

Book reviews

Trade and Climate Change: A Report by the United Nations Environment Programme and the World Trade Organization by UNEP and the WTO. . . Steve Charnovitz
Global Warming and the World Trading System by Gary Clyde Hufbauer, Steve Charnovitz, and Jisun Kim. . . . Daniel C. Esty
Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory by Erich Vranes Ludivine Tamiotti

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Trade and Climate Change: A Report by the United Nations Environment Programme and the World Trade Organization

by UNEP and the WTO

Geneva: WTO, 2009

On 26 June 2009, the World Trade Organization (WTO) and the United Nations (UN) Environment Programme (UNEP) launched their new joint Report *Trade and Climate Change* [WTO–UNEP Report].¹ The Report raised eyebrows around the world for several reasons. To start with, the project had not been announced in advance and neither organization posted a draft report on its website for public comment. Also, the partnership with UNEP was surprising as that Programme has been kept away from the center of international efforts to address greenhouse gas (GHG) emissions. Most importantly, however, the Report received attention because of how its conclusions were characterized by the media. Among the news headlines were:

- WTO signals backing for border taxes²
- WTO: some trade limits OK to stop climate change³
- WTO Supports Climate Protection Goals⁴
- WTO–UNEP report gives the nod – sort of – to carbon border taxes⁵
- WTO admits some trade limits may be necessary to stop climate change⁶
- UN, WTO call for trade shift to halt climate change⁷

1 WTO, ‘WTO and UNEP launch a report explaining for the first time the connections between trade and climate change’, 26 June 2009, Press/559. UNEP issued an identical press release on the same day, available at www.wto.org/english/news_e/pres09_e/pr559_e.htm.

2 *Financial Times*, 25 June 2009 (by Fiona Harvey).

3 Associated Press Financial, 26 June 2009.

4 Qatar News Agency, 26 June 2009.

5 Globalwarming.org, 26 June 2009 (by Fran Smith), available at www.globalwarming.org/2009/06/26/wto-unep-report-gives-the-nod-%E2%80%94-sort-of-%E2%80%94-to-carbon-border-taxes/.

6 *Gaea Times*, June 26, 2009 (by Frank Jordans), available at <http://blog.taragana.com/n/wto-admits-some-trade-limits-may-be-necessary-to-stop-climate-change-92761/>.

7 EurActiv.com, 1 July 2009, available at www.euractiv.com/en/climate-change/un-wto-call-trade-shift-halt-climate-change/article-183687.

- Trade barriers that look green⁸
- WTO rules can be used to fight climate change: report⁹

Coincidentally, on the same day that the WTO and UNEP released their Report, the US House of Representatives approved new climate change legislation that includes trade measures against non-cooperating countries (Mufson, 2009).

In the weeks since the release of the WTO–UNEP Report, the findings in the Report have become part of the political debate. For example, in an editorial on ‘Trade and Climate’, the *New York Times* noted that ‘the World Trade Organization has suggested that levying taxes at the border on the carbon content of imports would be acceptable if they are devised properly’.¹⁰ In Washington, a letter to President Barack Obama from ten US Senators expressed ‘strong support’ for the inclusion of ‘a border adjustment mechanism’ in pending climate legislation, and noted that: ‘Recently, the World Trade Organization (WTO) and the United Nations Environment Program issued a report confirming that WTO rules do not override environmental measures.’¹¹

As a result of these developments, some important questions arise. First, is the Report truly a product of the two international organizations *qua* organizations, or are the actual authors secretariats or individuals? Second, if the Report emanates from the two organizations, is it intended to have legal effect as an agreement between those organizations?¹² Third, why did the WTO and UNEP launch this research project when they did?

On the question of provenance, the answer is found on the second inside page of the Report which presents two disclaimers. The first disclaimer states that: ‘Any opinions reflected in this publication are the sole responsibility of the World Trade Organization (WTO) Secretariat.’ The second disclaimer states that ‘the views expressed do not necessarily represent the decision or the stated policy of the United Nations Environment Programme’. Moreover, the inside title page lists three persons from each organization who are the lead authors.¹³ So the answer to the first question is that the Report is not authored by either of the organizations.¹⁴ Consequently, for the second question the answer is that the Report is not an agreement of the two organizations and does not have any legal effect.

⁸ *Globe and Mail*, 2 July 2009, available at www.theglobeandmail.com/search/?query=trade+barriers+that+look+green. This editorial notes that the Report ‘is an opinion of the WTO secretariat as well as the UNEP, and is thus not any kind of binding ruling, but it is a good guide to what the WTO might decide in future disputes that involve environmental policies’.

⁹ United News of India, 4 July 2009.

¹⁰ ‘Trade and Climate’, *New York Times*, 19 July 2009, p. 9, available at www.nytimes.com/2009/07/19/opinion/19sun1.html?_r=2.

¹¹ Letter from Senator Sherrod Brown *et al.* to President Barack Obama, 6 August 2009, available at http://brown.senate.gov/imo/media/doc/ClimateChange_Manuf.pdf. Cash (2009).

¹² For a brief discussion of the normativity of international agreements signed by the WTO with other international organizations, see Mavroidis (2008: 435). For a comprehensive treatment of lawmaking by international organizations, see Brölmann (2007).

¹³ From the WTO: Ludvine Tamiotti, Robert Teh, and Vesile Kulaçoğlu. From UNEP: Anne Olhoff, Benjamin Simmons, and Hussein Abaza.

¹⁴ Obviously, only humans can write reports, not organizations, but the question is whether the Report is a policy position adopted by an international organization.

But those simple answers are not satisfactory because the architects of the Report may have been seeking to blur the issue of paternity. Consider the following: the first title page of the Report designates it as the 'WTO–UNEP Report' and contains the logos of the two agencies. The second title page says it is a report 'by' the Organizations. The press release issued by the two organizations speaks of the WTO and UNEP and does not mention the fine print of the disclaimer. Clearly, the manner in which the Report was packaged and presented led to the widespread assumption in the press and among the public that the Report represented the stated policy of the two organizations.

So that leads to the third question: why this Report? I have no inside information, but here is what I think has been going on. The Report presented an opportunity for Pascal Lamy, the WTO Director-General, and Achim Steiner, the Executive Director of UNEP, to collaborate on the increasingly important intersection of climate and trade. Although new scholarship continues to be produced on trade and climate, the linkage has been too sensitive to discuss within meetings of the UN Framework Convention on Climate Change (UNFCCC). So Lamy and Steiner could reasonably have believed that an official report calling attention to the linkage would provide value to policymakers and stakeholders. Moreover, both organizational executives, who have been somewhat on the fringes of climate change policy, may have seen the Report as a way to insinuate themselves, and their organizations, into the mainstream of the forthcoming Copenhagen climate negotiations. Besides governments, these negotiations will include attendees from key international organizations such as the Intergovernmental Panel on Climate Change (IPCC), the World Meteorological Organization, the Organisation for Economic Co-operation and Development (OECD), the World Bank, and the Global Environment Facility.

Clearly, Lamy is interested in the climate–trade linkage and has not been shy in publicly discussing it. For example, at the Bali conference on climate change in December 2007, Lamy analogized WTO rules to a 'toolbox' and suggested that a forthcoming climate agreement 'must then send the WTO an appropriate signal on how its rules may best be put to the service of sustainable development; in other words, a signal on how this particular toolbox of rules should be employed in the fight against climate change'.¹⁵ Indeed, this is just one of many speeches in which Lamy has opined on how the WTO can promote climate change goals.¹⁶

While it is always risky to impute motives, I infer that behind Lamy's speeches is the idea that the WTO will benefit if that Organization appears greener to the public and that climate negotiations will benefit from a signal that WTO rules are not an excuse for inaction on climate. Lamy may also believe that multilateral progress on climate could help to unlock multilateral progress on the Doha Agenda. Indeed, in their joint press release, Steiner and Lamy urge 'an equitable and decisive deal' at Copenhagen and also 'urge nations to conclude the Doha trade round which includes opening trade in environmental goods and services, a

15 WTO, 'Lamy: Doha could deliver double-win for environment and trade', 9 December 2007.

16 For example, see WTO: 'The "greening" of the WTO has started, Lamy', 24 October 2007; 'A consensual international accord on climate change is needed – Lamy', 29 May 2008; 'Lamy: Global problems do not respond to unilateral fixes – Copenhagen must be our focus', 26 June 2009.

complementary track towards reducing greenhouse gas emissions to scientifically-defensible levels'.¹⁷

While Steiner has not given speeches about trade and climate, UNEP has conducted research on trade and environment linkages for over 15 years. Because of its weak organizational footing, UNEP has always had a problem in getting respect and attention, and perhaps Steiner appreciated an opportunity to raise UNEP's profile by partnering with the WTO Secretariat. Following the release of the WTO–UNEP Report, UNEP published a collection of essays by distinguished commentators on trade and climate.¹⁸

Although either the WTO or UNEP could have produced a study on trade and climate alone, the collaboration probably produced a stronger work product. Moreover, the optics of the partnership serve the political interests of both chief executives. Lamy and Steiner are comfortable in making the statement in the Foreword to the Report that 'The WTO and UNEP are partners in the pursuit of sustainable development' (p. v). In my opinion, this claim of a partnership between the organizations is dubious.

Is there any harm in a little bit of identity theft in publishing a Report with an ostensible authorship by international organizations when in fact it is only attributable to civil servants? In my view, there is harm. Lamy and Steiner apparently thought that the Report would carry more authority if it had the imprimatur of the WTO and UNEP than if it had been published under the name of the six individuals listed in footnote 13 of this review. In other words, give the appearance of declaring the public will of each of the Organizations without technically doing so. The harm is the public confusion that results and the avoidance of the internal accountability mechanism of gaining governmental approval for a normative policy statement.

Unfortunately, this is not the first time this year that a WTO position statement has lacked legal legitimacy. For example, in May 2009, the WTO joined three other international organizations in making a joint statement on the H1N1 virus.¹⁹ The statement avers that there is no sanitary justification for the imposition of trade measures on pigs and pig products. WTO watchers were surprised to see the WTO Secretariat signing on without the legal accountability of first seeking approval by the WTO General Council. A few weeks after the release of the WTO–UNEP Report, Lamy publicly admitted that 'there are limits to what Directors General can achieve in what are member-driven organisations, even when they join forces in partnership'.²⁰

Survey of the four-part Report

With that context as preface, let me now turn to the substance of the Report. The Report is divided into four parts covering climate change generally, trade and climate, multilateral work on climate change, and the WTO implications of national climate

17 'WTO and UNEP launch a report explaining for the first time the connections between trade and climate change', WTO Press/559, 26 June 2009.

18 UNEP (2009).

19 WTO News Item, Joint FAO, OIE, WHO, and WTO Statement A(H1N1) virus, 2 May 2009.

20 WTO, 'Lamy urges multilateral cooperation to advance public health "in the real world"', 14 July 2009.

policies. I will discuss each part of the Report, and then discuss the broader significance of the Report.

Part I of the Report provides an overview of current knowledge about GHGs and global warming. UNEP and the WTO do not purport to be presenting any new data or modeling. Rather, the Report seeks to summarize a large amount of technical information based largely on the work of the IPCC, the International Energy Agency, the World Bank, and US agencies. A major theme in this Part is to distinguish between developing and developed countries, and the Report explains that ‘global warming is a concentration problem as well as an emission problem’ (p. 4).²¹ The reader learns that developing countries are responsible for around 23% of historical CO₂ emissions, two-thirds of new GHG emissions, and have a higher growth rate of CO₂ emissions (pp. 5–6). On the other hand, per capita emissions in industrialized countries are four times higher on average than in developing countries. The Report discusses various scenarios for adverse climate impact and notes that developing countries will generally be the most adversely affected. In addition, Part I spotlights the potential impact on particular sectors, such as agriculture, tourism, fisheries, and transport infrastructure.

This Part also discusses the use of government policy to address climate change through mitigation and adaptation. Mitigation reduces the rate and magnitude of climate change; adaptation increases the ability of people to cope with the consequences of climate change. The Report emphasizes the role of technology in both mitigation and adaptation. The Report also discusses ‘pathways’ for the transfer of technology and notes the continuing debate on whether the protection of intellectual property rights ‘impedes or facilitates the transfer of technologies to developing countries’ (p. 44). The impact of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is not discussed in detail.

Overall, Part I provides a valuable synopsis of what the climate problem is and the basic strategies in use to address it. The most significant weakness in Part I is inattention to the efficiency question. That is, is the allocation of resources to counter climate change the best use of incremental spending by governments to promote human development? The most well-known commentator who insists on the need for comparative analysis is Bjorn Lomborg, and it is disappointing that WTO–UNEP Report contains no reference to that critical point of view. Another weakness is the inattention to nuclear technology, which is mentioned on only one text page of the 142-page Report.

Part II of the Report examines the relationship between climate and trade and is based on ‘available economic literature’ (p. 48) and other secondary sources. (One important piece of literature not cited is the WTO Secretariat’s study, *Trade and Environment*, which was published a decade earlier and appears to serve as a template for the 2009 Report.²²) The Report explains the scale, composition, and technique effects of trade, and points out that most studies indicate that more open trade will lead to increased CO₂ emissions. The Report also suggests that there is no

21 The division of carbon emissions into stock and flow was sketched out by Jagdish Bhagwati in a paper prepared in 2000 under the auspices of the Global Environment and Trade Study (Bhagwati, 2000: 488–489). The bibliography of the WTO–UNEP Report, unfortunately, omits Professor Bhagwati’s excellent paper.

22 See WTO (1999). For a review of that study, see Charnovitz (2000).

overall positive relationship between higher income and lower CO₂ emissions (or at least not in non-OECD countries). Another finding is that most international trade is transported by sea and that shipping has the best carbon emission efficiency among the various modes of transport. With respect to agriculture, the Report notes that reducing subsidies could make international agricultural trade a more effective tool for adaptation.

Part III of the Report provides an overview of 'Multilateral Work Related to Climate Change'. The UNFCCC and its mechanisms are summarized, and the Report notes that most industrialized countries will not be able to meet their Kyoto Protocol targets. The Montreal Protocol on ozone is summarized too.

Also discussed in Part III is the work of the WTO. The Report contends that the WTO Agreement 'established a clear link between sustainable development and trade opening in order to ensure that market opening goes hand in hand with environmental and social objectives' (p. 80). This is a baffling statement because WTO rules certainly do not require governments to ensure that trade liberalization is consonant with the environment and social objectives of governments or other stakeholders.

The Report provides a summary of the environment-related issues in the Doha negotiations. The liberalization of environmental goods and services is covered in detail, and the Report also notes the ongoing negotiations to ensure a harmonious coexistence between WTO rules and specific trade obligations in multilateral environmental agreements. The Report suggests that a successful outcome to these negotiations will reinforce the relationship between the trade and environment regimes. In discussing ongoing WTO work, the Report cites four negotiating documents that are not available for download from the WTO website.²³ This is a disturbing reminder of the continuing lack of transparency at the WTO.

Part IV of the Report addresses 'National Policies to Mitigate, and Adapt to, Climate Change, and their Trade Implications'. The Report provides an overview of carbon taxes, energy taxes, emission trading, the allocation of emission allowances, and off-sets. Although the authors claim that the auctioning of emission allowances would 'be more in keeping with the "polluter pays" principle' (p. 94), no analysis is offered as to what the polluter pays principle is, what it says about transition subsidies, and whether the principle is applicable to transborder pollution.

This part of the Report focuses in on the problems of 'competitiveness' and 'carbon leakage'. According to the Report, if environmental policies in various countries impose different levels of costs on competing firms, then there will be a price advantage for firms in countries with less stringent environmental policies, leading to a gain in competitiveness (p. 98). The Report defines 'carbon leakage' as the relocation of energy-intensive industries to countries with weaker environmental policies, and contends that there are two risks: first, that the global effectiveness of carbon-constraining policies can be endangered if some countries attract carbon-intensive industries; and, second, that there is a 'risk of job relocation resulting from the relocation of industries to countries where climate mitigation policies are less costly' (p. 99). The Report then argues that free allocation of emission allowances 'may not be sufficient to prevent carbon leakage, and the question that then arises is whether the concerns over carbon

²³ WTO-UNEP Report, p. 86, n. 136, 138, 143.

leakage and competitiveness impact warrant government intervention in the form of border adjustments' (p. 100). In my view, the Report's analysis conflates the environmental concept of carbon leakage with the perennial protectionist argument for a level playing field in regulation. The Report here can be read as endorsing the legitimacy of using trade measures to prevent 'job relocation' arising from tighter environmental regulation. I wonder if that is what the WTO Secretariat meant to say.

Next, the Report discusses 'border measures' and says that they include border tax adjustments, 'border adjustments', and other border measures. The Report uses the term 'border adjustment' to mean a requirement that an importer hold (or purchase) an emission allowance on imports from countries that do not impose sufficient emission reduction obligations on their industries (pp. 100–101).²⁴ The Report illustrates some possibilities for 'other border measures' namely, antidumping and countervailing duties linked to climate and a tax on the emissions from transporting goods in international trade (p. 101). With respect to a border adjustment, the Report notes the practical difficulty of devising a measure that 'responds to the concerns of domestic industries while still contributing to the wider goal of global climate change mitigation' (p. xix). Although the Report does not endorse any of these measures, a quick reader might misunderstand that.

Another section in Part IV discusses how the rules of the General Agreement on Tariffs and Trade (GATT) apply to border measures. The Report explains that if a 'border measure related to climate change is found to be inconsistent with one of the core provisions of the GATT, justification might nonetheless be sought under the general exceptions to the GATT (i.e. Article XX) provided that two key conditions are met' (p. xix). That statement is correct, and the Report provides a good summary of the caselaw under the environmental exceptions in Article XX.²⁵

On the other hand, the Report states that 'WTO case law has confirmed that WTO rules do not trump environmental requirements' (p. xix). In my view, that is an overstatement. An environmental requirement as perceived by a government is not exempt from being trumped by WTO rules. But, so far under WTO caselaw, no environmental requirement was ever overridden merely because it was too restrictive of trade.

The next section discusses financial mechanisms to promote climate-friendly goods and technologies. The Report provides an inventory of subsidies and tax preferences in use, and then summarizes WTO rules on subsidies, agricultural support, and intellectual property. Although the Report does not include an analysis of how these rules might govern climate subsidies, it does offer the intriguing suggestion that TRIPS is relevant to suppressing acts of unfair competition, such as misleading representations about the positive environmental qualities of products (p. 117).

The final area covered in the Report is technical standards. The Report notes that in recent years, there has been a proliferation of technical requirements related to

²⁴ The Report confuses the debate by referring to a regulatory requirement on importers as a 'border adjustment' as if this were a legitimate category under WTO law distinguishable from a border tax adjustment. On the other hand, the Report correctly distinguishes between border taxes and border tax adjustments (p. 103), a distinction that is often confused by commentators.

²⁵ The Report, errs, however, in stating that the GATT *Tuna* panel of 1991 held that protecting dolphins had 'been found to fall' within the Article XX(b) and (g) exceptions (p. 107). In reality, that notorious GATT panel made no such finding in holding that the US import ban was not justified by GATT Article XX. *US–Tuna*, BISD 39S/155, paras. 5.26, 5.29, 5.32, 5.34 (unadopted).

climate-friendly goods and energy efficiency.²⁶ The Report discusses the legal applicability of the Agreement on Technical Barriers to Trade (TBT), and here the discussion is necessarily general because there has been little WTO jurisprudence in the TBT Agreement. One exception is the discussion in the Report about the unadopted GATT panel decision, *United States–Taxes on Automobiles*. The Report argues that this pre-WTO decision is relevant to the national treatment requirement in the TBT Agreement.

Looking ahead, the Report endorses ‘a successful conclusion to the current negotiations on both climate change and trade opening’ (p. 141), and notes that finishing up WTO negotiations on market opening for environmental goods and services will help to improve access to climate-friendly goods and technologies. Yet the Report does not offer suggestions for how the tensions between industrial and developing countries in both of these negotiations should be resolved. Nor does the Report push the envelope by assessing whether there might be tradeoffs between the Doha Round and the Copenhagen talks.

Taken as a whole, the Report provides value. Moreover, UNEP and the WTO are distributing the Report electronically without charge so as to better serve the public. By contrast, other international agencies that publish many reports, such as the OECD and the World Bank, typically ask the public to pay for electronic downloads.

The last issue to be covered is an assessment of the WTO Secretariat’s position on climate change. At the beginning of this review, I quoted several news headlines regarding the Report. Certainly all of them are wrong insofar as they imply a legal stance by the WTO. But are the quotations correct with respect to the Report itself?

In my view, many are not. The Report does not back border taxes, does not bless some trade limits, does not suggest employing WTO rules to fight climate change, and does not admit that some trade limits may be necessary. On the other hand, the Report does not condemn any possible use of trade measures in response to foreign environmental policies. Nor should it.

To me, the most positive feature of the WTO–UNEP Report is something that may slip by many readers, namely that the Report shows the intellectual growth of the WTO Secretariat. In its earlier incarnation as the GATT Secretariat, the Secretariat’s attitude about the trade–environment linkage was less sophisticated and more trade-centric. I can still remember the shock in the environmental policy community when the GATT Secretariat published its study on ‘Trade and the environment’ in 1992 that presented a simplistic understanding of the use of trade measures for environmental purposes (GATT, 1992).²⁷ For example, the GATT study claimed that ‘In principle, it is not possible under GATT’s rules to make access to one’s own market dependent on the domestic environmental policies or practices of the exporting country’ (GATT, 1992: 23). And in one of its oft-quoted passages, the Secretariat argued: ‘If the door were opened to use trade policies unilaterally to offset the competitiveness effects of

²⁶ The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) is discussed in Part IV only in passing. The Report contends that ‘the SPS Agreement would help countries align their response to new types of pest and disease outbreaks as a result of climate change’ (p. 88), but no explanation is offered as to how SPS rules accomplish such positive integration. In my view, SPS rules do not.

²⁷ I do not mean to suggest that the GATT study was uniformly bad. Some of the economic analysis was thoughtful, including the discussion of global warming (GATT, 1992: 34–35). For a critique of the arguments in the GATT study as to GATT law, see Charnovitz (1992).

different environmental standards, or to attempt to force other countries to adopt domestically-favoured practices and policies, the trading system would start down a very slippery slope. Countries are not clones of one another, and will not wish to become so – certainly not under the threat of unilateral trade measures’ (GATT, 1992: 22).

The 1992 GATT Secretariat study was published at a time when environmentalists around the world were just beginning to worry about how trade rules might interfere with environmental policies. The tone-deaf Secretariat study was exactly the wrong message at the wrong time and contributed to the GATT’s anti-environmental reputation. That bad rap has taken years to turn around by friends of the WTO. In his most recent speech about climate change titled ‘Climate First, Trade Second – GATTzilla is Long Gone’, Pascal Lamy has seemingly declared that his project to cure the WTO’s bad environmental reputation has now succeeded.²⁸

Happily, the WTO–UNEP Report abandons the sterile legal analysis of the 1992 GATT study, which is not even listed in the bibliography of the 2009 Report. In collaborating with UNEP, the WTO Secretariat leverages its own expertise to produce a thoughtful presentation on the complex issues that lie at the intersection of two regimes. With this Report in the public domain, governments may now find it easier to acknowledge and address the trade dimension of climate policy.

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²⁸ WTO, ‘Lamy underscores the urgency of responding to the climate crisis’, 2 November 2009.