

## **Dealing with the Challenge of Climate Change within the Legal Framework of the WTO**

**Akhtamova Yulduz Akhtamovna**

Tashkent State University of Law

[axtamova.yulduz@tsul.uz](mailto:axtamova.yulduz@tsul.uz)

### **Abstract**

Although international trade and climate change regimes are two different fields of international law, they are closely interrelated. In particular, certain domestic environmental policies adopted by States may run afoul of WTO law, thereby having adverse effects on free trade. It has been claimed by critics that non-discrimination principles and subsidies regulations of WTO law constrain its Members' ability to take certain unilateral actions aimed at climate change mitigation. According to other commentators, despite the existence of potential conflicts between UNFCCC and WTO regime, there are still synergies which can be developed to bring a greater coherence, and WTO's multilateral framework can serve as a vehicle to facilitate targets of the Paris Agreement. This paper argues that although sustainable development is recognized by WTO regime and it leaves some scope for climate change actions, its current legal framework does not provide sufficient space for member's regulatory autonomy in order to take national regulatory policies

**Key words:** Climate change, WTO law, Paris Agreement.

### **I. Introduction**

The preamble of the Agreement Establishing the WTO explicitly recognizes sustainable development as its objective, thereby 'seeking to protect and to preserve the environment' [1]. Thus, the commitment of WTO to sustainable

development extends its scope to environmental protection. WTO's framework provides two tracks for addressing climate change challenge, namely, multilateral and unilateral [2]. Multilateral track involves negotiations among all WTO members on particular climate change-related trade policies, while a unilateral approach implies domestic climate change-related trade measures taken by a single member on its own [3].

## **II. Methods**

WTO Members can maintain, restrict or expand national policy space relating to climate change-related trade measures within the current negotiations. For the first time in WTO's history, the Doha Round introduced negotiations on the environment and trade, and made them main part of the Doha Development Agenda (2001) [4]. Three key objectives of the negotiations are enhancing mutual supportiveness of the WTO rules and multilateral environmental Agreements (MEAs), promoting collaboration between the WTO and MEA secretariats, and eliminating tariffs and non-tariff obstacles on environmental goods and services [5]. Moreover, WTO members commenced plurilateral negotiations on an Environmental Goods Agreement (EGA) in 2014, which is designed to eliminate customs duties and tariffs on 54 important environment-related products [6]. EGA can significantly contribute to the implementation of the Paris Agreement objectives concerning GHG emissions and clean energy [7]. Specifically, it helps developed as well as developing countries to shift into clean energy economy faster by eliminating trade tariffs on clean energy technologies (CETs) and goods, thus lowering their prices, which makes them affordable for developing countries and increases their competitiveness compared to fossil fuels [8]. As a result, EGA increases trade in "green" goods and leads to reduction of carbon emissions. One of the special features of EGA is supposed to be its application of "Most-Favored Nation" principle, which allows the extension of tariff concessions made by its signatories to all WTO Members [9]. However, EGA negotiations are still in

progress and it comes into force only in case a “critical mass” is achieved meaning that the goods covered by the Agreement must make up a significant percentage of global trade [10].

### III. Results and discussions

The General Agreement on Tariffs and Trade (GATT) 1994 provides “General Exceptions” under Article XX, which are designed to balance WTO commitments of Members, with their right to adopt other legitimate policies aimed at addressing non-economic concerns. Specifically, even if climate-change related trade policies are supposed to be inconsistent with quantitative restriction and non-discrimination principles of the GATT, the policies can be justified under Article XX provisions in case requirements of Article XX are satisfied [11]. The exhaustive list of public policy objectives included in ten paragraphs of Article XX represents exemptions from GATT obligations.

Two specific paragraphs, (b) and (g) of Article XX might be relevant for climate change-related trade policies namely, if such measures are necessary to protect human, animal or plant life or health or, if they relate to the conservation of exhaustible natural resources correspondingly [12]. As regards paragraph (b), in the light of continuously deteriorating environmental circumstances and recurring natural catastrophes that indicate the impacts of climate change, claiming that climate change-related policies are adopted to protect human life and health can be a legitimate objective [13].

Furthermore, in *United States-Standards for Reformulated and Conventional Gasoline* case, the panel found that clean air constituted an exhaustible natural resource since it could be depleted and also decided that a measure aimed at reducing the depletion of clean air was a measure to preserve a natural resource within the meaning of Article XX (g) [14]. Thus, this ruling broadened the extent of paragraph (g) to the conservation of environment. In addition, in *EC-Seals* case, invocation of public morals under Article XX (a) as defense for a unilateral

restriction on the importation of seals was recognized by the panel and the Appellate Body, and it can be assumed that climate change could also be allocated within the ambit of paragraph (a). If it would be considered as a matter of public morals in a particular country [15].

However, these exceptions are conditional as defenses under Article XX can be successfully invoked only if a GATT-inconsistent climate-related measure meets the requirements set therein [16]. WTO Dispute Settlement Body (DSB) applies two-tier test in order to determine whether a measure at issue qualifies for justification. Firstly, it determines whether a measure is covered by the exceptions specified in paragraphs (a)-(j) of Article XX [17]. Secondly, it determines whether the requirements of the chapeau of Article XX are met [18]. As discussed earlier, Members are likely to invoke exceptions provided in paragraphs (a), (b) and (g) of Article XX for climate change-related GATT-inconsistent measures [19]. But even if a measure is covered by one of these exceptions, it must also satisfy the conditions of the chapeau of Article XX, which prevents measure from being ‘applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same condition prevail, or a disguised restriction on international trade’ [20].

The objective and role of the chapeau is considered in *US-Shrimp I* as a search for balancing between rights of Members to resort to one of the exceptions of Article XX and WTO rights of other Members under the GATT 1994 [21]. As part of this balancing, the DSB appears to have applied a necessity test or least restrictive means in relation to policies justified under Article XX (g) by importing necessity requirement and the notion of good faith of the parties into the chapeau [22]. Thus, balancing test under the chapeau leads to a number of issues in terms of climate change actions because of uncertainties inherent in timing necessary for action as well as the effectiveness of various instruments for dealing with climate change [23]. Therefore, the possibility of success for invoking Article XX

exceptions for climate-change related measures is low and it depends on case-by-case analysis of the DSB [24].

### **Conclusion**

As it is discussed in detail, WTO laws intersect with climate change policies in many ways. Although WTO preamble along with general exceptions under GATT and TBT standard rules allow Members to take certain climate change-related trade measures, they are not sufficient for meeting climate change goals and obligations set in the international environmental agreements. Especially, non-discrimination principles and WTO laws on subsidies demonstrate excessive constraints on climate change-related domestic measures. Therefore, current legal framework of the WTO is not suitable for combating climate change challenge and needs to be amended or developed in accordance with the flexibilities provided by the Agreement Establishing the WTO.

### **Bibliography**

#### **I. Primary Sources**

1. Agreement on Technical Barriers to Trade (1 January 1995) 1868 U.N.T.S. 120
2. Agreement on Subsidies and Countervailing Measures (April 15 1994) 1867 U.N.T.S. 14
3. GATT 1994:General Agreement on Tariffs and Trade 1994 (15 April,1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
4. Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) 2303 U.N.T.S. 162.
5. Marrakesh Agreement Establishing the World Trade Organization (April 1994) 1867 U.N.T.S 154
6. Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force November 2016) T.I.A.S No. 16-1104
7. United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 U.N.T.S. 107

#### **II. WTO DSB Reports**

8. Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft* (20 August 1999) WT/DS70/AB/
9. Appellate Body Report, *United States-Import Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R
10. Appellate Body Report, *Canada-Renewable Energy case* (6 May 2013) WT/DS412/AB/R, WT/DS426/AB/R
11. Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft* (20 August 1999) WT/DS70/AB/R
12. Panel Report, *Canada-Renewable Energy case* (19 December, 2012) WT/DS412/R, WT/DS426/R
13. Panel Report, *United States-Standards for Reformulated and Conventional Gasoline* (29 January 1996) WT/DS58/AB/R

### III. Books

14. Bossche P.V.d. and Zdouc W., *The Law and Policy of the World Trade Organization*, (4<sup>th</sup> edn, Cambridge University Press, 2017)
15. Cottier T., and Payosova., 'Common Concern and Legitimacy of WTO in Dealing with Climate Change' in Panagiotis Delimatsis (eds), *Research Handbook on Climate Change and Trade Law*, (Edward Elgar Publishing 2016)
16. Park D., (eds), *Legal Issues on Climate Change and International Law*, (Springer 2016)

### IV. Journals

17. Charnovitz S., and Fischer C., 'Canada-Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies' (2015) 4 (2) *World Trade Review*
18. Ehring L., 'De Facto Discrimination in World Trade Law *National and Most-Favoured-Nation-Treatment-or Equal Treatment?*' (2002) 36 (5) *Journal of World Trade*
19. Kulovesi K., 'International Trade Disputes on Renewable energy :Testing Ground for Mutually Supportiveness of WTO Law and Climate Change Law' (2014) 23 *Rev Eur Comp & Int'l Env'tl L* 342

### V. Online Articles

20. Araya M., 'The Relevance of the Environmental Goods Agreement in Advancing the Paris Agreement Goals and SDGs' ICTSD (2016), pp.4 <[https://www.ictsd.org/sites/default/files/research/the\\_relevance\\_of\\_the\\_environmental\\_goods\\_agreement\\_in\\_advancing\\_the\\_paris\\_agreement\\_goals\\_and\\_the\\_sdgs\\_0.pdf](https://www.ictsd.org/sites/default/files/research/the_relevance_of_the_environmental_goods_agreement_in_advancing_the_paris_agreement_goals_and_the_sdgs_0.pdf)> accessed 25 December 2019
21. Low P., Marceau G., and Reinaud J., 'The Interface between the Trade and Climate Change Regimes : Scoping the Issues' WTO Economic Research and Statistic Division (2011) Staff Working Paper ERSD-2011-1, pp.18 <[https://www.wto.org/english/res\\_e/reser\\_e/ersd201101\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201101_e.pdf)> accessed 5 January 2020

22. Das K., and others, 'Making the International Trade System Work for Climate Change' (2018) <<https://climatestrategies.org/wp-content/uploads/2018/07/CS-Report-Trade-WP4.pdf>> accessed 5 January 2020

#### VI. Websites

23. 'Negotiations on trade and the environment' (World Trade Organization) <[https://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_negotiations\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envir_negotiations_e.htm)> accessed 25 December 2019
24. 'Environmental Policies covered by Article XX' (World Trade Organization) <[https://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)> accessed 5 January 2020