

Chapter 2

The World Trade Organization and Climate Change

2.1 The WTO Charter

The interface of trade and environment in the global arena in a multilateral setting is characterized by both trade regimes and environmental regimes, under several international agreements devised over the past few decades. International trade policies are largely governed by the WTO. The global environmental policies are governed by various Multilateral Environmental Agreements (MEAs), especially by the UN Framework Convention on Climate Change (UNFCCC). There is some compatibility between the two regimes in their provisions of policies. Lack of compatibility of trade provisions (specific trade obligations, STOs) specified under MEAs with the trade policies under the WTO framework is often complicated by the fact that signatories of MEAs vary substantially from one agreement to another within the large set of MEAs, and also differ from the list of 153-member countries of the WTO. Since the WTO regime has a predominant role in devising various international trade policies and has the most well-equipped dispute settlement mechanism relative to any other trade or environmental regime, and since much of the world trade tends to follow the WTO trade stipulations, it is important to examine relevant aspects of trade and environment/CC interface under the WTO charter.

In the Preamble to the 1994 Marrakesh Agreement Establishing the WTO, reference was made to the importance of working towards sustainable development. It states that the WTO Members recognize:

...that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The WTO charter allows for some environmental considerations (rather related ‘exceptions’ to the general non-discriminatory) in trade policies, and these are provided among others, mainly under the antiquated General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), Subsidies and Countervailing Measures (SCM), and Agreement on Technical Barriers to Trade (TBT). Box 2.1 summarizes some of the important provisions.

Box 2.1: Summary of the WTO Environmental Provisions

The main provisions in the WTO agreements dealing with environmental issues:

GATT Article XX: policies affecting trade in goods for protecting human, animal or plant life or health are exempt from normal GATT disciplines under certain conditions (see later in this section for details).

TBT (relating to product and industrial standards; this mentions the word ‘environment’!), and SPM (relating to animal and plant health and hygiene): recognition of some of the environmental objectives.

Agriculture: environmental programs exempt from required cuts in subsidies

SCM: allows one-time subsidies, up to 20 percent of firms’ costs for adapting to new environmental laws (*this provision lapsed in 2000*).

Intellectual property: governments can refuse to issue patents that threaten human, animal or plant life or health, or risk serious damage to the environment (TRIPS Article 27).

GATS Article XIV: policies affecting trade in service for protecting human, animal or plant life or health are exempt from normal GATS disciplines under conditions similar to those under GATT Article XX.

The criterion of non-discrimination is the main principle on which the rules of the multilateral trading system are founded. The GATT 1994 provides for a few ‘exceptions’ with a bearing on environmental aspects of trade, but the chapeau of this Article mandates that the non-discrimination principles be adhered to even in these cases that allow for ‘exceptions’.

GATT 1994 Exceptions

The GATT 1947 articles of formation did not include the word ‘environment’, yet the GATT jurisprudence remains relevant in the current WTO adjudication process. Most of the environmental exceptions have been attempted over the years seeking cover under GATT exceptions via Article XX. However, most of the disputed cases that supposedly involved environmental protection lost their standing because of the chapeau of the Article

that ensures non-discrimination among GATT-participating countries and avoidance of disguised trade restrictions.

GATT Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (b) necessary to protect human, animal or plant life or health;....;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The chapeau of Article XX was designed to ensure that the GATT-inconsistent measures do not (a) result in arbitrary or unjustifiable discrimination, and/or, (b) constitute disguised restrictions on international trade. Most of the trade-environment disputes during the past half-a-century or more have been centered on interpretations in the application of this Article, and most of the cases failed in utilizing these exceptions under the GATT jurisprudence. Article XX still has no provision under GATT 1994 for the term 'environment' for its protection, and it refers to 'exhaustible resources' rather than nonrenewable resources. The latter was not in common use at the time of the GATT 1947, but it is useful to revise the terminology so that we do not only concern ourselves with 'exhaustible resources' but also pay adequate attention to non-renewable resources in the interests of the environmental, ecological and ecosystem services.

The restrictive scope of the GATT Article XX is a singular limitation for the protection of the global commons via any trade-related measures. Legitimacy of what is produced and traded rather than how it is produced makes it impossible to take into account relevant environmental measures and to apply Article XX for that purpose.

Three major tests are traditionally used in the application of Article XX exceptions, thus constituting the GATT 1947–jurisprudence within the WTO framework. The three-step test elements are the following:

(a) Application of 'necessary' test

Measures required being least trade restrictive ("least GATT-inconsistent", according to some of the dispute resolution panels of the GATT) among the reasonably available alternatives. The potential candidate alternative measures with respect to which the least GATT-inconsistency is to be examined remains a moot issue in most scenarios. In the absence of transparent and precise guidelines on this test, any given proposal can be disqualified as not being 'least GATT-inconsistent'.

A more positive specification of the test would seek GATT-consistency in relation to the objectives of the WTO Agreement and its imperatives on application of principles of sustainable development.

(b) GATT Article XX (b): Application of ‘proportionality’ test

A relationship between total costs of intervention measures and their benefits is suggested as a prudent measure to test the relevance of any environmental measure as an environmental exception. However, there are hardly any quantifiable scientific criteria in potential application (in a replicable or calibrated manner) of this qualitative prescription. There has been precious little guidance from GATT panels in assessing appropriate costs and benefits of alternative measures.

(c) Application of ‘balancing’ test

Based on a comparison of costs and benefits, ‘primarily aimed at’ factor of the GATT Article XX (g). This is also a largely subjective perception rather than an empirically testable hypothesis.

Article XX (g) allows WTO members to take action to conserve exhaustible natural resources. Based on a Tuna-Dolphin dispute between Mexico and the US, and later between the EU and the US, it was clarified that the Article does have ‘*extra territorial*’ effect but not ‘*extra jurisdictional*’ effect. The Tuna-Dolphin II Panel of the GATT endorsed national measures designed to protect extra territorial resources. These GATT jurisprudence measures and tests (a), (b), and (c) stated above have been largely redesigned under the WTO jurisprudence, as reflected in the AB Report on Shrimp-Turtle case (discussed in [Sect. 2.3](#)).

2.2 Environmental Trade Measures and the WTO

Environmental trade measure (ETM) is a restriction on international trade with the proclaimed purpose of promoting an environmental objective selected by the restriction imposing entity. ETMs can be availed in several forms: specifying standards, imposition of taxes and trade restrictions, trade sanctions, product subsidies and trade conditionality, and a few related elements. Environmental objectives may be of local, regional or global significance. Justifications for invoking these objectives might arise from one or more of the provisions of the WTO agreements. The ETMs may be product based, process based, or both. The provisions under the WTO charter do not usually allow process-based treatment of trade rules devised by member countries, although a few exceptions are allowed. These aspects are examined later in this chapter.

Are the ETMs likely to be suitable for attaining global environmental objectives? *Some of the prerequisites for utilizing ETMs in the governance of global trade and environment include (Rao 2000): the existence of a strong positive*

correlation of environmental benefits with ETMs, and the benefits of these measures outweigh the total costs (including transaction costs, direct and indirect costs) of deploying the same.

Trade-related environmental measures or ETMs constituted a major segment of the international trade disputes among parties to the GATT. When international trade policies are required to recognize internalization of environmental costs and multilaterally agreed principles of process and production methods (PPMs), environmental and trade objectives tend to bear greater coherence. The roles of PPMs remains key to several environmentally beneficial trade measures and deserve more attention; more details follow later in various sections of this Monograph.

GATT Article III mandates national treatment of 'like products':

Article III.4 of the GATT 1994 reads, *inter alia*:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The requirement that all like products be treated equally limits the flexibility of a country to differentiate on the basis of environmental impact of products (during their life-cycle or different stages of production and usage), unless the definition of 'like product' includes specifications distinguishing these in terms of their environmental characteristics. If the provision of the Article allows for comparison of 'like products' in terms of their environmental effects, we enter into the arena of differentiation on the basis of PPMs as well. Such a distinction could possibly tempt some of the countries to utilize the provision to introduce disguised non-tariff barriers in the name of the environmental features underlying the products. It is likely that some cases could arise, but this problem is minimized when the basis of restriction is based on objective, scientific, and transparent guidelines. These have to be approved by the WTO. *A meaningful provision of PPMs, with a slight modification of Article XX and/or Article XI should largely serve the purpose of integrating environmental considerations into trade issues.*

The notions of 'likeness' and 'less favorable treatment' merit careful scrutiny when seeking to invoke taxation or other border adjustment methods in relation to embedded carbon at various stages of product production and final delivery through international trade channels. The GATT 1994 regulated border adjustment measures: Article III allows a member to impose a tax (at III.2) or regulation (at III.4) on imported 'like products' that are similarly treated in the domestic context. Whether or not products are 'like products' depends on how they 'compete' in the applicable market, and invoke the following features for comparison: their end use, product substitutability at the consumption level, physical characteristics, and applicable tariffs for each of the specific products under comparison. A key determinant of likeness of products is seen in terms of PPMs, and these may be product-related or non-product-related. The GATT Article II.2 (a) suggests that border taxes can be levied invoking non-product-related PPMs when it allows

“in respect of an article from which the imported product has been manufactured or produced in whole or in part”. This could possibly pave way for distinguishing products in relations their embedded GHGs. This may not be the final word on the legality, however. The issues tend to be fairly complex and depend largely on the specifics of the product in question as well the intentions of any distinction in tariffs on those products.

Some authors suggested that the Article XX of the GATT can be reformulated by the WTO members to explicitly authorize trade-restrictive environmental measures in tune with the MEAs such as the Basel Convention on the Control of Transboundary Movement of Hazardous Substances, Convention on International Trade in Endangered Species (CITES) or others. An indiscriminate application of the non-discrimination principle of the GATT tends to work significantly against the provisions and objectives of some of the MEAs such as CITES. Based on regional or sub-regional ecological characteristics, some of the endangered species may have to be listed in the trade-ban category or other classifications (for example, chinchillas from the US are allowed for trade but not from Peru). This is obviously incompatible with the non-discrimination clause of the GATT.

‘GATT-proofing’ of ETMs (including environmental labeling) authorized by MEAs, has been suggested by some authors as a measure to avoid potential disputes. However, it is important to invoke the relevant integrated application of the articles of the WTO, including its preamble. *The preamble should serve as a lead principle of guidance for interpreting all the articles and Agreements under the WTO charter. This will pave the way for trade-environment conflict resolution since it already provides for the application of the concept of sustainable development.*

2.3 The WTO Jurisprudence

Several elements of the WTO charter can constrain the use of trade measures for the effective governance of climate change. Despite considerable jurisprudence based on case law from the WTO disputes several unknowns remain whenever a conflicting trade and climate change measure is brought forth by member countries. The important ones are noteworthy here.

The WTO case law remains as important as the WTO articles of agreement. For example, in the *US—Gasoline* case, the Appellate Body stated as follows (WTO Appellate Body Report, DSR 1996, p. 28): “It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests—including the protection of human health, as well as the conservation of exhaustible natural resources—to find expression....”

The significance of environmental protection was thus recognized by the WTO members to such an extent as to warrant the above statement in the first paragraph of the Preamble. This background to the WTO charter was also emphasized by the Dispute Settlement Body (DSB) in the Shrimp-Turtle case, suggesting that the preambular language casts its effects on the interpretation of the agreements annexed to the WTO agreement. It is also important to recognize that the preambular language suggests a reasonable role for the common-but-differentiated responsibilities (CBDR) principle (articulated in various MEAs) in the governance of trade and environmental policies as it also includes in the same paragraph that efforts to preserve the environment be accomplished by members “in a manner consistent with their respective needs and concerns at different levels of economic development”.

The 1994 Tuna-Dolphin II Panel was the first GATT panel to refer to the objective of sustainable development. The recent Appellate Body reports of the WTO indicate greater sensitivity to provisions of the Preamble to the WTO Agreement, and reasonable interpretations of GATT Article XX ‘exceptions’, thus allowing for non-discriminatory application of ETMs and resolution of environmental trade disputes (ETDs). However, the most recent ruling of 2011 from the WTO in relation to the Mexican Dispute (launched in 2008) on ‘dolphin-safe’ labeling by the US rejects the US labeling mechanism; it has been found inconsistent with the non-discrimination principles of the GATT and TBT as the so-called voluntary labeling requirement is *de facto* mandatory and discriminatory (Source: ictsd.org/i/news/bridgesweekly/111338, visited on August 16, 2011; see also *The Wall Street Journal*, July 20, 2011 “WTO sides with Mexico in tuna battle with US”).

As a highlight of the WTO jurisprudence, we first summarize an important Case that sheds light on some of the integration principles of trade and environment that have further implications on trade and CCG.

European Communities–Canada: Measures Affecting Asbestos and Asbestos Containing Products

(WTO Document WT/DS135/R of September 2000; and AB report WT/DS135/AB/R of March 12, 2001)

This dispute arose out of French Government Decree #96-1133 of December 24, 1996, which banned almost all varieties of asbestos import and production, citing health concerns- a case of environmental public health. On October 8, 1998 Canada sought a WTO Panel, after its failure to reach any agreement with the EC concerning trade discrimination dispute involving an EC member France.

In examining the ‘likeness’ of these two sets of products, the Panel adopted an four general criteria in analyzing ‘likeness’: (1) the physical properties, nature and quality of the products; (2) the end-uses of the products; (4) consumers’ tastes and habits; and, (4) the tariff classification of the products. The Panel declined to apply “a criterion on the risk of a product”, “neither in the criterion relating to the properties, nature and quality of the product, nor in the other likeness criteria ...” (Panel Report, paras 8.130 and 8.132).

The Panel observed that there is a link between the “characteristics of product and the product itself” (para 8.41) and that the reference to ‘characteristics’ is the special feature of the definition of ‘technical regulation’ in Annex 1.1 to the TBT Agreement. Thus the role of TBT was examined in this complaint under the WTO charter Agreements. The Panel concluded that the Decree was justified under GATT Article XX (b), and that it satisfies the chapeau of the Article as well. The panel report led to Canada’s appeal with the DSB. The AB issued its report on March 12, 2001.

Following Canada’s appeal, the EC challenged the Panel’s findings that the two sets of products examined by the Panel are ‘like products’ under Article III.4 (extract given below) of the GATT 1994. The EC contended that the Panel erred in its interpretation and application of the concept of ‘like products’, in particular, in excluding from its analysis consideration of the health risks associated with chrysotile asbestos fibers. The EC argued that, under Article III.4, products should not be regarded as ‘like’ unless the regulatory distinction drawn between them “entails shift in the competitive opportunities” in favor of domestic products.

The GATT Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. This is the ‘general principle’ of Article III.1. The AB report at para 87 stated that the general principle set forth in Article III.1 “informs” the rest of Article III and acts “as a guide to understanding and interpreting the specific obligations contained” in the other paragraphs of Article III, including paragraph 4. In interpreting the term ‘like products’ in Article III.4, reference must be made to the general principle in Article III.1, rather than to the term ‘like products’ in Article III.2.

The AB report conclusions included the following:

1. reversal of the Panel’s finding (in paragraph 8.72(a) of the Panel Report) that the TBT Agreement “does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a ‘technical regulation’ within the meaning of Annex 1.1 to the TBT Agreement”; the French ETM, viewed as an integrated whole, concluded to constitute a “technical regulation” under the TBT Agreement;
2. reversal of the Panel’s findings (in paragraphs 8.132 and 8.149 of the Panel Report) that “it is not appropriate” to take into consideration the health risks associated with chrysotile asbestos fibers and other related fibers (including cement-based products containing chrysotile asbestos fibers or PCG fibers (comprising polyvinyl alcohol fibers and cellulose-and-glass fibers) in examining the ‘likeness’, under Article III:4 of the GATT 1994;
3. reversal of the Panel’s finding that chrysotile asbestos fibers and PCG fibers, and cement-based products containing chrysotile asbestos fibers and cement-based products containing PCG fibers are ‘like products’ under Article III:4 of the GATT 1994;
4. concurrence with the Panel’s finding that the measure at issue is “necessary to protect human ... life or health”, within the meaning of Article XX(b) of the GATT 1994.

This AB report constitutes a significant milestone in the evolving WTO jurisprudence with greater recognition of the genuine role of the exceptions clauses under GATT Article XX. It is significant that serious attempts have been made to interpret ‘like product’ in relation to the relevant context. This approach is likely to contribute toward enhanced role of environmental exceptions if they comply with other relevant clauses of the articles of the WTO charter. There may be guidance from this in the pursuit of ETMs for CCG.

It is also to be noted here that the balancing the objectives of sustainable development and multilateral trade system is required under the preamble of the WTO Agreement as this Preamble “informs” the GATT 1994 Agreement in general, and its Article XX in particular, in addition to other covered agreements under the WTO charter.

We turn our attention to another important ruling from the Appellate Body of the WTO in another case.

United States—Import Prohibition of Certain Shrimp and Shrimp Products (The AB Report WTO/DS58/AB/R of October 12, 1998)

Among the important new interpretations of the AB are those of the role of ‘evolutionary’ concepts in interpreting concepts such as ‘natural resources’. The AB Report at para 130 stated that “From the perspective embedded in the Preamble to the WTO Agreement, the generic term ‘natural resources’ in Article XX (g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.

The advances, if any, in the WTO jurisprudence in support of the environment and CC interfacing the trade policies, fall short of definitive and predictable norms of interpretations. Forward-looking reforms of the Articles of the WTO charter and in relevant specific policy design are relevant for further progress.

Emerging issues in trade-economy-environment-CC interface include the WTO-consistency of green economic policies at national level that seek to restrict market access to create local jobs. The recent complaint to the WTO by the Government of Japan seeks direction on the Canadian measures under its ‘Green Energy and Green Economy Act, 2009’ argues that the subsidy and other measures violate the WTO rules (GATT Articles III.4 and III.5, Article 2.1 of TRIMS Agreement and Articles 3.1 (b) and 3.2 of the SCM Agreement). Potential new directions for a reasonable balancing of economic, environmental, and social dimensions of policies in relation to international trade are to be sought, not necessarily under an international agreement but individual countries should be allowed to pursue their socio-economic priorities rather than obey ‘one size fits all’ rules of the WTO.

The complexity of the legal issues may be an unavoidable scenario if and when disputes arise. Excessive time and costs of litigating cannot be ruled out and the outcome itself may not be in favor of protecting the environment or improving CCG. What then is called for is Notification Method, if there are no better reforms in place, so that any intending member seeking to adopt carbon-related differential tariffs or border taxes offers a transparent non-discriminatory approach and

notifies all members to seek a reasonable consensus, rather wait for a dispute to arise and seek settlement under the DSU of the WTO.

Next we examine the role of subsidies and duties in promoting climate-friendly products and services under the WTO regime.

2.4 Subsidies for Climate-Friendly Trade

An important agreement in the WTO charter is the SCM in its scope to allow for subsidies to promote climate protection measures: research and development, concessional facilities for the transfer of climate friendly technology, and related areas. Article 8 of the SCM Agreement allowed certain subsidies as non-actionable for adapting technologies and related new industry category promotions) but this provision lapsed in January 2000. This provision needs to be revived and expanded with a clear requirement for transparency in its application; this is relevant for technology development and concessional financing for transfer of technology. Under the lapsed SCM Agreement (Article 8) provisions “assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms”, limited to a one-time expenditure up to 20 percent of the cost of adaptation. The provision needs to be revived for green subsidies in the interests of climate protection.

Article 1 of the SCM Agreement defines subsidy as a “financial contribution” (direct transfer of funds, foregone government revenues, governmental provision of goods and services, and the creation of funding mechanism) by a “government or public body” that confers a “benefit” with reference to the market competition. The SCM prohibits the following subsidies: preference for domestic over imported goods, enhancing export performance. Article 1 of the SCM Agreement defines ‘subsidy’ as a ‘financial contribution’ by a government or its public body that confers a ‘benefit’. The financial contributions include: direct transfer of funds, foregone revenues, creation of subsidy mechanisms and governmental provision of goods and services. Specific ‘actionable subsidies’ may attract WTO challenges, as in subsidies for renewable energy (especially in relation Article 6.3 of the SCM Agreement which examines adverse effects of subsidies in the market competition).

Lack of distinction and clarity in environmentally beneficial and harmful subsidies in the existing SCM framework is far from helpful (Green 2006). Also, it is no easy task to classify the two categories in any objective manner unless the entire streams (with linkages upfront and downstream) of elements that comprise qualifying or non-qualifying categories are assessed. For example, the role of ethanol deserves greater merit in Brazil as a byproduct of sugarcane industry but not necessarily in a land use change (or crop replacing) situation as in the USA. Considerable further attention is needed on these within and outside the framework of the WTO.

One of the areas where trade and environment tend to mutually support each other in the WTO regime is in promoting environmentally friendly technologies. Concessions/subsidies for environmentally efficient technologies (EET) have been suggested in several international agreements, including the WTO in its SCM Article 8.2 (c). Among MEAs, the CBD Article 16.2 provides that developing countries be provided access to and transfer of relevant biotechnologies “under fair and most favorable terms, including on concessional and preferential terms where mutually agreed upon”.

Emerging issues include the WTO-consistency of green economic policies at national level that seek to restrict market access in order to promote domestically produced renewable energy technologies and to create local jobs. The recent complaint to the WTO by the Government of Japan seeks direction on the Canadian measures under its ‘Green Energy and Green Economy Act 2009’ argues that the subsidy and other measures violate the WTO rules; Box 2.2 summarizes complaints on renewable energy subsidies on related issues in four separate cases.

Box 2.2 Recent WTO Disputes in Energy and Environment

A. Japan v Canada: Green Jobs and Trade Restrictions (WTO Case #DS 412)

Japan complained in September 2010 to the WTO that Canada (in its Green Energy Act 2009 and actions of the Ontario Power Authority) has embarked on trade preferences to domestic producers in order to support renewable energy and creation of local jobs, possibly offered subsidies and that these features seem to violate the GATT 1994 Agreement, the SCM, as well as Trade Related Investment Measures (TRIMs) Agreement. The European Union and the US wanted to join the WTO consultations on this matter. This dispute could bring to surface several major issues of potential conflict in emerging domestic policies of major countries and existing provisions of the WTO law. This case has recently been followed up by the EU; summary given below.

B. EU v Canada Renewable Energy Ontario’s feed-in tariff (FIT) (WTO Case #DS 426)

The European Union brought in a case on August 11, 2011 related to the Canadian province Ontario’s FIT rules seeking domestic content requirements. The EU argued that the provisions are inconsistent with Canada’s obligations under the WTO regime, especially the following:

Articles 3 (1) (b) and 3 (2) of the SCM Agreement, since the disputes measures constitute subsidies contingent upon domestic material use;

Article III.4 of the GATT 1994, because the measures offer less favorable treatment to imported equipment relative to products originating in Ontario; and,

Article 2.1 of Trade-related Investment Measures (TRIMs), because the measures require the purchase of or use of technology of Ontario origin.

C. US v China: Measures Concerning Wind Power Equipment (WTO Case #419)

The US government lodged a complaint in December 2010 regarding various grants and subsidies the Chinese government offered toward power equipment and promoting trade; the WTO provisions claimed to have been include: GATT 1994 Article XVI.1, and Articles 3 and 25 of the SCM. This Disputes ended recently in June 2011 after the Chinese subsidies earlier in the same year. Chinese wind power manufacturers are now among the global leaders for supply of relevant renewable energy production technologies.

D. Ukraine v Moldova (DS421, 2011): Measures Affecting the Importation and Internal Sale of Goods—Environmental Charge

The communication of 17 February 2011 to the WTO seeks consultations with the Government of the Republic of Moldova pursuant to the Article XXII.1 of GATT 1994 on the following matters:

Pursuant to the Law “On Charge for Contamination of Environment” of 25 February 1998 Moldova applies “a charge for import of products, the use of which contaminates the environment”, ranging from 0.5 to 5% of the customs value of imported products. The list of goods is extensive and it seems to be a systemic issue. It is argued that like domestic products are not subject to this charge. Moldova also applies “a charge for a plastic or ‘tetra-pack’ package containing products (except for dairy produce)”. It appears that packages containing domestically produced like products are not subject to this charge.

Ukraine considers that the measure is inconsistent with Moldova’s obligations under GATT 1994 with reference to Article III. 1 and 2, by subjecting the products of the territory of other Members imported into the territory of Moldova, directly or indirectly, to internal taxes or other internal charges in excess of those applied, directly or indirectly, to like domestic products and affording protection to domestic production. It is also claimed in the dispute that Moldova seems to have acted inconsistently with Article III.4 of the GATT 1994, by failing to accord to products of the territory of Ukraine imported into the territory of Moldova treatment no less favorable than that accorded to like products of national origin in respect of all laws,

regulations and requirements affecting their internal sale, purchase, transportation, distribution or use.

Considerable jurisprudence emerged from various trade–environment conflict cases in the WTO litigation processes over the years, as seen earlier. However, several avenues of possible conflict arise in light of emerging policies in relation to the CC problems. *Unless a pro-active framework is developed with due revisions of some of the articles in the WTO charter, a protracted series of disputes can undermine the entire WTO system itself.*

The WTO case law may reduce (the effect known as ‘regulatory chill’) legitimate environmental regulatory authority at national levels, despite claims to the contrary contained in the WTO-UNEP (2009) report stating the WTO jurisprudence demonstrates environmental concerns in trade policies.

We move on to an important area of aid and trade policies to seek potential congruence with the imperatives of CCG.

2.5 Aid for Trade and CCG

The Aid for Trade Initiative has been launched at the Sixth WTO Ministerial Conference in Hong Kong in 2005. The funding has increased steadily from developed countries to \$60 billion in 2009. The main elements of activity include: trade finance, infrastructure improvement, quality and standards setting, and capacity building.

Aid for trade policies, if designed in an efficient and effective manner, can co-align with the imperatives of and sustainable development. This potential is being realized only marginally at this time. The WTO at its next Ministerial Conference should be able to authorize a more directed and complementary CCG framework in relation to the current framework. In this line of approach, New Zealand, for example is seeking to mainstream CCG issues and also to ‘climate-proof’ ongoing infrastructure improvement programs. OECD-WTO (2011) survey of partner countries of the aid for trade program reveals a very low ranking of priority for environmental sustainability issues. However, this assessment is conditioned by what is on the menu of policy options and their program activities in relation to ongoing guidelines for utilizing resources under the aid for trade package. For example, when the offered resources for capacity building are not resourceful enough to mainstream trade and CCG as an integral package, it is futile to expect some of the developing countries to visualize the scope and seek such integration.

2.6 Doha Round Trade Negotiations

The Doha Round of Trade Negotiations launched in 2001 based on the resolutions is popularly known as Doha Development Agenda (DDA), and these are yet to see any substantial progress in devising relevant policies and enable their implementation. It is ironic that the WTO still maintains (see at www.wto.org on its environment pages and on aid for trade pages) that it is not a ‘development agency’, and also that it is not an ‘environmental agency’. It is simplistic, if not counterproductive, to make such negative assertions when trade is an integral part of economic growth and sustainable development. Trade is not an end in itself but an important means for achieving desirable objectives and these can be attained only when a balanced multi-pronged approach is adopted.

DDA has made very little progress for the past decade. In this mandate, Para 31 focuses on liberalization of trade in environmental goods and services (EGS), and also seeks further integration of trade and environmental policies with reconciliation of the WTO and multilateral environmental agreements (MEAs) frameworks. Para 31 (iii) in Doha Mandate seeks a potential win-win-win deal on liberalization of trade in EGS. This aspect is investigated in Chap. 3. Also Para 31 (i) of the Mandate seeks a better reconciliation of treaties under the WTO framework and various MEAs. These issues are examined further in Chap. 4 in relation to the UNFCCC and other important MEAs.

Although it is likely that the Doha Round Negotiations could come to useful conclusion during 2012, the fact they have lagged behind by several years is indicative of the severe institutional limitations. Besides, these limitations have imposed very high costs on societies in terms of lost opportunities for trade, economic growth, and enhanced environmental protection. An improved time-bound process for the conclusion of such agreements makes pragmatic sense in the interests of all.

Ever since 1995 formation of the WTO charter its Committee on Trade and Environment (CTE) has been charged with the responsibility to devise clear rules of reconciliation between WTO members and parties to the MEAs that may not fully overlap the membership (and vice versa). Sluggish at its best, has been the track record of this Committee. The 2001 Doha Ministerial Declaration (para 31 (i) mandated the WTO to consider the effects of trade rules as between parties to an MEA, without changing the existing rights and obligations of non-parties—with the implication any changes in the WTO charter in this regard cannot be expected under the current Doha Round of Talks if and when they conclude. The mandate explicitly directed its focus when it stated: “The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question” (Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1).

A Working Group Report of the World Economic Forum (WEF 2010) rightly suggested, *the WTO should negotiate agreements to resolve potential conflicting issues that could arise from the enactment of national measures on CC rather*

leave those issues to the eventual resolution under the WTO's Dispute Settlement Understanding (DSU).

Doha Round is not mandated to restructure WTO laws, and any substantial reform will have to be initiated at this time without waiting for the outcome of the slow sailing Doha Round negotiations. As Green (2005) and a few others argue, the reform of the WTO charter is important in accommodating the imperatives of the major issues of CC and the role of international trade.

2.7 Moving Forward

Successful conclusion of the DDA is very important, and updating the progress on environmental and CC fronts in relation to trade would be useful win-win-win approach to protect trade, environment and socio-economic development. International Law Association (ILA 2010) Draft Ninth Report of the Committee on International Trade Law, in its Conference at The Hague, noted:

The crisis in concluding the protracted Doha Development Round negotiations, the world financial crisis since 2008, the climate change crisis and unnecessary poverty of more than 1 billion people living on \$1 or less per day illustrate worldwide 'governance failures' to protect international 'public goods' beneficial for all citizens.

Is there a role for a 'peace clause'? Hufbauer et al. (2009) argued for a temporary provision of a so-called peace clause that will allow WTO member countries to adopt CC-related trade policies with due attention to avoid protectionism. However, in practical terms either the measures will be perceived as discriminatory or protectionist by some members of the WTO and can lead to other adverse trade wars.

Besides, how soon can such a peace clause be agreed upon? Experience suggests this is unlikely to occur in a reasonably short time frame, and it might as well be more useful to seek for full agreement. Epps and Green (2011) suggest the role of a new agreement within the WTO system, including formation of a Committee for Climate Change that could also arbitrate on climate related trade measures to lessen the burden of litigation process. Various directions for adoption of allowable (as well as disallowable) PPM criteria could also be part of the new agreement, thus reducing the scope for arbitrary choice of policies in the guise of CCG. A specific new agreement on these lines could enable greater positive actions from members seeking to deploy trade measures that promote the governance of CC, and also reduce legal uncertainties in potential areas of conflict. It has also been suggested that the new agreement could specify relevant procedures that would enable transparency and a review process that would induce international accountability for new trade policy actions by individual members.

There has been considerable debate regarding the role of the WTO in the global environmental governance arena. Several older writings suggested that the WTO should be solely focused on free trade promotion and not be constrained by other

constraints. For example, it has been stated that it is “appropriate that WTO focuses on trade and that other institutions focus on the environment” ... “trade policy is not the right tool and WTO is not the right place to bear the primary responsibility for pursuing environmental quality” (Frankel 2005). Even when it is not primarily responsible, the implications of various types of environmental externalities of trade need to be addressed and this is possible only when a comprehensive integrated approach is adopted. It is an oversimplification to treat trade and environmental issues by seeking one-to-one correspondence between the primary objectives of an organization at the expense of other highly interrelated facets of life.

As Hufbauer and Kim (2009) suggested, the WTO would rather like the MEAs to resolve trade-environment conflicts, but it is the will of the members of the WTO that brings disputes to the WTO doorsteps, realizing a rather conservative and legally strong organization may be of some help in favoring the trade dimensions.

Director General WTO Pascal Lamy stated at the Trade Ministers Dialogue on Climate Change in Bali on December 8–9, 2007 (see details at www.org/englis/thewto_e/dg_e.htm):

...the relationship between international trade –and indeed the WTO– and climate change would be best defined by a consensual international accord on climate change Such an agreement must then send the WTO an appropriate signal on how its rules may best be put to the service of sustainable development: in other words, a signal on how this particular toolbox of rules should be employed in the fight against climate change.

The claim by the WTO Secretariat that the WTO is not an environmental protection agency offers an insight into its possible underachievement in protecting the environmental dimensions of relevance. “Attention to the world’s ecological needs ought to be a hallmark of a world trade organization” (Charnovitz 2007). Besides, reduction of trade barriers to promote trade and climate protection, and hence economic development with gainful employment, should appeal to all. We will turn to the salient structural aspects of the UNFCCC that is the global apex body for CC in [Chap. 4](#).

In order that the WTO remains a genuine body to address trade and environmental issues involving trade measures, it is important its adjudication methods adhere to its charter that recognizes the role of environmental resources and sustainable development; only then will trade, the main focus of the WTO, remain sustainable. An important opinion from legal experts is noteworthy here. The International Law Association (ILA 2010) Draft Ninth Report of the Committee on International Trade Law, in its Conference at The Hague, noted: (a) The WTO can play a “positive constructive role” by confirming that WTO rules do not stand in the way of genuine environmental measures, and second, by offering guidelines to WTO members as to how they should develop the WTO-consistent climate change legislature; and, (b) disputes about trade-related environmental measures could overburden and undermine the WTO legal and dispute settlement system, unless the above steps are taken.

2.8 Urgent WTO Charter Reforms

GATT Article XX (b) needs to be amended to read: “*necessary to protect the environment, human, animal or plant life or health; and to contribute to climate change governance.*” The GATS, now one of the ‘covered agreements’ under the WTO Agreement, includes Article XIV that is nearly identical to GATT Article XX. It is meaningful to revise both with the following important reforms (see also Rao 2000):

1. *Include ‘environment and enable improved climate change governance’, in addition to the usual set of items in GATT XX (b) and GATS XIV (b); and,*
2. *Replace ‘exhaustible resources’ with ‘nonrenewable resources’ in order to include a larger set of resources and under less severe extinction conditions.*

It is useful to note that there exists a degree of incompatibility in the narration of different clauses under GATT Article XX, especially in relation to XX (b) and XX (g): the operative part of the former starts with ‘necessary’, and that of the latter emphasizes the ‘primarily aimed at’ requirement. The former seeks cost minimizing (seek the lowest cost alternative), and the latter tends to be satisfied with a less rigorous application. Under the GATT 1947 regime, ‘necessary’ was usually interpreted in terms of ‘least trade restrictive’ rather than in terms of cost-effectiveness as consistent with GATT articles.

The current WTO negotiations on Environmental Goods and Services deserve more detailed analysis, the subject of the next Chapter.



<http://www.springer.com/978-3-642-25251-8>

International Trade Policies and Climate Change
Governance

Rao, P.K.

2012, VIII, 53 p., Softcover

ISBN: 978-3-642-25251-8