TESSD Negotiation: An Ugly Duckling or A White Swan?

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The imperative for effective climate governance has recently driven numerous countries to consider incorporating sustainability criteria within the framework of global trade governance. A noteworthy effort in this direction is the Trade and Environmental Sustainability Structured Discussions (TESSD) within the World Trade Organization (WTO). Regrettably, there has been a scarcity of studies thoroughly examining the intricacies of the TESSD negotiations. This article fills this literature gap by empirically analyzing the ongoing TESSD negotiations. Moreover, the TESSD's plurilateral nature adds an extra layer of significance to its examination. While some scholars have theorized about the benefits of embracing plurilateralism in reforming WTO rules, none have yet subjected this hypothesis to empirical scrutiny. This article examines whether the plurilateral approach used in TESSD negotiations delivers these benefits. It reveals whether the TESSD negotiations can be likened to the ugly duckling's transformation into a graceful white swan, essentially deviating from the multilateral approach. Overall, this article's primary contribution lies in its critical examination of the TESSD negotiations and a thoughtful reflection on using the plurilateral negotiation approach in the context of environmental sustainability.

Keywords: WTO, trade and environmental sustainability structured discussions, plurilateralism, negotiation, environmental goods and services, subsidies, trade-related climate measures, circular economy

I. Introduction

In recent years, the pressing need for climate governance has spurred numerous countries to explore the integration of sustainability standards into global trade governance.[1] This proactive stance emanates from the conviction that trade measures have significant potential to contribute to environmental sustainability. Building on this momentum, subsequent to the 11th WTO Ministerial Conference in 2017 in Buenos Aires, Argentina, certain WTO members advocated for establishing the Trade and Environmental Sustainability Structured Discussions (TESSD). This initiative aims to complement the efforts of the Committee on Trade and Environment (CTE) in facilitating negotiations at the intersection of trade and the environment.[2] Finally, 48 WTO members, including the EU-27, formally announced the launch of the TESSD during the 'Trade and Environment Week,' hosted by the CTE from November 16 to 20, 2020.[3]

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[1] With regard to the WTO, please see Jan McDonald, *It's Not Easy Being Green: Trade and Environment Linkages beyond Doha*, in The WTO and the Doha Round: The Changing Face of World Trade 158-159 (Ross P. Buckley ed. 2003). Regarding FTAs, please see, for example, Jana Titievskaia, *Sustainability Provisions in EU Free Trade Agreements: Review of the European Commission Action Plan* (2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698799/EPRS_BRI(2021)698799_EN.pdf (accessed 3 October 2023).

[2] TESSD, *Ministerial Statement on Trade and Environmental Sustainability*, WT/MIN (21)/6/Rev.2 (2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/6R2.pdf&Open=True (accessed 14 May 2024).

[3] *Ibid*., at 2.

Presently, the TESSD has 74 participating members[4], and its deliberations over the past three years have unfolded in two distinct phases. The inaugural phase was dedicated to delineating the substantive themes for TESSD discussions. Culminating in a Joint Ministerial Declaration at the 12th WTO Ministerial Conference in 2021, TESSD members solidified the mandate of the forum, marking the conclusion of the first phase of deliberations. Subsequently, TESSD members transitioned into the second phase, initiating talks by forming four thematic working groups. These groups are tasked with negotiating pertinent issues within the realms of environmental goods and services (EGS), subsidies, trade-related climate measures (TRCMs), and the circular economy.[5]

Despite the TESSD's significance, there is a lack of comprehensive studies on its intricacies. This article fills this literature gap by empirically analyzing the ongoing TESSD negotiations. Moreover, the TESSD's plurilateral nature adds an extra layer of significance to its examination.

The TESSD operates as a plurilateral negotiation forum, and its deliberations yield binding results applicable solely to its members. Consequently, the scope of the TESSD's impact is relatively confined compared to the broader reach of the WTO's multilateral negotiations. This plurilateral feature sets the TESSD apart from the WTO's multilateral negotiations.

Traditionally, WTO members have not regarded WTO negotiations as the optimal forum for addressing non-trade issues like environmental concerns. Instead, they have typically opted for multilateral environmental negotiations, such as those held during the United Nations Climate Change Conference. Despite earlier attempts in the 1980s by GATT members to address the import issue of hazardous products through GATT multilateral negotiations, those efforts to solve environmental issues proved unsuccessful.

Nevertheless, there has been a growing advocacy for plurilateral WTO negotiations in recent years. Scholars have increasingly explored the advantages and disadvantages of this negotiation approach, examining its distinctions and similarities compared to multilateral negotiations.[6] A pivotal hypothesis posits that plurilateral negotiations have the potential to overcome the stalemate in WTO negotiations and facilitate the reform of WTO rules.[7] This assumption underscores the efficiency of plurilateral negotiations. The TESSD negotiations provide a significant opportunity to test this hypothesis empirically.

Therefore, this article places particular emphasis on the role of plurilateralism in facilitating TESSD negotiations. To add an engaging touch to the narrative, I weave in the timeless story of the ugly duckling. Penned by Hans Christian Andersen in 1844, the tale unfolds as the ugly duckling, mistakenly placed in a duck's nest, confronts adversity only to undergo a remarkable transformation into an elegant and charming white swan, ultimately becoming the most beautiful of its kind.

This analogy prompts contemplation on whether the intrinsic plurilateral nature of TESSD sets it apart from other WTO multilateral negotiations and enables it to propel advancements in environmental sustainability negotiations. Through a meticulous analysis of the outcomes

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[4] See TESSD, *Meeting Held on 19 and 20 July 2022*, INF/TE/SSD/R/12 (2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R12.pdf&Open=True (accessed 14 May 2024), para.1.1.

[5] See TESSD, *Communication from the TESSD Coordinators*, INF/TE/SSD/W/17/Rev.1 (2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/W17R1.pdf&Open=True (accessed 14 May 2024), at 2-3.

[6] See Robert Basedow, *The WTO and the Rise of Plurilateralism – What Lessons can we Learn from the European Union's Experience with Differentiated Integration?*, 21(2) Journal of International Economic Law 411 (2018), doi: 10.1093/jiel/jgy020; Meredith Kolsky Lewis, *The Origins of Plurilateralism in International Trade Law*, 20(5) Journal of World Investment & Trade 633 (2019), doi: 10.1163/22119000-12340150.

[7] Robert Basedow, *supra* n.6, at 418; Rudolf Adlung and Hamid Mamdouh, *Plurilateral Trade Agreements: An Escape Route for the WTO?*, 52(1) Journal of World Trade 85 (2018), doi: 10.54648/trad2018005.

and shortcomings of the ongoing TESSD negotiations, this article aims to provide insights and answers to this intriguing question.

The remainder of this article is structured as follows. Part II briefly reviews the progress of the four TESSD thematic negotiations, presenting the current outcomes of their deliberations. Part III assesses the four TESSD thematic negotiations in turn. The evaluation provides a detailed examination of the deficiencies in achieving key milestones, highlighting areas where improvements are imperative. Part IV reflects on the use of the plurilateral approach in the TESSD thematic negotiations. This part highlights that the TESSD thematic negotiations are inefficient and, thus, do not reflect the advantage of plurilateral negotiations. It reveals the absence of plurilateralism in the TESSD negotiation. It also offers valuable insights and reflections on navigating this issue. The article concludes with a summary in Part V, encapsulating the key findings and insights derived from the examination of the TESSD thematic negotiations.

II. Workings of the Trade and Environmental Sustainability Structured Discussions

A. Environmental Goods and Services (EGS)

Over the years, trade negotiators have collaborated across various platforms to facilitate the liberalization of trade in environmental goods and services (EGS). The primary goal is to broaden access for more countries through international trade, ensuring they can acquire the products and technologies essential for environmental protection and climate change mitigation and adaptation.[8] The TESSD negotiations on EGS commence with a comprehensive review of past efforts to identify areas of synergy.[9] Building on previous discussions, TESSD members have collectively decided to integrate into the negotiation process the identification of EGS, strategies to address non-trade barriers (NTBs), stakeholder engagement—emphasizing public participation—and discussions linked to other initiatives (e.g., corresponding talks in APEC and regional trade agreement negotiations).[10] Acknowledging the urgency of addressing climate change, TESSD members have chosen to approach these issues through the lens of climate governance.[11] Presently, their focus is directed towards facilitating trade in goods and services associated with renewable energy.[12]

To date, TESSD members have engaged in discussions concerning solar, wind, and hydropower products and technologies. Participants in the TESSD negotiations have highlighted the critical role of developing countries in both climate change mitigation and adaptation efforts, emphasizing the need to examine the diffusion of EGS in these regions. The discussions underscored the challenges faced by developing countries, including a lack of infrastructure, technology, expertise, skilled workers, and financial resources, hindering the

[8] Examples include negotiations on the Doha Development Agenda (DDA) and Environmental Goods Agreement (EGA) within the WTO, the discussions on EGS in the Asia-Pacific Economic Cooperation (APEC), and Regional/Free Trade Agreements (RTAs/FTAs) negotiations. See TESSD, *Meeting Held on 31 March and 11 April 2022*, INF/TE/SSD/R/7(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R7.pdf&Open=True (accessed 14 May 2024), para.4.2.

[9] See TESSD, *Meeting Held on 7 February 2022*, INF/TE/SSD/R/6(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R6.pdf&Open=True (accessed 14 May 2024), para.2.4.

[10] See TESSD, *supra* n.8, para.4.2.

[11] See TESSD, *Statement by the TESSD Co-Convenors*, INF/TE/SSD/W/21(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/W21.pdf&Open=True (accessed 14 May 2024), para.7.

[12] *Ibid*., para.7.

adoption of green technologies. Additionally, attention was drawn to trade policies in certain developing countries that act as barriers to accessing essential elements—products, services, and technologies—required for the widespread adoption of solar energy.[13] During the negotiations, participants meticulously identified specific EGS and associated trade barriers within the solar, wind, and hydropower sectors.[14] Notably, the United Kingdom provided compelling evidence, clearly defining the goods and services encompassed in the value chain of the wind energy industry.[15]

B. Subsidies

The TESSD subsidies negotiation seeks to assess the adverse effects of subsidies on the environment and delineate the role of trade policy in mitigating these impacts. In earlier negotiation rounds, participants reached a consensus to concentrate on refining the design of agricultural subsidies and those linked to the transition to a low-carbon economy. Concurrently, they sought to improve the transparency of these subsidies.[16]

Currently, the negotiation exclusively addresses agricultural subsidies. Within this scope, some TESSD members have presented two proposals to enhance transparency. Paraguay suggested creating a questionnaire akin to the Dialogue on Plastic Pollution. This questionnaire aims to collect information on TESSD members' subsidies, detailing their environmental objectives and impacts.[17] Simultaneously, an undisclosed participant proposed quantifying environmental effects as a means of evaluating the benefits derived from climate-smart agricultural practices.[18] Regarding the design of subsidies, Brazil, China, the EU, and Canada have shared their experiences. It is heartening to observe that, at the current stage of negotiations, TESSD members demonstrate a willingness to endure, to a certain extent, the adverse trade effects of agricultural subsidies in pursuit of shared climate objectives. This cooperative spirit is particularly invaluable in the context of environmental negotiations.

In addition, TESSD participants received expert insights on subsidies and their environmental implications from various international organizations. The Organization for Economic Cooperation and Development (OECD) unveiled a comprehensive list of more than 1300 fossil fuel subsidies (support measures), advocating for enhanced transparency through mechanisms such as periodic peer reviews.[19] The United Nations Environment Program (UNEP), in collaboration with the Food and Agriculture Organization (FAO) and the United Nations Development Program (UNDP), presented a joint report highlighting the deficiencies in current agricultural support policies. Many existing agricultural policies, especially those

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[13] See TESSD, *Informal Working Group Meetings Held on 16-17 March 2023*, INF/TE/SSR/R/16(2023), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R16.pdf&Open=True (accessed 14 May 2024), para.4.12.

[14] *Ibid*., section 4. See also TESSD, *Informal Working Group Meetings Held on 10-11 May 2023*, INF/TE/SSD/R/17 (2023), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R17.pdf&Open=True (accessed 14 May 2024), section 2.

[15] See TESSD, *Communication from the United Kingdom*, INF/TE/SSD/W/23(2023), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/W23.pdf&Open=True (accessed 14 May 2024). See also TESSD, *Communication from the United Kingdom*, INF/TE/SSD/W/26(2023), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/W26.pdf&Open=True (accessed 14 May 2024).

[16] See TESSD, *supra* n.11 para.9.

[17] See TESSD, *supra* n.13, para.3.2.

[18] *Ibid*., para.3.5.

[19] See TESSD, *Informal Working Group on Subsidies Held on 18 May 2022 (15:00-18:00)*, INF/TE/SSD/R/11(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R11.pdf&Open=True (accessed 14 May 2024), para.2.2.

involving price incentives and coupled subsidies, were found to promote environmentally harmful farming practices and production systems.[20] The UNEP recommended repurposing agricultural support policies to eliminate trade-distorting and environmentally/socially harmful subsidies, with due consideration to country-specific circumstances, including the interests of vulnerable groups.[21]

Furthermore, the WTO Secretariat showcased subsidies that were documented in the WTO Environmental Database. Despite its partial coverage, the database effectively illustrates subsidies' environmental impacts and underscores the vital role of transparent disclosure in reforming subsidy policies. Additionally, the International Institute for Sustainable Development and OECD elucidated their methodology for measuring the environmental impact of industrial subsidies.[22]

C. Trade-Related Climate Measures

In the initial phases of the TESSD Trade-Related Climate Measures (TRCMs) negotiation, considerable time was dedicated to selecting negotiation topics. Ultimately, TESSD members opted for a sector-by-sector approach, focusing on two key issues related to climate governance.[23] The first involved a comprehensive review of carbon measurement standards and decarbonization measures, while the second centered on the exchange of information concerning the development and implementation of TRCMs. Currently, TESSD members are actively engaged in negotiations within two specific sectors.

The first sector is steel. Regrettably, TESSD members have encountered challenges in advancing negotiations regarding carbon measurement standards and decarbonization measures. The current impasse centers around a dispute over each country's responsibility for emission reduction.

In addressing the development and implementation of TRCMs, the WTO Secretariat underscored the significance of adhering to the principles outlined in the TBT Agreement and international standards to prevent the emergence of trade barriers.[24] A consensus among many members highlighted that establishing standards through international platforms such as the WTO and OECD could mitigate the risk of introducing additional trade barriers and prevent redundant efforts across various forums.[25] Members advocated for the incorporation of sufficient transition periods when implementing new standards, aiming to alleviate administrative burdens and reduce trade barriers.[26] Additionally, several members, including Singapore, shared valuable insights from their national regulatory experiences, emphasizing the pivotal role of transparency, the rule of law, and public participation in developing and implementing national TRCMs.[27] Overall, TESSD members arrived at a unified approach to standard-setting in the steel sector, affirming the necessity for international negotiations, adherence to global standards, transparency, and the active inclusion of developing countries in both the development and utilization of TRCMs.

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[20] *Ibid*., para.3.1.
[21] *Ibid*., para.3.2.
[22] See TESSD, *Informal Working Group Meetings Held on 4-5 October 2022*, INF/TE/SSD/R/13(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R13.pdf&Open=True (accessed 14 May 2024), paras.5.3-5.4.
[23] See TESSD, *supra* n.11, para.6. See also TESSD, *Summary Report 2022*, INF/TE/SSD/R/14(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R14.pdf&Open=True (accessed 14 May 2024), para.2.7.
[24] *Ibid*., para. 2.5.
[25] *Ibid*., para. 2.4.
[26] *Ibid*., para. 2.8.
[27] *Ibid*., para. 2.7.

The second industrial sector under consideration is fertilizers. TESSD members shared various measures they have implemented to reduce carbon emissions in fertilizer production.[28] Among these measures, a promising approach involves reducing carbon emissions associated with ammonia production, given that ammonia constitutes a primary component in numerous commercial fertilizers. Ammonia manufacturers face the imperative of capturing carbon dioxide generated during hydrogen production. This entails combining low-carbon hydrogen with nitrogen gas to synthesize ammonia. Hence, the development of technology capable of capturing carbon dioxide by-products from hydrogen production emerges as a crucial factor in decarbonizing fertilizer production.

Additionally, some countries, such as Australia and Canada, shared insights into the establishment of carbon emissions standards for hydrogen and ammonia.[29] TESSD members underscored the need for increased international collaboration in the development of emission measurement standards, regulatory transparency (including timely notification of regulatory measures), capacity building, and the sharing of technology and knowledge.[30] The latter is deemed crucial for enabling developing countries to produce environmentally friendly fertilizers and surmount NTBs arising from carbon emissions standards.

In the realm of TRCM development and implementation, members reiterated the significance of transparency and public participation (e.g., stakeholder consultations).[31] This emphasis parallels the approach taken in the steel negotiations.

D. Circular Economy

The TESSD Circular Economy Negotiation centers around identifying challenges hindering the achievement of a circular economy and devising strategies to overcome them. TESSD members systematically examine various trade sectors pertinent to the circular economy, conduct in-depth analyses of trade-related issues across the life cycle of products within each sector, and investigate the measures countries adopt to enhance domestic resource efficiency and promote circular economy objectives.[32] Presently, discussions are underway focusing on two key industries: electronics and renewable energy.[33]

In the electronics negotiations, TESSD members directed their attention specifically to issues surrounding lithium-ion batteries. The deliberations encompassed the role of the WTO in addressing related issues, the influence of trade policies on the transportation and utilization of used batteries, the establishment of recycling infrastructures (inclusive of the associated challenges of trade barriers and export restrictions), the alignment of definitions, standards, and regulations pertinent to circular value chains, and the provision of support for developing and LDCs.[34]

In the context of renewable energy, TESSD members engaged in discussions focused on both wind and solar energy. However, the publicly available minutes exclusively reflect deliberations on solar energy. Consequently, this article will specifically address discussions related to solar energy. Within this domain, TESSD members explored topics such as photovoltaic (PV) recycling, trade in raw materials associated with solar energy, standardization, and pertinent issues concerning developing countries and LDCs, including measures to prevent environmental pollution from second-hand solar PV.[35]

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[28] See TESSD, *supra* n.14, para. 4.3.
[29] *Ibid*., para. 4.4.
[30] *Ibid*., para. 4.5.
[31] *Ibid*., para. 4.8.
[32] See TESSD, *supra* n.*22*, paras. 4.1-4.2. See also TESSD, *supra* n.11, para.8.
[33] *Ibid*., para.8.
[34] See TESSD, *supra* n.13, paras. 5.2-5.4.
[35] See TESSD, *supra* n.14, paras. 5.2-5.4.

Furthermore, the Working Group on Circular Economy released a draft mapping exercise on 5 July 2023. This work summarizes a number of important issues based on data from the WTO Environmental Database, including transparency, standards and regulations, trade facilitation, waste management, capacity building and technical assistance, and technology and other trade-related aspects for cooperation.[36] The findings strongly indicate that these issues should be focal points in the TESSD's circular economy negotiations.

III. Assessment of the TESSD Negotiations

Completing sustainable trade negotiations poses a formidable challenge, largely due to the intricate nature of green trade issues. For TESSD members aspiring to craft optimal trade measures, it becomes imperative to identify and address all sustainability-related trade issues meticulously. This demands in-depth discussions and thoughtful solutions among TESSD members.

However, the reality of negotiations introduces a significant hurdle. Guided by stringent agendas, negotiators must adhere to strict timeframes to reach a consensus. They often find themselves compelled to make trade-offs in content to adhere to these agendas.

As expected, the four TESSD thematic negotiations are not immune to this challenge. Presently, these negotiations exclusively focus on matters concerning the reduction of greenhouse gas (GHG) emissions and initiatives aimed at combating climate change. This specific emphasis is a direct response to the urgent imperative of reducing GHG emissions. In light of this compelling rationale, it is important to note that this article will refrain from critiquing the scope of the TESSD negotiations.

The central inquiry of this article revolves around the achievement of milestones in the four thematic negotiations within the current stage of TESSD. As outlined in the conference proceedings, these negotiations' milestones can be succinctly summarized in two key points. The first involves designing or enhancing existing trade measures to contribute to reducing GHG emissions. The second objective aims to bolster the capacity of developing countries to address climate change through international trade. This heightened capacity encompasses improved access, via international trade, to essential goods, services, and technical and financial assistance necessary for GHG emissions reduction and climate change mitigation and adaptation. Subsequent sections will evaluate each of the four TESSD thematic negotiations, gauging the extent to which TESSD members have successfully attained their negotiation milestones.

A. EGS Negotiations

1. Deficiencies Associated with Services Trade Negotiations

The first thing worth noting is the need for more attention given to environmental services in the discussion. Numerous environmental services play a pivotal role in reducing GHG emissions. These encompass a broad spectrum, including but not limited to renewable energy generation, energy efficiency services, and carbon capture and storage.[37]

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[36] See TESSD, *Mapping Exercise: Trade and Trade Policy Aspects Along the Lifecycle of Products*, INF/TE/SSD/W/27(2023), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/W27.pdf&Open=True (accessed 14 May 2024).

[37] Abatement services may also include sustainable mobility, reforestation and afforestation, waste management and recycling, carbon offsetting initiatives, green building and sustainable construction, environmental consulting services, as well as education and advocacy efforts.

In line with previous environmental services negotiations, the foundation for initiating trade liberalization discussions lies in the identification of pertinent services. Hence, negotiations concerning environmental services should commence with identifying abatement services eligible for preferential treatment. TESSD members aspiring to enhance the dissemination of abatement services should integrate a broader range of these services into the negotiations by enriching their definitions. Regrettably, the ongoing negotiations fail to address the explicit definition of these abatement services.

Instead, the discussion on abatement services is a by-product of abatement goods talks with TESSD members briefly touching upon services only in the context of discussions on related goods. This gap implies that TESSD's EGS negotiations have not been proactive in lowering procurement costs and broadening access to abatement services. Commitments to liberalization in this domain remain stagnant at the pre-TESSD negotiation level, which proves insufficient to address the formidable challenge of climate change, given that many essential abatement services are conspicuously absent from the commitment schedule.

Unfortunately, developing countries mainly rely on purchasing abatement services to compensate for their deficiencies in expertise and technologies. Consequently, the contribution of ongoing negotiations to disseminating the use of abatement services in developing countries is quite limited.

2. Inefficiencies in Identifying Abatement Goods

Preceding TESSD negotiations, trade negotiators have explored three methods for identifying EGS.[38] The first method involves using an abstract definition to delineate EGS. For instance, the Organization for Economic Cooperation and Development (OECD) and Eurostat characterize EGS as those that measure, prevent, limit, minimize, or correct environmental damage to water, air, and soil, encompassing issues related to waste, noise, and ecosystems.[39] The second approach entails compiling a list outlining specific types of EGS. This method aligns with the practices of the Doha Development Agenda, the Environmental Goods Agreement, and the APEC list.[40] If adopted, TESSD members could prepare an EGS list based on the previous ones. A third approach proposes establishing an overarching environmental goal and facilitating trade in goods and services essential for attaining related targets.[41] This method offers a more goal-oriented perspective, ensuring that trade focuses on products and services directly contributing to achieving the set environmental goal.

The approach TESSD members adopt amalgamates elements of the second and third methods. It intends to present a comprehensive list of measures to facilitate trade in goods and services, with a primary goal of reducing GHG emissions. However, TESSD members have only engaged in discussions on solar, wind, and lithium batteries. The sluggish pace of these negotiations can be attributed to the highly time-consuming negotiation methodology employed by TESSD members – they intend to investigate and tackle trade and environment issues sector by sector. This protracted discussion would hinder the expansion of the negotiation scope to include a broader range of goods and services essential for comprehensive GHG emissions reduction.

In the context of trade liberalization talks, the optimal approach is to swiftly identify a list of goods/services that bring clarity to the scope of negotiation. This strategy offers two distinct

[38] See TESSD, *Experiences in the Promotion and Facilitation of Environmental Goods and Services*, INF/TE/SSD/W/18(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/W18.pdf&Open=True (accessed 14 May 2024), at 5-9.
[39] *Ibid*., at para.2.17.
[40] *Ibid*., at 8.
[41] *Ibid*., para. 2.26.

advantages. First, it prevents negotiators from inadvertently making erroneous trade commitments, guaranteeing the quality of negotiation. Secondly, it allows negotiators to address matters within the established negotiation agenda, ensuring the efficiency of the negotiations.

However, an inherent contradiction exists between quality and efficiency. This conflict becomes even more pronounced in EGS negotiations, given the multitude of matters associated with abatement goods and services. Consequently, the method suitable for TESSD EGS negotiation should strike a delicate balance between the quality and the efficiency of the negotiations. In light of this, the third approach mentioned earlier appears to be a reasonable compromise. Instead, the current negotiation method tends to overly focus on establishing an exhaustive list of emission-reduction goods and services, neglecting the need to advance negotiation efficiently.

Fundamentally, facilitating trade in abatement goods and services does not mandate an exhaustive catalog of specific items. Instead, a clear definition of the characteristics of these goods and services can effectively communicate what TESSD members have agreed upon to facilitate trade. When disputes arise over the meaning of abatement goods and services, WTO panels can examine the purview of eligible abatement goods and services by interpreting the terms TESSD members use in their agreement. The current negotiation approach arguably reflects a level of distrust among TESSD members of the WTO's dispute settlement.

Additionally, the current negotiation approach is poised to encounter heightened challenges in the future. Abatement goods and services, alongside other EGS, constitute sectors that naturally evolve over time. The liberalization in this field necessitates a regularly updated list to stay relevant. The existing inefficient negotiation pattern would impede such a timely upgrade.

3. Deficiency in the Optimization of Harmonized System Codes

The Harmonized System (HS) code serves as a critical tool for customs officers to classify various types of goods. Hence, customs officers rely on these codes to identify abatement goods eligible for tariff exemptions. The existing HS codes, formulated as six-digit identifiers by the Harmonized System Committee of the World Customs Organization, exhibit limitations in precise product categorization, particularly in presenting the diversity of environmental goods, including specific abatement products. The accuracy of product identification is contingent upon eight- or ten-digit codes unique to each country's tariff system. The lack of comprehensive incorporation of abatement goods in HS codes leads to an inability to identify whether a commodity qualifies for the corresponding trade preferential treatment. Unfortunately, this critical matter is still unaddressed in the TESSDEGS negotiations.

4. Ignoring the Issue of Multi-use Products

The ongoing EGS negotiations have overlooked the crucial aspect of the multi-use potential of products, posing a potential source of future trade disputes. While contributing to reducing GHG emissions, many goods may also have alternative applications. This raises a fundamental question: What criteria should be established for conferring trade preferences on goods associated with emissions reduction? Two plausible options emerge. The first entails granting unconditional trade preferences to products capable of reducing GHG emissions. The second option involves conferring trade preferences exclusively on products actively utilized for emission reduction purposes.

Both approaches present distinct advantages and drawbacks. The first approach is evidently simple to implement, yet it carries the risk of free-riding behavior. This implies that certain importers may exploit trade preferences by acquiring abatement products for purposes other

than emission reduction. On the other hand, the second approach addresses this concern but proves immensely challenging in practical implementation.

Should TESSD members choose the second approach, they would initially need to delineate which goods, with emission reduction potential, also serve alternative purposes. Subsequently, formulating trade management measures and review mechanisms becomes imperative to monitor and verify the utilization of abatement goods in importing countries. The regulatory and inspection measures become notably intricate, especially when factoring in the possibility of re-exporting these commodities. The heightened complexity of these measures would not only increase trade costs but also hamper the global dissemination of abatement goods.

Considering these challenges, the second approach appears less favorable. However, it is crucial to note that this does not automatically validate the superiority of the first approach. The optimal solution could involve TESSD members committing to prevent importers from exploiting trade preferences for abatement goods for purposes other than emission reduction. While such a commitment may not entirely eradicate the risk of abuse, it would serve as a foundation for addressing corresponding trade disputes. The effectiveness of this approach hinges on the level of mutual trust among TESSD members.

Should there be skepticism about adherence to the rules or rectification of erroneous trade behavior following a breach, the alternative might involve implementing robust trade regulations and scrutiny mechanisms to curb the misuse of trade preferences. Regardless, a comprehensive and open discussion among TESSD members is essential to address the complexities surrounding the multi-use of products and establish a framework that effectively balances regulatory means and regulatory ends.

5. Failure to Address Non-Tariff Barriers to Trade

The ongoing TESSD EGS negotiations have yet to address the issue of NTBs. Common NTB concerns encompass import controls, state aid and subsidy measures, public procurement and localization policies, and sanitary and phytosanitary standards.[42] These matters are intricately linked to non-trade values such as incentives for innovation, environmental protection, animal and human health, and the broader realization of human rights. Given the varying stages of social development, notable disparities exist between the perspectives of developed and developing countries on these issues.

Unlike traditional trade barriers, the elimination of NTBs proves to be more challenging due to these nuanced differences. Achieving consensus between developed and developing countries on resolving these matters within the framework of TESSD's EGS negotiations poses a substantial challenge, particularly on politically sensitive topics like human rights.[43] Presently, the TESSD EGS negotiations do not engage in substantive discussions concerning the solution of these NTB issues. However, the postponement of these discussions is likely to impede facilitating trade in abatement goods.

6. Sidelining Key Developing Country Issues

TESSD's EGS negotiations have deferred addressing several crucial issues raised by developing countries. Notably, some do not endorse the establishment of general trade

[42] Luisa Kinzius et al, *Trade Protection and the Role of Non-tariff Barriers*, 155(4) Review of World Economics 604 (2019), doi: 10.1007/s10290-019-00341-6.

[43] See Andreas. R. Ziegler & Xinyan Zhao, *Global Constitutionalism as a Method in International Economic Law*, in Handbook on Research Methods in International Law 429-432 (Deplano Rossana & Tsagourias Nicholas eds 2021), https://www.elgaronline.com/edcollchap/edcoll/9781788972352/9781788972352.00035.xml (accessed 14 May 2024). To know the difficulties of cooperation between democracies and non-democracies, see Jean d'Aspremont, *L'état non démocratique en droit international Étude critique du droit international positif et de la pratique contemporaine* (Editions A. Pedone 2008).

preference commitments. Instead, they advocate for more modest tariff-cutting commitments compared to those carried out by developed countries.[44] This approach appears to integrate the principle of common but differentiated responsibilities into trade negotiations concerning abatement goods.[45] Predictably, concerns have arisen among certain members about the potential emergence of free-rider problems due to divergent trade commitments.[46]

Resolving this disagreement is pivotal for the success of TESSD's EGS negotiations, particularly considering the aspiration to reach a consensus with more developing countries on the trade of abatement goods. Regrettably, the current stage of TESSD's EGS negotiations has not delved into this issue. The discussions have merely revisited previous approaches, such as allowing developing countries special and differential treatment for a specific period through the establishment of a transition period or specifying that the implementation of a trade preference commitment necessitates the involvement of a specific number of participants.[47] Unfortunately, these approaches do not seem to fully address the concerns of developed countries regarding potential free-riding behavior.

From an ethical standpoint, incorporating the principle of common but differentiated responsibilities into the EGS negotiations makes sense. This perspective recognizes that developing countries are entitled to make smaller economic sacrifices in their efforts to reduce carbon emissions compared to developed countries, which have historically emitted more greenhouse gases.[48]

However, formulating effective and equitable global climate policies requires balancing ethical considerations with climatological realities. From a climatological viewpoint, adopting low decarbonization standards based on the principle of common but differentiated responsibilities is irrational. On the one hand, assigning varied responsibilities for emission reductions may risk undermining global climate governance, as the success of climate initiatives hinges on the collective participation of all nations.[49]

On the other hand, over the long term, adopting low decarbonization standards cannot genuinely bring economic benefits to developing countries. While reducing GHG emissions is a global climate issue, it is crucial not to overlook the regional ones associated with it. In highly industrialized developing countries, delaying action to reduce emissions could exacerbate severe changes in the local climate, leading to significant economic losses. The severe environmental pollution in China and India and the resulting exorbitant remediation costs prove the short-sightedness of adopting low emission reduction standards. Conversely, investing in emission reductions can generate economic benefits for developing countries. Economic research indicates a positive correlation between air quality and economic growth.[50]

7. Overlooking Trade Barriers Associated with Developed Countries

[44] See TESSD, *supra* n.38, para.2.49.
[45] To know this principle, please see Philippe Cullet, *Common but Differentiated Responsibilities*, in Research Handbook on International Environmental Law 209-210 (Malgosia Fitzmaurice et al. eds 2021), https://www.elgaronline.com/edcollchap/edcoll/9781786439703/9781786439703.00017.xml (accessed 14 May 2024).
[46] See TESSD, *supra* n.38, para.2.55.
[47] *Ibid*., para.2.55.
[48] Philippe Cullet, *supra* n.45, at 212-213.
[49] Thomas Cottier et al., *The Principle of Common Concern and Climate Change*, 52(3) Archiv des Völkerrechts 303-307 (2014), doi: 10.1628/000389214X14186502494027.
[50] See Joshua Graff Zivin & Matthew Neidell, *The Impact of Pollution on Worker Productivity*, 102(7) American Economic Review 3658-3659 (2012), doi: 10.1257/aer.102.7.3652; Richard G. Newell et al., *The GDP-Temperature Relationship: Implications for Climate Change Damages*, 108 Journal of Environmental Economics and Management 102468 (2021), doi: 10.1016/j.jeem.2021.102445.

Another overlooked concern that demands attention is trade barriers raised by developed countries.[51] At the current stage, TESSD members are primarily focused on addressing the matter of developing countries' access to abatement goods. This emphasis implies an assumption that developing countries mainly act as importers of abatement goods. However, the reality of international trade deviates from this presumption, as some developing countries emerge as significant exporters of abatement goods.[52]

For these exporting countries, the trade impact of green industry support policies, such as local content requirements and industrial subsidies, becomes a more critical concern in the realm of international trade.[53] These developing and developed countries have common ground on these issues, as both share a mutual interest in promoting trade in abatement goods. However, the specific concerns of these exporting developing countries differ, as their focus lies on issues related to access to the markets of developed countries. Hence, this matter is distinct from the ongoing negotiations on the removal of trade barriers, which primarily center on enhancing access to the markets of developing countries while considering their unique circumstances. Consequently, the outcomes of these discussions may not effectively address the trade barriers imposed by developed countries.

Regrettably, this issue is not on the agenda of the TESSD EGS negotiations at the current stage. The absence of dialogue on this issue underscores that the perspectives of some developing countries are not adequately considered in the existing TESSD EGS negotiations. This negligence may reduce these countries' support for subsequent negotiations to varying degrees.

B. Subsidy Negotiation

1. Failure to Define Environmentally Harmful Subsidies

The TESSD subsidy negotiation exhibits a primary flaw in its failure to address the crucial issue of defining environmentally harmful subsidies. A clear and universally agreed-upon definition forms the foundation for identifying subsidies that adversely affect the environment. Only through such clarity can the TESSD subsidy negotiation effectively delve into discussions regarding environmental impacts.

Presently, TESSD members generally concur that inefficient subsidies promoting wasteful consumption contribute to adverse environmental impacts.[54] However, the ambiguity lies in the absence of a comprehensive explanation from TESSD members regarding what constitutes wasteful consumption or inefficient subsidies. Under the current definitions, TESSD members possess the latitude to interpret the terms "wastefulness" and "inefficiency" differently.

Therefore, there may be different approaches to curbing the use of so-called brown subsidies that prove detrimental to the environment. This variance potentially leads to discrepancies in the implementation of the potential TESSD agreement on reducing brown subsidies. Consequently, even if the TESSD subsidy negotiation attains a consensus on minimizing environmentally harmful subsidies, certain countries within TESSD may persist in employing

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[51] See David Kleimann et al., *Green Tech Race? The US Inflation Reduction Act and the EU Net Zero Industry Act*, 46(12) The World Economy 3420 (2023), doi: 10.1111/twec.13469.

[52] See, for example, Xinyan Zhao, *The WTO Panel Report on US-Safeguard Measures on PV Products: A Decisive Victory for the Fight Against Climate Change?*, in European Yearbook of International Economic Law 2022 179-182 (Jelena Bäumler et al. eds 2022), https://www.springerprofessional.de/the-wto-panel-report-on-us-safeguard-measure-on-pv-products-a-de/25395714 (accessed 14 May 2024).

[53] See TESSD, *Informal Working Group on Environmental Goods and Services Held on 17 May 2022 (10:00-13:00)*, INF/TE/SSD/R/8(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R8.pdf&Open=True (accessed 14 May 2024), para.3.5. See also TESSD, *supra* n.13, para.4.11.

[54] See TESSD, *supra* n.8, para.6.3.

inefficient subsidies that encourage wasteful consumption. This persistence would pose a significant obstacle to achieving the overarching goal of reducing GHG emissions.

Nevertheless, formulating a comprehensive and unequivocal list of subsidies may not provide an infallible solution. Similar to the challenge of defining EGS, the nature of subsidies can evolve over time. Hence, TESSD's subsidy management system should demonstrate flexibility in addressing potential challenges. The resilience of this system can be bolstered by implementing a timely and efficient communication mechanism. TESSD members could consider adopting a communication approach akin to that of the SPS and TBT committees, requiring members to share information on a subsidy within a subsidy committee before its introduction.

Within the proposed framework of the subsidies committee, the practice of information sharing would establish a peer review mechanism among TESSD members. This mechanism aims to prevent the implementation of environmentally harmful subsidies by fostering collaboration and transparency. Such proactive sharing of information would enhance the adaptability of the subsidy management system, ensuring its efficiency despite the dynamic nature of subsidies.

2. Failure to Address the Lack of Transparency in Fossil Fuel Subsidies

The existing international trade regime lacks a robust system for the disclosure of subsidies[55], potentially concealing environmentally harmful practices. More transparency is needed to quantify the volume and environmental impact of these hidden subsidies. Hence, international trade regulation must incorporate these concealed environmentally harmful subsidies to mitigate their adverse effects effectively. The proposed subsidy committee initiative could be pivotal in addressing this critical yet unresolved issue.

In the ongoing TESSD subsidy negotiations, Paraguay has introduced a proposal to enhance subsidy transparency, as previously mentioned. However, the available meeting documents do not clearly indicate widespread support for this transparency initiative among participating members.

Furthermore, there is room for enhancement within the proposal itself. The Paraguayan suggestion involves employing a questionnaire to gather information about the utilization of subsidies in member countries and their environmental implications. The questionnaire serves as a tool for periodic accounting of subsidy usage. It would require member countries to report on the subsidies they employ and their environmental effects annually or at defined intervals.

However, a notable drawback of this system is the absence of a requirement for member states to consult with one another before implementing specific subsidies. This limitation means that the approach lacks a mechanism for promptly disclosing the most recent subsidies adopted by member states. Yet, timely disclosure of information aligns with the core principle of transparency. Compared to the committee initiative, a communication-based peer review mechanism, questionnaires exhibit evident areas for improvement in facilitating the timely disclosure crucial for achieving the transparency goal.

3. Insufficient Attention to Side Effects of Agricultural Subsidies

A significant drawback in TESSD's subsidy negotiations is the insufficient attention given to the potential side effects of agricultural subsidies. While these subsidies play a vital role in promoting employment and bolstering food security, their positive impacts need to be carefully balanced against potential drawbacks.

[55] Harro van Asselt & Ellycia Harrould-Kolieb, *Toward an Intergovernmental Transparency Arrangement for Fossil Fuel Production*, 16(3) Carbon & Climate Law Review 164 (2022), doi: 10.21552/cclr/2022/3/4.

The advantages of agricultural subsidies are compelling. These subsidies can serve as a means to boost food productivity and, concurrently, encourage the cultivation of crops for biofuels, contributing to renewable energy production alongside meeting food market demands. The only caveat is that developing countries cannot match the scale at which developed countries employ agricultural subsidies due to financial resource constraints.[56] Hence, TESSD members see their negotiations as a precious opportunity to provide developing countries with financial support.

Nevertheless, the use of agricultural subsidies is a double-edged sword. In addition to their positive effects, agricultural subsidies also have a negative side. As several TESSD members stressed, the abuse of agricultural subsidies would lead to overproduction and water depletion.[57] These consequences pose a dual threat, manifesting as a structural hunger and severe environmental damage.[58] Hence, during TESSD subsidy negotiations, due attention must be given to the rationality of agricultural subsidy design, particularly when discussing the increased use of such subsidies in developing countries.

Therefore, the success of the TESSD subsidy negotiation requires a well-rounded and comprehensive approach that addresses both positive and negative dimensions. Unfortunately, at the current stage of negotiations, there appears to be an imbalance in addressing these two crucial aspects. Rather than achieving a harmonious equilibrium, negotiators seem inclined to favor one side of the issue over the other. While some are enthusiastic about bolstering the capacity of developing countries to employ agricultural subsidies, others are eager to delve into discussions related to the elimination of subsidies with detrimental environmental impacts.[59]

4. Failure to Address the Issue of Subsidy Inequality

The persistent unequal capacity between developing and developed countries in subsidizing agricultural sectors has posed a significant obstacle to meaningful North-South cooperation[60], and this critical issue remains unaddressed in the ongoing TESSD negotiations. From the perspective of developed countries, two key considerations merit attention. First, there is a need to contemplate increasing the aid budget. Presently, the revenues generated from certain environmental programs, such as the EU CBAM, appear to be a promising source for additional aid funding.[61] This article contends that TESSD members should actively explore this possibility, as such discussions could garner more support from developing countries for environmental programs like the EU CBAM.

A second issue deserving attention is the prudent management of aid funds. Achieving the objectives of aid necessitates the efficient utilization of funds. Moreover, the judicious use of aid funds is vital in fostering mutual trust between donors and beneficiaries, encouraging donors to provide sustained support. This aspect is directly linked to the rational use of agricultural subsidies.

This article proposes two measures for aid management. First, TESSD members could collaboratively develop a set of guidelines for designing agricultural subsidies. Secondly,

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[56] See TESSD, *supra* n.8, para. 6.4.

[57] *Ibid*., para.6.4.

[58] To know structural hunger, please see Judith Wise, *Hunger and Thieves: Anticipating the Impact of WTO Subsidies Reform on Land and Survival in Brazil*, 31(2) AM. INDIAN L. REV 535-536 & 538 (2007), doi: 10.2307/20070797. To know water depletion case, please see Naresh Devineni et al., *Solving Groundwater Depletion in India While Achieving Food Security*, 13 Nature Communications 3375 (2022), doi: 10.1038/s41467-022-31122-9.

[59] *Ibid*., paras.6.3-6.5.

[60] Kristen Hopewell, *US-China Conflict in Global Trade Governance: The New Politics of Agricultural Subsidies at the WTO*, 26(2) Review of International Political Economy 209 (2019), doi: 10.1080/09692290.2018.1560352.

[61] Sigit Perdana & Marc Vielle, *Making the EU Carbon Border Adjustment Mechanism Acceptable and Climate Friendly for Least Developed Countries*, 170 Energy Policy 113250 (2022), doi: 10.1016/j.enpol.2022.113245.

regular information exchanges within the proposed subsidies committee are strongly recommended. This suggestion provides TESSD members with a platform for consistently sharing experiences using agricultural subsidies, enabling a better understanding of aid donors regarding how aid funds are used in recipient countries. This comprehensive approach is conducive to addressing both the quantitative and qualitative aspects of financial support within the TESSD framework.

C. Trade-Related Climate Measures Negotiation

1. Failure to Address the Standardization of Carbon Emissions

Due to the opposition of some developing countries, the ongoing negotiations within the steel and fertilizer sectors have yet to set up a unified carbon emissions standard. As mentioned earlier in this article, this stance aligns with the common but differentiated responsibility principle.[62] According to this principle, some developing countries would advocate for varied decarbonization responsibilities based on their developmental status, seeking a lower decarbonization level to qualify for free market access, such as removing the EU's CBAM measures.

Nevertheless, given the need to prevent carbon leakage, applying the principle of common but differentiated responsibilities encounters a formidable challenge. In the case of the EU CBAM, for example, preventing carbon leakage requires a universal implementation of the EU CBAM. Consequently, the EU cannot selectively exclude developing countries from the system. Neither would it lower developing countries' carbon emissions standards. Climatological studies also indicate that excluding developing countries from the EU CBAM scope is not conducive to achieving the objectives of climate governance.[63] What is more, the existing WTO agreements lack a legal basis for mandating the EU to provide differential treatment for developing countries under the EU CBAM.

Therefore, there is an intractable contradiction between these developing countries' claims and climate governance needs. With this in mind, if these developing countries persist in their stance, the TESSD TRCMs negotiations will likely come to a standstill on the issue of carbon emissions standardization.

As highlighted earlier, similar debates have emerged in EGS negotiations. This article contends that TESSD members should critically assess whether differential treatment in the fight against climate change genuinely benefits developing countries. Given that the TESSD negotiations have not addressed this fundamental question, it consistently resurfaces, underscoring a weakness in TESSD's negotiation strategy.

2. The Absence of Support Measures for Developing Countries

If developed countries hope to compensate developing countries for trade losses arising from the operation of TRCMs, a practical approach could involve using revenues from their climate programs to fund climate change-related projects in developing countries, particularly LDCs and island States.

For those seeking financial/technical support from developed countries, establishing a platform for negotiations is essential. This article posits that the TESSD TRCMs negotiations would be an appropriate venue. Within this framework, developed countries can collaboratively reach a consensus on financial/technical assistance exclusively with TESSD's developing country members. Such a plurilateral commitment helps address free-riding concerns.

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[62] See also Michael Hertel, *Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities*, 45(3) Journal of World Trade 653 (2011), doi: 10.54648/trad2011023.

[63] Sigit Perdana & Marc Vielle, *supra* n.61, at 113250.

However, the ongoing TESSD TRCMs negotiations still need to address specific support measures for developing countries. This may reflect the difficulty of exploring this issue within the existing TESSD framework. Although the conference notes do not reveal related information, it is reasonable to speculate that developed countries are unprepared to discuss this issue in depth. Given the involvement of major developing countries, developing countries have strong negotiation power within the current TESSD framework. This negotiation power may make some developed countries conservative about delving into the formulation of support measures generally applicable to TESSD's developing country members. They might be inclined to provide financial and technical assistance to only some of the TESSD's developing country members. However, such an initiative may provoke opposition from major developing countries.

D. Circular Economy Negotiation

1. Failure to Address Key Issues Related to Renewable Energy and Lithium Batteries

The current TESSD circular economy negotiation faces a significant challenge, particularly in addressing key issues related to renewable energy and lithium batteries. Rather than solving these problems, the ongoing discussions have primarily served as a platform for participants to share their experiences advancing the renewable energy and lithium battery industries.

For instance, one member suggested using life cycle/climate impact assessments to mitigate toxic materials, reduce waste, and uncouple material usage from economic growth.[64] Another member outlined various circular economy measures adopted, such as prolonging the lifespan of products, implementing value retention processes (e.g., remanufacturing, refurbishment, reuse, and repair), integrating recycled materials into supply chains, circular design, waste collection, recycling, and reuse, as well as addressing e-waste recycling and decarbonization.[65] Additionally, capacity-building initiatives related to the circular economy, including market policies, standards, and data, were highlighted.[66]

While these shared experiences provide valuable insights, it is crucial to acknowledge that they alone cannot resolve substantial problems. The focus needs to shift toward the critical issues of technical and financial support. It is suggested that developed countries provide specific guidance and assistance to developing country members based on their recommendations.

2. Failure to Address Regulatory Coherence Issue

Inconsistencies between national, regional, and global policies can hinder the circular economy.[67] Hence, during the experience sharing of national policies, TESSD members should consider the differences between these varied policies and their impacts on the circular economy. Unfortunately, the ongoing TESSD circular economy negotiations have not yet addressed the issue of regulatory coherence.

Research suggests that the static unification of regulatory standards is absent in international law.[68] Nevertheless, TESSD members can commit their national policies to work towards common environmental goals and strive to improve national regulatory standards.

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[64] See TESSD, *supra* n.8, paras. 5.5-5.11.

[65] See TESSD, *Informal Working Group on Circular Economy – Circularity Held on 18 May 2022*, INF/TE/SSD/R/10(2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TESSD/R10.pdf&Open=True (accessed 14 May 2024), at 1-4.

[66] *Ibid*., para.6.3.

[67] *Ibid*., para.2.1.

[68] Rossana Deplano, *Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry*, 6(1) European Journal of Legal Studies 88 (2013), doi: 10.2139/ssrn.2724467.

Therefore, this article suggests that TESSD members set minimum TESSD regulatory standards applicable to member states and simultaneously commit themselves to gradually raising their national regulatory standards. This proposal is consistent with the environmental and labor provisions widely used in FTAs and, thus, should be acceptable for many TESSD members. To ensure the implementation of this commitment, members should also establish a periodic review mechanism to monitor the upgrading of national regulatory standards. In addition, TESSD members may strengthen their cooperation on mutual recognition of standards to remove trade restrictions arising from unnecessary regulatory measures.

IV. Reflections on Plurilateralism in TESSD Negotiations

A. Inefficient Plurilateral Negotiation

Theoretically, plurilateral negotiations offer a more fitting approach than multilateral ones at this stage of WTO negotiations. This assertion stems from the alignment of the plurilateral model with the needs of the current phase of trade rule negotiations.[69] Unlike earlier phases focused on tariff reduction, the present phase prioritizes regulatory convergence.[70] Given the persisting differences in value propositions among major trading countries, achieving regulatory convergence across all WTO members seems unattainable. Consequently, establishing a club of like-minded countries within the WTO through plurilateral negotiations presents an opportunity to break the deadlock in WTO negotiations. Such a club is also conducive to enhancing negotiation efficiency by tailoring reforms to the shared values of participating members.

However, the current phase of the TESSD negotiations fails to demonstrate the anticipated benefits of plurilateral negotiations. The four thematic negotiations within TESSD have fallen short of reaching milestones, lacking consensus on emission reduction measures, standardization, and detailed support measures for developing countries. TESSD members may require extensive time to achieve these objectives. Of concern is that the current negotiations cover only a limited number of industries, foreshadowing prolonged timelines to address the broader spectrum of TESSD negotiation issues. Moreover, this phase has unearthed deep-rooted problems, mirroring challenges faced by the WTO's multilateral negotiations, particularly concerning financial and technical assistance to developing countries and the common but differentiated responsibilities principle for emission reductions. These formidable challenges jeopardize the progression of the four thematic negotiations, echoing the impasses witnessed in the WTO's multilateral negotiations.

B. The Absence of Plurilateralism

The ongoing thematic negotiations within the TESSD fail to effectively leverage the benefits of plurilateral negotiations, primarily due to the overly diverse TESSD membership structure. I contend that the diversity of the TESSD membership reflects an intractable contradiction that exists within the TESSD negotiations – i.e., the need to select like-minded members and the reliance on the participation of others with different political stances to increase the impact of the TESSD's negotiation outcomes. The features of environmental sustainability issues considerably accentuate this contradiction.

Historically, international trade negotiations adhered to a paradigm where developed countries acted as rule makers, positioning developing countries as rule takers. This traditional model could potentially constrain the outcomes of environmental sustainability negotiations. While certain developed countries in TESSD can collaboratively establish industry standards

[69] Robert Basedow, *supra* n.6, at 414.
[70] *Ibid*., at 414.

and use their influence over the industry's value chain to encourage adoption by developing countries, the successful implementation of these rules in many developing countries heavily relies on financial and technical support from developed countries.

Furthermore, highly industrialized developing countries – notably China and India – wield significant influence in both the supply chain of environmental goods and the management of global emissions. This entails that the participation of developing countries, particularly those with robust industry bases, is vital in fostering broader international cooperation in addressing climate issues.

Considering these, the TESSD thematic negotiations have incorporated a number of developing country members to enhance the representativeness of the negotiations. The current membership comprises key participants from the OECD, BRICS, and G20, with a near-equal representation of developed and developing countries. While this setup enables TESSD members to represent a wide array of political stances in trade negotiations, it also means that negotiators struggle to align on common positions, highlighting the absence of plurilateralism in TESSD negotiations.

Disparities in political positions (reflected in both different values and conflicting national interests) have undermined mutual trust between some major economies and complicated negotiations on trade and environmental sustainability. As a result, TESSD members face significant difficulties in setting emission reduction standards and addressing developing-country issues. This difficulty is likely the reason why TESSD members have chosen to discuss the various types of goods and services in the green industry value chain and the related climate measures on a case-by-case basis. Given the diversity of green industries, this negotiation strategy seriously reduces the efficiency of TESSD negotiations.

C. To Be an Ugly Duckling or a White Swan?

While the TESSDs take the form of plurilateral negotiations, their substance reflects the genuine desire for a multilateral solution. From this perspective, the TESSD negotiations appear indistinguishable from previous WTO multilateral negotiations. If TESSD members persist with the current negotiation approach, the process may protract, potentially leading to an impasse. However, altering the current format entails excluding certain members, more or less constraining the impact of negotiation outcomes. Thus, a pivotal question emerges: how should TESSD members make the trade-offs?

I argue that TESSD should be a white swan rather than an ugly duckling – i.e., highlighting the plurilateral feature of the TESSD negotiations to make it more distinct from the WTO's multilateral negotiations. In today's environmental sustainability negotiations, efficiency often clashes with multilateral solutions. There is no way to square the circle. TESSD negotiations, with their inherent plurilateralism, distinguish themselves from other environmental negotiations. It should maximize the benefits of this attribute in order to complement other multilateral environmental negotiation platforms. It is, therefore, desirable, albeit regrettable, to sacrifice some of the impact of negotiation outcomes to enhance the TESSD's plurilateralism.

The enhancement of plurilateralism necessitates a more strategic selection of TESSD participants. It is suggested that founding members engage in discussions beyond existing thematic negotiations on fundamental issues critical to specific negotiations. Decisions on these issues could serve as criteria for selecting members for thematic negotiations.

As seen in the analysis above, these issues should encompass basic definitional matters (e.g., defining abatement goods and services), the establishment of a regular exchange mechanism (e.g., a subsidies committee), the application of common but differentiated responsibilities, and the aid to developing countries (e.g., sources of financial support and terms of technology sharing).

Consensus on these issues would bring about two significant changes in subsequent negotiations. First, TESSD would delineate clear preconditions and benefits for its members, enabling them to choose whether to stay in the negotiations. This bidirectional selection optimizes the structure of TESSD membership, ensuring that participating countries are like-minded in the sense that they share consensus on pivotal issues. Secondly, there is potential to formulate more inclusive trade rules by integrating social rights (human rights) into TESSD negotiations. Given the existing global agreement that a sustainable environment is a human right[71], this approach offers a more comprehensive perspective on environmental sustainability negotiations. These two changes promise to enhance the efficiency and quality of negotiations, differentiating TESSD from WTO multilateral negotiations.

V. Conclusion

This article critically examines the ongoing thematic negotiations within TESSD and highlights numerous shortcomings, indicating a failure to achieve essential milestones. Members have not successfully addressed critical standard-setting issues nor agreed on specific modalities for supporting developing countries. This suggests the inefficiency of the ongoing TESSD thematic negotiations, which is attributable to the absence of a plurilateral negotiation feature.

The deficiency in plurilateralism is evident in the overly diverse TESSD membership structure. While the current composition accommodates a broad spectrum of political positions in multilateral trade negotiations, it simultaneously complicates the consensus-building process. Consequently, TESSD negotiations share similarities with WTO multilateral negotiations, failing to emerge as a distinctive negotiation platform and remaining akin to an "ugly duckling" rather than morphing into a unique "white swan."

This article contends that there is a pressing need to enhance the plurilateral nature of TESSD negotiations to fully leverage the advantages inherent in such an approach. The proposal is for founding members of TESSD to achieve consensus on a set of fundamental yet pivotal issues outside of thematic negotiations. Subsequently, members would determine their ongoing participation in TESSD thematic negotiations based on that consensus. While this approach may reduce TESSD membership, it ensures that participating members share consensus on key issues. Establishing such consensus is crucial for enhancing the efficiency of subsequent negotiations and realizing the benefits that plurilateral negotiations are designed to offer.

[71] See UNGA, The Human Right to a Clean, Healthy and Sustainable Environment, A/76/L.75, 26 July 2022.