

CAN TRADE ADVANCE CLIMATE ACTION?

This article examines some of the linkages between trade rules and climate action, and identifies how trade rules might be made to support the fight against climate change. Multilateral environmental agreements have included provisions on trade and some have even included the protection of the environment in the preamble. Similarly, regional and bilateral trade agreements include some additional obligations, such as the obligation to have high environmental standards. However, it remains that certain trade rules may limit climate measures. Changes to such rules would assist in allowing measures to be used in the transformation to low carbon economies. Other options include the use of a climate waiver or an interpretation of the rules to allow certain climate measures.

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According to Secretary General of the UN, António Guterres, climate change is the existential problem for human civilization.¹ Indicators are not promising: Worldwide, we are experiencing extreme weather. In North America, severe hurricanes, wildfires, and flooding have left devastation in their wake, while in the Middle East and across Europe, fires and extreme heat have claimed lives.

Recent climate reports warn us that disasters are worsening. The glaciers in the Himalayas are melting at an unprecedented rate, raising concerns about water supplies in the future in that region. Ice sheets in Greenland and Antarctica threaten to result in a sea level rise considerably higher than anticipated. The Arctic is warming at two to three times the average rate of temperature increase over land of approximately 1.0 degrees centigrade, and may result in the release of methane from the melting of permafrost. The temperature of the oceans is increasing more significantly than had been predicted affecting marine life.

Despite this sobering information, greenhouse gas (GHG) emissions are still rising. Emissions in 2018 are expected to rise after a brief period of plateauing. Global temperatures are also still rising. 2018 was the warmest year in recent history.² Yet, despite this rather frightening evidence of the impacts of climate change, demand for fossil fuels is predicted to increase in the future.³

The Relationship between Trade and the Climate

The relationship between climate and the economy is complex. Certainly, in recent years, globalization has resulted in an increase in trade. Movement of goods by land and by sea has grown considerably. There is a general agreement that global prosperity has gone up, particularly resulting in an increase in income in many developing countries. But parallel to this increase in trade, we see the widespread environmental degradation of our land, oceans, and atmosphere. More importantly for this paper, we see a significant increase in the global average temperature, particularly since the 1940s. While an analysis of the broader links between economy and the environment are beyond this article, we can look at the link between trade rules and climate measures, a subset of this discussion, and identify some ways to make trade rules supportive of climate action.

¹ United Nations Secretary-General, Secretary-General's remarks on Climate Change, 10 September 2018.

² Christiana Figueres et al., "Emissions are still rising: ramp up the cuts," *Nature*, 5 December 2018, www.nature.com/articles/d41586-018-07585-6

³ International Energy Agency (IEA), "World Energy Outlook 2018," Executive Summary, 2018, <https://webstore.iea.org/download/summary/190?fileName=English-WEO-2018-ES.pdf>

The Framework of the International Climate Regime

The Paris Agreement,⁴ which has 184 parties,⁵ established the framework to prepare and update nationally determined climate action plans called “nationally determined contributions.” It also established a goal for states to limit the temperature increase to well below 2.0 degrees centigrade. Additionally, states will aim to channel financial flows towards low carbon development pathways.⁶ Embedded in the Paris agreement is a recognition of the need to achieve net negative emissions in the second half of the 21st century. Thus, the Paris Agreement contains the concept of a low carbon world which will require a significant transformation of economies and societies. One question to consider is how trade rules may impact such a transformation.

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Trade Measures in Environmental Agreements

Several decades ago, the international community recognized the impact of trade on the environment. Thus, in 1973, the international community agreed to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), an agreement regulating trade in endangered species.⁷ Another example of how trade issues have been used in international instruments is the Montreal Protocol, a treaty aimed at the reduction and phasing out of the use of ozone-depleting substances where the parties agreed not to trade in such substances with nonparties as a way of encouraging wide participation in the Protocol.⁸ In another treaty, the Stockholm Convention on Persistent Organic Pollutants, imports and exports of the substances targeted for phase out are prohibited.⁹ There are other examples of how trade measures are reflected in environmental agreements, usually with a view to allowing legitimate measures under multilateral environmental agreements (MEAs) while protecting the trading system from measures that constitute unjustified or disguised restrictions on trade.

⁴ UNFCCC, “Adoption of the Paris Agreement,” 12 December 2015, Dec CP.21, 21st Sess, UN Doc FCCC/CP/2015/L.9 (entered into force 4 November 2016).

⁵ Paris Agreement, United Nations Treaty Collection, Chapter XXVII, No 54113, Parties: 184.

⁶ Paris Agreement, note 2, Article 2.

⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243, 12 ILM 1085 (entered into force 13 January 1976). [CITES]

⁸ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3; 26 ILM 1550 (1987) (entered into force 1 January 1989).

⁹ Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119, 40 ILM 532 (2001), (entered into force 17 May 2004).

Notably, the UN Framework Convention on Climate Change contained references to climate change as did the Kyoto Protocol.¹⁰ Parties to these two agreements remained concerned about the balance between trade rules and climate measures. That being said, the Paris Agreement does not contain any reference to trade measures within it, although such language had originally been proposed during the negotiations.

Environmental Language in Trade Agreements

Recently, we have seen references to the environment or sustainable development in trade agreements. For instance, the Marrakesh Agreement establishing the World Trade Organization (WTO) contains a reference to the use of the world's resources in accordance with the objective of sustainable development in its preamble. This agreement also preserved the Article XX (b) exception on measures that states deem necessary for the purposes of the protection of human, animal and plant life and health and which has been used for environmental protection, as well as the Article XX (g) exception relating to the conservation of exhaustible natural resources under the General Agreement on Trade and Tariffs (GATT).¹¹

However, it is not only the multilateral trading system of the WTO that has addressed the issue of trade and environment. Numerous regional and bilateral trade agreements now contain provisions in chapters on the environment which require parties to have and enforce high environmental standards and not to derogate from such standards to attract trade and investment. Some more recent versions of regional trade agreements also include affirmations by states of their commitments taken under MEAs to which they are party. In addition, softer obligations regarding the promotion of trade in environmental goods and services and the use of international standards can be found in some bilateral and regional trade agreements. Some agreements have added the innovation of a sustainable development chapter which considers not only the environment but also other development issues. The Trans-Pacific Partnership which recently came into force goes even further than most regional trade agreements in that it contains positive obligations on environmental matters. Obligations included the removal of certain fisheries subsidies and provisions to combat illegal, unreported, and unregulated fishing.¹² It also includes a binding dispute resolution mechanism.

¹⁰ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, 31 ILM 849 art 7 (entered into force 21 March 1994) [UNFCCC]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, UN Doc FCCC/CP/1997/7/Add.1, 10 December 1997; 37 ILM 22 (1998) (entered into force 16 February 2005).

¹¹ GATT 1994: General Agreement on Tariffs and Trade, 15 April 1994, art XX (d), (g), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [GATT].

¹² Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 8 March 2018, art 20.16 (entered into force 30 December 2018), <https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3808>

Regional trade agreements provide more options to address environmental issues within the trading system than the more broadly subscribed multilateral WTO. They are more flexible and can be more responsive to emerging issues but are limited in their geographic scope. Trade agreements contain language addressing the relationship between trade and the environment both aspirationally with respect to sustainable development, and by providing for some exceptions to trade rules. Environmental chapters in regional and bilateral agreements affirm the desire for high environmental standards. The most far-reaching language in regional agreements even provides positive obligations regarding environmental actions such as the removal of fisheries subsidies.

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However, more can be done. There is a wide range of economic activity subject to WTO disciplines and under a typical bilateral free trade arrangement, which can have an impact on climate measures. Three important WTO agreements are the GATT,¹³ the Agreement on Trade Related Investment Measures (TRIMS), and Agreement on Subsidies and Countervailing Measures (SCM).¹⁴ Chapters on investment can be found within some regional and bilateral agreements.¹⁵

The General Agreement on Trade and Tariffs

GATT Members seek to promote liberalization in the trade of goods, based on a number of principles. These include the principle of most favored nation, which requires members to give all other members the same favorable treatment as is extended to any member and the principle of national treatment. This requires non-discrimination between goods of members and domestic goods.

Members may negotiate to reduce tariffs within the GATT or they may unilaterally reduce or eliminate tariffs on certain goods for policy reasons. This would apply to tariffs for environmental goods provided all members are treated the same and

¹³ GATT (1994).

¹⁴ TRIMS Agreement: Agreement on Trade-Related Investment Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [TRIMS Agreement]; Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [SCM Agreement].

¹⁵ Such agreements include The Comprehensive and Economic Trade Agreement (CETA), Chapter 7 on Subsidies.

the requirements for national treatment are met. For example, members of the Asia Pacific Economic Cooperation group have reduced tariffs for environmental goods based on an agreed list of such goods.

Efforts have been made by certain members of the WTO to conclude a broader-based Environmental Goods Agreement, but these negotiations stopped without any conclusion being reached. The negotiators were not able to agree upon an appropriate list of environmental goods. In the future, if an agreement is not reached within the WTO, efforts should be made to restart negotiations outside the WTO, taking steps to encourage other states to participate. Alternatively, efforts could be made bilaterally or regionally.

Another requirement of the GATT is that similar or “like” products be treated in the same manner. While an assessment of the quality of likeness is multifaceted and can take into account issues such as consumer preferences, end uses and product properties, it is not clear that a difference in production process would be sufficient to justify a difference in treatment. If a product produced with a large carbon footprint—i.e. a production process that emits large amounts of GHG gases—must be treated in the same way as a product with a small carbon footprint, this would restrict efforts to favor goods produced in an environmentally sustainable way. Ways to attenuate the uncertainty concerning likeness include the use of border carbon adjustments, which would apply a charge to imports with a high GHG footprint that are in competition with domestic goods with a low carbon footprint at the border. International standards could also play a role in harmonizing approaches to carbon footprints in different countries.

In addition, as discussed above, there are provisions under the GATT to allow for environmental exceptions where measures are designed to protect human, animal, and plant life and health as well as to conserve exhaustible natural resources. These must still meet the test of not being an unjustifiable or disguised restriction on trade. Moreover, the measures must be deemed “necessary,” which has been interpreted to mean the least trade restrictive. While a number of cases challenged under the WTO have been successful in meeting this test, if a measure is challenged, it could take years to make a determination and the fear of litigation may result in a domestic regulatory chill. A possible approach to this would be the introduction of a climate waiver under the WTO which would allow certain domestic climate measures that meet certain predetermined criteria to be adopted even if they were inconsistent with GATT rules.¹⁶ The climate waiver requires exceptional circumstances and while it can be agreed with three-quarters of the vote, the preference is for a consensus

¹⁶ James Bacchus, “The Case for a WTO Climate Waiver,” *Centre for International Governance Innovation*, 2 November 2017, www.cigionline.org/publications/case-wto-climate-waiver

among members. Another approach would be for the members to reach an interpretation or understanding that would allow consideration of carbon footprints in determining likeness. Again, consensus is preferred although not required.

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Investment Law

Investment law also poses challenges. The objective of international investment protection agreements (IIPAs) such as bilateral investment treaties is to protect foreign investments in the host countries. Compensation must be provided in the event the host country takes action in breach of its international obligations that causes loss or damage to such investments including expropriation.¹⁷ Investors must be treated in a fair and equitable manner in accordance with international law. Some investment tribunals have made decisions which have been criticized as limiting the ability of the host government to regulate in the interest of the environment.¹⁸

Some IIPAs, as well as TRIMS, also require countries not to impose performance requirements or local content requirements. These rules may open the door to challenges in areas such as renewable energies. In the Ontario Feed-in tariff program case (FIT), also discussed below, the program to attract investment in renewable energy in Ontario, Canada was brought before the WTO dispute resolution mechanism on the basis, *inter alia*, of an improper use of subsidies. Ultimately, it was decided on the basis of the requirement against the use of local content under the TRIMS agreement.¹⁹ Local content requirements are thought to undermine the competitive benefits of imported goods, but often local content is a component of garnering political support for new programs and technologies to advance clean technology.

¹⁷ Expropriation does not require a physical taking but might involve regulatory action which amounts to a taking.

¹⁸ William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability, 17 November 2015, www.italaw.com/sites/default/files/case-documents/italaw4212.pdf; Ethyl Corporation v. The Government of Canada, UNCITRAL, NAFTA, Award on Jurisdiction, 24 June 1998, www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf

¹⁹ WTO, “Canada-Certain Measures Affecting the Renewable Energy Generation Sector / Canada-Measures Relating to the Feed-In Tariff Program,” WT/DS412/AB/R / WT/DS426/AB/R, 6 May 2013, www.wto.org/english/tratop_e/dispu_e/412_426abr_e.pdf

TRIMS incorporates the GATT Article XX (b) and (g) exceptions to protect human, animal, and plant life and health and the conservation of exhaustible natural resources.²⁰ Many IIPAs also include similar environmental exceptions and, have a prohibition against lowering standards to attract trade and investment. These provisions are useful but are arguably insufficient to incentivize investment in clean technology that is required to support the transformation to a low carbon economy.

A rethinking of investment law to allow for measures that are necessary for the low carbon transformation would be useful. Allowing local performance requirements in the field of clean technology, even on a limited time basis would assist in developing a climate-friendly investment agreement. Alternatively, incentives to attract clean technology investment could be allowed under a climate waiver or formal interpretation of the agreements in question. Certain states have negotiated exceptions where they have identified areas of importance, for example, Canada for cultural industries.

Subsidies Law

In considering the need for rapid climate action and the transformation to a low carbon economy, the WTO Subsidies and Countervailing Measures Agreement is of particular concern. It establishes a regime to govern providing subsidies, which are defined as providing financial contributions by the government that confer a benefit. Subsidies contingent on export performance or on the use of domestic as opposed to imported goods are always prohibited and would always be inconsistent with WTO law. Subsidies which are specific to an enterprise, industry, or group of industries or enterprises can be challenged by WTO members if they result in an adverse impact on a member. These are called actionable subsidies. Other subsidies not specific to industries or enterprises and more general in nature are non-actionable, that is they are not open to challenge. Subsidies have been accepted in the context of agriculture, under the Agreement on Agriculture,²¹ showing that there is room to allow for subsidies where states agree that a policy imperative for such an approach exists.

The relevance of subsidies law to climate change is the necessity for a low carbon transformation and for technologies to assist with this change. An essential element of this transformation is the need to have a larger deployment of renewable energy and other clean technologies, for example, relating to battery storage and to electrification of transportation. Such technology development is affected by various public policies as well as by market forces. Subsidies to support clean technology

²⁰ TRIMS Agreement, May 2013, art 3.

²¹ Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

development and trade, as well as investment in clean technology, should be a tool for policymakers. However, the rules regarding subsidies allow such subsidies to be challenged when they are “specific” or targeted to exports. Many subsidies for renewable energies and clean tech have been litigated as specific subsidies while subsidies for fossil fuels tend to be more general in application and are less likely to be the subject of a dispute.

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In a recent FIT case in Ontario about measures to attract investment to solar power the tribunal did not find a financial benefit and, therefore, did not find a subsidy. However, the tribunal voted against the scheme on the basis of its requirement for the use of domestic inputs contrary to the TRIMS agreement. Law experts found the legal reasoning to have considerable uncertainty regarding how subsidies might be used in the renewable energy context. Subsidies for fossil fuels include consumption subsidies and production subsidies. Various estimates are that such subsidies worldwide total approximately 425 billion dollars a year. Yet, there appear to be no cases challenging such subsidies under trade rules. It would be desirable to ensure that fossil fuel subsidies do not receive more favorable treatment than clean technology measures.

Making Trade Rules More Supportive of Climate Measures

As discussed throughout the paper, there are a number of measures relating to trade that could be taken by states to provide policy room for climate measures. Some initiatives such as the renegotiation of an agreement for favorable treatment of environmental goods could be launched by the like-minded. Tariffs on such goods could also be lowered unilaterally, bilaterally, or by a group of like-minded states. A climate waiver could be used to address the issue of carbon intensity of production and possibly subsidies issues.²² The issue of production methods could also theoretically be addressed by border carbon adjustments, which would involve imposing charges at the border to reflect differences in the carbon-intensive nature of the production process.

An interpretation of the GATT that would allow certain measures to address the climate is also attractive. Under IIPAs, exceptions could be made for climate measures

²² Bacchus (2017).

similar to the manner in which these are made for cultural and other industries. Additionally, the restrictions on local content requirements could be relaxed. Under the SCM, allowing subsidies that support the development of clean technology industries would advance climate action. Moreover, some consideration of how the rules impact fossil fuel subsidies may merit consideration.

Several commentators have analyzed the various approaches to making trade rules more supportive of climate measures.²³ Measures have been analyzed by the likelihood of success. Some analysts believe that the likelihood of success for a waiver or an interpretation is very low, and instead recommend more limited measures such as increased transparency, particularly on fossil fuel subsidies, enhanced cooperation on technology transfer, and increased use of environmental experts in disputes. While these limited measures may be more easily achieved, they are likely insufficient to provide meaningful impetus to the transformation to a low carbon economy as quickly as required to maintain safe global temperatures.

While it is not the responsibility of trade negotiators to drive climate action, it certainly behooves the global community to use all means possible to maintain safe global temperatures. Trade rules should not stand in the way but should advance and support the fight against climate change.

²³ Kasturi Das et al., “The Trade System and Climate Action: Ways Forward Under the Paris Agreement,” *Climate Strategies*, July 2018, <https://climatestrategies.org/wp-content/uploads/2018/07/CS-Report-Trade-WP4.pdf>