

## MITIGATING CLIMATE CHANGE: DISCUSSING THE PERMISSIBILITY OF UNILATERAL DOMESTIC ACTIONS UNDER WTO LAW

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### ABSTRACT

*Rising sea levels and coastal erosion caused by global warming remains a serious problem, and controlling greenhouse gas emissions remains a top priority for both national and international agendas. As such, while some countries have sought international cooperation to combat global warming, some countries decided to take matters into their own hands by imposing unilateral domestic measures to control greenhouse gas emissions. Some might argue that since combating climate change is a goal shared by all countries, actions to mitigate this problem should be taken together by the international community as a whole. However, this paper wishes to emphasize that the World Trade Organization, in pursuing multilateral trade liberalization, leaves Members considerable rooms to formulate their own domestic policies for important values and also considers the special conditions in different countries. Moreover, not all countries have the same prevailing conditions with other countries, and these countries' special conditions in level of development or severity of problems faced should be duly considered. This paper discusses the different approaches to reduce greenhouse gas emissions and their nexus with the world trading system. Firstly, this paper will discuss three different unilateral domestic measures, namely requirements regarding production and processing methods, carbon tax, and domestic subsidies. Next, if the unilateral measures listed above violates the rules set out under the General Agreement of Tariffs and Trade, this paper discusses if there an applicable exception to justify the said violation.*

Keywords: World Trade Organization, unilateral domestic measures, domestic subsidies, carbon tax, non-product related PPMs.

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### INTRODUCTION

As domestic measures are developed to mitigate climate change, it raises an important question: Are these measures compatible with international trading rules? Is it possible for a country to pursue domestic measures that are effective and appropriate to the prevailing circumstances in that country? The underlying concerns regarding such measures mainly stems from the fear that they may be trade protectionist measures in disguise. Exporters from other countries may be denied access to a country or they will incur high adjustment costs in order to maintain access to overseas markets.<sup>1</sup>

This paper examines the extent to which domestic measures to mitigate climate change could be compatible under the current world trade regime. While WTO Agreements are representative of efforts of the international community to pursue shared goals, this paper submits it may be possible for a country to take unilateral measures that will pose a reduced risk in violating WTO law. It is also important to note that, existing rules under the General Agreement on Tariffs and Trade (hereinafter referred to as GATT) and other WTO rules were not drafted to address climate change problems.<sup>2</sup> In fact, there is nothing in WTO law that specifically prohibit Members from taking unilateral domestic measures to combat climate change. However, we need to be mindful that if environmental measures takes the form of carbon tariffs, subsidies, and technical regulations, they will still be indirectly regulated under the WTO rules.

#### I. UNILATERAL MEASURES

##### A. ECO-LABELS

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<sup>1</sup> Rene Vossenaar and Veena Jha, *Environmentally Based Process and Production Method Standards: Some Implications for Developing Countries*, in TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 21 (Veena Jha at al. eds., 1997).

<sup>2</sup> Patrick Low et al., *The interface between the trade and climate change regimes: Scoping the issues*, WTO STAFF WORKING PAPER, Jan. 12, 2011, at 2,

The use of eco-labels aims to protect the environment by suggesting the consumer to buy an environmental-friendly product and by encouraging producers to produce more of those products.<sup>3</sup> Both mandatory and voluntary labelling schemes risk contravening WTO law: while mandatory labels restrict market access for non-complying products, labels that are granted under a voluntary scheme are meant to improve the perceived attractiveness of products that are awarded the label; hence, such labels may negatively affect the competitive conditions of other products, possibly disadvantaging imported products.<sup>4</sup>

Eco-labels are usually awarded based on the product's environmental-friendly process and production methods (hereinafter referred to as PPMs). PPMs specify how products should actually be produced. As mentioned above, when PPMs are applied to imports, it becomes controversial because most PPM-related trade restrictions are based on competitiveness concerns and the need to comply with domestic environmental standards rather than on the environmental impact made during consumption.<sup>5</sup> Thus, the issue to be discussed in this paper is whether mandatory eco-labels could be formally applied to imports under the current WTO rules.

Under the current WTO rules, eco-labelling requirements could constitute as a PPM, and PPMs are regulated under the Agreement on Technical Barriers to Trade (hereinafter referred to as TBT Agreement). For a PPM to be regulated by the TBT Agreement, it has to constitute as a technical regulation under TBT Agreement Annex 1.1. TBT Agreement Annex 1.1, refer to documents (i) applicable to an identifiable group of products, (ii) laying down product characteristics or their related PPMs, and (iii) with which compliance is mandatory.<sup>6</sup>

Here, we will discuss the possibility of a mandatory eco-labelling requirement to be compatible with the WTO rules, namely the TBT Agreement and GATT Art. III:4.

#### a. TBT AGREEMENT ANNEX 1.1

Product characteristics under TBT Agreement Annex 1.1 refers to a product's objectively definable features, qualities, attributes, or other distinguishing marks.<sup>7</sup> In contrast, a measure regulating a product *based on its type of production* does not lay down product characteristics.<sup>8</sup> Pursuant to the said article, a technical regulation needs to lay down either "product characteristics" or "their related PPMs". This raises the question of whether a PPM that does not affect the product's final characteristics, or in other words, which is *not related* to product characteristics, should be regulated under the TBT Agreement at all. In most cases, a PPM requirement imposed to reduce carbon emissions do not leave any traces on the final product. For example, a requirement that cotton fabrics be made with handloom instead of powerloom does not exhibit different definable features with other fabrics. Thus, such PPM requirement is a non-product-related PPM (hereinafter referred to as npr-PPM).

How TBT obligations would apply to such a label is not settled in WTO law.<sup>9</sup> However, we can take reference from the negotiating history of the TBT Agreement. During the negotiation, negotiators intended to apply the TBT Agreement only to measures governing product characteristics, while the insertion of PPMs was simply out of the concern that some Members might use PPMs regulations to circumvent their TBT obligations. To narrow down the scope of PPMs covered by TBT Agreement, New Zealand suggested that TBT Agreement should cover only those *necessary to ensure certain quality in a final product*, and Mexico suggested the term "related" as shown in the final text to *ensure a narrow selection of PPMs*.<sup>10</sup> According to this negotiating history, TBT Agreement Annex 1.1 warrants a narrow interpretation. Thus, to have sufficient nexus to product characteristics, a PPM must be necessary to ensure certain quality in a final product.

This position was affirmed in the case of EC-Seals. In that case, the EC had in place an EU Seal regime which lays down certain conditions for seal products to be placed on the EU market. Norway claimed that the EU Seal Regime is a technical regulation within the meaning of the TBT Agreement because it lays down one or more characteristics of the products or their

<sup>3</sup> Jasper Stein, *The Legal Status of Eco-Labels and Product and Process Methods in the World Trade Organization*, 1(4) AMERICAN J. ECON. & BUS. ADMIN. 285, 285 (2009).

<sup>4</sup> Erich Vranes, *Climate Labelling and the WTO: The 2010 EU Ecolabelling Programme as a Test Case Under WTO Law 1-2* (2010). Available at SSRN: <https://ssrn.com/abstract=1567432> or <http://dx.doi.org/10.2139/ssrn.1567432>.

<sup>5</sup> *Id.*, at 23.

<sup>6</sup> ABR, EC-Sardines, [176]; ABR, EC-Asbestos, [66-70].

<sup>7</sup> ABR, EC-Asbestos, [67].

<sup>8</sup> ABR, EC-Seal, [5.34, 5.41, 5.45].

<sup>9</sup> JOSEPH E. ALDY ET AL., PEW CENTER ON GLOBAL CLIMATE CHANGE, BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE 150 (2003).

<sup>10</sup> TBT Negotiation History, [107, 110, 131, 147].

related PPMs, The EU Seal Regime prohibits the placing of seal products on the EU market unless they qualify under certain exceptions, consisting of the following: (i) seal products obtained from seals hunted by Inuit or other indigenous communities (IC exception); (ii) seal products obtained from seals hunted for purposes of marine resource management (MRM exception); and (iii) seal products brought by travelers into the European Union in limited circumstances (Travelers exception).<sup>11</sup>

In that case, the Appellate stated that the prohibition of the EU Seal Regime was imposed subject to conditions based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. They then concluded that there is no basis in the text of TBT Agreement Annex 1.1, or in the prior Appellate Body Reports to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt can be viewed as product characteristics. Therefore, the EU Seal Regime is not a technical regulation within the meaning of the TBT Agreement because it did not lay out product characteristics, nor does it prescribe PPMs relating to the product characteristics.

Since a npr-PPM does not lay down product characteristics, and nor does it relate to the product characteristic, it does not fall within the scope of the TBT Agreement.

#### **b. GATT ART. III:4 NATIONAL TREATMENT**

Even if a npr-PPM is not subject to the TBT Agreement, it is still an internal measure that will be subject to the regulations of the GATT as long as it affects the internal sale, offering for sale, purchase or transportation, distribution, or use of imports from other countries.

To claim a domestic regulation inconsistent with GATT Art. III, a complainant must prove that (i) it is a law or regulation affecting the internal sale of the products, (ii) the products at issue are like products, and (iii) it accords less favourable treatment to imported products vis-à-vis like domestic products.<sup>12</sup> In a case where an eco-labelling requirement is applied to both imported and national products, it may be at risk of violating GATT Art. III:4 if a large portion of the country's products already comply with the said regulation, while most of the imported products will need make changes to their production methods in order to comply with the requirement, leading to the issue of *de facto* discrimination. In this scenario, this paper still submits that it is not easy for a npr-PPM to be regulated under the GATT Art. III:4, and the elements of article shall be discussed in turn below.

Since GATT Art. III:4 only regulates like products, if the eco-labelling requirements do not regulate like products, it will not violate GATT Art. III since not all of the above elements are met. Past cases have established that likeness can be assessed by the competitive relationship of the products.<sup>13</sup> This can be further examined by four criteria, namely, the products' characteristics, end-uses, consumer's tastes and habits, and tariff classification.<sup>14</sup> Since GATT Art. III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, therefore a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products.<sup>15</sup>

It is possible to establish that green products and normal products are not in a competitive relationship with each other. Firstly, they are different in terms environmental risks. Past WTO jurisprudence has affirmed that if consumers distinguish the products based on their production manner due to, for instance, associated risks of regulatory concern to the measure, their tastes toward the products are dissimilar.<sup>16</sup> Also, the prices of green products tend to be different from normal products. The Appellate Body in the case of Philippines-Distilled Spirits has affirmed that the difference in price between two products can indicate consumers' different tastes toward them.<sup>17</sup> Because only when consumer's original perceptions are different, different price can be attached to products.

Furthermore, whether the said PPM does accords less favourable treatment to an imported product will depend on a number of other factors, such as whether the different treatment is due to the origin of products. A detrimental impact cannot be established if the detriment is explained by factors unrelated to the foreign origin of the product.<sup>18</sup> In the case of non-product

<sup>11</sup> ABR, EC-Seal, [1.4].

<sup>12</sup> ABR, EC-Seal, [5.99]; ABR, Thailand-Cigarettes (Philippines), [127]; ABR, Korea-Beef, [133].

<sup>13</sup> ABR, EC-Asbestos, [99].

<sup>14</sup> ABR, EC-Asbestos, [101].

<sup>15</sup> ABR, EC-Asbestos [98].

<sup>16</sup> ABR, EC-Asbestos, [122]; ABR, US-Clove Cigarettes, [119].

<sup>17</sup> ABR, Philippines-Distilled Spirits, [215].

<sup>18</sup> PR, EC-Biotech, [7.2514]; ABR, Dominican-Cigarettes, [96].

related PPMs, such different treatment is explained by the *production process* of the said product, which is unrelated to the *origin* of product.

As such, a npr-PPM will pose a small risk in violating the national treatment requirement in WTO law.

## B. CARBON TAX

A carbon tax is a tax that is levied to greenhouse gas (GHG) emissions. A carbon tax seeks to reduce carbon emissions by creating an incentive for greenhouse gases emitting human activities — for example the cotton industry — to use technology powered by renewable energy in the loom process. Carbon taxes are not controversial when they are implemented only domestic products, and not on imports. However, when domestic carbon taxes are also imposed upon imports, it becomes a trade measure that falls under the purview of the WTO rules.

There are many ambiguities surrounding the WTO legal rules concerning carbon taxes on import and export, especially regarding the nature of a carbon tax. In the context of international trade, a tariff or customs duty is a financial charge in the form of a tax, imposed at the border on goods going from one customs territory to another. Tariffs are regulated under GATT Art. II, and a distinction is drawn between ‘internal taxes and charges’ pursuant to Article III GATT and ‘other duties or charges’ imposed in connection with importation — according to Article II:1(b) GATT second sentence, which cannot be adjusted at the border. If the measure in question is indeed a tax, it needs to comply with the National Treatment principle in Article III:2 GATT; if it is not considered a tax but an import duty, Article II GATT applies.<sup>19</sup>

This paper discuss the possibility of a carbon tax that will pose a reduced risk in violating WTO law by analyzing the compability of a carbon tax with GATT Arts. II:1 and GATT Art. III.

### a. GATT ART. II:1

First sentence of GATT Art. II:1(b) provides that imported products "shall ... be exempt from ordinary customs duties (OCD) in excess of" the amounts set forth in the importing Members' Schedules, i.e., its bound tariff rates. Members can, however, also apply "other duties and charges (ODCs)" to imported products, in addition to the ordinary customs duties. While this means, in effect, that the total charge levied on an imported product may exceed the bound level of ordinary customs duties, the ability to apply ODCs is not unlimited. To the contrary, for a Member to be able to apply an ODC, it MUST register the ODC in its Schedule, and the ODC actually applied must not exceed the level indicated in the Schedule. Other duties and charges are governed by GATT Article II:1(b) second sentence.

Some would argue that carbon taxes applied on imports should be regulated under GATT Art. II:1 as GATT Art. II:1 applies to ODCs or ODCs, while internal taxes are excluded.<sup>20</sup> To determine if a tax is of the nature of an ODC, the charges whose obligation to pay has to accrue *on or in connection with* importation.<sup>21</sup> To put it more specifically, such obligation accrue upon the entry of a product into the customs territory before the product enters the domestic market.<sup>22</sup> They argue that since the accruing event of the tax is the carbon emissions which took place during the production process, it could be considered as an external event, the carbon tax should be regulated under GATT Art. II. Thus, if it is considered as an ODC, it should be registered in the Schedule.

However, both GATT Art. III Ad Note and the Appellate Body have also cautioned that the time at which a charge is collected or paid is not decisive;<sup>23</sup> the focus is rather on the time at which a charge accrues. However, it is important to note that the sale itself will take place in the importing country, which is undoubtedly an internal event. Therefore, the said carbon tax still bears an internal element, and thus should be considered as internal tax. Even if such tax is collected at the point of customs clearance, it does not affect the above conclusion.

The Panel of *China-Auto Parts* found that the ordinary meaning of internal taxes refers to charges applied to *sale of goods* inside a customs territory.<sup>24</sup> In addition, the Panel in the case of *Dominican-Cigarettes* found that a tax applying both to imported and domestic products could be an internal tax in nature.<sup>25</sup> The case of *China-Auto Parts* is not applicable in a case

<sup>19</sup> Jochem Wiers, *French ideas on climate and trade policies*, 2 CARBON & CLIMATE L.REV. 18, 21 (2008).

<sup>20</sup> PR, *China–Auto Parts*, [7.199].

<sup>21</sup> ABR, *China–Auto Parts*, [158]; ABR, *India–Additional Import Duties*, [157].

<sup>22</sup> ABR, *EC–Poultry*, [145]; PR, *China–Auto Parts*, [7.184].

<sup>23</sup> ABR, *China–Auto Parts*, [162].

<sup>24</sup> PR, *China–Auto Parts*, [7.174].

<sup>25</sup> PR, *Dominican–Cigarettes*, [7.84].

where the carbon tax applies to both imported and domestic products, because the case background of China – Auto is a tax that is applied only on imported products. Instead, the rationale in the Panel Report of Dominican – Cigarettes which found such measures an internal tax is more suitable.

Thus, a carbon tax would not fall under the purview of GATT Art. II, but rather regulated under GATT Art. III:2.

#### **b. GATT ART. III: 2 FIRST SENTENCE**

As mentioned above, internal taxes refer to charges accruing *due to an internal event* which occurs after the product is imported.<sup>26</sup> If a carbon tax is found to be an internal tax, it needs to satisfy the national treatment requirement found in GATT Art. III:2. An internal charge will be inconsistent with GATT Art. III:2 first sentence if: (i) the imported and domestic products are like products and (ii) the imported products are taxed in excess of the domestic products.<sup>27</sup>

Regarding the first element, the Appellate Body in the case of EC-Asbestos has affirmed that the scope of likeness under GATT Art. III:2 first sentence is narrower than that under GATT Art. III:4.<sup>28</sup> In this case, as elaborated in above, products with different PPMs are not considered to be alike under GATT Art. III:4. Thus, since they are not like products in a broader sense, that is, GATT Art. III:4 like products, it is only logical that they are not like products in a narrower sense, that is, GATT Art. III:2 first sentence like products.

Regarding the second element, it is impossible to tax an imported product in excess of a domestic product. This is because since carbon tax is determined by the carbon emissions in the production process, the same method of tax computation applies to both imported and domestic products. Therefore, this kind of taxation method does not constitute *de jure* discrimination.

#### **c. GATT ART. III: 2 SECOND SENTENCE**

The said carbon tax would also need to be consistent with GATT Art. III:2, second sentence. An internal tax will be inconsistent with GATT Art. III:2, second sentence if: (i) the imported and domestic products are directly competitive or substitutable, (ii) the imported and domestic products are not similarly taxed, and (iii) the dissimilar taxation is applied so as to afford protection to domestic production.<sup>29</sup> However, a carbon tax which is applied to both imported and domestic products will find it hard to constitute as a violation of this article.

Firstly, regarding the first element, an assessment of whether the imported and domestic products are competitive relationship is conducted. In assessing this element, the Appellate Body in Japan – Alcoholic Beverages II agreed with the Panel's illustrative enumeration of the factors to be considered in deciding whether two subject products are "directly competitive or substitutable". For example, the nature of the compared products, and the competitive conditions in the relevant market, in addition to their physical characteristics, common end-use, and tariff classifications.<sup>30</sup>

Regarding the first element, as mentioned above in the assessment of whether products with different PPMs are considered to be like products under GATT Art. III:4, the products are not likely to be in a competitive relationship with each other since consumers are likely to perceive them to be different in terms of pricing and environmental risks.

Regarding the second element, the carbon tax mentioned above does not tax imported products dissimilarly with domestic products. This is because as elaborated above, this tax applies the same method of tax computation to both products.

### **C. GREEN SUBSIDIES**

The third question is how WTO law would restrict the use of domestic green subsidies. Green subsidies are subsidies that provide incentives to market actors to engage in behaviour that leads, either in the short term or long term, to lower emission rates.<sup>31</sup> The main issues regarding domestic subsidies under WTO law arise from the WTO regulation of subsidies and countervailing duties. Subsidies are regulated under the Agreement on Subsidies and Countervailing Measures (hereinafter

<sup>26</sup> ABR, China–Auto Parts, [163]; PR, China–Auto Parts, [7.132].

<sup>27</sup> ABR, Canada–Periodicals, p. 22-23.

<sup>28</sup> ABR, EC–Asbestos, [96, 98-99].

<sup>29</sup> ABR, Canada–Periodicals, p. 24-25.

<sup>30</sup> ABR, Japan–Alcoholic Beverages II, p. 25.

<sup>31</sup> ROBERT HOWSE, IISD, CLIMATE MITIGATION SUBSIDIES AND THE WTO LEGAL FRAMEWORK: A POLICY ANALYSIS 2 (2010).

referred to as SCM Agreement). According to the Appellate Body Report in US — Softwood Lumber IV,<sup>32</sup> the object and purpose of the SCM Agreement is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions.

The purpose of regulating subsidies is to prevent them from distorting international markets, especially since a subsidy can introduce a structural competitive imbalance into the market for a good which is unrelated to the natural comparative advantages of the different countries producing that good. Where this occurs, an unsubsidized good can find it impossible to compete with the subsidized good (as it in effect is competing with the treasury of the subsidizing country), even where the unsubsidized good has the intrinsic comparative advantage. Therefore, the WTO does not prohibit the use of most form of subsidies, unless they distort the international market.

Thus, even if a green subsidy is given to a particularly carbon intensive industry, it will still remain compatible with SCM rules as long as it is not a prohibited subsidy under the SCM Agreement. In fact, there are only two types of subsidies that are prohibited under the SCM Agreement: export subsidies and import substitution subsidies. The following section discusses the possibility for a state to subsidize producers to adopt green methods in producing products, and still be compatible with the SCM Agreement.

#### a. SCM ART. 3.1

The prohibited subsidies in the SCM Agreement are found in SCM Art. 3.1. SCM Art. 3.1(a) prohibits subsidies that are in law or in fact contingent upon export performance, which pursuant to SCM Fn. 4, refers to subsidies “tied to” actual or anticipated exportation. Since green subsidies are granted to encourage producers to reduce carbon emissions, they can hardly be found as an export subsidy. However, any climate change subsidy that on its face or in fact was provided based on export of the subsidized good is prohibited.<sup>33</sup> However, it is hard to establish a relationship between the granting of a green subsidy and a condition to export.

The Appellate Body in the case of EC-Aircraft has found that the term “tied to” refers to a relationship of conditionality or dependence,<sup>34</sup> which arises when a subsidy is geared to promote future export performance by the recipient.<sup>35</sup> However, in most cases, green subsidies are allocated so that producers will use the funds to produce green products, i.e. for the installation of modern eco-friendly technology. That being said, the granting body does not intervene in the recipients’ decision on how to allocate their funds to promote exportation or domestic sales, and there is no checking mechanism on how the recipients use the funds. In such cases, the green subsidy is not geared to promote exportation and therefore not an export subsidy.

It is also important to note that recipients of green subsidies are completely permitted to use the received funds to promote their domestic sales based on the conditions of supply and demand in the domestic and export markets. According to the Appellate Body Report in the case of EC-Aircraft, a tie between the subsidy and exportation can be found when a subsidy incentivizes the recipient to export in a way that does not simply reflect the supply and demand in the domestic and export markets undistorted by such subsidy.<sup>36</sup> If the subsidy is structured in such a way that the recipient will not receive more funds because of exportation, it does not incentivize the recipients to export more.

To conclude, as long as a green subsidy does not condition its granting upon exportation, it will not violate SCM Art. 3.1(a).

## II. POSSIBLE JUSTIFICATION OF VIOLATIONS

Even if the unilateral domestic measures listed above does violate GATT Art. I, II or III, it can still be permitted if they satisfy the conditions set forth in GATT Art. XX. GATT Art. XX governs the use of the general exception for trade in goods, and it allows Members to pursue interests and values other than trade that are recognized under the paragraphs of Article XX. This shows that even though the WTO is a trade-centered regime, the exceptions set forth in GATT Art. XX still recognizes that members can pursue other interests, and it seeks to balance trade interest and other values which members deem important.

<sup>32</sup> ABR, US–Softwood Lumber IV [64]

<sup>33</sup> ANDREW GREEN, *Trade rules and climate change subsidies*, 5 WORLD TRADE REV. 377, 397 (2006).

<sup>34</sup> ABR, Canada–Aircraft, [171].

<sup>35</sup> ABR, EC–Aircraft, [1044].

<sup>36</sup> ABR, EC–Aircraft, [1045].

Past WTO jurisprudence have established that in order that the justifying protection of Article XX may be extended the violating measures, the measures at issue must not only come under one or another of the particular exceptions — paragraphs (a) to (j) — listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. In other words, the analysis of GATT Art. XX is two-tiered: first, provisional justification by reason of characterization of the measure under XX paragraphs; second, further appraisal of the same measure under the introductory clauses of Art. XX.<sup>37</sup>

In cases where the measures are adopted to mitigate climate change, the most likely bases for exception would be Art. XX(b), for measures necessary to protect human, animal, and plant life or health, or Art. XX(g), for measures relating to the conservation of exhaustible natural resources.

#### A. GATT ART. XX(B)

GATT Art. XX(b) covers measures that are (i) designed to protect the life and health of human, animal, and plant and (ii) necessary. A country may argue that a measure designed to reduce carbon emissions falls within the ambit of GATT Art. XX(b) because it is a measure designed to protect the human, animal and plant lives in the country from the life-threatening consequences of global warming, such as coastal erosion, sea-level rise and the extinction of flora and fauna.

The country enacting such measures would also need to prove that the measures are “necessary” within the meaning of GATT Art. XX(b). As mentioned in the Appellate Body Report of EC-Seal,<sup>38</sup> a necessity analysis involves a process of “weighing and balancing” a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.<sup>39</sup> The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken.

In the case of Brazil-Taxation, the Panel recalls that the Appellate Body has explained that ‘few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks, and that protecting the environment is no less important. In light of the above, the Panel finds that the level of importance of the interests pursued by Brazil (i.e. increase of vehicle safety and reduction of CO<sub>2</sub> emissions) is high.”<sup>40</sup> Thus, measures taken to mitigate climate change are likely to fall within the ambit of paragraph(b).

#### B. GATT ART. XX(G)

Alternately, countries can justify a measure under GATT Art. XX(g) by proving that the measures in question are related to the conservation of exhaustible natural resources. In order for a measure to fall under paragraph(g), the measure has to be (i) related to (ii) the conservation of exhaustible natural resources and (iii) made effective in conjunction with restrictions on domestic production.

Regarding the first element, “exhaustible natural resources” under GATT Art. XX(g) refer to valuable natural resources that can be depleted or susceptible to depletion.<sup>41</sup> In the case of *US-Gasoline*, the Appellate Body found clean air as depletable by air pollutants.<sup>42</sup> Even though the air pollutant in that case are toxic pollutants such as VOCs and NO<sub>x</sub>, the same line of reasoning can be applied in this case. To further elaborate, in both cases, it involves clean air being depleted by some harmful materials. In the case of mitigating climate change, clean air can be similarly depleted by excessive CO<sub>2</sub> concentrations. Furthermore, the WHO has deemed excessive human-induced CO<sub>2</sub>-emissions as air pollutants.<sup>43</sup> Thus, if a country implements measures to reduce carbon emissions in the production of products so as to reduce the amount of CO<sub>2</sub> in the atmosphere, the measures are designed to preserve the clean air.

A measure is *related to* the alleged policy objective if it is primarily aimed at the said objective,<sup>44</sup> that is, exhibiting a close and genuine relationship of means and ends between the measure and the objective.<sup>45</sup> Past WTO jurisprudence show that there are

<sup>37</sup> ABR, US-Gasoline, p. 22.

<sup>38</sup> ABR, EC-Seal, [5.169].

<sup>39</sup> ABR, Korea-Beef, [164]; ABR, US-Gambling, [306]; ABR, Brazil-Retreaded Tyres, [182].

<sup>40</sup> PR, Brazil-Taxation, [7.913-7.916].

<sup>41</sup> ABR, US-Gasoline, p.14-16; PR, US-Gasoline, [6.37]; ABR, US-Shrimp, [128].

<sup>42</sup> PR, US-Gasoline, [6.37]; ABR, US-Gasoline, p.14-19.

<sup>43</sup> World Health Org. [WHO], *A Global Health Guardian: Climate Change, Air Pollution, and Antimicrobial Resistance*, <http://www.who.int/publications/10-year-review/health-guardian/en/> (last visited September 12, 2018).

<sup>44</sup> ABR, US-Gasoline, p. 18.

no disputes regarding this requirement, and therefore suggest that this requirement is easy to meet. A state should show the measures are related to the conservation of clean air and coastal lives because they control can the carbon emissions and thus reduce the threat to these exhaustible resources.

Regarding the third element, a measure is made effective in conjunction with restrictions on domestic production if it imposes restrictions on imported and domestic production in an even-handed manner.<sup>46</sup> It is a less strict requirement as it does not require the states to treat the imported and domestic products equally, as long as the measures as a whole also imposes limitations on domestic products, then this element can be met.

### C. GATT ART. XX CHAPEAU

A measure is consistent with GATT Art. XX chapeau unless it is applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.<sup>47</sup> According to the Appellate Body Report in US-Gasoline,<sup>48</sup> the chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is important to underscore that the purpose and object of the introductory clauses of GATT Art. XX is generally the prevention of abuse of the exceptions of GATT Art. XX.

According to the US – Shrimp Appellate Body Report para.159, the line of equilibrium between the right of a Member to invoke an exception under Art. XX and the rights of the other Members under varying substantive provisions is not fixed and unchanging; the line moves when facing different measures and different case facts. Therefore, there is no static standard of review. However, past jurisprudence gives us some insight into the circumstances that be construed as an abuse of the exceptions contained in GATT Art. XX.

As part of the “arbitrary discrimination” analysis, the Appellate Body in the US-Shrimp considered it impermissible for a WTO Member to use an embargo to “require” other Members to adopt the same standards, without taking into consideration different conditions which may occur in the territories of those other Members.<sup>49</sup> In that case, the Appellate Body found that Section 609 is an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy. Therefore, a carbon tax or a PPM should not be designed to coerce other states into following their own carbon regime. A carbon tax or a PPM should be structured to consider different conditions of different states, and focus on the final result, rather than on then design itself.

A second factor referred to by the Appellate Body was the failure of the United States to engage the appellees and other Members exporting shrimp to the United States in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members. Since climate change is a global problem and unilateral measures taken by a country are more than likely to have an extra-territorial effect, it is desirable for a state to cooperate in determining what would be a suitable benchmark in reducing carbon emissions.

Thirdly, the Appellate Body noted that Section 609 was applied in a manner that discriminated among WTO Members where the same conditions prevail. In US – Shrimp, before adopting the measure, US seriously negotiated with some affected countries, but not with the other Members that also export shrimp to the United States, and the effect is plainly discriminatory. Therefore, when enacting environmental protection measures, further negotiation with all the countries affected by such measures is an important element in avoiding arbitrary discrimination.

To conclude, if the measures fulfill the requirements set out in one of the subparagraphs and the chapeau, the measures can be justified under GATT Art. XX.

### III. CONCLUSION

Even though the WTO system focuses on issues regarding international trade, yet this does not mean that the WTO disregards other important values. The WTO preamble had already identified the importance of maintaining “the optimal use of the world’s resources in accordance with the objective of sustainable development”. This shows that even though the WTO is

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<sup>45</sup> ABR, US–Shrimp, [135,136].

<sup>46</sup> ABR, US–Gasoline, p. 20-21.

<sup>47</sup> ABR, US–Gasoline, p. 23.

<sup>48</sup> ABR, US–Gasoline, p. 22.

<sup>49</sup> ABR, US–Shrimp, [163].



primarily a trade forum, it also recognizes other important value in the process of pursuing multilateral trade liberalization. This has been identified by the US – Shrimp Appellate Body Report that WTO Members also recognize the importance of environment protection. Therefore, concerns regarding environment protection can be supported as being in accordance with the objective of the WTO Agreement.

World trade should not be just about trade, but should also be about the pursuit of sustainable development. Therefore, when interpreting individual WTO obligations, one should take into due account their environmental implications to pursue a proper balance between trade liberalization and sustainable development. Increased trade and efficiency are desirable. However, other values should also be considered since materialistic progress is just one aspect of maximizing quality in this world, the sustainable development of the world and the balance between trade and non-trade value is indispensable.

To address a global environmental issue, every country should have their own policy space since every country represents different environmental concerns due to their own ecological vulnerability in different geographic areas. Global warming may be a global issue, but there are countries are more significantly impacted than global warming than other countries. One effective method in a country may not be as effective in another to address the specific consequences of global warming faced. Therefore, a country will need find an adequate balance between its trade obligations and the obligation to contribute to a sustainable life.

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