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Climate Change and a Renewable Energy Scale-up: Responding to Challenges Posed to the WTO

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ABSTRACT

Actual and potential conflicts between the trade regime and the climate change regime are problematic to both. There is an increasing sense of urgency based on the accumulating evidence from climate science that more effective efforts are needed to mitigate climate change and that trade rules and institutions might be barriers to such efforts. Clarification of the issues and development of options are needed now to facilitate constructive responses in both the trade and climate regimes.

This paper therefore discusses the costs and benefits of options for adjusting World Trade Organization (WTO) rules to provide additional policy space under the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) for subsidies or other measures to mitigate climate change and promote renewable energy. Eight paths to address this challenge are being explored—amendment of the WTO Agreement; waiver of WTO obligations; agreement on an understanding interpreting WTO rules; plurilateral agreement; litigation in the WTO dispute settlement process; agreement on a moratorium on dispute settlement regarding certain measures; conclusion of a plurilateral agreement; and/or unilateral action.

It is found that whereas a formal amendment would be controversial, difficult and time-consuming, options of a waiver or an interpretative understanding may be more realistic. If it is not feasible to adjust WTO rules, it would be useful to look again at the ways in which current rules provide flexibility for climate change mitigation measures.

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LIST OF ABBREVIATIONS

ETS	emissions trading system
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICTSD	International Centre for Trade and Sustainable Development
IPCC	Intergovernmental Panel on Climate Change
MFN	most favoured nation
RGGI	Regional Greenhouse Gas Initiative
SCM	Subsidies and Countervailing Measures
TBT	technical barriers to trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNFCCC	United Nations Framework Convention on Climate Change
US	United States
WTO	World Trade Organization

INTRODUCTION

This paper discusses the costs and benefits of options for adjusting World Trade Organization (WTO) rules to provide additional policy space under the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) for subsidies or other measures to mitigate climate change and promote renewable energy. We explore eight paths to address this challenge—amendment of the WTO Agreement; waiver of WTO obligations; agreement on an understanding interpreting WTO rules; plurilateral agreement; litigation in the WTO dispute settlement process; agreement on a moratorium on dispute settlement regarding certain measures; conclusion of a plurilateral agreement; and/or unilateral action.

Other papers published by the International Centre for Trade and Sustainable Development (ICTSD) have proposed changes in WTO rules affecting government measures to promote clean energy, and have discussed reasons why the existing policy space is insufficient. This paper discusses how changes of this sort could come about, how long they would take, what they would involve, and their scope of application. It is essential to have a grasp of these fundamentals before investing time, effort, and political resources in advocacy for rule changes.

Actual and potential conflicts between the trade regime and the climate change regime continue to be problematic to both. There is an increasing sense of urgency based on the accumulating evidence from climate science that more effective efforts are needed to mitigate climate change and that trade rules and institutions might be barriers to such efforts. Clarification of the issues and development of options are needed now to facilitate constructive responses in both the trade and climate regimes.

We find that:

- Amending WTO agreements would be controversial, difficult, and time-consuming. In practice, it would be necessary to reach consensus in the WTO on how to amend GATT Article XX or the SCM Agreement, and on the text of any amendment. Negotiating a consensus agreement on such changes would require the proponents to make the case for the importance of climate change mitigation, set out the type of mitigation measures they wish to permit, explain why the changes are necessary, and engage seriously with other Members whose export interests would be injured by the mitigation measures. This negotiation would be difficult, although when completed, the results would be permanent and would have unquestionable legitimacy.

- No such amendment could enter into force unless it is accepted by two-thirds (106) of the 159 WTO Members. This process would take many years, during which climate change would continue and governments and stakeholders would face substantial uncertainty about their scope of action under trade rules.

- Amendments would only bind those WTO Members that accept them. For any WTO Member that does not accept an amendment, the un-amended WTO rules would still apply, and that Member could bring and win a dispute against any climate change/renewable energy measure that violates the un-amended (existing) WTO rules.

- To eliminate this free-rider problem and bridge the time period before entry into force, one possibility would be to seek consensus approval of a waiver of WTO obligations as a package with the amendment.

- Another possibility would be to seek agreement on an authoritative interpretation of WTO rules, or an understanding adopted by a WTO Committee regarding the interpretation and application of one of the WTO agreements. These interpretative understandings, adopted by consensus, would not change the law, but they could affect outcomes in WTO dispute settlement.

- Other alternatives include plurilateral agreements on interpretation and application of WTO rules; efforts to alter the rules through WTO litigation; collective agreement on a moratorium on dispute settlement; efforts to alter the rules through WTO litigation; or unilateral WTO-illegal action by governments that are willing to pay the price in trade retaliation. Each of these has costs and benefits in varying degrees.

- If it is not feasible to adjust WTO rules, it would be useful to look again at the ways in which the rules now provide flexibility for climate change mitigation measures, and to take a serious look at those measures that are WTO-compatible. Thus, if there is a desire for measures to increase the price of carbon, and to ensure against carbon leakage through border adjustment measures, a serious look at carbon taxes rather than cap and trade systems may be what is needed. If a government wishes to levy a carbon tax on imports as a border tax adjustment, it may be able to do so consistent with the national treatment provisions of GATT Article III. If a border tax adjustment is consistent with Article III, it is consistent regardless of its objectives or how the money collected is spent.[1]

1 GATT Panel Report, *US – Taxes on Petroleum and Certain Imported Substances*, para. 5.2.4.

PROBLEMS IN MITIGATING CLIMATE CHANGE AND PRESERVING THE TRADE SYSTEM

The problems that are driving this analysis can be viewed from several perspectives–some current, specific and tangible, and others more conceptual but nevertheless fundamental to the futures of the trade and climate regimes. Two specific, tangible problems illustrate the diverse challenges that climate change and renewable energy pose for the WTO system—border adjustment measures for emissions trading systems (ETSs), and subsidies for renewable energy.

ETSs already exist in the European Union (EU), Switzerland, New Zealand, the Regional Greenhouse Gas Initiative (RGGI) in the northeastern region of the United States (US), and in California and Tokyo. Others are in advanced planning in Québec, Canada, the Republic of Korea, the Chinese provinces of Hubei and Guangdong and cities of Beijing, Tianjin, Shanghai, Chongqing, and Shenzhen.[2] No ETS has yet incorporated a border adjustment mechanism. If and when there is an ETS with a border adjustment mechanism, it is possible that another WTO Member will challenge the border adjustment measures in the WTO.

Subsidies benefiting renewable energy products have been the subject of WTO disputes, as well as trade remedy actions. These developments may impede a policy instrument that could accelerate the development of climate-friendly energy technologies, and thus prolong dependence on greenhouse-gas-intensive fossil fuels.

More generally, uncertainties about the evolution of WTO rules and the prospects of challenges in the WTO dispute settlement process create misgivings, and thus disincentives to governments' development of climate-friendly and renewable-energy policies. Just as government policy uncertainties can inhibit firms' investment decisions, WTO uncertainties can inhibit governments' policy development.

In addition, differences between the trade regime and the climate regime can pose difficult analytic and negotiating challenges. Trade economics and environmental economics start from different fundamental premises (Bhagwati 2009). Trade economics often (though not always) begins by assuming that markets tend to be economically efficient, and that government interventions in the form of trade policies tend to create economic inefficiencies. But for environmental economists, environmental problems such as climate change result from market failure, and require government policies to correct (Stern 2007). Market failures (such as innovators' inability to capture all of their innovations' benefits) also constrain research, development, and diffusion of technological solutions to the problem of climate change, such as solar, wind, and other forms of renewable energy. Markets may thus lead to over-production and over-consumption of energy technologies (including those based on fossil fuels) that involve negative externalities, and they may lead to under-production and under-consumption of renewable energy technologies that have positive externalities (Jaffe, Newell, and Stavins 2005).

Governments address these market failures and externalities through policies targeting greenhouse gas emissions, and through support for technologies to reduce such emissions. The former internalize the costs of greenhouse gas emissions in transaction prices (such as the price of producing and consuming electricity) to mitigate the emissions. The latter include subsidies and other efforts to incentivize businesses and consumers to increase investment in technologies that can reduce the emissions. In both cases, governments can choose to take measures that implement these policies in a WTO-compatible manner, or they can choose measures that are at odds with WTO rules.

The trade regime and the climate regime, in fact, share some common ground. Economic efficiency is an objective of both the multilateral trade system centered in the WTO and the multilateral climate system centered in the United Nations Framework Convention on Climate Change (UNFCCC). In that key aspect, there is a basic compatibility between the two systems.

From a climate change perspective, it is desirable to increase the world's changeover to forms of renewable energy that will reduce greenhouse gas emissions. Governments should act to reduce the cost of renewable energy inputs including traded equipment for solar and wind power. Reducing the cost of these inputs, and facilitating scale-up of renewable energy production, will help renewable energy get to the magic point of grid parity where the market price of renewable energy meets or undercuts the market price of fossil fuels. From a trade perspective, if grid parity is the goal, it should be possible for governments to work together to achieve this in a manner that is compatible with the flexibility built into trade rules.

As Intergovernmental Panel on Climate Change (IPCC) reports become increasingly gloomy, the climate community has an increasing sense of urgency that governments must do more—tax policies; mandatory performance standards; carbon and pollution regulations; feed-in tariffs to subsidize generation of renewable electricity; or procurement

2 International Emissions Trading Association, *Greenhouse Gas Market 2013,* http://www.ieta.org/assets/Reports/ghgreport2013-web.pdf.

preferences for renewable energy and green products. Resistance by economic actors with arguments based on trade rules then leads the climate change community to call for the trade rules to be remodeled to create more policy space—by modifying Article XX (the exceptions clause) of the GATT, or by modifying the SCM Agreement to create new exceptions to its rules. Clarification of the issues and development of options are needed now to facilitate constructive responses in the trade and climate regimes.

OPTIONS ON THE ROAD TO POLICY SPACE FOR RENEWABLE ENERGY/ CLIMATE

AMENDING THE WTO AGREEMENT

The WTO's amendment process

The WTO can amend the GATT or the SCM Agreement if it wishes to do so. But before investing time, effort and political resources in advocacy for an amendment, it is important to understand how long it would take, what it would involve, and what benefits it might confer.

The WTO's amendment rules appear in Article X of the constitution, the Marrakesh Agreement Establishing the WTO. Under Article X:1, a proposal to amend any of the agreements on trade in goods could be submitted by any WTO Member or the WTO's Council on Trade in Goods, which oversees the administration of the GATT; any proposal submitted by a Member would most likely undergo extensive debate in the Council on Trade in Goods. The rules of procedure of the Council on Trade in Goods provide that its decisions are made by consensus, and that if a consensus decision is not possible, the matter is referred to the General Council for decision.[3]

When and if the Council on Trade in Goods reaches consensus on a decision to amend these agreements, it would then submit the proposal to the WTO's Ministerial Conference, or to the General Council, which carries out the functions of the Ministerial Conference between the Ministerial Conference's biennial meetings. The proposal would take the form of a draft of a Decision to amend, with an attached draft protocol of amendment. The Ministerial Conference or General Council would then consider whether to submit the proposed amendment to WTO Members for acceptance. For a period of 90 days after the submission of the proposal, this decision can only be taken by consensus, but thereafter it can be taken by a two-thirds majority of the Members[4] (106 of the current 159 Members).

Politically, advancing a proposal for amendment to accommodate climate change mitigation measures would involve substantial effort. The proponents of an amendment would have to make a factual and political case for the amendment proposal. They would need to explain the factual background of climate change, and the need to permanently alter the rules. They would need to explain the type of climate change measures that are needed, their impact on trade, and why these measures require an amendment—that is, why these measures would be inconsistent with the WTO Agreement and why they could not be taken in a WTO-consistent manner.

The discussion on the amendment would take substantial time. Because the Council on Trade in Goods decides by consensus, the amendment decision will not move forward until the concerns of all Members have been satisfied to the extent that they will not object.

Because the process would resolve Member concerns by negotiation and agreement, the ultimate decision would have a level of legitimacy that is not present in any rule change that comes about through litigation. When the Council on Trade in Goods agrees that an amendment is appropriate, it should not be difficult to obtain consensus support for the same amendment in the General Council or Ministerial Conference, which are composed of the same Members.

After the Protocol of amendment has been opened, each Member would then decide whether to accept the amendment and thereby bind itself under international law. Acceptance takes place through deposit of an instrument with the WTO Secretariat after a Member has gone through whatever internal approval process is required under its domestic law.[5]

Most amendments to the WTO Agreement, including any amendment to Article XX or the SCM Agreement, enter into force only after two-thirds of the Members have accepted the amendment and agreed to be bound under international law.[6]

3 G/L/79, Rules of Procedure for Meetings of the Council for Trade in Goods, adopted on 31 July 1995, Rule 33. It would be extremely unlikely that a proposal for amendment would go forward to the General Council without consensus backing.

4 Marrakesh Agreement, Article X: 1.

5 Marrakesh Agreement, Article X: 7; discussion of formal requirements for an instrument of acceptance, http://www.wto.org/english/tratop_e/trips_e/accept_e.htm.

6 Amendments to a few provisions, not including Article XX, can only go into effect upon acceptance by all Members; Marrakesh Agreement, Article X: 2.

Article X: 3 of the Marrakesh Agreement provides that amendments to the WTO Agreement take effect only with respect to the WTO Members that have accepted them. Even if a WTO Member participates in the consensus decision to propose an amendment and open a protocol of amendment for acceptance, it can later decline to accept the amendment. Under Article X: 3, it is possible for the Ministerial Conference to set a deadline for acceptance of an amendment and decide to expel any Member that has not accepted the amendment by the deadline, but this decision requires a three-fourths majority of all Members (currently 120 votes), and is very unlikely for this and other reasons.[7]

Because the WTO Agreement is a treaty, it is subject to the rules of the Vienna Convention on the Law of Treaties concerning the effect of amendments. Article 40(4) of the Vienna Convention provides that an amendment does not bind any party to a multilateral treaty that it does not accept, and that in relations between a party to the amended treaty and a party to the un-amended treaty, the un-amended treaty governs their mutual rights and obligations.[8] Any new party to a treaty after an amendment enters into effect is considered generally to be a party to the amended treaty, but to be a party to the un-amended treaty in respect of parties not bound by the amendment.[9]

These rules would have the following effects in respect of a hypothetical amendment of GATT Article XX or the SCM Agreement:

- The amendment would not take effect until at least two-thirds of WTO Members take positive action to deposit instruments of acceptance. Obtaining acceptance by two-thirds of the Members would require getting 106 governments to make it a priority to obtain domestic approval and take positive action to accept the amendment. This could take a substantial period of time.

- The amendment will never go into effect for any Member that does not accept it. Any existing Member that does not accept the amendment will continue to be subject to the un-amended Article XX and SCM Agreement in its rights and obligations with other WTO Members.

- Suppose that a WTO Member enacts a climate change mitigation regime that includes measures that are inconsistent with GATT national treatment rules, and (for whatever reason) cannot be justified under the current text of Article XX or the SCM Agreement, but would be permitted under these provisions as amended. This Member accepts the amendment. Any Member that has not accepted the amendment can rely on the un-amended WTO Agreement, and if it brings a dispute against the climate measures, the WTO panel must apply the un-amended WTO Agreement. If a government anticipates that the amendment would facilitate trade measures against its exports, and it objects to such trade measures, it need only decline to accept the amendment.

- After the date when the 106th instrument of acceptance is received, until the date when all Members have accepted the amendment, there would be two competing texts of the WTO Agreement. As an example, on 10 March 1955 the GATT Contracting Parties agreed to a Protocol amending the Preamble and Parts II and III of the GATT. On 7 October 1957, when this Protocol had been accepted by two-thirds of the contracting parties, the amendments entered into force for those who had accepted it. The last acceptance by a government that had been a contracting party before 7 October 1957 took place on 7 February 1969. During that period, there were two texts of the GATT in force for different contracting parties.[10]

Experience with WTO amendment process

Only one amendment to the WTO Agreement has been agreed. On 6 December 2005, the WTO General Council adopted by consensus a Decision to amend provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to make it easier for poorer countries to obtain generic versions of patented medicines through compulsory licensing of patents.[11] This amendment will replace a waiver decision of 30 August 2003, which waived provisions of the TRIPS Agreement and established a regime for such compulsory licensing.[12]

The amendment decision included a Protocol Amending the TRIPS Agreement, and opened this protocol for acceptance until 1 December 2007. As of November 2013, 46 Members and the EU on behalf of 29 other Members had accepted the Protocol.[13] Eight years after the amendment protocol was initially opened, the amendment still needs 31 more acceptances before it can enter into force.

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7 If a Member were expelled from WTO because of its non-acceptance of a WTO amendment to authorize climate change measures, it would then not be bound by WTO law and would be able to retaliate against the trade of any country taking climate change mitigation measures.

8 Vienna Convention on the Law of Treaties (1969), Article 30 (4)(b), as applied by Article 40 (4).

9 Vienna Convention on the Law of Treaties (1969), Article 40 (5).

10 Analytical Index of the GATT (6th ed., 1996), pp. 1006–07.

11 WT/L/641, Amendment of the TRIPS Agreement, Decision of 6 December 2005, http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.

12 WT/L/540 and Add.1, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of the General Council of 30 August 2003, http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

13 See http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.

Amendment of the WTO Agreement would not in itself provide legal security for climate change measures that would be inconsistent with the current WTO Agreement and would negatively affect other Members' exports. Any Member that cares more about its exports than about climate change can decide not to accept the amendment, free-ride on the climate change mitigation measures of others, and retain the ability to bring a WTO dispute against the climate change mitigation measures. The practical significance of such a dispute depends on the relative size of the parties to the dispute, but the possibility of such a dispute would undercut the signal that climate change mitigation measures give to governments, business, and stakeholders.

WAIVERS

How can WTO Members bridge the period before an amendment enters into force, and eliminate the free-rider problem? The waiver for TRIPS and public health shows a possible path.

Waivers are governed by Article IX: 3 and IX: 4 of the Marrakesh Agreement. Article IX: 3(b) requires that a request for a waiver concerning the agreements on trade in goods (including the GATT) must be submitted initially to the Council on Trade in Goods, for consideration during a period of not more than 90 days, and that the ultimate decision-maker is the Ministerial Conference/General Council. The Council on Trade in Goods operates under consensus decision rules, and under a 1995 General Council decision, decision-making on waivers is routinely done by consensus.[14] Article IX: 4 provides that the decision granting a waiver must state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver will terminate, and any waiver lasting more than one year must be reviewed annually.

Waivers of the GATT are also subject to special rules in the Understanding in Respect of Waivers of Obligations of the GATT 1994, which is part of the WTO Agreement. These rules require a request for a GATT waiver to describe the measures that a Member intends to take, the specific policy objectives that the Member seeks to pursue, and the reasons that prevent the Member from achieving its policy objectives by GATT-consistent means. These are the same issues that would need to be resolved in the course of advancing a proposal for amendment. The Council on Trade in Goods has dealt with many waivers since 1995,[15] sometimes quickly and sometimes over a substantial time period when trade concerns could not be resolved. When these waivers have been worked out in the Goods Council and passed forward to the General Council for decision, the General Council has quickly approved them, often as a package gaveled through in a matter of minutes.

As provided in Article IX: 4, all waivers are temporary, and all but one have stated a specific expiration date. The exception is the waiver on TRIPS and health, which states that it will terminate for each Member only on the date when an amendment to the TRIPS Agreement replacing its provisions enters into effect for that Member.[16]

A waiver has the effect of legally waiving the application of the stated WTO obligations. In compliance proceedings in the EC – Bananas III dispute, the Appellate Body found that "the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision. Its purpose is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement."[17] However, for measures that are within the terms of a waiver, the waiver provides legal certainty that there will be no finding of rule violation in a WTO dispute settlement proceeding brought by any WTO Member, and that the measure will not be subject to WTO-authorized trade retaliation; it also provides legal security for traders and investors depending on those measures. The waivers dealt with in the EC – Bananas III dispute permitted the EU to discriminate against banana imports from some Members, and thereby provided legal security for the operations of banana traders and exporters.

If WTO Members want to authorize discriminatory climate change mitigation measures, they can do so by agreeing on an amendment package coupled with a waiver that expires for each Member when the amendment package has entered into effect for that Member. The combination will eliminate the free-rider problems with the amendment process. However, the unavoidable political problems of obtaining such authorization remain.

Requesting and obtaining a waiver, like requesting and obtaining an amendment decision, involves a political process. Those Members that want a waiver or amendment for climate change mitigation measures will need to make the environmental, economic, factual, and political case for the specific measures they want to take, and persuade other Members to go along. Climate change clearly involves exceptional circumstances, but the proponents of a waiver will still have to define the exact measures that would be covered within the scope of the waiver, and they would

14 WT/GC/M/8, section 3; WT/L/93, Decision-Making Procedures under Articles IX and XII of the WTO Agreement, adopted on 15 November 1995.

15 For list, see Analytical Index of the WTO (3rd ed., 2011), p. 93; http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#fntext492.

16 WT/L/540, para. 11; see note 12.

17 Appellate Body Report, *EC — Bananas III (Article 21.5 — Ecuador II)/EC—Bananas III (Article 21.5 — US)*, para. 382.

need to satisfy other Members that the proponents cannot achieve their policy objectives by WTO-consistent means.

The proponents would also need to actively engage with the concerns of other Members regarding the trade impact of the measures that the waiver would cover. This process cannot be skipped or scanted. WTO Members' concerns regarding the impact of climate change measures on trade, jobs, and growth in their countries are real, and cannot be wished away. The WTO provides a place where these trade concerns can be aired and resolved.

INTERPRETATIVE UNDERSTANDINGS

Proponents of policy space for climate change mitigation measures may also consider seeking an authoritative interpretation of the WTO Agreement, under Article IX: 2 of the Marrakesh Agreement. Article IX: 2 gives the Ministerial Conference and the General Council the authority to adopt such interpretations. The Uruguay Round negotiators, who had experience with the power of the GATT Contracting Parties to take "joint action" under Article XXV of the GATT, created a similar power for WTO Members.

This power is limited. First, Article IX: 2 "shall not be used in a manner that would undermine the amendment provisions in Article X." As the Appellate Body has observed, "such multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content."[18] Authoritative interpretations do not make new law and cannot impose new obligations. Second, a decision to adopt an interpretation of this sort must be taken by vote, but many WTO Members oppose any use of voting for decision-making; moreover, this decision must be taken by a three-fourths majority of all WTO Members (currently 120 votes). Third, Article IX: 2 requires that any proposal for an authoritative interpretation must first be recommended by the Council overseeing an agreement. A proposal for an interpretation of the GATT or the SCM Agreement would need to first go through the Council on Trade in Goods, and as discussed above, the Goods Council makes its decisions by consensus. The consensus process could take substantial time, but would provide an opportunity for all sides to resolve any concerns regarding the legal impact that an understanding might have in the real world.

Committees in the WTO have also adopted decisions interpreting and applying the obligations within their jurisdiction. The Committee on Technical Barriers to Trade (TBT), for instance, has adopted a series of decisions and recommendations, including a 2000 decision on principles for the development of international standards.[19] This decision set out, among other things, principles that should be observed in standardizing activities, and provided that membership of an international standardizing body should be open on a non-discriminatory basis to the relevant bodies of at least all WTO Members. All of these decisions have been adopted by consensus because the rules of procedure of all WTO Committees call for decision-making by consensus and not by voting.

If an authoritative interpretation is not an amendment, and not a waiver, then what is its legal status and what weight will it be given in a WTO dispute? The rules of treaty interpretation in the Vienna Convention on the Law of Treaties, which guide the interpretation of the WTO Agreement, provide that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" shall be "taken into account" when interpreting a treaty.[20] A "subsequent agreement" in this sense is a "further authentic element of interpretation to be taken into account together with the context" of a treaty.[21]

In the dispute on US – Tuna II (Mexico), the Appellate Body agreed that the TBT Committee's 2000 decision referred to above qualifies as such a "subsequent agreement" because the decision was adopted by the TBT Committee after conclusion of the TBT Agreement, the Committee's membership comprises all WTO Members, and the decision was adopted by consensus; in addition, the decision was developed in relation to specific TBT Agreement provisions, to clarify and strengthen the concept of international standards, and to ensure the effective application of the TBT Agreement. The extent to which this decision informs the interpretation and application of a TBT provision depends on the extent to which it bears specifically on that provision.[22] The Appellate Body then used the principles in this decision as aids in interpreting the TBT Agreement. It determined that a particular standard for certification of "dolphin-safe" tuna did not qualify as an "international standard" because the body that made this standard was not open to all WTO Members.[23]

18 Appellate Body Report, *EC — Bananas III (Article 21.5 — Ecuador II)/EC— Bananas III (Article 21.5 — US)*, para. 383.

19 Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, reprinted in WTO document G/TBT/1/Rev.10, "Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995," 9 June 2011, pp. 46-48.

20 Vienna Convention on the Law of Treaties (1969), Article 31 (3) (a).

21 Appellate Body Report, *EC — Bananas III (Article 21.5 — Ecuador II)/ EC— Bananas III (Article 21.5 — US)*, para. 390 (citing the "Report of the International Law Commission on the Work of its 18th Session, Geneva, 4 May-19 July 1966" (1966) II Yearbook of the International Law Commission 172, at 221, para. 14).

22 Appellate Body Report, *US – Tuna II (Mexico)*, paras. 371–72.

23 Appellate Body Report, *US – Tuna II (Mexico)*, paras. 396–99.

The Tuna example shows that a consensus-based interpretation adopted by a WTO Committee can have a clear impact on outcomes in disputes. Debate and discussion in WTO institutions, and consensus-based decision-making, provide means for the climate community to engage on issues where it believes more policy space is needed, persuade public opinion in the WTO of the importance of the climate issues at stake, answer the practical trade concerns of others, and achieve consensus decisions that affect the interpretation of WTO obligations.

PLURILATERAL AGREEMENT OR UNDERSTANDING

Governments could also reach agreement on how they will interpret WTO rules in trade relations with each other. Nothing prevents WTO Members from entering into such an agreement, although its impact would depend on whether its parties included major players in the WTO.

WTO non-discrimination rules would still apply to any advantages under such an agreement. For instance, a club of like-minded countries could agree that they will interpret and apply the SCM Agreement's definition of subsidies in a specific manner that is favorable to the scale-up of renewable energy. However, if the application of this definition provides more favorable countervailing duty treatment to participants in the agreement, any non-participant that is a WTO Member can demand equal treatment under most-favoured nation (MFN) rules.[24]

A plurilateral agreement of this sort stands apart from the WTO, and cannot be blocked by one WTO Member that prevents consensus. On the other hand, such an agreement has no stable legal relationship with the WTO unless it is added to Annex 4 of the WTO Agreement (a decision which, under Article X: 9 of the Marrakesh Agreement, can only be taken by consensus). In addition, WTO dispute settlement procedures apply only with respect to the "covered agreements" listed in Appendix I of the WTO Dispute Settlement Understanding. This list can be amended, but only by consensus.[25]

LITIGATION

The cost and delay involved in achieving change through negotiation leads Members to try to make new rules through litigation (VanGrasstek 2013). However, the mandate of the WTO's dispute settlement mechanism, in Article 3.2 of the WTO's Dispute Settlement Understanding, is "to preserve the rights and obligations of Members under the covered agreements;" dispute settlement recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements." WTO's dispute settlement mechanism does not make law, but interprets legal instruments.

Litigation also has practical limitations as a strategy. It is risky and may be unpredictable, as the outcome of a case depends on the particular facts and circumstances. Bad facts may create bad results.

MORATORIUM ON DISPUTE SETTLEMENT

WTO Members have taken action to alter the effect of the WTO Agreement by adopting moratoriums on dispute settlement. The first example of such a moratorium, in the Peace Clause in Article 13 of the Agreement on Agriculture, provided that until 2004 certain measures would be exempt from claims based on provisions in the SCM Agreement or the GATT. Article 63 of the TRIPS Agreement provided for the theoretical possibility of dispute settlement in respect of "non-violation nullification or impairment" of rights under the TRIPS Agreement, but Article 63:2 provided a five-year moratorium on such disputes, with the option of extension, and this moratorium has been periodically extended.[26] In the WTO negotiations on basic telecommunications services, the negotiators agreed to disagree regarding the interface between MFN rules and accounting rates (charges for terminating international telecommunications traffic), and agreed to a non-binding understanding that the application of accounting rates "would not give rise to action by Members under dispute settlement under the WTO." [27]

The WTO could adopt a similar dispute settlement moratorium concerning some or all climate change mitigation measures. It is not clear whether such a moratorium would have an iron-clad effect or whether

24 GATT Panel Decision, *US – Denial of MFN Treatment as to Non-rubber Footwear from Brazil* (1992), para. 6.8: "the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I: 1."

25 Marrakesh Agreement, Article X: 8.

26 The most recent extension took place through a Ministerial Decision of 17 December 2011 (WT/L/842, TRIPS Non-Violation and Situation Complaints), directing the TRIPS Council to continue examining the scope and modalities for such complaints and providing that "It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement." A further extension was proposed for the Bali Ministerial Meeting.

27 S/GBT/4, Report of the Group on Basic Telecommunications, 15 February 1997. The Panel Decision on *Mexico – Telecoms* (para. 7.125) notes the Chairman's statement in presenting this report on 15 February 1997, that "this was merely an understanding, which could not and was not intended to have binding legal force. It therefore did not take away from Members the rights they have under the Dispute Settlement Understanding; it was merely intended to give Members who had not taken MFN exemptions on accounting rates some degree of reassurance." The Panel found that "according to its own terms, the Understanding is explicitly non-binding, and concerns only procedural rights to dispute settlement, not substantive obligations" (Panel Decision on *Mexico – Telecoms*, para. 7.126).

doctrines of estoppel could be invoked to prevent a Member from making arguments in a dispute that contradict statements it has earlier formally endorsed, or challenging measures where it has explicitly promised it would not do so.[28]

As in the case of the other possibilities for adapting WTO rules, the proponents would have to make the case for the urgency of action to mitigate climate change, the necessity of the Member actions contemplated, and why these actions cannot be taken in a clearly WTO-consistent manner. The proponents would also need to engage with and resolve the concerns of other Members regarding the impact on them of the proposed climate change mitigation measures. In order to provide legal certainty, a moratorium decision would need to clearly state an intention not to challenge certain measures, and clearly describe the measures not to be challenged.

UNILATERAL ACTION

As discussed above, all known methods of adjusting WTO rules take a substantial period of time, engagement in negotiations with other WTO Members, and political process. It would likely take many years to achieve agreement on a permanent change in WTO rules via amendment, and to obtain enough acceptances for the amendment to enter into force. Climate change would move forward steadily during that time.

If climate change is so large a threat to human economic and other interests that mitigation measures must be taken now—and carbon leakage from imports is significant enough to take action now without waiting for adjustment in WTO rules—then some might consider there is a rational case for civil disobedience to WTO rules. A government for which climate change mitigation is paramount may consider moving ahead and implementing its measures, defying the trade rules, and paying the price of trade retaliation.

But unilateral trade action on a large scale would be profoundly destructive to the trade regime that has been built at huge cost over many years. It would also likely be costly to the party taking unilateral action, and is not an option realistically available to smaller players.

CARBON TAX

If it is not feasible to adjust WTO rules immediately to accommodate WTO-inconsistent climate change mitigation or renewable energy measures, it would be useful to look again at the ways in which WTO rules already now provide flexibility for such measures. It would also be useful to prioritize those climate change mitigation measures that are relatively WTO-compatible.

Thus, if there is a desire for measures to increase the price of carbon, and to ensure against carbon leakage through border adjustment measures, carbon taxes rather than cap and trade systems deserve serious consideration. If there is a desire to justify border measures that violate national treatment rules, it may be desirable to limit WTO-inconsistent measures to those that clearly address carbon leakage in a non-protectionist manner, and can be justified under Article XX (g) and the chapeau of Article XX.

28 The *Mexico – Telecoms* panel found that the understanding in that case did not apply to the substance of the claims at issue. Similarly, in EC – Aircraft, the panel found that a 1992 agreement did not explicitly agree that certain measures were lawful nor waive rights to challenge those measures (para. 7.104). However, in *EC – Bananas III, Article 21.5 (II) (Ecuador) – Article 21.5 (II) (US),* the Appellate Body found that "if a WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it cannot be regarded as failing to act in good faith if it challenges that measure" (para. 228).

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