

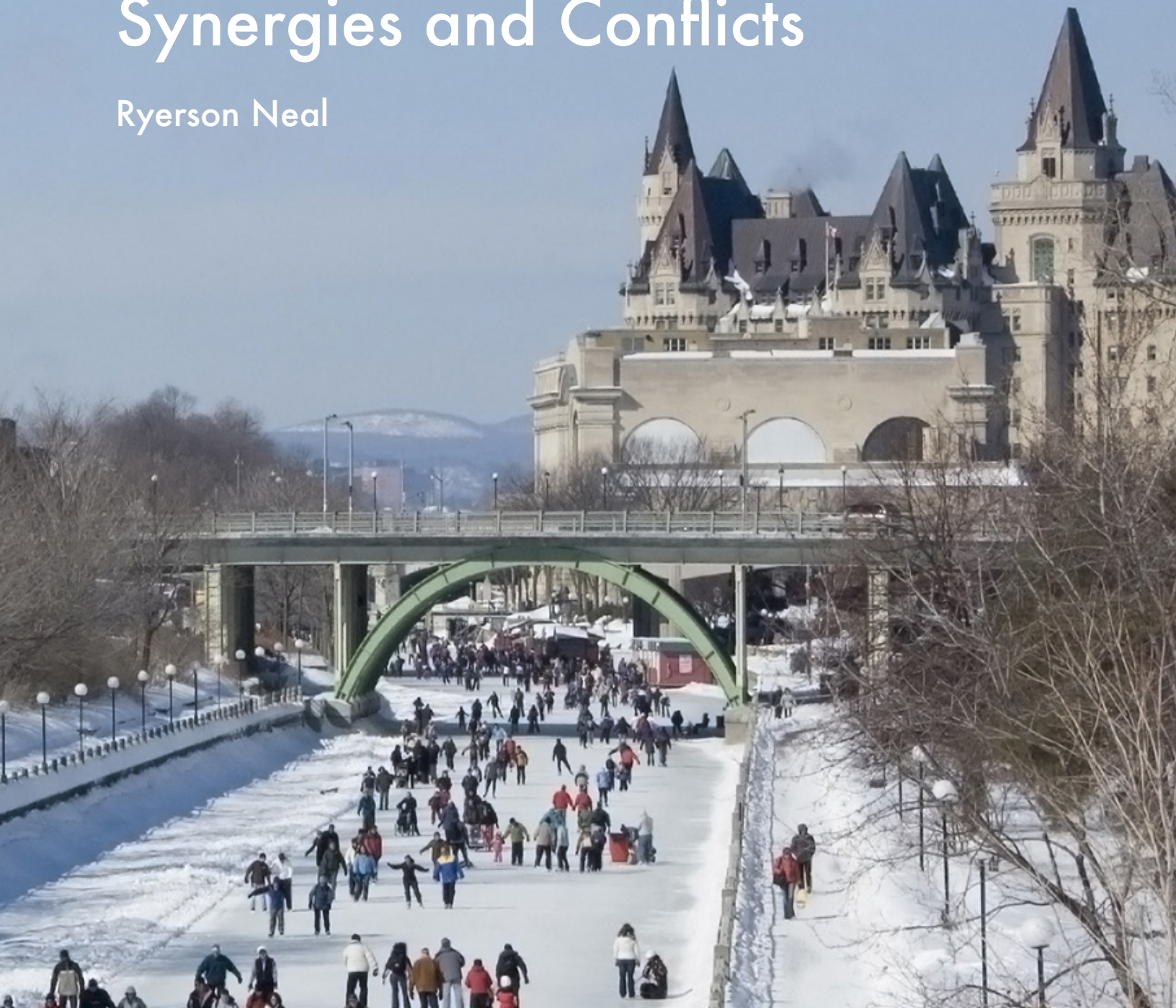
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Centre for International  
Governance Innovation

Conference Report – Ottawa, Canada, January 2018

# Trade and Climate Change Synergies and Conflicts

Ryerson Neal





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# Table of Contents

vi	About CIGI
vi	À propos du CIGI
vi	About the International Law Research Program
vii	About the Author
vii	Acronyms and Abbreviations
1	Executive Summary
1	Introduction
2	Institutional Architecture
5	Subsidies and Trade Rules: Fossil Fuels versus Renewables
8	Carbon Footprint, Process and Production Methods, and BCAs
11	Emerging Approaches to Trade and Climate Change
14	Areas for Further Research
16	Agenda
17	Participants

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## About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

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## À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

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## About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

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## About the Author

**Ryerson Neal** graduated from the University of Toronto Faculty of Law in 2017. He completed his articles at CIGI in 2018.

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## Acronyms and Abbreviations

<b>BCAs</b>	border carbon adjustments
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>FIT</b>	Feed-in Tariff Program
<b>FTAs</b>	free trade agreements
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>ILO</b>	International Labour Organization
<b>ISO</b>	International Standards Organization
<b>JPAC</b>	Joint Public Advisory Committee
<b>MFN</b>	Most Favoured Nation
<b>NAFTA</b>	North American Free Trade Agreement
<b>PPMs</b>	process and production methods
<b>SCM</b>	Agreement on Subsidies and Countervailing Measures
<b>SDG</b>	Sustainable Development Goal
<b>TBT</b>	Agreement on Technical Barriers to Trade
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>VAT</b>	value-added tax
<b>WTO</b>	World Trade Organization





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## Executive Summary

Participants from academia and various levels of government gathered in Ottawa to discuss the often underappreciated interplay between the international climate agenda and the global trade system. The trade system has traditionally supported open flows of goods and services by disciplining tariffs, as well as trade-distorting subsidies and regulations. But there is an emerging tension between this approach and the desire of governments to address climate change through potentially trade-distorting domestic regulations and green subsidies. The challenge for policy makers is how to maintain relatively free, undistorted trade, while still giving countries sufficient policy space to implement effective measures to combat climate change.

Participants generally agreed that the connection between trade and climate does not receive sufficient attention. There is a clear need for policy makers in both realms to better coordinate and ensure that the legal regimes governing climate and trade evolve in complementary ways. Although it was recognized that international trade law and institutions will not be the primary vehicles for advancing the international climate agenda, participants agreed that more could be done to ensure the trade regime supports climate goals. Several options were discussed, ranging from border carbon adjustments (BCAs) to a World Trade Organization (WTO) climate waiver. No one approach is without its own significant political and technical challenges. Nevertheless, most attendees agreed that trade frameworks and institutions must find a way to be more responsive to the urgent problem of climate change.

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## Introduction

This research workshop was organized by the Centre for International Governance Innovation (CIGI) and held in Ottawa. The meeting took place under the CIGI Discussion Rule.<sup>1</sup>

The aim of the conference was to explore the links between the international climate change agenda and the international trade system. Although virtually all WTO members have, in other fora, recognized that climate change is a threat to the international community, they have done little to adapt the international trade system to support mitigation efforts. Conference participants discussed ways in which the current trade frameworks might be changed to proactively address climate change, or, at the very least, better facilitate climate action by individual members.

The conference was divided into sessions on four themes:

- institutional architecture: what is the appropriate institutional setting for environment-related trade regulations;
- subsidies for fossil fuels and renewable energy;
- carbon footprints, process and production methods, PPMs and BCAs; and
- emerging approaches to trade and climate change.

There appeared to be broad agreement that the WTO is not positioned to be a leading international actor on this issue and will need further guidance and points of reference from international climate negotiators. Still, there was hope that WTO members will begin exploring ways to make the international trade system more supportive of the climate goals agreed to at the twenty-first session of the Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC).

While foundational changes to the trade system may be needed to make it more supportive of

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<sup>1</sup> When discussions are held under the CIGI Discussion Rule, participants are free to use the information received, but no such participant's individual or institutional views about that information shall be revealed; this rule shall not prevent the consensus of the participants, as a group, or the identity and affiliation of group members from being revealed.

climate change goals, participants focused on those trade measures that can be implemented within the WTO framework as it currently exists, given the urgent need for action.

Participants identified several trade-related measures that individual countries, like-minded groups or the WTO could pursue to encourage emissions reductions or at least facilitate them. Many of the proposed solutions appeared feasible from a technical and legal perspective, although each involved its own political and economic challenges.

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## Institutional Architecture

Conference participants recognized that international trade institutions such as the WTO will necessarily be key partners in the global effort to address climate change. However, many believed these institutions — the “trade regime” — are not the primary drivers for international action on this issue. Rather, the international climate frameworks and negotiations will have to fill that role. However, this should not give the WTO licence to stand idly by. WTO members should seek out ways to mitigate trade’s large environmental impact. Overall, participants hoped that the WTO will step up to be a leading voice in the development of trade rules and practices that are supportive of, and complementary to, international climate law and policy.

Several participants were confident that the organization would at least not actively obstruct the fulfillment of whatever climate change agenda the international community adopts. What is most needed, it was argued, is for climate change policy makers to agree on what kinds of trade-related tools they want and require to reach their emissions goals. They then have to communicate those needs to trade negotiators.

## The Paris Agreement

Several speakers recognized that the Paris Agreement offers at least a useful expression of international will that might helpfully inform future WTO trade disputes, especially around questions of necessity or arbitrariness. The agreement is compelling evidence of a broad

international consensus on the threat posed by climate change and the need to address it. WTO adjudicators, namely Dispute Settlement Panel and Appellate Body members, it was noted, have a good track record of both referencing and relying on international law in their decisions. Accordingly, one would hope to see the text and purposes of the Paris Agreement influence any future reports by WTO Dispute Settlement Panels or the Appellate Body.

However, several participants noted that the Paris Agreement still provides an inadequate reference point for the trade regime when assessing whether trade-distorting climate measures are justifiable. The Paris Agreement itself offers no indication of what types of measures are considered permissible to achieve the nationally determined contributions. For example, neither the Paris Agreement nor any international forum has stated whether a BCA to complement domestic carbon pricing is considered a legitimate means to combat climate change.

It was suggested that any guidance of this kind would be followed by the organs of the international trade system. For instance, if the parties to the Paris Agreement were to agree on a definition of “response measure,” the WTO Appellate Body would probably use that definition in deciding future trade litigation cases. Unfortunately, negotiations on defining “response measures” have been gridlocked for some time, probably because negotiators are aware of the significant impact that the adoption of a definition would have on activities such as international trade.

Beyond the Paris Agreement, there is apparently little international law that WTO adjudicators can look to when considering the validity of trade measures aimed at addressing climate change. While that may be the case, several participants agreed that the WTO should not remain passive while awaiting more concrete direction from other international fora. WTO members may need to think about a more proactive environmental agenda for the organization. Indeed, one speaker reminded participants that climate change is now recognized as a “common concern” of the international community. While this is a broad and still uncertain concept in international law, it suggests that countries have an obligation to cooperate in addressing climate change, and that it should inform ongoing and future trade negotiations.

## What Can the WTO Do about Climate Change?

On this theme, one speaker suggested that the WTO's capacity for leadership should not be underestimated. Historically, various areas of international law and policy have interacted with and built upon one another. The WTO has been able to influence developments in other international regimes. For instance, one participant noted that in 1996, a WTO Ministerial Declaration recognized the International Labour Organization (ILO) as the international institution with primary responsibility for worker rights.<sup>2</sup> Few thought much of this declaration at the time, but it is now apparent that this endorsement by the WTO reinvigorated the ILO and gave the organization the basis to take concrete actions that have been very important for global labour markets.

Conversely, other international actors have influenced the WTO agenda. In June 2001, the Food and Agriculture Organization (FAO) of the United Nations Council adopted an International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, which included a call for states to tackle fishing subsidies at the national level.<sup>3</sup> The WTO Doha Declaration subsequently took up that issue.<sup>4</sup> Ever since, the WTO has been engaged in a search for international disciplines on fishing subsidies. Sustainable Development Goal (SDG) 14 later called for the elimination of fishing subsidies and referred to the WTO as the primary agent to accomplish it.<sup>5</sup>

These instances illustrate the fruitful interplay between international regimes and how they can push one another to achieve shared goals. It will be useful to keep this dynamic in mind when discussing the role of the WTO in addressing climate change.

## Does the Trade System Already Provide Policy Space for Climate Change Measures?

Reflecting on past WTO cases, participants noted that the trade system has generally recognized and accommodated trade-distorting measures motivated by environmental or moral concerns. Countries will have some helpful precedents to rely upon, should they need to defend their climate-related trade measures in WTO litigation.

Several conference participants emphasized that the trade system is formally neutral when it comes to the environment. The goal of the WTO-General Agreement on Tariffs and Trade (GATT) rules is not to obstruct environmental regulation, but simply to root out protectionist measures masquerading as environmental protections.<sup>6</sup> Several participants expressed confidence that WTO Dispute Settlement Panels and the Appellate Body will take a rigorous but fair approach when assessing trade-distorting measures aimed at addressing climate change. So long as the measures have some rational basis, are of a non-protectionist nature, and are backed up by the appropriate scientific evidence, the WTO is not going to be a major barrier to their implementation. Some participants even predicted that carbon tariffs will stand a good chance of being validated when they are eventually challenged at the WTO. Adjudicators will be hard-pressed to decide against a country that can present a defensible scientific rationale for its climate change measures and credibly demonstrate non-protectionist motives.

## The Challenge of Multiple Objectives

One enduring difficulty for trade law, however, has been accommodating environmental measures (for example, clean energy subsidies) that can be interpreted as supportive of legitimate environmental objectives, but also domestic industrial development goals. For instance, subsidies aimed at building greener economies could have both environmentally beneficial, but also trade-distorting effects.

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2 WTO, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC, online: <[www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm)>.

3 FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome, Italy: FAO, 2001), online: <[www.fao.org/3/a-y1224e.pdf](http://www.fao.org/3/a-y1224e.pdf)>.

4 WTO, *Ministerial Declaration*, WT/MIN(01)/DEC/1, 4th Sess, online: <[www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf)>.

5 UN, "Sustainable Development Goal 14", online: <<https://sustainabledevelopment.un.org/sdg14>>.

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6 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, TIAS 1700 (entered into force 1 January 1948) [GATT 1947].

Some participants cited the *Canada—Feed-in Tariff* case as an example of this challenge. In that instance, the WTO Appellate Body sided with countries challenging Ontario’s Feed-in Tariff (FIT) Program, an initiative that was broadly intended to promote greater production of renewable energy.<sup>7</sup> From one point of view, the FIT Program embodied a genuine desire to address climate change. It was troubling for some that the WTO took issue with a program that was instituted to further sustainable economic development, a goal widely endorsed by the international community. If trade law could not countenance an initiative like the FIT Program, some worried that it might hinder the implementation of urgently needed climate measures more broadly.

Other participants took issue with this characterization. The WTO, they claimed, has a history of being reasonably accommodating when it comes to assessing measures with multiple objectives, including environmental ones. While accepting that the “multiple objectives” question remains a challenge for the WTO, these participants reminded the conference that the fatal problem with the FIT Program was the indefensible inclusion of a domestic content requirement. Therefore, the case should not be read as invalidating subsidies for renewable energy in general.

It was further suggested that the problem might lie less with the WTO and more with how domestic governments characterize their climate change measures. WTO adjudicators will see trade-distorting measures in a more defensible light if competitiveness or job creation are not expressly touted as purposes of those measures. However, it was recognized that these programs can often only gain political support if they are sold to constituents as job creators.

## Multilateral or Plurilateral Agreements?

There was general agreement that the multilateral trade negotiation process is currently stalled, with little appetite to welcome climate change onto what is already a crowded agenda. The 2017 WTO Ministerial Conference in Argentina, it was said, had largely confirmed this state of affairs.<sup>8</sup>

Plurilateral agreements were discussed as one option to bypass the multilateral gridlock. However, some participants believed that sweeping moves to redefine “like products” or allow greater subsidization of green industries are probably only possible in the multilateral context. Tackling fossil fuel subsidies was mentioned as one issue that may be ripe for plurilateral action. Several problems with plurilateral agreements were noted, however. Not only do they detract from the multilateral ethos of the trade system, but they offer problematic opportunities for free riders. Getting the consensus needed to list a plurilateral agreement in Annex 4 of the Marrakesh Agreement is another difficulty.<sup>9</sup> Nevertheless, even if a WTO-sanctioned plurilateral agreement is not feasible, this should not deter groups of like-minded countries from negotiating agreements among themselves on specific issues.

It should also be possible to incorporate more environmental measures into bilateral trade agreements. Conference participants were referred to empirical research suggesting that the number of environmental provisions in bilateral and regional trade agreements has proliferated over the last five to 10 years. These provisions come in a variety of forms and include some interesting innovations that go beyond the North American Free Trade Agreement’s (NAFTA’s) seminal environment chapter. These innovations are welcome and could be emulated in even more bilateral and regional free trade agreements (FTAs) over the coming years.

7 *Canada—Measures Relating to the Feed-in Tariff Program* (2013), WTO Doc WT/DS426/AB/R (Appellate Body Report), online: <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds426\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm)>.

8 WTO, “Eleventh WTO Ministerial Conference”, online: <[www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/mc11\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm)>.

9 WTO, *Marrakesh Agreement Establishing the World Trade Organization* (1994), 1867 UNTS 154, 33 ILM 1144, Annex 4, online: [www.wto.org/English/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/English/docs_e/legal_e/04-wto_e.htm) [Marrakesh Agreement].

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# Subsidies and Trade Rules: Fossil Fuels versus Renewables

## The Agreement on Subsidies and Countervailing Measures

The Agreement on Subsidies and Countervailing Measures (SCM Agreement)<sup>10</sup> attempts to minimize trade distortions arising from the subsidization of specific firms or industry groups. The agreement prohibits the use of certain subsidies (subsidies contingent on export performance or use of domestic content). It permits other subsidies, but allows other countries to impose countervailing measures against the subsidized products. These permissible subsidies are therefore “actionable.”

Much of the conference’s discussion around green subsidies focused on the degree to which the SCM Agreement would act as a barrier to subsidies aimed at promoting a greener economy.

## Green Subsidies

It remains unclear to what degree the SCM Agreement impedes WTO members from subsidizing green industries. One participant thought it telling that the WTO Panel in *Canada—Feed-in Tariff Program* found that Ontario’s FIT Program violated the national treatment measure in the GATT and the Trade-Related Investment Measures Agreement, but not the SCM Agreement. Indeed, the complainants had failed to show that the FIT Program constituted a subsidy under the SCM Agreement. This case at least suggested that the SCM Agreement may not be a major obstacle to green subsidies.

There is also ambiguity over whether GATT article XX on general exceptions applies to the SCM Agreement.<sup>11</sup> Article XX allows for derogation from the GATT 1947 trade rules for certain reasons, such as the protection of public morals or the environment. Traditional thinking holds that article XX applies only to disputes arising out of alleged breaches of GATT 1947 provisions and not to other WTO

agreements. However, this is now a more open question in the wake of WTO case law in which article XX has at least influenced the interpretation of articles in other WTO agreements, such as article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).<sup>12</sup> Article XX, therefore, remains something of a wild card when considering the potential impact of the SCM Agreement on green subsidies. It was suggested that if the article XX exceptions are not available to respondents whose green subsidies are alleged to have violated the SCM Agreement, then the agreement might well represent a significant limitation on the ability of countries to subsidize green technology and industries.

With the foregoing in mind, participants suggested that the SCM Agreement might benefit from amendments that give greater recognition to environmental purposes. Since climate change represents one of the greatest market failures of all, there should be room for government intervention to account for externalities of carbon-emitting activity.

In the absence of amendments to the agreement, policy makers might consider whether there is potential to slot green subsidies under section 1.1(a)(1)(iii), which exempts the provision of “general infrastructure” from the definition of subsidy.<sup>13</sup> Governments could potentially put at least some green subsidies beyond the reach of the SCM Agreement by promoting the notion of “environmental infrastructure” as an integral part of general infrastructure.

Participants also recalled that the SCM Agreement originally provided some space for green subsidies under article 8, but this provision was allowed to lapse in 2000.<sup>14</sup> Environmental advocates at the time perhaps underestimated the provision’s potential usefulness, and it may be time to consider bringing it back. Still, it was noted that the now dormant provision had only ever provided a highly circumscribed amount of policy space for green subsidies. If article 8 were reintroduced in some form, it would need to be far more permissive.

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10 WTO, *Agreement on Subsidies and Countervailing Measures*, 15 April 1994 (entered into force 1 January 1995) [SCM Agreement], online: <[www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](http://www.wto.org/english/docs_e/legal_e/24-scm.pdf)>.

11 GATT 1947, *supra* note 6, art XX.

12 See *United States—Measures Affecting the Production and Sale of Clove Cigarettes* (2012), WTO Doc WT/DS406/AB/R (Appellate Body Report); *Agreement on Technical Barriers to Trade*, 1868 UNTS 120 (entered into force 1 January 1995) [TBT Agreement].

13 SCM Agreement, *supra* note 10, s 1.1(a)(1)(iii).

14 *Ibid*, art 8.

Some participants felt that WTO rules should draw a clear distinction between permissible “good subsidies,” such as green subsidies untainted by domestic content requirements, and “bad subsidies,” such as those subsidizing fossil fuels or tied to domestic content requirements. However, it was noted that this might do little good for governments who feel that they have to sell the subsidization of green infrastructure and industries as domestic job-creation initiatives. It was argued, for instance, that Ontario’s FIT Program was only politically viable because it included a domestic content requirement and, therefore, the promise of more jobs in Ontario.

Some participants expressed doubt about whether the WTO could ever really differentiate between “good” and “bad” subsidies. In the eyes of the trade world, all subsidies are bad by definition because they distort the flow of trade. However, perhaps the regime should recognize that some subsidies are necessary to correct market failures. It was acknowledged that the trade regime may need to refine its understanding of subsidies in order to better allow for this distinction. Yet, even if the trade regime were able to institute more permissive disciplines on green, market-correcting subsidies, at least one participant suggested this might have limited impact: WTO members, the participant suggested, would always be able to craft new “adverse effects” arguments upon which to base litigation, even against market-correcting subsidies.

Some participants noted that the debate over subsidies for renewable energy technology might now be moot, given that these technologies have become much cheaper and more competitive in recent years. Apparently, one of the reasons why renewable technology (especially solar panels) is now so much more competitive is that China invested billions of dollars in growing its solar industry, often with domestic content requirements attached.<sup>15</sup> In doing so, it singlehandedly lowered the costs of solar for global consumers. While this subsidization externalized certain costs to other countries, those same countries are now benefiting from the availability of affordable, made-in-China solar panels.

It was suggested that the Chinese experience shows how heavy subsidies, even if tied to local content requirements, may not be entirely bad. When

infant industry protection works in one country, global benefits can be felt. And if infant industry protections fail to produce results, they are neither environmentally nor economically detrimental, at least in a global sense. It was suggested that trade frameworks, namely the SCM Agreement, may need to provide looser disciplines on these initiatives, perhaps allowing them in general, but mandating some form of sunset clause or termination provision. That is, trade law should build in allowances for greater subsidization of green industries, even if involving domestic content requirements, so long as it is done in “a proper way.”

Furthermore, while one can make good arguments against subsidies and domestic content requirements in theory, in practice, others are doing it, and countries such as Canada and the United States risk allowing competitors to corner the market on certain green technologies if they do not follow suit. China’s attempt to win the standardization battle in electric vehicle charging infrastructure — in part through massive subsidies to domestic firms — was cited as one example.

Others strongly disagreed with the notion of a more permissive approach toward these types of subsidization programs, asserting that domestic content provisions especially are a “bridge to nowhere.” Domestic content requirements, it was said, are inefficient and wrong, regardless of whether they are attached to the subsidization of green technology, and the costs of purchasing environmental virtue should not be externalized to others. It may be helpful to permit subsidies that address true market failures, but there is no justification for attaching domestic content requirements to them.

If subsidies are provided, they should be tailored to reduce externalities and certainly not be tied to domestic content requirements. The best approach to green subsidization, one participant asserted, is to support basic research and development related to green technology, rather than support specific firms. China’s breakthrough in solar technology could have been accomplished, it was argued, without any domestic content requirements. Indeed, it is possible that domestic content requirements could, in some cases, detract from emissions-reduction efforts by raising the costs for consumers to buy environmentally friendly, renewable-energy technology.

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15 John Fialka, “Why China Is Dominating the Solar Industry”, *Scientific American* (19 December 2016), online: <[www.scientificamerican.com/article/why-china-is-dominating-the-solar-industry/](http://www.scientificamerican.com/article/why-china-is-dominating-the-solar-industry/)>.

## Fossil Fuel Subsidies

Given the urgent need to address climate change, participants emphasized the importance of prioritizing those measures that are likely to have the greatest impact over the shortest time span. Participants generally agreed that reducing or eliminating fossil fuel subsidies is one measure that should be prioritized. Fossil fuel subsidies appear in many forms across tax and regulatory frameworks. The wide dispersion tends to make them less conspicuous, but when aggregated together, they still dwarf most other subsidies.

However, participants were well aware that reducing fossil fuel subsidies represents an enormous political challenge for most governments. In many jurisdictions, these subsidies have existed for decades and are almost considered a birthright. Ontario was cited as an example where the accretion of various fossil fuel subsidies over the last century has left an intricate overlay of benefits and tax breaks that is a challenge to conceptualize, let alone dismantle. But this is typical across WTO countries.

Amending trade instruments such as the SCM Agreement to more rigorously discipline fossil fuel subsidies likewise presents a considerable challenge. The prospect for WTO litigation over members' various fossil fuel subsidies is also considered remote. As one participant suggested, all WTO members are "living in a glass house" on this issue.

There have, however, been some encouraging developments. The advocacy of the growing multi-country Friends of Fossil Fuel Subsidy Reform group continues to keep this issue on the international agenda. Both the Group of Twenty and the Group of Seven have formally committed to phase out "inefficient" fossil fuel subsidies. However, as one participant noted, these commitments should ideally extend to all fossil fuel subsidies, not only those deemed "inefficient."

Several participants pointed to recent WTO progress on ending fisheries subsidies as a sign that the organization has the capacity and the potential to tackle fossil fuel subsidies. It is certainly worth studying whether success on the fishing subsidies front can be replicated for fossil fuels. Even a WTO pronouncement that fossil fuel subsidies ought to fall within a prohibited category could have a significant normative

effect. It was argued that this kind of action at the WTO would be preferable to simply waiting in silence for the UNFCCC to address the issue

Participants generally agreed that there is a need for greater international consensus on the definition of fossil fuel subsidies and a better understanding of how to measure and categorize them. Fostering transparency through new and innovative reporting mechanisms will therefore remain important. It was suggested that the WTO is well-positioned to play a greater role in this regard. Specifically, the Trade Policy Review Mechanism could be replicated to create a new "Subsidies Policy Review Mechanism" that would systematically scrutinize countries' subsidy policies from a trade perspective. This would at least bring transparency to subsidy policies in some countries.

The WTO might also consider enhancing the technical capacities of governments to measure and analyze fossil fuel subsidies. Any initiatives that prompt governments to study and consolidate their own knowledge about subsidies would at least be helpful in sustaining the international debate.

However, some participants noted that it is probably neither desirable, nor tenable, for the WTO to be the forum where the international community decides to definitively outlaw fossil fuel subsidies. It was felt that it would be better for this type of action to come first in climate negotiations, paving the way for related changes in the trade regime. For many reasons, it was claimed, it is simply more difficult for the trade regime to take the international lead on this issue.

Of course, countries may take unilateral action on fossil fuel subsidies, and it was suggested that this is where the greatest potential for reform lies. Within countries, there are many constituencies that should find themselves naturally aligned against fossil fuel subsidies; they just need to join forces. Indonesia's recent reforms of fuel subsidies were cited as an example of what can be accomplished through action at the national level.

One participant suggested that governments look to ratchet down subsidies when price levels dip to make the reforms more bearable. For instance, when market prices for a fossil fuel drop, a government might take the opportunity to permanently ratchet down its subsidization of the consumption of that fuel. This graduated

approach would minimize the social and economic disruption of removing the subsidies.

It was further suggested that “tariffication” might provide a way to make fossil fuel subsidies more transparent and, thus, more readily dispensed with. Once subsidies to fossil fuel producers are converted into a tariff equivalent, it may be easier to gradually phase them out.

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## Carbon Footprint, PPMs and BCAs

### PPMs-based Distinctions under WTO Law

The choice of PPMs used to produce goods undoubtedly has a significant impact on carbon emissions. Trade measures that treat otherwise identical products differently on the basis of PPMs therefore have the potential to help combat climate change. However, such measures might conflict with long-held GATT-WTO non-discrimination principles.

Participants noted that there has been no WTO litigation in which the legitimacy of PPMs-based distinctions has been expressly argued and addressed. But some pointed to cases in which differentiating products based on the means of production has been “recognized,” for instance, *US—Tuna II*.<sup>16</sup> *EC—Seals* is another example.<sup>17</sup>

Because these cases at least “recognize” PPMs in the context of an article III analysis, it was suggested that PPMs-based measures will likely be accommodated by the WTO in the future, provided they are well designed. The notion that PPMs-based trade measures are entirely impermissible has been challenged in the academic literature<sup>18</sup> and the case law is proceeding in step with this thinking. The Appellate Body’s accommodating

approach toward the public morals measures at issue in *EC—Seals* also suggested to several participants that the Appellate Body may be inclined to permit PPMs-based climate measures when a case eventually comes up on that point.

### Redefining “Like Products”

Under GATT articles II and III, a WTO member cannot discriminate in its treatment of like products.<sup>19</sup> An assessment of whether products are like products under the GATT is generally informed by four criteria: physical characteristics, tariff classification, end uses and consumer preferences (i.e., would consumers treat the two products as substitutes).<sup>20</sup> Historically, the environmental impact of the products’ respective PPMs has not been considered in the likeness analysis.

There was some suggestion that GATT articles II and III offer the scope to accommodate measures that discriminate among otherwise identical products on the basis of PPMs. For instance, there may be room to argue that the environmental impacts of certain PPMs do cause consumers to view physically identical products in different ways.

Some participants were wary of broadening the likeness analysis to include assessment of PPMs. Redefining the notion of like products might appear tempting, but it could be a slippery slope leading to all kinds of questionable distinctions down the road. Participants were asked to recall the *Belgian Family Allowances* case,<sup>21</sup> in which Belgium sought to discriminate against imports from countries that lacked social welfare systems. The GATT countries decided that this was a bridge too far. After all, where would the distinctions end?

One speaker said it was telling that, in litigation, WTO respondents have not attempted to dispute the likeness of products on the basis of the environmental impact of the products’ PPMs. There is a sense within the WTO membership that the system might unravel if they were to entertain such arguments. Therefore, respondents who want to defend a challenged environmental measure will generally concede likeness or

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16 *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012), WTO Doc WT/DS381/AB/R (Appellate Body Report).

17 *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (2014), WTO Docs WT/DS400/AB/R, WT/DS401/AB/R (Appellate Body Reports).

18 Steve Charnovitz, “The Law of Environmental ‘PPMs’ in the WTO: Debunking the Myth of Illegality” (2002) 27 *Yale J Intl L* 59.

19 *GATT 1947*, *supra* note 6, arts I, II.

20 These factors were outlined in *Japan—Customs, Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (1987), GATT Doc L/6216, BISD 34S/83.

21 WTO, *Belgian Family Allowances* (1952), GATT Doc G/32, BISD 1S at 59, online: <[www.wto.org/english/tratop\\_e/dispu\\_e/gatt\\_e/52famalw.pdf](http://www.wto.org/english/tratop_e/dispu_e/gatt_e/52famalw.pdf)>.



contest it on non-PPMs grounds and then move on to arguing an article XX exception.

It was claimed that the majority view in trade circles is that trade-restrictive environmental measures based on PPMs should be assessed under the article XX exceptions. Relying on the article XX exceptions, it is felt, would not necessarily lead to an unravelling of the international trade system. Article XX's requirements of necessity would still discipline any future practice of justifying PPMs-based distinctions under the public morals or environmental exceptions.

## A More Proactive PPM Agenda?

While PPMs-based measures might survive WTO litigation, some participants hoped that the trade system would aspire to a more proactive climate agenda. They would like the WTO to go beyond a passive “functionalist” approach and explore ways to reform the system, so that it expressly facilitates PPMs-based measures aimed at supporting emissions reductions.

One challenge recognized by several speakers would be winning the support of developing countries for such an agenda. Developing countries may see PPMs-based trade measures as barriers that will disproportionately disadvantage their economies. Many recalled how the regulations at issue in *US—Tuna* effectively required Mexico to carry out significant technical upgrades to its fishing fleet in order to export to the US market. It was felt that many developing countries will see PPMs-based measures as placing unfair and unrealistic demands on their economies because they lack the technology for low-emission production methods.

One proposed solution was to link the adoption of PPMs-based trade distinctions to transfers of technology to developing countries. This would enable developing countries to meet the enhanced environmental standards that PPMs-based measures would effectively impose on their exports.

It was unclear how such a regime would be implemented. There are no workable rules on the transfer of technology in international law. The closest is perhaps article 66.2 of the TRIPS Agreement, whereby parties “shall” support technology transfer.<sup>22</sup> However, even

this provision has led to little action because, for the most part, member governments do not own the technology and cannot force domestic companies to make the transfers. In short, the tools are lacking to incentivize such transfers.

A couple of tools were proposed. Developed countries might offer tax rebates to those companies that did transfer emissions-reducing technologies abroad. The international climate regime might also recognize such transfers as offsets when assessing developed countries' emissions.

Whatever the challenges may be, several speakers emphasized the importance of recognizing that all humans have a shared interest in the least-polluting technology being used in the production of goods, regardless of where production is taking place. This needs to be the starting point when discussing transfer and dissemination of clean production technology, and it cannot be approached simply as an intellectual property rights issue.

## BCAs

While establishing an international understanding among like-minded countries on BCAs is an attractive option, it is unclear how it would deal with the complex global value chains that define today's global economy. It might be good to start by focusing on BCAs for a select group of high-emission carbon industries and build from there. There was interest in how current models for applying value-added tax (VAT) could be applied to help solve challenges to the implementation of BCA systems.

It was observed that implementing WTO-compliant BCAs is not really the problem. Governments are aware that such regimes would pass WTO scrutiny. The barriers to implementation are much more political than legal. There is often a strong industry preference for free allocation policies as opposed to BCAs. Industries that rely on the importation of intermediate goods are also concerned about the cost implications of BCAs for their operations. Moreover, governments remain concerned that implementing BCA regimes will invite trade retaliation from major trading partners.

An additional challenge that was noted is latent opposition to BCAs in developing countries. They may well see these measures as motivated by protectionist impulses in developed countries. Irrespective of environmental benefits, any BCA will, to some degree, also serve a protectionist

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22 *Agreement on Trade-related Aspects of Intellectual Property Rights*, 15 April 1994 [entered into force 1 January 1995] [TRIPS Agreement], art 66.2.

function, and this reality will be an impediment to getting buy-in from developing countries.

## Border Carbon Tax Adjustments

Reflecting on the urgency of the climate problem, it was suggested that analysis is needed on how countries can move ahead with unilateral trade measures while waiting for multilateral efforts to play out. Of course, any unilateral action — namely taxes on fossil fuel use — would need to be politically acceptable in high-emissions countries such as the United States.

One approach to make domestic taxes on carbon more acceptable was described as follows: every country that imposes positive net taxes on fossil fuel use in domestic markets could extend the same treatment to all goods it imports. A country could do this by setting a default surcharge on imported goods equivalent to the net taxes imposed on any competing domestically produced goods. However, the surcharge would be reduced to account for any carbon taxes already applied in the country of origin. In essence, this is a BCA, but its defining feature is that it is calibrated to account for carbon taxes that have already been applied to the imported goods abroad, and not simply on the carbon footprint of the good.

It was believed that this would make domestic carbon taxes politically feasible because domestic firms would not feel disadvantaged by competing imports. The plan would also give governments in high-polluting countries an incentive to impose domestic carbon taxes or other mitigation measures, since these would reduce the BCAs imposed on their exports at foreign borders. It was argued that this approach would be consistent with WTO rules and would minimize additional transaction costs. Additionally, the plan would exempt from the BCA all exports from low-emitting, low-income countries.

Some participants questioned the usefulness of a plan that uses energy taxes as a reference point as opposed to carbon content of the exported goods. At the end of the day, it was said, it all comes down to carbon content anyway. There was also a concern that the complexity of modern global value chains would make determining the energy taxes already paid on any imported product prohibitively complex. Knowing whether to make adjustments for “tax-like” energy measures would further complicate the process.

However, there was some suggestion that current approaches to VAT and double taxation could serve as models for overcoming these challenges.

Another critique of this approach was that it would offer little incentive for individual companies to reduce their carbon footprints. For instance, a company using renewable energy to produce its goods would face the same BCA as a company from another country using fossil fuels to produce the same good.

It was also noted that while exempting low-emissions countries from the BCA would be laudable, the prospect of increased transshipment from other countries would, in turn, require a complex rules-of-origin regime, one that would possibly violate Most Favoured Nation (MFN) principles.

## An International Understanding on Carbon Taxes?

In 1992, Principle 16 of the Rio Declaration made it clear that the polluter should be made to pay, although without distorting trade and investment flows.<sup>23</sup> Unfortunately, this did not lead to a great deal of international action on carbon taxes and the cost-internalization of emissions. The enduring problem for action on cost-internalization has been competitiveness. It was suggested that an agreement of like-minded countries to move forward on carbon taxes outside of the WTO and, indeed, outside of the international climate regime, could help overcome competitiveness concerns.<sup>24</sup>

The WTO could be the right forum to reach an agreement on the application of carbon taxes to imported and exported products. An agreement could set out reasonable methods for applying taxes to imported products, both by industry and by country. This common understanding would at least prevent trade disputes. It would allow countries to rebate carbon taxes on exports and open space for bilateral agreements on carbon taxes. It would be less an agreement of like-minded countries to impose carbon taxes and more a common understanding of how BCAs for imports and exports would operate. This could provide a solid foundation for future efforts.

<sup>23</sup> *Rio Declaration on Environment and Development*, UNGA, UN Doc A/CONF.151/26 (Vol 1) (1992), Principle 16.

<sup>24</sup> See Steve Charnovitz and Daniel C Esty, “Green Rules to Drive Innovation”, *Harvard Business Review* (March 2012).

## The Development of Standards

Increasing international standardization of measurements, products, and methods of calculating emissions and carbon footprints was cited as a powerful way to facilitate emissions mitigation measures. Having a common understanding of how to conduct environmental audits, accounting and reporting, as well as how to measure emissions is necessary for international mitigation regimes to function effectively. Finding common ground is, of course, a challenge. Take, for example, the International Standards Organization's (ISO's) work on standards for carbon footprints: after two years of work, the ISO essentially had an agreement in place, but this was derailed when a single country challenged the process.

One participant suggested that the ISO is well-positioned to foster the development of climate and emissions standards. ISO standards have been widely cited in WTO Panel decisions and are referenced in the TBT Agreement.<sup>25</sup> In fact, the ISO enjoys a good working relationship with trade officials focused on technical barriers to trade. Furthermore, three-quarters of the organization's membership are developing countries, giving it helpful insight into and sensitivity to the issues these countries are concerned about. The ISO also has strong institutional ties to international players on the climate file, most notably the United Nations Environment Programme.

The bottom-up process that the ISO employs for the development of standards gives its standards a significant measure of international credibility, especially when they are referenced in the trade context. The ISO's multi-stakeholder process gives a voice to consumers and industry, and also involves a nuanced approach to build standards that take into account differences in national development.

Making ISO standards a reference point for both the trade and environmental regimes should be attractive to a number of international actors. Major exporters such as China are increasingly seeing standards as an important aspect of trade competition: exports are more competitive if they can be shipped out with the appropriate ISO identifier.

It was suggested that part of the unrealized potential of standardization is its capacity to promote the

adoption of higher-efficiency products. Global convergence on the highest product efficiency standards for even a small basket of consumer goods could have a tremendous impact on global energy consumption. This would complement the trade regime, which generally welcomes harmonization. Standardization also makes national-level protectionism more difficult. Even if a small group of countries were to begin a standardization initiative of this kind, it could create enough critical mass that the rest of the world would have to follow suit.

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## Emerging Approaches to Trade and Climate Change

### The Need for Action on Fundamental Reforms

Recognizing that global climate change is a problem requiring urgent attention, several participants noted that the focus should be not only on solutions that will necessarily involve lengthy renegotiations of various WTO agreements. While it would be good to begin discussions on how to address climate change through more fundamental reforms to the GATT-WTO frameworks, it was suggested that we should prioritize measures that can be most easily implemented within the trading system as it exists today.

### A Role for WTO Jurisprudence

Seeking out new legal interpretations of the existing rules through litigation is one way to make the trade system work in support of climate objectives. It would, for instance, be helpful if the Appellate Body were to interpret a carbon tax as a border tax adjustment under GATT article II.<sup>26</sup> Several participants were quick to note, however, that the Appellate Body will be reluctant to go too far in breaking new ground. New legal interpretations will only address narrow issues and will probably not provide the wide scope for action that is needed to effectively reduce emissions. Targeted litigation might be helpful, but

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<sup>25</sup> TBT Agreement, *supra* note 12.

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<sup>26</sup> GATT 1947, *supra* note 6, art II.

the potential for new WTO case law to help solve the climate problem should not be overestimated.

## The Need for Greater Interchange between Climate and Trade Specialists

Many speakers noted that a key problem remains the lack of interchange between climate and trade specialists. These two groups need to come together more often to better understand each other's respective objectives, challenges and concerns. One group cannot wait and simply hope that the other comes up with the way forward: the two must act in concert. Certainly, trade officials will be reluctant to put climate on the WTO agenda until they get actionable guidance from climate negotiators. Indeed, it was argued that they might not be inclined to address the issue in the absence of more forceful advocacy from those on the climate side. Creating this kind of dialogue is a relatively simple thing to do, but often gets overlooked. Experience shows that people on both sides are often unaware of how trade and climate change intersect, and all too often miss opportunities for collaboration and synergy.

It was also suggested that this interchange needs to extend to include voices from the business and private sector. The Joint Public Advisory Committee (JPAC) of the NAFTA Commission for Environmental Cooperation was cited as one potential model to facilitate this sort of stakeholder engagement.

## The SDGs and the WTO

Several participants noted that sustainable development has not featured prominently in recent dispute settlement litigation. At the latest Ministerial Conference in Buenos Aires, the WTO did not seem keen on bringing the SDGs to the foreground of WTO talks.

It might be useful to increasingly situate trade discussions and litigation within the context of the SDGs, in particular SDG 13 on climate. After all, the SDGs clearly call on the trading system to play a role in the goals' implementation. The preamble of the Marrakesh Agreement<sup>27</sup> likewise calls for trade to be conducted in accordance with the objectives of sustainable development. The Appellate Body provided some support for this principle as far back as *US—Import Prohibition of Certain Shrimp*

*and Shrimp Products* in 1998.<sup>28</sup> The fact that all WTO members are also UN members who have signed on to the SDGs should offer a clear basis for interpreting WTO rules in a way that supports sustainable development. This background, it was suggested, could be leveraged to a greater extent to get climate concerns on the WTO agenda. For instance, the SDGs might offer a basis for WTO members to begin discussions on how to impose greater disciplines on fossil fuel subsidies.

## The Possibility of a Climate Waiver

A WTO “climate waiver” was proposed as a way to give countries sufficient policy room to implement climate measures, while not requiring a fundamental change to the GATT-WTO system.<sup>29</sup> The great advantage of a waiver, it was said, is that it can allow for immediate action on trade and climate, while more fundamental changes to the trading system are gradually developed in negotiations.

A waiver is clearly permitted under the Marrakesh Agreement<sup>30</sup> and has already been used several times (for example, conflict diamonds, drugs and medicines for least developed countries). Climate change would undoubtedly qualify as one of the “exceptional circumstances” that such waivers are supposed to address. While waivers are time-limited, they are often renewed and, over time, may become part of the global economic landscape. They can become firmly rooted in the system, taking on a sort of quasi-permanence.

It would take some work to get a waiver passed. Officials from both the climate and trade regimes would need to collaborate to get the waiver idea on the WTO agenda. A group of like-minded countries would then need to champion it. This might involve appointing a WTO working party to examine the issue and undertake the necessary consultations. Once before the membership, however, the waiver would only require a three-quarter majority, rather than consensus, to pass. It remains unclear, however, what the content of the waiver should be. It was suggested that a good start might be a waiver designating carbon taxes as

27 Marrakesh Agreement, *supra* note 9, Preamble.

28 *US—Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report).

29 See James Bacchus, “The Case for a WTO Climate Waiver” CIGI, Special Report, 2 November 2017.

30 Marrakesh Agreement, *supra* note 9, art IX.

internal taxes under the GATT. This would at least allow for carbon-based border tax adjustments.

## Does GATT Article XXVIII Offer a Feasible Route for the Introduction of Carbon Tariffs?

Tariffs were recommended as one trade measure that might be revived to combat climate change. Tariffs are simple, predictable tools that are relatively easy to implement. It was suggested that we lose out by resorting to much more complicated and costly non-tariff barriers to address climate change. Non-tariff measures do have certain limitations: for instance, border tax adjustment schemes are limited by the structure of the implementing country's own tax regime.

Recalling that GATT article XXVIII ("Modification of Schedules") allows for negotiated tariff reconsolidation,<sup>31</sup> it was suggested that current national tariff schedules could be changed to give an advantage to products produced in a "clean" way. For example, a country might raise tariffs on steel produced using emissions-intensive methods, while reducing to zero the tariff for steel produced using cleaner means. The same could be done for electricity produced by coal-burning plants as opposed to electricity produced through hydro.<sup>32</sup> It was suggested that any increase in tariffs on carbon-intensive products could be offset by lowering tariffs on cleaner products, thereby adhering to the principle of compensatory concessions.

Tariffs of this sort would create an incentive for exporters to change their methods of production. The tariffs would not necessarily have to be imposed on all products. Countries might pick a basket of products that are traditionally associated with high carbon emissions. This targeted approach would ensure a significant impact on emissions, but would minimize administrative and regulatory complications. Certainly, the problem of trade diversion would prevent countries from implementing this unilaterally, unless they had very large markets (for example, the United States and China). It would probably have to be done on a plurilateral basis.

Some participants questioned whether article XXVIII would, in fact, provide a feasible legal path for the reconsolidation of tariffs. They noted that the article XXVIII process is actually quite complicated and should not be counted upon as an expeditious way to establish carbon tariffs. The difficulties Canada encountered in its attempts to renegotiate tariffs upward on dairy products were cited as an example.

Some participants expressed concern about the general idea of relying on tariffs to help fight climate change. The creation of GATT, it was claimed, was motivated in part by a desire to see tariffs progressively reduced. Many, therefore, consider the retention or raising of tariffs inimical to the ethos of the GATT system, regardless of article XXVIII. The introduction of new tariff line items into national tariff schedules would generally run counter to efforts to streamline and simplify those schedules. There was also a question of how new tariffs would overcome the GATT article II bar on raising tariffs beyond "bound" commitments. In general, there were concerns raised about how tariff reconsolidation efforts would engage with MFN and national treatment principles.

Furthermore, one participant asked how a preferential tariff for low-emissions goods could apply to a country such as Canada, which has already bound itself to zero or near-zero tariffs on virtually all imports. While lowering tariffs for low-carbon products might be effective for countries with higher bound rates, those with zero tariffs have no room to go lower.

## Trade Remedies

The imposition of countervailing duties is having a growing impact on the global dissemination of affordable green technology. Recent decisions by the US and Indian governments to impose tariffs on Chinese solar exports were cited as examples of this trend. The growing list of trade remedy cases over solar products raises the question of whether trade remedies are hindering more widespread adoption of emissions-reduction technology. It may be useful to study this issue jointly with a Chinese research institution. After all, many of the trade remedy cases take issue with Chinese solar production.

<sup>31</sup> GATT 1947, *supra* note 6, art XXVIII.

<sup>32</sup> This approach and its legality under international trade law was discussed in Thomas Cottier, Olga Nartova & Anirudh Shingal, "The Potential of Tariff Policy for Climate Change Mitigation: Legal and Economic Analysis" (2014) 48:5 J World Trade 1007.

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## Areas for Further Research

The meeting concluded with a discussion about outstanding research questions and possible further research on the interaction between international trade and climate law. The following areas were identified.

### What Role for the WTO?

- How can the WTO adopt a more proactive climate agenda?
- Will the international trade system ever be able to respond in a meaningful way to climate change, in the absence of a stronger expression of international consensus on what measures are appropriate to address emissions?
- How will the Paris Agreement inform future Appellate Body decisions?
- How should the concept of “common concern” inform WTO action on climate change?
- The SDGs commit all UN members to the pursuit of sustainable economic development. How should this commitment influence what climate change measures are permissible under international trade law? How will the implementation of the SDGs play into future Appellate Body decisions?
- How can we create greater interchange between climate and trade negotiators/experts?
- What are the prospects and advantages/disadvantages of instituting climate-related trade measures through regional or plurilateral agreements of like-minded countries?
- Could the Agreement on Agriculture<sup>33</sup> be changed to help address climate change?
- How can business and industry voices be best included in trade-climate talks? Does the JPAC of the NAFTA Commission provide a useful model for such engagement? Why

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33 WTO, *Agreement on Agriculture*, 1868 UNTS 410, in *Marrakesh Agreement*, *supra* note 9, Annex 1A, online: <[www.wto.org/English/docs\\_e/legal\\_e/14-ag.pdf](http://www.wto.org/English/docs_e/legal_e/14-ag.pdf)>.

were JPAC-type institutions not replicated in the FTAs that followed NAFTA?

### What Is Possible under the Current System?

- Does existing WTO law give sufficient policy space for countries to address climate change? Are the GATT article XX exceptions sufficient?
- Does the WTO approach to “multiple objectives” constitute a serious barrier to the implementation of climate measures?
- Is the SCM Agreement an impediment to the subsidization of green industries and renewable energy?
- Does the SCM Agreement already provide enough policy space to accommodate green subsidies? Can some green subsidies be characterized as the provision of “general infrastructure”?
- Can tariffs be reintroduced within the GATT-WTO framework as emissions-reduction measures?
- Does GATT article XXVIII offer a feasible route for the introduction of higher tariffs targeting carbon-intensive products?
- Should scope be given to emissions-reduction measures by broadening the like-product analysis to include consideration of PPMs, or is this a slippery slope?
- Are national cap-and-trade systems that involve free allowances WTO-compliant?
- How can BCAs operate effectively in a global economy defined by highly complex global value chains?

### Subsidies

- Is it possible to identify instances where solar and wind subsidies have “worked”? Can green subsidies be realistically assessed for which were “good” and which were “bad”?
- Does the WTO need a specific agreement on energy?
- Would “tariffication” of fossil fuel subsidies assist in reducing emissions?

- Would it be helpful for a WTO member to challenge another member's fossil fuel subsidies? How would the Appellate Body decide such a case?
- Should the WTO become more involved in the fossil fuel subsidy debate? If so, how?
- Can recent efforts to put fisheries subsidies on the WTO agenda offer any lessons about how to start a WTO dialogue on greater disciplines for fossil fuel subsidies?
- Are domestic content requirements really that bad when attached to subsidies for infant green industries? Should the trade system accommodate domestic content requirements in these instances?
- How can the trade system better recognize the fact that some subsidies are legitimate attempts to correct market failures?

## Adoption and Transfer of Clean Technology

- What role does technology transfer play in reducing emissions? Can technology transfer make PPM-based measures more acceptable to developing economies? How can we incentivize such transfers?
- Will developed countries find it attractive to offset their carbon footprints by transferring clean technology to developing countries? Is this a viable way to incentivize the transfer of clean technology?
- Is the dissemination of clean, emissions-reducing technology (for example, solar panels) being unduly hampered by trade remedy actions?
- How can greater agreement on standards (for example, through the ISO) help drive the adoption of green technology? Should agreements on standards play a larger role in the negotiation of regional or bilateral trade agreements?

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# Agenda

January 18, 2018

Sheraton Ottawa Hotel, 150 Albert Street, Ottawa, Ontario

- 8:30-9:00 a.m.**      **Introduction – Oonagh E. Fitzgerald**  
Presenter: **Silvia Maciunas**
- Importance of the Topic
  - Identification of Key Issues
- 9:00-10:30 a.m.**      **Session 1 – Institutional Architecture: WTO or Regional and Bilateral Agreements?**
- Role of the WTO
  - Regional and Bilateral Agreements
  - Differences in Multilateral Environmental Agreements and Trade Agreements
- Moderator: **Silvia Maciunas**  
Framing the Issues: **Robert Brookfield, Aaron Cosbey and Jean-Frédéric Morin**
- 10:30-11:00 a.m.**      **Morning Break**
- 11:00 a.m.-12:30 p.m.**      **Session 2 – Subsidies under Trade Rules: Fossil Fuels versus Renewables**
- Legality of Subsidies: Which Are Legal, Which Are Illegal?
  - Phasing Out Fossil Fuel Subsidies: Legal and Economic Considerations
  - Supporting Renewable Energy Subsidies: Legal and Economic Considerations
- Moderator: **Hugo Perezcano Díaz**  
Framing the Issues: **Hugh Cheetham, Dianne Saxe and Susanne Droege**
- 12:30-1:30 p.m.**      **Lunch**
- 1:30-3:00 p.m.**      **Session 3 – Carbon Footprints, PPMs and Border Carbon Adjustments**
- Ecolabelling and Standards
  - Border Carbon Adjustments?
  - Revisiting the PPMs
- Moderator: **Maria Panezi**  
Framing the Issues: **John Odell, Steve Charnovitz, Thomas Cottier and Robert Page**
- 3:00-3:30 p.m.**      **Afternoon Break**
- 3:30-5:00 p.m.**      **Session 4 – Emerging Approaches to Trade and Climate Change**
- Climate Waiver
  - Tariff Reconsolidations
  - Moving toward the Green Economy
- Moderator: **Oonagh E. Fitzgerald**  
Framing the Issues: **James Bacchus, Steve Charnovitz and Thomas Cottier**  
Research Agenda



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