligations under the ILO Convention or other international agreements.

Together, this article argues, these developments lay the groundwork for a new multilateral model of trade and corporate accountability. The "hard bargaining" of some individual states, which is sometimes considered in the literature as a unilateral contrast to multilateralism, may have the effect of advancing multilateral diplomacy in trade and investment. This reading relies on an understanding that multilateral IOs respond to and consolidate the agendas of their member states, such that individual state initiatives can foster, not merely impede or break, multilateral consensus. These efforts are already having a broader impact on the multilateral view of regulation. For example, both the civil society campaign against Transatlantic Trade and Investment Partnership (TTIP) and the withdrawal of many emerging markets from their BITs have been driven by con-

23 Interview, counselor, World Trade Organization Legal Affairs division, October 11, 2019.

24 At the time of writing. This will soon be superseded in size by RCEP.

25 Field observations, World Trade Organization, October 2019.

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cerns about ISDS procedures. Following these events, the leading multilateral body for investment rules, UNCITRAL, convened multilateral talks on a new dispute resolution standard, potentially to include a global investment court, at which both states and investors would have equal right to bring cases. Both businesses and civil society groups, in addition to governments, are participating in the new rule creation. Anthea Roberts and Taylor St John have argued, based on observance of the talks, that investors in both developed and emerging markets, including Germany and China, have been open to replacing ISDS with a new multilateral standards (Roberts and St John 2020).

There remain several areas of concern in this emerging ad hoc multilateralism where existing global economic governance institutions can play a constructive role. First, the emerging consensus on new multilateral rules for dispute resolution that give states more power to exert their regulatory authority over corporations, while welcome, does not solve the problem of the ISDS provisions in three thousand existing treaties. As suggested by Poulsen and Gertz, both the United Nations, as the host of UNCITRAL, and the World Bank, as the host of ICSID, can play a role in resolving this issue by issuing new interpretations of their existing rules that allow for greater regulatory policy space (Poulsen and Gertz 2021). Since many existing treaties simply refer to the rules set by these multilateral bodies, this is a simple work-around that can preempt further unilateral treaty termination. Moreover, consolidating these state-led efforts under the convening umbrella of multilateral organizations will also help to diffuse the emerging norm to states whose unilateral agenda has turned in another direction. This includes, most significantly, China, a trade powerhouse that has been resistant to stronger labor and environmental standards in its own agreements, and is itself a source of human rights violations in global supply chains (Swanson 2022). Yet China is also a member of the WTO, the UN, and the World Bank, whose compliance with the new norms could be secured through the gradual formalization of those norms as part of GATT, ICSID, and UNCITRAL.

Second, the emerging proposals for an investment court should consider the lessons of the US-Guatemala dispute, in which the time taken for a union complaint about corporate malfeasance to reach a state that could bring the complaint prevented the dispute from benefiting the workers harmed. Given the urgency of addressing rights violations while they are still taking place and when victims can meaningfully gain from justice, the new rules should allow civil society bodies, such as unions or even groups of citizens, to bring complaints more directly, as proposed by the Hague Rules on Business and Human Rights Arbitration (Levy 2017). A multilateral investment court, however, would also need institutional protection against unilateral state action to undermine its functioning, as in the recent US withdrawal of support for appellate judges at the WTO. This might include clearly specified conditions under which a supermajority of states can overrule an intransigent member.

Third, the growing pressure on the trade and investment regime to adjudicate complaints about labor, the environment, or human rights reflects in part that trade and investment law is a rare body of international law with binding enforcement capacity. As a WTO official argues:

> These are issues where you may have other organizations that are probably better placed to regulate the policy question. So why is it in the WTO? And the answer is? Do you know? Because we have dispute settlement mechanisms. Binding dispute settlement. And then we also have to be careful not to overload the WTO with some of these issues, because they may impose a burden on the system that we may not be able to support.[26]

This concern points to the need to consider the type of arbitrators appointed to state-state disputes where arbitration is still the norm. In particular, where issues of labor, the environment, or human rights are at stake, greater emphasis should be placed, as in the USMCA rapid response process, on appointing panels of experts in the relevant policy area, and not merely experts in trade law who may be ill suited to adjudicate the substantive stakes.

Fourth, much of the new policy in this area is being pioneered by developed countries at the expense of imports from the developing world. These measures, therefore, inevitably impose a cost of adjustment on poor countries, which must refit factories to comply with carbon standards, create new inspection regimes, or pursue expensive certifications. Where trade and investment agreements allow for sanctions against noncompliant states, as in the TPP, there is a risk of penalizing countries for being too poor to meet the conditions of the market access that will enable them to grow. Both Cambodia and Vietnam have raised this complaint regarding EU policies (Beattie 2020). Calls to raise standards in the Global South may coincide with, or serve as an excuse for, protectionism in the Global North, becoming a new barrier to trade for poor countries. Moreover, the assumption that Global South governments require pressure from Global North trading partners to adopt progressive regulation can carry paternalistic connotations.

While acknowledging the validity of these concerns, the case studies in this article show that increasingly, the strongest advocates for greater corporate accountability under the trade regime are Global South governments themselves, such as in South Africa, as well as groups representing marginalized workers, such as unions and their members in Mexico and Guatemala. Moreover, the drive toward incorporating such standards into multilateral agreements offers an important guard against their use as a tool of discrimination. The Paris Agreement already stipulates that countries should have "common but differentiated responsibilities" to meet its targets.

26 Interview, counselor, WTO Rules Division, October 11, 2019.

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Given this, a true multilateralism of regulation must include a revival of formal trade and development talks at a multilateral level at the WTO. This is an area where established multilateral IOs have a crucial role to play in resolving bottlenecks and distributional inequalities that arise from the new regulatory approach. Rather than seeking to detoxify the controversy surrounding the failed Doha talks, the WTO can seize on its member states' parallel agreement on the Sustainable Development Goals and convene new rules talks around its stated goal of using trade to achieve these existing objectives. As part of these talks, the WTO and other multilateral IOs could jointly develop a mechanism to obligate rich countries, potentially as part of their existing 0.7 percent of GNI annual aid commitments, to provide financial and logistical assistance to developing countries in meeting the new regulatory requirements. Indeed, at the most recent climate summit in Glasgow in autumn 2021, the convening power of the UNFCCC helped to broker agreement for the United States, France, Germany, and the United Kingdom to contribute funds for the energy transition in South Africa. Multilateral organizations should seek to broker similar funding arrangements to support transition across the emerging markets. This would make individual states' efforts to impose regulation in the trade regime consistent with their WTO obligation to do so without discrimination and to the benefit of the least developed.

In this way, rather than treating the plurilateral efforts of states to seek regulatory space within the trade and investment regime as challenges to the multilateral order, multilateral economic governance organizations can embrace these efforts as the seeds of a new multilateral framework for holding corporations accountable, while ensuring that the pursuit of accountability is reconciled with fairness and inclusion for the least developed.

COMPETING INTERESTS

The author has no competing interests to declare.

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