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A 'Realist' Perspective: Limitations to the Role of the WTO Members in Addressing Trade-Related Climate Change Concerns

Frances Nwadike

Abstract

Climate change exists and threatens to have negative consequences on the environment. Fortunately, the international community has recognised this peril and taken steps to address it, including obtaining commitments from States to address climate change concerns within their jurisdictions. However, some measures proposed or adopted have an impact on trade, and, in some cases, breach trade rules. This has led to calls for WTO members to facilitate climate action within the trade system by either amending or establishing new trade rules. Nonetheless, it is unlikely that WTO members will achieve such changes due to the WTO's complex negotiation process and delays in decision making. This paper adopts the theory of realism to explain why such limitations exist, and how they hinder climate action within the trade system. Based on this, it recommends that WTO judicial bodies, specifically WTO panels and the Appellate Body, could address trade-related climate change concerns where WTO members fail to do so.

Introduction

Climate change exists and threatens to have adverse environmental impacts. Examples of such impacts include heatwaves, flooding, melting of glaciers, and an increase in vector-borne diseases.¹ Fortunately, the international community has recognised this peril and taken steps to address it, including listing climate action as a United Nations (UN) sustainable development goal and establishing the Paris Agreement on climate change.² The Paris Agreement encourages states to adopt measures that aim at 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels'.³ In accordance with this objective, State governments

¹ United Nations Framework Convention on Climate Change, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries' (UNFCCC 2012) ch4

<<https://unfccc.int/resource/docs/publications/impacts.pdf>> accessed 23 August 2019.

² Paris Climate Agreement (adopted 12 December 2015, entered into force 4 November 2016) 54113 (UNFCCC).

³ *ibid*, art 2.

are required to facilitate a transition to a low carbon global economy.⁴ One main reason for such an obligation is the concern that, because renewable energy projects require large amounts of financial investment, firms may be unwilling to invest in or may under-invest in such projects due to the large amount of funds required.⁵ As a result, some State governments may need or want to provide financial contributions or flexible rules as a way of encouraging private investment. However, such intervention may breach some rules established by the World Trade Organisation (WTO). For example, in the *Canada-Renewable Energy/Feed-In-Tariff* case,⁶ the European Union and Japan alleged that the Feed-In-Tariff (FIT) programme in Ontario, Canada, constituted a subsidy that violated the relevant provisions in the Agreement on Subsidies and Countervailing Measures (ASCM). This case raises concerns that the ASCM and possibly other WTO rules may hinder climate action. As a result, some academics argue that relevant WTO agreements should be amended to reflect climate action objectives and facilitate global climate action.⁷

WTO members, through their representatives in the ministerial conference/general body (also known as the WTO political body), have the primary authority to make decisions relating to the multilateral trade system. This decision-making authority covers all matters relating the trade system, including the amendment and/or establishment of multilateral trade agreements. With regard to trade-related climate change concerns, several academics agree that it is unlikely that WTO members will amend or establish trade rules to facilitate climate action under the system.⁸ This is due of the system's complex negotiation process and delay in decision making, which could frustrate proposals for climate action. Using the international relations theory of Realism, this paper explains why these limitations exists, and thus frustrate much-needed climate action in the trade system. Further, it recommends that the WTO's judicial bodies could address climate change where WTO members fail to do so.

⁴ Liesbeth Casier and Tom Moerenhout, 'WTO Members, Not the Appellate Body, Need to Clarify Boundaries in Renewable Energy Support' (International Institute for Sustainable Development) (2013) <www.iisd.org/pdf/2013/wto_members_renewable_energy_support.pdf> accessed 26 April 2019.

⁵ World Trade Organisation, 'World Trade Report 2010; Trade in natural resources' <www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf> accessed 25 April 2019

⁶ WTO, Canada – Certain Measures Affecting The Renewable Energy Generating Sector- RWT/DS412/AB/R.

⁷ Beatriz Leycegui and Imanol Ramirez, 'Addressing Climate change: A WTO Exception to Incorporate Climate clubs' (2015) E15 Expert Group on Measures to Address Climate Change and the Trade System 11

<www.ictsd.org/sites/default/files/research/E15_Climate_Leycegui%20and%20Ramirez_FINAL.pdf> accessed 24 August 2019; Steve Charnovitz and Carolyn Fischer, 'Canada-Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies' (2015) 14 World Trade Review 77, 209. <www.cambridge.org/core/journals/world-trade-review/article/canadarenewable-energy-implications-for-wto-law-on-green-and-notsogreen-subsidies/33D8401BFCD8F07649074145B0DF2EB4> accessed 22 August 2019.

⁸ Leycegui and Ramirez (n 7) 3.

This paper is divided into five sections. Section one provides a brief literature review, while section two defines the term ‘Realism’ and discusses three basic assumptions of realism. Section three adopts the assumptions to explain why WTO members are hindered from taking prompt climate action, and section four considers whether the WTO judicial bodies are constrained by the same factors that hinder WTO members from taking climate action. Section five provides a conclusion.

1. Literature Review

The *Canada Renewable Energy* case raised concerns that some trade rules hinder climate action. This concern is not limited to the ASCM and extends to other WTO agreements including the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).⁹ Based on this, Casier and Moerenhout argue that existing WTO rules need new guidance and that this could benefit from climate change incentive debates in trade committees.¹⁰ Further to this, they state that it is the responsibility of WTO members to provide the new guidance, not the Appellate Body or other judicial bodies. This is based on the premise that WTO political bodies (ie WTO members) are responsible for amending or establishing trade agreements, while WTO judicial bodies are required to interpret the agreements.

Where an issue is not covered by the applicable trade agreement, but is relevant to the settlement of a trade dispute, Casier and Moerenhout seem to suggest that such an issue should be referred to WTO members for renegotiation or incorporation into the applicable trade agreement through an amendment. It is doubtful that WTO members will agree on modifying WTO rules or issue any decision on trade-related climate issues anytime soon.¹¹ Leycegui and Ramirez state that this is attributable to the complex negotiation and decision making process, which requires consensus from all WTO members before any change is reflected in the trade rules.¹² This view is also shared by Jaemin Lee, who agrees that the delay in decision making frustrates the adoption of climate action in the trade system.

As a result, some academics have made suggestions on how climate change concerns can be addressed within the trade system. For example, Charnovitz and Fisher state that exemptions should be made for measures that seek to protect the environment,¹³ while Zhang and Assuncao

⁹ Cameron Hutchison, ‘Does TRIPS Facilitate or Impede Climate Change Technology Transfer into Developing Countries?’ (2006) University of Ottawa Law & Technology 517, 517
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019365> accessed 22 August 2019.

¹⁰ Casier and Moerenhout (n 4).

¹¹ Leycegui and Ramirez (n 7) 11.

¹² *ibid* 2.

¹³ Charnovitz and Fischer (n 7) 209.

suggest that climate action could be achieved through a joint WTO/UNFCCC working group.¹⁴ Others recommend the establishment of climate change clubs,¹⁵ or a new trade agreement.¹⁶ The implementation of these recommendations will require a positive consensus from all WTO members, and since it is unlikely that WTO members will provide the required amendments or consensus in the short time, a solution should be sought from a different WTO body, preferably the WTO judicial bodies.

Jaemin Lee recommends that guidance on trade-related climate change issues could be sought from the jurisprudence of the WTO judicial bodies.¹⁷ He argues that the collective jurisprudence of the bodies suggests that renewable energy projects could be exempted from the ASCM. This view is also shared by Huaxia Lee.¹⁸ Both scholars adopt a doctrinal approach to analyse and justify the possibility of addressing trade-related concerns through the WTO judicial bodies, particularly the Appellate Body.

A doctrinal approach helps to critically analyse the extent to which WTO jurisprudence can serve as guidance for climate action in the trade system. However, the absence of an explanation of factors that prevent WTO members from taking prompt climate action will lead to criticism against the WTO judicial bodies when their rulings facilitate climate action in the absence of a clear provision in the relevant trade rule. Therefore, an explanation based on a theoretical foundation will help to identify and understand factors that influence State action, especially in an international context.

This paper seeks to fill this gap in the literature by adopting the theory of Realism to explain State action within the trade system and how this limits the ability of WTO members to collectively adopt climate actions within the trade system. This work espouses Realism because it is one of the two traditional theories of international relations that explains how States relate with other States in an international system. Furthermore, the main assumptions of this theory provide a

¹⁴ ZhongXiang Zhang and Lucas Assuncao, 'Domestic Climate Policies and the WTO' (2001) FEEM Working paper 26 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=288273> accessed 20 August 2019.

¹⁵ Leycegui and Ramirez (n 7) 2.

¹⁶ Matthew Kennedy, 'Legal Options for a Sustainable Energy Trade Agreement' (2012) ICTSD Global Platform on Climate Change, Trade and Sustainable Energy 41 <<https://www.ictsd.org/sites/default/files/downloads/2012/07/legal-options-for-a-sustainable-energy-trade-agreement.pdf>> accessed 25 August 2019.

¹⁷ Jaemin Lee, 'SCM Agreement revisited: Climate Change, Renewable Energy, and the SCM Agreement' (2016) 15 World Trade Review 613, 643 <<https://www.cambridge.org/core/journals/world-trade-review/article/scm-agreement-revisited-climate-change-renewable-energy-and-the-scm-agreement/FA795B2EC9339C05888989960563117F/core-reader>> accessed 24 August 2019.

¹⁸ Huaxia Lee, 'The Climate-Trade Conundrum: A Critical Analysis of the WTO Jurisprudence on Subsidies to Renewable Energy' in Mitsuo Matsushita, and Thomas J Schoenbaum (eds), *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy and the Environment* (Springer 2016) 297, 317.

relevant platform for identifying factors that inhibit decision making and climate action in the trade system.

2. Realism

The term 'Realism' is used in different academic disciplines, including philosophy and international relations.¹⁹ This paper is concerned with the use of realism as a theory of international relations. In this context, Realism can be defined as a theory that explains how States behave towards other States in an international system.²⁰ There are different forms of realism, and each form has a unique definition and interpretation.²¹ Examples of the different forms of realism include classical realism, political realism, neorealism and structural realism. Despite their differences, they all share some basic concepts,²² namely: a) that the international system lacks a central authority and therefore is anarchical in nature, b) States are the primary actors within an international system, and c) States act in their national interest in pursuit of power or security.²³

These three assumptions seem to depict the existing structure of the WTO. This is illustrated by the fact that WTO members are the primary actors in the trade system, as membership is restricted to sovereign States seeking to promote their trade interests through relations with other States in the WTO. They are not subject to a higher or central authority, but rather collectively operate as the central authority through their separate representatives in the Ministerial Conference. Based on this, it is reasonable to state that realism could be adopted to analyse the trade system, especially State action in the system.

Nonetheless, some scholars warn that the use of realism as an explanation of the international system should be applied with caution, as realism does not 'fully describe the world'.²⁴ In line

¹⁹ Jack Donnelly, 'Realism' in Scott Burchill, Andrew Linklater, Richard Devetak, Jack Donnelly, Matthew Paterson, Christian Reus-Smith and Jacqui True (eds), *Theories of International Relations* (3rd edition, Palgrave Macmillan 2005) 29 <<http://lib.jnu.ac.in/sites/default/files/ReferenceFile/Theories-of-IR.pdf>> accessed 24 August 2019.

²⁰ Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organisation' (1995) 44 *Duke Law Journal* 829, 855 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3278&context=dlj>> accessed 24 August 2019.

²¹ Ronen P Palan and Brook M Blair, 'On the Idealist origins of the realist theory of international relations' (1993) 19 *Review of International* 385, 397 <www.jstor.org/stable/20097348?seq=1#metadata_info_tab_contents> accessed 24 August 2019.

²² Donnelly (n 19) 30.

²³ Sandrina Antunes and Isabel Camisao, 'Realism' in Stephen McGlinchey, Rosie Walters and Christian Scheinpflug (eds), *International Relations Theory* (E-International Relations Publishing 2017) 15 <www.e-ir.info/publication/international-relations-theory/> accessed 23 August 2019.

²⁴ Philip M Nichols, 'Realism, Liberalism, Values and the World Trade Organisation' (1996) 17(3) *University of Pennsylvania Journal of International Law* 749

with this view, Shell argues that 'States in a realist world marked by interstate anarchy would not find sufficient common ground or trust to create the WTO's binding dispute resolution mechanism'.²⁵ This assertion does not take into consideration the other assumptions of realism, especially national interest. Based on the assumption of State interest, States act in their national interest in pursuit of power or security, which means that States will cooperate with other States if it will serve their national interest. In regard to the WTO system, it is reasonable to suggest that the common ground in the system for members is trade, and thus, members are willing to cooperate with each other as a way of pursuing their trade interest and economic power or security. Further, the WTO does not represent a form of central authority under the trade system, but rather an expression of power from sovereign States. Sovereignty in this regards means that a State has the power to decide how it will cope with its problems and can limit its freedom by making commitments relevant to providing a solution to its problems.²⁶ Applying this definition, it appears that WTO members have not surrendered their sovereignty; instead each member has decided to limit its freedom for the purpose of achieving national trade interests or resolving trade problems in cases involving breach of trade rules. Therefore, it is arguable to state that the basic concepts of realism provide a relevant platform for analysis of State action within the trade system.

3. Realism and WTO Members

The WTO is a member-driven organisation and lacks a central authority. It is composed of sovereign States who jointly act as the primary decision-making authority in the trade system. This authority is exercised by State representatives in the Ministerial conference.²⁷ Article IV.1 of the Marrakesh agreement provides that:

The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.²⁸

From this provision, it may be assumed that this decision-making authority extends to non-trade issues covered by trade rules. In line with this, Cosbey and Mavroidis argue that WTO members

<<https://pdfs.semanticscholar.org/26f1/cd1ac4fe8cbcf914987e099c16c090016038.pdf>> accessed 22 August 2019.

²⁵ Shell (n 20) 855.

²⁶ Kenneth N Waltz, *Theory of international politics* (Addison-Wesley 1979) 96.

²⁷ Agreement Establishing the World Trade Organisation (15 April 1994) LT/UR/A-1A/GATT/3, arts 4, 9.

²⁸ *ibid*, art 4.

have a duty to address trade-related climate change concerns within the system.²⁹ It is undisputable that WTO members have the primary authority to make decisions and also address non-trade issues covered by the trade system. Nonetheless, the ability of WTO members to take urgent climate action is limited by the complex negotiation process and delays in decision making, which are due to State action in the processes. This paper adopts the basic concepts of realism to explain factors that influences State action and discusses the concepts under two sub-topics, namely, State interest and decision-making.

a. State Interest

According to realists, State interest plays a crucial role in the international system.³⁰ States participate in international organisations only when such participation will foster their national interest.³¹ The objective of the WTO is to promote global trade and facilitate trade relations amongst its members.³² This indicates that the primary interests of WTO members in the institution is to establish trade relations with other members in the institution and boost the trade opportunities for their domestic goods. This focus on trade interest raises the issue of whether WTO members are willing to consider and balance climate action with their trade interest under the trade system.

Climate change is a common interest shared by WTO members. This is illustrated by the fact that climate change affects all States either directly or indirectly, and nearly all WTO members are signatories to the Paris climate agreement. In line with this, there have been discussions within the trade system about understanding the trade system's potential contribution to addressing climate change,³³ and also negotiations on trade agreements that will enable State members fulfil their commitments under the Paris Agreement. For example, some WTO members are engaged in negotiations seeking to establish an agreement (Environmental Goods Agreement) that facilitates the trade of goods (including technology) and services that benefit the environment.³⁴ This is in accordance with Article 10.2 of the Paris climate agreement, which requires States to strengthen cooperative action on technology development and transfer.

²⁹ Aaron Cosbey and Petros C Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17 *Journal of International Economic Law* 11.

³⁰ Richard H Steinberg, 'Wanted -Dead or Alive: Realism in International Law' in Jeffrey Dunoff and Mark Pollack (eds), *International perspectives on International Law and International Relations: The State of Art* (Cambridge University Press 2013) 148.

³¹ Dana Gold and Stephen Mcglinchey, 'International Relations Theory' in Stephen Mcglinchey (ed) *International Relations* (E-International Relations Publishing 2017) 49.

³² Agreement Establishing the World Trade Organisation (n 27) arts II, III.

³³ WTO, 'WTO members discuss climate change, chemicals and waste management' (WTO, 15 November 2016) <www.wto.org/english/news_e/news16_e/envir_14nov16_e.htm> accessed 24 August 2019.

³⁴ WTO, Trade and Environment <https://www.wto.org/english/tratop_e/envir_e/envir_e.htm> accessed 24 August 2019.

The existence of a shared climate change interest amongst WTO members does not guarantee the same level of commitment towards climate action. This is because a State's commitment towards climate action is influenced by a number of factors, including variation in climate change impacts, political will of State governments, and the availability of adequate finance or relevant technology, amongst several others.

Variation in climate change impacts results in the adoption of different climate change measures. Climate change measures recognized by one State may not be relevant to or have significant economic consequences for another State. For example, while some States advocate for the adoption of carbon taxes/tariff as a form of climate action,³⁵ some other States rely on the trade of carbon intensive products (such as fossil fuel and Coal) for economic growth.³⁶ In such a situation, imposing a tariff on carbon-intensive goods may restrict the trade of such goods and affect the income derived from the sale of such goods. It is doubtful that States affected by such tariffs will agree to such measures in the short term without a rigorous and detailed negotiation. Thus, diverging State interests make it difficult for consensus to be reached on trade-related climate change concerns, and constrains the ability of WTO members to take prompt climate action, especially where measures proposed are against the self-interest of participating States.

b. Decision-making

Membership under the trade system is restricted to States, and they operate through their representatives in the Ministerial conference. State representatives are expected to participate in decision making, as a way of ensuring that their State's trade interests are represented in negotiations and subsequently reflected in relevant agreements. Members have equal voting rights, and consensus from all members is required to make any decision relating to the multilateral trade agreements (except where expressly stated otherwise).³⁷ Professor Van den Bossche and Professor Zdouc state that 'such broad participation would make negotiations ineffective', and make it difficult to reach agreement on controversial issues.³⁸ This is because members will prioritise their national interest in discussions, and thus some members may decline to give consent where the proposals made are in conflict with or fail to incorporate their trade interest.

Arguably, establishing a central authority in the Ministerial conference could facilitate speedy decision making. This authority could provide the deciding vote where an impasse exists due to a lack of consensus. It could also establish provisional guidelines for resolving issues not covered by the multilateral agreements but relevant to resolving trade disputes. This could help to

³⁵ For example, Sweden amongst several others.

³⁶ For example, Saudi Arabia, Nigeria, Angola and Venezuela other members of the Organisation of the Petroleum Exporting Countries (OPEC).

³⁷ *ibid* (n 27), art IX.

³⁸ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organisation* (3rd edition Cambridge University Press 2013) 144.

promptly clarify and determine the compatibility of climate change measures with relevant trade agreements, and by doing so, facilitate prompt climate action. Nonetheless, it is unlikely that WTO members will agree to be subject to a central authority. This is because trade agreements and decisions are crucial to economic growth and States would prefer to dictate the terms of such agreements.

In summary, urgent action is required to address climate change concerns within the trade system. Unfortunately, the absence of a central authority and diverging State interests constrain the possibility of prompt climate action within the political body of the system in the short term. Therefore, it is necessary to consider whether an alternative body can facilitate climate action. The next section considers whether WTO judicial bodies can perform this role. It selects this component for analysis because the judicial bodies are the only alternative body within the WTO system that can impose binding decisions on WTO members.

4. An Alternative Body within the WTO to address Trade-Related Climate Change Issues?

The WTO dispute settlement system is regulated by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (known as the DSU). This dispute settlement system is composed of panels, the Appellate Body (AB), and the Dispute Settlement Body (DSB). The focus of this part of the thesis is limited to panels and the AB (referred to as WTO judicial bodies). This is because, unlike the WTO DSB, panels and the AB are actively engaged in dispute settlement and not composed of State representatives.

This section seeks to determine whether WTO panels and the AB can address trade-related climate change concerns when WTO members cannot do so. It analyses whether the judicial bodies are constrained by State interest and its decision-making process, and, based on its findings, concludes that the WTO judicial bodies can address trade-related climate change issues.

a. State interest

Unlike the WTO political bodies, membership in the judicial bodies is not based on State interest, but on the qualifications and expertise of the individuals appointed.³⁹ In addition to this, the DSU requires members of both bodies to be independent and unaffiliated with any State government, and excludes any panellist from presiding over cases that involve his or her country of origin.⁴⁰ This is to ensure that rulings are not influenced by State interest or personal bias in favour of any State party.

³⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 arts 8.1, 17.3.

⁴⁰ *ibid*, art 8.3.

Nonetheless, it is possible for members of both bodies to hold unexpressed, biased views about issues under contention or the parties involved in a dispute. However, the extent to which such views can influence a ruling in favour of the preferred party is almost certainly insignificant. This is because members of the judicial bodies have the duty to 'preserve the rights and obligations of members', thus any ruling in deviation from this objective can be identified and challenged. More so, members of the bodies have their personal integrity to protect, and will likely avoid taking actions that could undermine this. Therefore, given the absence of direct State interest, it is arguable to state that rulings or recommendations of the judicial bodies are made objectively and with the aim of upholding the trade rights and obligations of members under the system.

Nonetheless, the fact that the judicial bodies are guided by the need to preserve the trade system does not mean that the bodies ignore non-trade issues. Existing case law indicates that WTO judicial bodies do not take a hard stance against non-trade issues. They seek ways to maintain a balance between trade and non-trade issues by recommending the removal of only those non-trade measures that constitute a form of 'arbitrary and unjustifiable discrimination'. For example, in the *US-Shrimp* case,⁴¹ India, Malaysia, Pakistan and Thailand instituted a complaint against the United States (US) regarding certain measures that banned the importation of shrimp and shrimp products from their jurisdiction. The AB held that while the measures adopted by the US qualified for provisional justification, they constituted a form of 'arbitrary and unjustifiable' discrimination. Frankel states that this ruling is a victory for environmentalists, as the AB acknowledged that the US could establish measures to address its environmental concerns.⁴²

With regards to climate change concerns, it is reasonable to conclude that the judicial bodies will not hinder unilateral climate change measures as long as such measures do not constitute a form of arbitrary or unjustifiable discrimination. In the *Canada-Renewable Energy* case, the European Union and Japan alleged that the Feed-in Tariff (FIT) programme established by the Ontario government in Canada constituted a form of subsidy mainly because of the local content requirement. However, the AB did not have sufficient factual findings from the Panel to complete its legal analysis as to whether the programme conferred a benefit, and therefore refrained from classifying the FIT programme as a form of subsidy. By doing so, the AB acted in line with Article 17.6 of the DSU, which limits appeals to issues covered in the panel report.

Assuming the AB had completed its benefit analysis, it remains unknown whether it would have classified the FIT programme as a subsidy, although this seems likely given that it concluded that the programme conferred a benefit, as the programme already had a 'local content requirement,'

⁴¹ WTO, United States-Import Prohibition of Certain Shrimp and Shrimp Products- Report of Appellate Body (adopted 21 November 2001) WT/DS58/AB/R.

⁴² Jeffrey Frankel, 'Global Environmental Policy and Global Trade Policy' (2008) Harvard Kennedy School Faculty Research Working Paper series 9
<<https://www.belfercenter.org/sites/default/files/legacy/files/Frankel2Web.pdf>> accessed 25 August 2019.

which is expressly prohibited by the ASCM. By recommending the removal of the local content requirement (which was the main issue of contention), the AB enabled Canada to continue its renewable energy programme and upheld the trade rights of the opposing parties. This therefore illustrates that the WTO dispute settlement bodies are able to reconcile state members trade interest with climate change interest (including other non-trade interest),⁴³ in a way that binds all members.

b. Decision-making

The decision-making process adopted by the WTO judicial bodies is not plagued with unnecessary delay. This can be attributed to two possible reasons, namely a) the existence of a central authority under the dispute settlement system, and b) the small membership size and strict time-frame imposed on the judicial bodies.

The WTO judicial bodies serve as the central authority under the dispute settlement system. This is illustrated by the fact that they have the jurisdiction to resolve disputes and make binding rulings on trade and non-trade issues covered by the multilateral trade agreements. The rulings and recommendations of the WTO judicial bodies determine the actual meaning of trade provisions, and thus serves as a guideline on the meaning and applicability of such provisions in subsequent disputes (subject to a consensus by WTO members to reject the ruling).⁴⁴ For example, in the *Canada Renewable Energy* case,⁴⁵ both the AB and Panel made reference to the AB's interpretation of Article 1.1(a)(1) of the ASCM in the *US-Large Civil Aircraft* case.⁴⁶ This suggests that the doctrine of judicial precedence loosely exists in the WTO dispute settlement system. In *Japan-Alcoholic Beverages II* case, the AB held that:

WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.⁴⁷

This means that the judicial bodies determine each case based on the facts and merits of each case. Thus, the previous rulings of the judicial bodies are not binding on subsequent disputes, but rather serve as guidance to ensure the 'security and predictability of the multilateral trade

⁴³ Keisuke Iida, 'Is WTO Dispute Settlement Effective' (2004) 10 Global Governance Issue 207, 220.

⁴⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes (n 39), art 2.4.

⁴⁵ WTO, *Canada- Certain Measures Affecting the Renewable Energy Generation Sector-Report of the Appellate body* (adopted 23 May 2013) WT/DS412/AB/R.

⁴⁶ WTO, *United States-Measures Affecting Trade in Large Civil Aircraft - Second complaint-Report of Appellate body* (23 March 2012) WT/D353/AB/R.

⁴⁷ WTO, *Japan-Taxes on Alcoholic Beverages-Report of the Appellate body* (adopted 1 November 1996) WT/DS8/AB/R 31.

system'.⁴⁸ It can also be deduced from the statement above that the judicial bodies can interpret agreements in a way that addresses an issue not expressly covered by the agreement, but which is nonetheless relevant to the settlement of a dispute. In doing so, it is important that such an interpretation does not add or diminish the rights and obligations of members under the multilateral agreement, as this would violate the provisions of the DSU. Based on this, it is reasonable to state that the judicial bodies can address trade-related climate change concerns in disputes where trade agreements are silent on such concerns, and its rulings will be binding on WTO members and also serve as a form of guidance for subsequent cases.

Furthermore, the small membership size of the WTO judicial bodies facilitates speedy decision making. Each panel is composed of three or five members, while three members of the Appellate Body preside over an appeal.⁴⁹ This makes it easy for members of the bodies to work closely, make convenient work arrangements (in terms of time and venue), and also meet their respective work timeframe.⁵⁰ This facilitates prompt dispute settlement and prevents the continuous breach of trade rights and obligation, which could undermine the trade system.⁵¹

In summary, the WTO judicial bodies are well placed to address trade-related climate change concerns, and balance trade interests with climate change interests. Its ability to take prompt action and make binding decisions could facilitate prompt climate action whilst upholding members' trade rights and obligations. It is worth noting that the WTO dispute settlement is facing a challenge, as the AB faces the risk of becoming inactive if new appointments are not made to it. Despite this, a dispute settlement system is required under the WTO system, whether in its current or a modified form, and the recommendation of such a system would likely be accepted or binding on disputing parties. This is because, although State members establish the relevant WTO trade agreements, the meaning of the provisions is shaped by case law. Thus, the advantages discussed in this section are not unique to the Panel and AB and can be embodied by any subsequent dispute settlement system adopted by WTO members.

Conclusion

WTO State members, through their representatives, have the primary authority to make binding decisions on trade issues and non-trade issues related to trade (including climate change

⁴⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes (n 39), art 3.2.

⁴⁹ *ibid*, arts 8.5, 17.1.

⁵⁰ *ibid*.

⁵¹ The AB is likely to become inactive soon; for some years the AB has been facing delays in issuing its reports despite the time-limits imposed by the treaties. See <https://worldtradelaw.typepad.com/ielpblog/2018/06/the-timing-for-circulating-appellate-body-reports.html>.

measures). Using the theory of Realism, this paper argued that the ability of WTO members to exercise this authority and promptly address trade-related climate change issues is limited by State interest and the absence of a central authority in the WTO political body. Further to this, it considered the WTO dispute settlement bodies, and argued that there are distinct advantages in having the Panel and Appellate body act where WTO members cannot.