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WTO LAW & ENVIRONMENTAL POLICIES:
Consistency of Eco-labels, Carbon Taxes and Green Subsidies under WTO Provisions.

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Abstract.

This monograph aims to provide legal solutions to the tension between trade and environment within the WTO forum. Policy instruments such as Carbon Taxes, Eco-labels and Green Subsidies are commonly used by WTO Members to tackle climate change's effects as they incentivize the de-carbonization of national economies. Nonetheless, Members must carefully design these environmental measures to avoid inconsistencies with its commitments under the GATT, the TBT and the SCM Agreements. Moreover, Article XX of the GATT enshrines exceptions that provide a balance between the multilateral agreement and the individual policy space that every Member is entitled to.

Keywords.

Trade, environment, tension, WTO

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I. Introduction

Historically, the international community has not given environmental protection the importance it deserves. Governments and international organizations were worried about economic development but not of its potential impact on ecosystems, the pollution it might generate or the long-term environmental degradation.[1]

International concerns were not initially focused on the environment. Instead, one of the main aspects of the international order was the idea of free trade between countries.[2] Knowing that the main objective of mercantilism is to "maximize exports, minimize imports, and thus build up trade surpluses in order to accumulate specie",[3] countries saw the need to establish a ruled-based system in order to have closer economic relations.

These reasons converged to the establishment of the General Agreement on Tariffs and Trade in 1947 (GATT 1947). Further in 1994, it turned into the World Trade Organization (WTO), which is "the only global international organization dealing with the rules of trade between nations."[4]

[1] H. Jeffrey Leonard; David Morell, Emergence of Environmental Concern in Developing Countries: A Political Perspective, Stanford Journal of International Law, At. 281
[2] Craig Van Grasstek, The History and Future of the World Trade Organization, WTO Publications, https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf
[3] Id, Pg. 4.
[4] What is the WTO?-The WTO, Wto.org https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

Tensions between trade and environment are not new within the WTO forum. While one of the main purposes of the WTO is to help trade flow as freely as possible,[5] scientific evidence supports the need of an urgent response from the international community to face the critical environmental situation caused by rapid industrialization, which is correlative with free trade.[6]

The environment has suffered a detrimental impact because of the rapid industrialization, deforestation, chemical effluents, transportation and other activities, all performed by humans.[7] In that sense, environment has been gradually included in the international agenda because of the challenges that we are facing because of anthropogenic reasons.

According to the National Aeronautics and Space Administration (NASA), there are five vital signs that raise concerns and call for environmental policies. These vital signs are: (i) the concentration of carbon dioxide in parts per million; (ii) the global temperature; (iii) the significant increase of the sea level; (iv) the decline of the arctic sea ice minimum; and (v) the ice mass from both Antarctica and Greenland.[8]

[5] What is the WTO? - Who we are, Wto.org https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (2018).
[6] Hollis B. Chenery, Interactions Between Industrialization and Exports, The American Economic Review, https://www.jstor.org/stable/1815482
[7] Oregon Health and Science University, Causes and health consequences of environmental degradation and social injustice, Social Science & Medicine, http://phsj.org/wp-content/uploads/2007/10/env-deg-soc-injustice-soc-sci-med.pdf
[8] Carbon dioxide concentration | NASA Global Climate Change. (May 17, 2017)

Moreover, on its Fifth Assessment Report,[9] the Intergovernmental Panel on Climate Change made an urgent call to decrease the amount of anthropogenic emissions of greenhouse gases since it is the main cause of widespread impact of climate change on human and natural systems.

The WTO recognizes the importance of this issue. "The organization is in fact developing constructive principles for accommodating both trade and environmental concerns. A series of rulings by the WTO's dispute resolution bodies … have established the principle that trade rules do not stand in the way of legitimate environmental regulation."[10] However, the implementation of environmental policy instruments can implicate a great challenge for WTO Members. This, since environmental measures might constitute barriers to trade and thus, be challenged before the WTO Dispute Settlement Mechanism.

The 16th edition of the European Law Students' Association (ELSA) Moot Court Competition on WTO Law (EMC2), based its moot problem on this issue. The case entailed the dispute between two fictional countries –Borginia and Syldavia- surrounding the enactment of three measures that allegedly violated the General Agreement on Tariffs and Trade (GATT), the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Subsidies and Countervailing Measures (SCM).

[9] Intergovernmental Panel on Climate Change (IPCC), Climate Change 2014 Synthesis Report, https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf (November 1, 2014), At. Pg. 2.
[10] Weinstein. Michael. The Greening of the WTO. (2001), At. 147

As this year's competitors in the EMC2, we were able to understand the importance of this issue not only as a challenging academic subject, but as a fundamental matter that needs be addressed and resolved as soon as possible. As a consequence of the work we developed for a year, we not only became aware of this issue but also acknowledged how trade and environment are related to each other.

Our research on this topic allowed us to receive the following awards: Best Written Submission for the Complainant, Best Written Submission for the Respondent and Best Overall Written Submission at the All American Regional Rounds, as well as the Valerie Hughes Award for the Best Written Submission for the Respondent in the Final Oral Rounds. In that sense, the EMC2 2017-2018 moot case and our written submissions will be included as annexes to this monograph, since they were fundamental for the research and judgement we have developed surrounding this topic, which will be the core of this monograph.

Therefore, this monograph will develop a critical analysis on how certain environmental policies, which may involve certain degree of distortion to the international trading system, can be consistent with WTO Law. Said analysis will focus on Eco-labels, Carbon Taxes and Green Subsidies. Finally, we will explain how environmental measures can be justified under Article XX of the GATT.

II. Eco-labels

Consumers are nowadays not only interested in the functional or aesthetic aspects of products but also on their environmental features. In fact, they are willing to pay more for environmental-friendly products and as a result, green markets have exploded.[11]

There are several methods that can be implemented in order to protect the environment. Among them, there are market-based instruments which are intended to encourage a certain behavior through market signals, instead of giving explicit orders in regard to activities or products that are harmful to the environment. Market-based instruments can be divided into two groups: supply-oriented and demand-oriented tools.[12]

This has been explained by Neamtu in the following way:

> The former category, which include eco taxes and tradable permits, are intended to change producers' behavior through financial incentives to reduce their environmental negative impact and their effectiveness does not depend on consumers' preferences. The latter category, which includes also eco labels, relies on providing consumers with information about the environmental impacts certain products have and appeals to the consumers' responsibility toward protecting the environment.[13]

The Global Ecolabeling Network defines Ecolabeling as "a voluntary method of environmental performance certification and labelling that is practiced around the world. An ecolabel identifies products or services proven environmentally preferable overall, within a specific product or service category."[14]

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[11] Hajin Kim, Eco-Labels and Competition: Eco-Certification Effects on the Market for Environmental Quality Provisions, N.Y.U. Environmental Law Journal, (2015), At. 181.
[12] Bogdana Neamtu, & Dacian C. Dargos, Sustainable Public Procurement: The use of Eco-Labels, European Procurement & Pulic Private Partnership Law Reveiw, (2015), At. 92.
[13] id. At, 93.
[14] What is ecolabelling? https://globalecolabelling.net/what-is-eco-labelling (2018).

Likewise, Stein defines Eco-labels as "a noticeable symbol informing the consumer about the environmental friendliness of a product, what otherwise might be difficult to explain to the consumer."[15]

In light of the above, an Eco-label is a mechanism that permits consumers to identify certain environmental features –such as eco-friendly materials or eco-friendly production methods- of a product, by placing a distinctive sign on it. They provide information to consumers in order to reduce the information asymmetry between producers and consumers, which is especially high when it comes to environmental features.[16]

Eco-labels can be used to protect the environment since they influence consumers on their behavior when acquiring one product or another, and encourage producers to produce eco-friendly products over regular ones.[17] Labelling schemes have become very popular and adopted different modalities which include voluntary and mandatory labels, self-declared and third-party labels, environmental information and environmental leadership labels, single issue and life cycle based labels, single sector and multiple sector labels.[18]

[15] Jasper Stein, The Legal Status of Eco-Labels and Product and Process Methods in the World Trade Organization, American Journal of Economics and Business Administration, (2009), At. 285.
[16] Bogdana Neamtu, & Dacian C. Dargos, Sustainable Public Procurement: The use of Eco-Labels, European Procurement & Pulic Private Partnership Law Reveiw, (2015), At. 92.
[17] Jasper Stein, The Legal Status of Eco-Labels and Product and Process Methods in the World Trade Organization, American Journal of Economics and Business Administration, (2009), At. 285.
[18] John Polak, Trade as an Environmental Policy Tool? GEN, Ecolabelling and Trade, World Trade Organization Public Symposium, (16 June 2003).

Even if Eco-labels are a great option towards environmental protection, their design can sometimes result in a violation to the WTO law system. In that sense, the following section will explain how to structure WTO-complaint Eco-labels by analyzing: (i) Eco-labels within the WTO law system; (ii) Eco-labels as Technical Regulations under Annex 1.1 of the TBT; (iii) the National Treatment obligation; (iv) the label's trade-restrictiveness; and (v) Relevant International Standards.

A. Eco-labels within the WTO law system.

The WTO recognizes the importance of the environment throughout its legal provisions. The first recital of the Marrakesh Agreement establishes:

> Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development…[19] (emphasis added)

Regarding this provision, the Appellate Body[20] in US-Gasoline stated that:

> In the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including

[19] Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S 154 (1994).
[20] The Appellate Body is a standing body, which is composed by seven members that are elected by the Dispute Settlement Body for a four-year term. The purpose of said body is to hear appeals from reports issued by panels in disputes brought by WTO Members.

its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. [21]

However, the main purpose of the WTO is to achieve free trade among Members. In order to do so, discrimination is avoided in the multilateral trading system through the National Treatment (NT) and Most-Favoured Nation (MFN) obligations, which are principles of non-discrimination.

In light of the above, Members decided in the Uruguay Round to include specific provisions for labeling schemes, which constitute today's framework for their implementation under WTO Law system. Essentially, they are foreseen in Articles 2 and 3 of the TBT, and also in Article III:4 of the GATT.

In that sense, in the following sections we will analyze how governments can protect the environment through Eco-labeling schemes, making some remarks on three key points that will avoid an inconsistency with WTO provisions.

B. Eco-labels as Technical Regulations under Annex 1.1 of the TBT.

Article 2 of the TBT regulates the adoption and application of Technical Regulations by Central Government Bodies. Thus, only measures which are Technical Regulations within the meaning of Annex 1.1 of the TBT can be inconsistent with said Article. In that sense, when assessing an Eco-label under the TBT, we shall first determine the nature of the measure.

[21] ABR, US-Gasoline, At. Pg. 30

Annex 1.1 of the TBT defines what a Technical Regulation is in the following terms: "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." [22] (emphasis added)

In regard to the *related processes and production methods* acknowledged by the definition, there is an ongoing discussion[23] of whether they have to be related to the final product or not, in order for the measure to fall within the scope of Annex 1.1. Because of the wording of this provision, it is possible to interpret that the processes and production methods established by the document must be related to the product characteristics.

However, this discussion is settled when it comes to *labeling requirements*. This, since when analyzing an Eco-labeling scheme based on a process and production method that was not related to the final product, the Appellate Body in US-Tuna II (Mexico) determined that it was under the scope of Annex 1.1 of the TBT.[24]

C. The National Treatment obligation.

[22] Agreement on Technical Barriers on Trade, 1868 U.N.T.S 186 (1994).
[23] Sanford E. Gaines, Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures, Columbia Journal of Environmental Law, (2002), At. 96
[24] ABR, US-Tuna II (Mexico), At. Para. 199.

By wanting to achieve trade liberalization, the Preamble of the Marrakesh Agreement establishes the aim to eliminate "discriminatory treatment in international trade relations."[25] Consequently, the WTO Law system is driven by two main principles of non-discrimination.

In regard to said principles, Peter Van den Bossche (2005) stated the following: "…there are two main principles of non-discrimination in WTO Law: the most-favoured-nation (MFN) treatment obligation and the national treatment obligation. In simple terms, the MFN treatment obligation prohibits a country from discriminating *between* countries; the national treatment obligation prohibits a country from discriminating *against* other countries."[26]

When it comes to labels, the National Treatment obligation is enshrined in Article 2.1 of the TBT and Article III:4 of the GATT. The former applies exclusively if the label is found to be a Technical Regulation. On the other hand, the latter is broader since it applies to labels even if they are not Technical Regulations. However, both are different and not cumulative obligations, since "…the scope and content of these provisions is not the same."[27]

In that sense, a label can result in an inconsistency with Article 2.1 of the TBT and Article III:4 of the GATT if it is designed or applied in a discriminatory manner towards other countries. Thus, in order to be WTO-compliant, an Eco-label issued by a government shall be, in a first place, origin-neutral.

[25] Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S 154 (1994).
[26] Peter Van den Bossche, Principles of Non-Discrimination, in The Law and Policy of the World Trade Organization: Text, Cases and Materials (2008). At. 369.
[27] ABR, US-Tuna II (Mexico), At. Para. 405.

The scope of the prohibition includes origin-neutrality not only in a formal, but also in a practical manner. It is important to note that within WTO Law a measure can be *de jure*[28] or *de facto*[29] discriminatory.[30] In that sense, an Eco-label should be designed and structured in a manner in which any producer is able to comply with its requirements without incurring in excessive costs, when comparing them with the costs that local producers would have to assume in order to fulfill the same requirements.

Nonetheless, according to the Appellate Body,[31] it is possible to create an Eco-label which causes a detrimental impact on the competitive opportunities of an imported group of products without it being inconsistent with Article 2.1. This, if the differential treatment stems exclusively from a legitimate regulatory distinction.[32]

We could think, for example, of a labeling scheme issued by country A, which requires producers to use exclusively 100% recycled materials in the production of a certain product, seeking to promote eco-friendly production. In that sense, only those producers that comply with the established requisites will acquire the right to market their product with the "recycled product" label.

This origin-neutral label would be, at first sight, in compliance with the WTO Law system. However, this situation would change if the producers from country A were

[28] *De jure* discrimination occurs when the discrimination is explicit in the face of the law.
[29] *De facto* discrimination occurs when although the discrimination is not explicit in the face of the law, it can be inferred from the total configuration of the facts.
[30] ABR, US-Clove Cigarettes, At. Para. 175.
[31] ABR, US-Tuna II (Mexico), ABR, US-Clove Cigarettes.
[32] ABR, US-Tuna II (Mexico), At. Para. 215.

specialized on the production of said product using 100% recycled materials, while the producers from country B were specialized in the production of that same product using 90% recycled materials.

In that scenario, importers from country B would not be eligible for the label, although their production method could also be considered as eco-friendly. In that sense, the measure could, arguably be inconsistent with Article 2.1 of the TBT, since only local producers would be eligible to acquire it. In that case, it would be necessary to determine if the measure stems exclusively from a legitimate regulatory distinction, or rather if it reflects discrimination.

At this point of the analysis, country A would have to show how the "recycled product" label is connected to the objective pursued by the measure -i.e. the protection of the environment- in a specific manner. Thus, it is of fundamental importance to consider while designing an Eco-label, its real relationship with the environmental objective, not in a broad sense but particularly.

Additionally, for the measure to be in compliance with Article 2.1, country A could also show how the measure is applied in an even-handed manner. The Appellate Body in EC-Seal Products stated that:

> The relationship of the discrimination to the objective of a measure is one of the most important factors, but not the sole test, that is relevant to the assessment of arbitrary or unjustifiable discrimination. In other words, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to that overall assessment.[33]

[33] ABR, EC-Seal Products, At. Para. 5.321

In that sense, the measure could avoid being an arbitrary or unjustifiable discrimination through its implementation. For example, country A could avoid discrimination claims by encouraging programs in which producers from country B could learn the benefits of their production method, or by granting certain economic facilities for those producers who decided to shift their production to the 100% recycled materials. Thus, the implementation of the measure would show the real intention of protecting the environment, rather than one oriented to protect the national industry.

All in all, a label can be discriminatory, which would imply an inconsistency with Article 2.1 of the TBT. This is particularly relevant when we take into account the Eco-labeling schemes' power to influence consumers, and their capacity to create a detrimental impact on the competitive opportunities of other Members. Therefore, the origin-neutrality of a label –not only in its design but also in its application- is fundamental in order to avoid an inconsistency with the WTO law system.

D. The label's trade-restrictiveness.

The sixth recital of the Preamble of the TBT recognizes all Member's right to regulate in order to achieve certain objectives -e.g. the protection of the environment- at the level they consider appropriate. On the other hand, the fifth recital establishes that Technical Regulations, including packing, marking and labeling requirements, shall not create unnecessary obstacles to international trade.

Furthermore, Article 2.2 of the TBT establishes certain obligations that WTO Members must observe when issuing Technical Regulations. Essentially:

> ... they must ensure that such preparation, adoption, and application is not done 'with a view to or with the effect of creating unnecessary obstacles to international trade'; and, in accordance with the second sentence, they must ensure that their Technical Regulations are 'not... more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.[34]

In order to comply with Article 2.2 of the TBT, the Appellate Body has traditionally analyzed two issues: whether the measure fulfills a legitimate objective, and whether the measure is necessary to fulfill the legitimate objective, considering its degree of contribution and the risks of non-fulfillment. [35]

The wording of Article 2.2 includes a list of legitimate objectives, which include the environment. In regard to those legitimate objectives, the Appellate Body noticed that the word *inter alia* in Article 2.2 suggests that the provision provides the interpreter with a set of examples of what legitimate objectives are, rather than setting a closed list. [36] In that sense, knowing that the protection of the environment is one of the recognized legitimate objectives, the following would be to analyze if a label is necessary to protect the environment.

Considering the above, a well-structured Eco-labeling scheme can be a good instrument to protect the environment within Article 2.2. In fact, it contributes to the fulfillment of this

[34] ABR, US-COOL, At. Para. 369.
[35] Gabrielle Marceau, The New TBT Jurisprudence in US – Clove Cigarettes, WTO US – Tuna II, and US – Cool, Asian Journal of WTO & International Health Law and Policy, (2013), At, 14.
[36] ABR, US-Tuna, At. Para. 313.

objective by encouraging the purchase and production of eco-friendly products, and its trade-restrictiveness is low in comparison to other instruments like import bans or quantitative restrictions.

Additionally, there is a need to make an argument about the risks of non-fulfillment of the objective that is being pursued. However, in regard to the environment, the Appellate Body in Brazil - Retreaded Tyres considered that "[i]n the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy."[37]

Thus, as long as an Eco-label is designed in a manner that truly informs consumers about its actual requirements in a striking manner -so that consumers can quickly identify the environmental features of the product, it will be consistent with Article 2.2 of the TBT. Nonetheless, the risk of non-fulfillment must be analyzed on a case by case basis.

E. Relevant International Standards

Article 2.4 of the TBT mandates WTO Members to use *Relevant International Standards* as a basis for the design of their internal Technical Regulations.[38]

[37] ABR, Brazil-Retreaded Tyres, At. Para. 151.
[38] Lukasz Gruszczynski, The TBT Agreement and Tabacco Control Regulations, Asian Journal of WTO & International Health Law and Policy, (2013) At, 121

In that sense, it is vital to determine if a *Relevant International Standard* exists. Although Article 2.4 of the TBT explicitly refers to *Relevant International Standards*, Annex 1.1 of the TBT does not define what they are. Hence, this notion must be derived from a holistic assessment of the terms *relevant*, *standard* and *international body* or *system*, which are individually defined in Annex 1.1 of the TBT.

In words of the Appellate Body, "the different components of this definition inform each other. The interpretation of the term 'international standardizing body' is therefore a holistic exercise in which the components of the definition are to be considered together."[39] However, a *Relevant International Standard* can be excluded from the design of a Technical Regulation if it is ineffective or inappropriate for the fulfillment of the objective that is being pursued by the measure.

If from the mentioned analysis it is concluded that a *Relevant International Standard exists,* the Technical Regulation must consider it in order to be in compliance with Article 2.4 of the TBT. In essence, according to the Appellate Body in EC-Sardines, the benchmark to determine if a *Relevant International Standard* has been used as a basis for the design of an internal Technical Regulation, is to determine whether there is a contradiction between both measures. If the conclusion is affirmative, then the Technical Regulation is inconsistent with Article 2.4 of the TBT. [40]

[39] ABR, US-Tuna II (Mexico), At. Para. 359.
[40] ABR, EC-Seal Products, At. Para. 249.

All in all, Eco-labels are a good strategy that can be implemented by governments in order to protect the environment. For that purpose, Members shall consider if the labeling scheme constitutes a Technical Regulation. If so, the labeling scheme cannot constitute an unnecessary obstacle to international trade, and Members shall also consider if there is a *Relevant International Standard* in regard to the subject that is covered by the Technical Regulation, in which case the former must be used as a basis for the latter. Furthermore, the labeling scheme shall not result in discrimination towards other countries, regardless of its nature of Technical Regulation. This, in order to avoid an inconsistency and future establishment of a Panel under the Dispute Settlement System.

III. Carbon Taxes

Carbon Taxes[41] are fees "imposed on the burning of carbon-based fuels".[42] They work as unilateral environmental measures that countries enact to incentivize the reduction of carbon dioxide emissions while increasing their fiscal revenue.[43] Countries can implement them in an upstream or in a downstream fashion. On one hand, upstream Carbon Taxes charge the carbon content in the fuel when it is extracted or imported -e.g. taxing the coal, oil and natural

[41] In this monograph, the term tax is going to be used as a broad category that includes both border measures and internal taxes.
[42] Carbon Tax Center. What´s a Carbon tax? https://www.carbontax.org/whats-a-carbon-tax/
[43] Jennifer Hilman, Changing Climate for Carbon Taxes: Who's Afraid of the WTO? http://energieclimat.hypotheses.org/17228 (July, 2013).

gas industries.[44] On the other hand, downstream Carbon Taxes charge producers as they produce or import carbon-intensive products -e.g. the steel and textile industries.[45]

Sovereign nations are permitted to impose taxes on the domestic production.[46] However, they must decide carefully how to impose taxes on imported products. If a Carbon Tax is only levied to domestic products, the competitive edge of local firms would be at stake. Foreign products, from less-stringent environmental standards jurisdictions, would have a price advantage over domestic firms, since the former would not internalize the environmental cost of a carbon intensive production.

In that scenario, domestic firms could face bankruptcy or decide to relocate their operation into less -stringent environmental jurisdictions. This phenomenon is called carbon leakage or emission migration, and it triggers unemployment, budget deficit and increases carbon emissions elsewhere.[47]

Levying the Carbon Tax to imported products tackles the competitive distortion that the tax creates if it is only levied to domestic products. This tax levels the competitive field,[48]

[44] Alice Pirlot. Environmental Border Tax Adjustments and International Trade Law. Ed. Edward Elgar, (2017). 138

[45] Roberton C. Williams, Overview of Carbon Taxes around the World and Principles and Elements of Carbon Tax Design, . (May 29, 2014). For further information regarding upstream and downstream design, see Erin T. Manur. Upstream versus Downstream Implementation of Climate Policy. (June 14, 2010)

[46] Jennifer Hilman, Changing Climate for Carbon Taxes: Who's Afraid of the WTO? http://energieclimat.hypotheses.org/17228 (July, 2013)

[47] Joost Pauwelyn, Carbon Leakage Measures and Border Tax Adjustments Under WTO Law, Research Handbook on Environment, Health and the WTO (2013), At. 448.

[48] An international level competitive field also entitles the tax exemption of the carbon tax for exported products. Otherwise, the products from the jurisdictions that enacted carbon taxes will be less competitive.

between domestic and foreign firms.[49] Members can tax imported products by using either border measures or internal measures. This, since according to the Appellate Body in China-Autoparts, a measure "…cannot be at the same time an ordinary customs duty and an internal charge."[50]

In regard to this matter, the Appellate Body stated that for a tax to be considered a border measure, "the obligation to pay it must accrue at the moment and by virtue of… importation."[51] On the contrary, internal measures are those in which the obligation to pay the charge accrues after importation and by virtue of an internal factor (e.g. transportation, distribution or internal sale). Nevertheless, an internal tax can be regarded as such, even if it is collected at the border.[52] What determines the nature of the tax is the triggering event and not the moment of collection.

The correct determination of the nature of the tax is crucial under WTO Law. This, since its categorization will determine whether the measure's consistency must be analyzed under Article II:1(a) and (b) of the GATT -if the tax is a border measure, or under Article III:2 of the GATT of the GATT -if the tax is an internal measure.

[49] Joel P. Trachtman, WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes, (2016), At. 17.
[50] ABR, China-Autoparts, At. Para. 79.
[51] Id. At. Para. 70.
[52] Ad Note to Art. III of the GATT specifies that when an internal charge is collected or enforced in the case of the imported products at the time of importation, such a charge is nevertheless to be regarded as an internal charge.

In that sense, this section will examine: (i) the consistency of a Carbon Tax with Article II:1 (a) and (b) of the GATT; (ii) the justification under Article II:2 (a) of the GATT; and (iii) the consistency of a Carbon Tax with Article III:2 of the GATT.

A. Consistency of a Carbon Tax with Article II:1 (a) and (b) of the GATT.

The purpose of Article II:1 of the GATT is that Members abide by the commitments established in their Schedule of Concessions. The Schedule of Concessions are an integral part of the GATT[53] and include, among other things, specific tariff concessions given by each Member.[54] The first two columns of the Schedule describe the products, the fourth column establishes the bound rate for ordinary custom duties for a given product. Additionally, the seventh column defines other duties and charges (ODC) applicable to that product.

Specifically, Article II:1(a) of the GATT contains a broad prohibition for Members regarding their Schedule of Concessions. It states that each party shall accord "to other contracting parties treatment no less favorable than that provided… in the Schedule."[55] In contrast, Article II:1(b) enshrines a narrower prohibition for each Member in the following way:

> The products described in Part I of the Schedule … shall, on their importation into the territory… be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement. (emphasis included)

[53] By virtue of Article II:7 of the GATT and as stated by the Appellate Body on the case Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items. Para. 145.
[54] Thus, each member or customs union has their own Schedule of Concessions. See further information about the Schedule of Concessions at .
[55] General Agreement on Tariffs and Trade, 1867 U.N.T.S 186 (1994), At. Article 1(a).

When the Appellate Body studied the relationship between this two Articles, it found that "Article II(b) prohibits a practice that will always be inconsistent with paragraph (a)."[56] Since the prohibition of Article II:1(b) of the GATT is more specific and encompassed in the prohibition of Article II:1(a), a country seeking to design a Carbon Tax as a border measure consistent with Article II of the GATT, must follow the precise requirements of Article II:1(b).

It is important to notice that there can be two types of border measures included on each Member's Schedule of Concessions: (i) ordinary customs duties; and (ii) other duties and charges.[57] Each of these measures will receive a different treatment according to Article II:1 (b) of the GATT. In first place, the imposition of ordinary customs duties is permitted as long as the duty does not exceed the bound tariff accorded by each Member on its Schedule of Concessions. Secondly, the imposition of other duties and charges is prohibited unless the Member validly included them on their Schedule of Concessions.[58] In any case, said charges cannot surpass the rate set forth in the Schedule.

Therefore, it is recommended to design the Carbon Tax as an ordinary customs duty. This, since if a Member did not include any measure as other charges or duties in their Schedule

[56] ABR, Argentina-Footwear, At. Para. 45.
[57] PR, Dominican Republic-Import and Sale of Cigarettes, defined other duties or charges as a residual category. It stated: "any fee or charge that is in connection with importation and that is not an ordinary customs duty, nor a tax or duty as listed under Article II:2… would qualify for a measure as an "other duties or charges" under Article II:1(b)." At. Para. 7.113.
[58] Frieder Roessler, Coment on India – Additional and Extra-Additional Duties on Imports from the Untied states, World Trade Review (2010). At. 269.

of Concessions, its enactment will be automatically inconsistent with Article II:1(b) of the GATT.

Moreover, the analysis of consistency of an ordinary customs duty under Article II:1(b) of the GATT was established by the Panel in EC-Chicken Cuts. In said case, the Panel stated that the comparison between the measures and the Schedule of Concessions must result in duties that do not exceed the latter.[59]

In that sense, the group of ordinary customs duties applied to a specific product, must not surpass the Member's Schedule of Concessions. This calculation is simple if the ordinary customs duty is designed in terms of an ad valorem tariff.[60] In said case, we must only add the amounts corresponding to each tax in order to verify that they do not exceed the bound rate.

However, if the Carbon Tax is designed as a specific tariff,[61] the calculation is more complex. In said case, the specific rate must be converted to an ad valorem rate to verify that the measure is not exceeding the Member's Schedule of Concessions. In regard to the mentioned analysis, the Appellate Body has found specific tariffs to be inconsistent with Article II:1(b)

[59] PR, EC–Chicken Cuts, At. Para 7.65.
[60] According to the WTO Glossary it is "a tariff rate charged as percentage of the price" https://www.wto.org/english/thewto_e/glossary_e/ad_valorem_tariff_e.htm
[61] According to the WTO Glossary, it is "a tariff rate charged as fixed amount per quantity such as $100 per ton." https://www.wto.org/english/thewto_e/glossary_e/specific_tariff_e.htm

if they do not have a ceiling that prevent them from surpassing the bound rate of the Schedule of Concessions.[62]

Therefore, if the Carbon Tax is designed as an ordinary customs duty, it is recommended to structure it using an ad valorem tariff and taking into consideration the additional ordinary customs duties that might exist for said product.

Finally, it is important to note that an upstream Carbon Tax is more likely to have an ad valorem tariff since the percentage of pollution can be deduced because of the nature of the item that its being taxed. "The amount of CO2 released in burning any fossil fuel is strictly proportional to the fuel's carbon content."[63] On the other hand, a downstream Carbon Tax is less likely to have an ad valorem tariff since different kinds of fuels can be used in the production of the taxed item, e.g. textiles or steel. Thus, downstream taxes tend to have a specific tax rate.

B. Justification under Article II:2 (a) of the GATT.

Article II:2 of the GATT provides a justification for border measures that do not comply with the requirements of Article II:1 of the GATT. As the Appellate Body stated, "Article II:2 sets out a closed list of instances in which bound tariff rates may be exceeded."[64] Particularly,

[62] ABR, Colombia-Textiles, stated that "The measure at issue does not incorporate a ceiling that prevents the compound tariff [specific tariff] from resulting in duties that exceed the bound rates in Colombia Schedule of Concessions", At. para. 5.42.
[63] Carbon Tax Center. What´s a Carbon tax? https://www.carbontax.org/whats-a-carbon-tax/ For instance, coal releases 228.6 pounds of CO2 while Natural Gas releases 117 pounds of CO2 per million British thermal units (Btu) according to the U.S. Energy Information Administration, cited in the Carbon Tax Center.
[64] ABR, Colombia-Textiles, At. Para. 5.36.

Article II:2(a) allows the enactment of a border measure that exceeds the Schedule of Concessions if it is "equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product."[65] (emphasis added). Thus, a country may design a Carbon Tax as a border measure, that is inconsistent with Article II:1(a) and (b) of the GATT, if it complies with the requirements of Article II:2(a).

The Appellate Body in India-Additional Import Duties reversed the interpretation adopted by the Panel regarding the terms equivalent and consistency with Article III:2, and stated that "…they impart meaning to each other and need to be interpreted harmoniously."[66] It further explained that the border measure and the internal tax must be compared both in qualitative and quantitative terms.

Consequently, it must be analyzed if the border measure that attempts to be justified is imposed in excess of a corresponding internal tax.[67] This in excess analysis refers to what Article III:2 of the GATT establishes. In that sense, a border measure can benefit from the regulatory discretion in Articles II:1(a) and (b), and III:2 of the GATT if, and only if, there is an equivalent internal tax to the one at issue.

When it comes to a Carbon Tax levied to both domestic and imported products, it seems to fit perfectly with the content of Article II:2(a) of the GATT. Nevertheless, a country that aims to design a Carbon Tax as a border measure must consider three aspects: (i) the Carbon Tax

[65] Article II:2(a) of the GATT.
[66] ABR, India-Additional and Extra-Additional Duties, At. Para. 170.
[67] Id. At. Para. 180.

will use a portion of the space the Member has to impose taxes according to its Schedule of Concessions; (ii) the analysis of equivalence must follow the one enshrined in Article III:2, which is very strict regarding like products as it will be further explained; and (iii) the burden of proof for the justification contained in Article II:2(a) is shared between the complainant and the respondent.

If a complaining party finds that there are reasons to believe that a measure that has been challenged under Article II:1(b) could satisfy the conditions of Article II:2(a), it "bears some burden in establishing that the conditions… are not met."[68]

In that sense, a country that is planning to implement a Carbon Tax shall comply with the requirements of Article II:1(a) and (b) of the GATT, or use the justification contained in Article II:2(a) to avoid an inconsistency with said Article. Nonetheless, if the Member aims to abide by the limit set forth in Article III:2 of the GATT instead of the one established by Article II:1(a) and (b), it is better to structure the measure as an internal tax.

C. Consistency of a Carbon Tax under Article III:2 of the GATT.

Article III:2 of the GATT enshrines the National Treatment obligation regarding internal taxation, aiming to attain trade without discriminatory taxation. Its achievement relies on an equal fiscal treatment between imported and domestic-produced goods.

[68] At. Para. 192.

Specifically, in terms of Article III:2, the National Treatment obligation is followed if imported products are not being taxed in excess or treated less favorably than like domestic products[69]. Said provision has two sentences with "separate and distinctive consideration of the protective aspect of a measure."[70] The first sentence has a narrower scope in terms of the products at issue since it applies to like products, while the second sentence applies to directly competitive or substitutable products -that are not considered like products. In regard to this matter, the Appellate Body in Korea-Alcoholic Beverages established the following:

> 'Like' products are a subset of directly competitive or substitutable products all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive o substitutable products are 'like'. The notion of like products must be construed narrowly but the category of directly competitive or substitutable products is broader. While perfectly substitutable products fall within ArticleIII:2, first sentence, imperfectly substitutable products can be assessed under ArticleIII:2, second sentence.[71] (emphasis added).

First sentence contains a two-tier test that must be developed in order to determine if a measure complies with the provision. This test evaluates whether: (i) imported and domestic products are like products; and (ii) the imported products are taxed in excess.[72] Regarding the first tier, the concept of likeness shall be construed narrowly.[73] Only products that are perfectly substitutable will fall in the scope of the first sentence. For said purpose, the

[69] Christine Kaufmann and Rolf H. Weber, Carbon-related border tax adjustment: mitigating climate change or restricting international trade? World trade review. At. pg. 504.
[70] ABR, Japan-Alcoholic Beverages II, At. Para. 19.
[71] ABR, Korea-Alcoholic Beverages, At. Para. 118.
[72] ABR, Canada-Periodicals, At. Pgs. 22-23.
[73] ABR, Japan-Alcoholic Beverages II, At. Pg. 19. Stated that "The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in ArticleIII:2, first sentence of the GATT 1994, the accordion of 'likeness' is meant to be narrowly squeezed."

criteria[74] established by Working Party on Border Tax Adjustments, as well as the tariff classification of the products, serve as framework to determine if the products are to be considered like products.

Like products are subject to a very stringent standard that correspond to the second tier of the test. The taxation in excess, is not qualified by a de minimis standard. In terms of the Appellate Body in Japan -Alcoholic Beverages: "Even the smallest amount of excess is too much. The prohibition of discriminatory taxes in Art. III:2 first sentence, is not conditional on a trade effects test."[75]

In light of the above, Members shall be aware when designing a Carbon Tax that the actual burden that is imposed through the tax to imported products must be exactly the same to the one imposed to like domestic products. This, taking into consideration that even bearing the cost of opportunity of money in time has been found by the Appellate Body to be discriminatory when importers were required to prepay the tax.[76]

If a Member designs a Carbon Tax in an upstream manner, it is possible that the products at issue are considered like products. The products could be virtually identical, with only one difference between them: their origin. Therefore, it is recommended to set the same tariff for both imported and domestic products when implementing the tax. The measure shall also

[74] The mentioned criteria are: product´s end-uses in a given market; consumers´ tastes and habits, the product´s properties, nature and quality. Report of the Working Party on Border Tax Adjustments, BISD 18S/97, At. para. 18. This shall not be considered a close list.
[75] ABR, Japan-Alcoholic Beverages II, At. Pg. 23 and ABR, Thailand-Cigarettes, At. Para. 113.
[76] PR, Argentina-Footwear, At. Para. 11.181.

enshrine the same formal obligations for both, which includes everything related to the collection of the tax. This path shall be followed every time that imported and domestic products are like products -which can also happen for a downstream tax.

If the products are not found to be like in terms of the first sentence of Article III:2 of the GATT, the analysis must shift towards the second sentence, which analyzes whether: (i) imported and domestic products are directly competitive or substitutable products; (ii) the products are not similarly taxed; and (iii) the dissimilar taxation is applied as to afford protection to the domestic production.[77]

Regarding the mentioned test, the wording not similarly taxed from its second tier corresponds to a different standard than the one contained in the first sentence of Article III:2. This one is less strict on its analysis. According to the Appellate Body, "the burden must be more than de minimis in any given case."[78] Moreover, the third tier of the test adds a requirement for a measure to be found inconsistent. Said tier requires the measure to accord a dissimilar taxation as to afford protection to the domestic industry. On this matter, the Appellate Body has established that the intent of the government is not central point.[79] Instead, it has determined as relevant assessing aspects the design, architecture and structure of the measure.[80]

[77] ABR Japan-Alcoholic Beverages II, At. Pg. 22-25.
[78] Id. At. Pg. 27.
[79] ABR Chile-Alcoholic Beverages, At. Paras. 71-72.
[80] Id.

If a Member designs a downstream Carbon Tax, it is possible that the products at issue fall under the scope of the second sentence of Article III:2 of the GATT. Manufactured products can have differences regarding physical characteristics, consumer's preferences or even their tariff classification, and be considered directly competitive or substitutable products.

In said case, there is margin for a difference in taxation -not conditioned to a de minimis standard. However, that difference in taxation would contravene the purpose of the Carbon Tax levied on imported products, which is to level the competitive field between importers and domestic producers. Thus, it is not recommended to design the tax with a differential taxation between imported and domestic products, even if the products being taxed fall under the scope of the second sentence of Article III:2 of the GATT.

By this means, a Member willing to design a Carbon Tax should follow the recommendations included in this section. Moreover, it is important to acknowledge that border measures are circumscribed to the Schedule of Concessions, while internal taxes are to the corresponding taxation for domestic products. The path each country chooses in order to impose taxes depends on their particular circumstances. Nevertheless, designing an upstream Carbon Tax that fits Article III:2 of the GATT is advisable, since its purpose is to level the competitive field between domestic and foreign industries, while protecting the environment.

IV. Green Subsidies

According to Article 1 of the SCM, a subsidy is a financial contribution made by a government or a public body that confers a benefit. Such financial contribution can be

structured in multiple ways, e.g. a direct transfer of funds, a tax exception, the providing of goods and services, the purchase of goods, or the payments to a funding mechanism.

Under WTO Law, subsidies are not prohibited *per se*. In fact, subsidies are policy instruments commonly used by governments to achieve a variety of purposes, including those related to environmental protection. Moreover, the United Nations Environment Programme (UNEP) determined that "… public financing is essential for the transition to a green economy and more than justified by the positive externalities that would be generated."[81]

A Green Subsidy[82] is "the allocation of public resources for the purpose of improving sustainability over what would otherwise occur via the market".[83] This kind of subsidy provides resources that permit governments "to obtain public goods and promote outcomes that generate positive environmental externalities".[84] They are fiscal policies that, unlike other environmental instruments, do not operate through regulation but instead through the market.[85]

Green Subsidies can generate overall positive effects and increase economic welfare, but they can also potentially activate international law provisions. In that sense, subsidies can promote

[81] Steve Charnovitz, Green Subsidies and the WTO, GW Law Faculty Publications & Other Works https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2341&context=faculty_publications, (2014).
[82] Do not confuse Green Subsidies with *green light subsidies.* The difference between these two concepts will be further explained in this section.
[83] Steve Charnovitz, Green Subsidies and the WTO, GW Law Faculty Publications & Other Works https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2341&context=faculty_publications, (2014).
[84] Id.
[85] Id.

the achievement of certain purposes, but if they are not designed in a correct manner, they might also have adverse effects on international trade.[86]

This section will analyze the challenges that Members face when designing Green Subsidies and how to overcome them in order to implement environmental-friendly measures. As it will be further explained, Green Subsidies used to be under the scope of Part IV of the SCM, which shielded them from being challenged under the Dispute Settlement System. Said provision is no longer applicable, which means that Members will have to follow the general rules contained in the SCM in order to implement Green Subsidies.

In that sense, this section will explain: (i) how Green Subsidies used to be shielded under Part IV of the SCM; (ii) what happened when Part IV expired; and (iii) how Green Subsidies can still be implemented by following the general rules that apply to all subsidies under the SCM.

A. Brief history of Green Subsidies under the WTO.

Subsidies have always been part of the WTO Law system. Nonetheless, historically, the possibility that Members have to incentivize and promote the use of green technologies through subsidies, has not been completely clear.

[86] Peter Van den Bossche, Principles of Non-Discrimination, in The Law and Policy of the World Trade Organization: Text, Cases and Materials (2008). At. 369.

In 1947, the GATT included some basic rules regarding subsidies. This Article did not define a subsidy and merely established that Members had to notify the implementation of subsidies that had an effect on trade, and seek to avoid using subsidies on exports of primary products.[87] This provision was later amended prohibiting Members "… from granting export subsidies to non-primary products which would reduce the sales price on the export market below the sales price on the domestic market".[88]

The mentioned rules were not enough and as a result, more complex and specific rules appeared in the Tokyo Round in 1973 with the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement*.[89] Said Agreement was also known as the *Tokyo Round Subsidies Code* and permitted greater uniformity and certainty towards subsidies under WTO Law.[90] Nonetheless, this plurilateral Agreement was not accepted by all Members and led to multiple disputes between Parties.[91] Thus, subsidies became part of the main agenda of the Uruguay Round in 1986.[92]

The negotiation held during the Uruguay Round had as a result the adoption of the SCM in 1994. This Agreement finally contained detailed rules regarding the definition of subsidies and the factors that would led them to be inconsistent.

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[87] Id.
[88] Id.
[89] Andrew Stoler,'The Evolution Of Subsidies Disciplines In GATT And The WTO, Institute for international trade, https://iit.adelaide.edu.au/research/conferences/docs/subsidies_usyd_0809.pdf (2009), At, 5.
[90] Peter Van den Bossche, The Law and Policy of the World Trade Organization (Cambridge University Press) (2005).
[91] id.
[92] Andrew Stoler,'The Evolution Of Subsidies Disciplines In GATT And The WTO, Institute for international trade, https://iit.adelaide.edu.au/research/conferences/docs/subsidies_usyd_0809.pdf (2009).

The SCM brought three categories of subsidies: prohibited, actionable and non-actionable subsidies. Non-actionable subsidies, also known as *green light subsidies,* were included in Part IV of the SCM,[93] which contained a series of subsidies that, as a general rule, could not be challenged by WTO Members. Environmental protection was enshrined in subparagraph (c) of the mentioned provision in the following way:

> (c) assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:
>
> (i) is a one-time non-recurring measure; and
> (ii) is limited to 20 per cent of the cost of adaptation; and
> (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
> (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
> (v) is available to all firms which can adopt the new equipment and/or production processes.

This subparagraph provided Members with policy space for them to implement Green Subsidies. Said space could only be threatened if a Member raised a concern about serious adverse trade effects to the SCM Committee, that in said case, could authorize countermeasures.[94]

In regard to Part IV, Article 31 of the SCM establishes the following:

> The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the

[93] Sadeq Z. Bigdeli, Resurrecting the Dead-The Expired Non-Actionable Subsidies and the Lingering Question of Green Space, Manchester Journal of International Economic Law, (2011).
[94] Id.

> Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Because of the content of Article 31, Part IV of the SCM was subject to a transitional five-year period that expired in 1999, after the absence of consensus to maintain it.[95] This means that Green Subsidies were no longer protected under Part IV of the SCM, which generated issues towards their implementation and required Members to be careful when designing these measures in order for them to be consistent with WTO Law.

B. The status of Green Subsidies after the expiry of Part IV of the SCM.

As explained before, Part IV of the SCM stopped being applicable to Green Subsidies in 1999, which opened the possibility to challenge them under the Dispute Settlement System. The expiry of the non-actionable subsidies clause reduced the policy space that countries had, limiting their environmental action and creating political issues around green matters.

The lack of precise rules about Green Subsidies in the SCM resulted in serious issues towards its promotion. This situation increased the possibility of new disputes between Members and limited the legitimate space that governments had regarding environmental protection.

Because of this situation, some argued that the non-actionable subsidies category should be reincorporated to the Covered Agreements. In fact, during the subsequent WTO reunion -the Doha Round negotiations in 2002, Venezuela and Cuba propounded the revival of Article 8

[95] Id.

of the SCM.[96] In its proposal, Venezuela stated that "… Members should examine measures aimed at achieving legitimate development goals such as regional growth, technology research and development funding, production diversification and development, and implementation of environmentally sound methods of production."[97]

Moreover, regarding these subsidies, the European Communities stated the following:

> Certain subsidies may have a negative impact on environment, but other can have a positive effect, by for instance encouraging reductions in pollution or furthering research into a cleaner environment. In view of this it may be necessary to address the environmental dimension of subsidies and, in particular, to consider further how to approach subsidies aimed at the protection of the environment, following the expiry of the 'green box'.[98]

Nonetheless, any consideration regarding this category encountered a series of political issues. For example, subsidies that incentivized the use of renewable energy became a political target. This, since China, Brazil and India were becoming international leaders in the use and implementation of different kinds of clean energies.[99] This situation became center-stage in the long and conflictive trade relationship between the United States and China.[100] Additionally, it increased the tension towards protectionism and trade action

[96] Id.
[97] Improved Rules Under the Agreement of Subsidies and Countervailing Measures-Non-Actionable Subsidies; Paragraph 10.2 of the Document on Implementation-Related Issues and Concerns, Proposal by Venezuela TN/RL/W/41 (17 December 2002).
[98] WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures, proposal by the European Communities TN/RL/W/30 (21 November 2002).
[99] Sadeq Z. Bigdeli, Resurrecting the Dead-The Expired Non-Actionable Subsidies and the Lingering Question of Green Space, Manchester Journal of International Economic Law, (2011).
[100] Id.

against this kind of subsidies, not only through the Dispute Settlement System but also through unilateral countervailing measures.[101]

The revival of Part IV of the SCM would mean that governments would have more green space for the design and implementation of Green Subsidies. Nevertheless, said revival requires political consensus, which means that until that happens, Members will have to find this policy space between the rules and prohibitions contained in the SCM.

C. Consistency of a Green Subsidy under the SCM.

After Part IV of the SCM expired, having green purposes stopped being enough for a subsidy to be in accordance with WTO Law. Therefore, Members nowadays need to take into consideration which rules must be followed in order to achieve the implementation of WTO-compliant Green Subsidies. In that sense, we will now explain the premises that Members must abide by in order to avoid the establishment of a dispute under the WTO Dispute Settlement System or unilateral countermeasures regarding their subsidies.

The SCM contains rules regarding certain factors that will determine the inconsistency of subsidies in Parts II and III of the Agreement. Said factors are: (i) *export contingency*; (ii) *import substitution*; and (iii) the presence of *adverse effects*. These three factors have been analyzed in detail in several Panel and Appellate Body Reports, which permits Members to understand how measures should and should not be designed and structured.

[101] Id.

In first place, when it comes to *export contingency*, Article 3.1(a) of the SCM establishes that Members are prohibited to impose "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance…"[102] The Appellate Body has defined *contingent* as conditional or dependent for its existence on something else.[103] The latter means that a subsidy which is conditional or dependent for its existence on export performance, will be deemed to be inconsistent with Article 3.1(a) of the SCM.

On the other hand, the Article establishes that said contingency can happen *de jure* or *de facto*. This means that measures can be challenged not only when the conditionality can be demonstrated from the words of the law, but also when it is inferred from the total configuration of the facts surrounding the granting of the subsidy.[104]

The second relevant factor is *import substitution*. This factor is contained in Article 3.1(b) of the SCM which establishes that Members are prohibited to impose "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."[105] This provision does not prohibit subsidization to domestic production *per se,* but instead to the use of domestic goods over imported goods. The Appellate Body differentiated these two situations in the following way:

> We recall that, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic "production" per se but rather the granting of subsidies contingent upon the "use", by the subsidy recipient, of domestic over imported goods. Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under

[102] Agreement on Subsidies and Countervailing Measures, 1869 U.N.T.S. 14 (1994), At. Article 3.1(a), SCM.
[103] ABR, Canada-Autos, At. Para. 98.
[104] ABR, Canada-Autos, At. Para. 99.
[105] Agreement on Subsidies and Countervailing Measures, 1869 U.N.T.S. 14 (1994), At. Article 3.1(a), SCM.

> Article 3 of the SCM Agreement. We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.[106]

Based on prior Panel and Appellate Body findings, the Panel in EC-Large Civil Aircraft (Article 21.5) pointed out that unlike article 3.1(a), article 3.1(b) does not make reference to contingency in law or in fact.[107] Nonetheless, the Appellate Body has found that this article's scope enshrines both *de facto* and *de jure* contingency.[108]

Regarding the standard set out for the analysis of the prohibition contained in this Article, the Appellate Body has interpreted the term *use* as the action of using or employing something.[109] It also determined that the meaning of said term may vary depending on the particular circumstances of the case. The Appellate Body stated that, depending on the specific facts of the case, *use* could refer to e.g. consuming a good in the process of manufacturing, incorporating the component into a separate good or serving as a tool in the production of a good.[110]

Both export-contingent and import-substitution subsidies are under the *Prohibited Subsidies* category of the SCM. This, since this kind of measures are known to have a distorting potential that can easily affect the international market. Because of that, "[t]he

[106] ABR, US-Tax Incentives, At. Para. 5.15.
[107] PR, EC-Large Civil Aircraft (Article 21.5-US), At. Para. 6.778.
[108] Id.
[109] ABR, US-Carbon Steel (India), At. Para. 4.374.
[110] ABR, US-Tax Incentives, At. Para. 5.8.

Agreement…takes the approach that subsidies directly targeting exports or import competition are by definition distortive and should therefore not be used."[111]

This distorting potential of *Prohibited Subsidies* is economically explained since they:

> … act as barriers to trade, by distorting the competitive relationship that develop naturally in a free trading system. Exports of subsidized products may injure the domestic industry producing the same product in the importing country. Similarly, subsidized products may gain artificial advantages in third country markets and impede other countries' exports to those markets. Because of this potential the WTO Agreements prohibit with respect to industrial goods any export subsidies and subsidies contingent upon the use of domestic over importing goods, as having a particularly high trade-distorting effect.[112]

Moreover, because of this distorting potential, the Appellate Body has been very strict when analyzing this kind of measures. In that sense, when implementing Green Subsidies, governments shall be aware that any connection to export performance or import substitution will make their subsidies *Prohibited Subsidies* and lead to a violation of the mentioned SCM provisions.

The third factor that could make a Green Subsidy inconsistent is the presence of *adverse effects*. If said effects are present, then the subsidy will become an actionable one. The Panel in US-Offset Act referred to this matter when determining that "a measure constitutes an actionable subsidy if it is a subsidy, if it is 'specific', and if its use causes 'adverse effects'".[113]

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[111] World Trade Report 2006. Subsidies, trade and the WTO. https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr06-2f_e.pdf (2006) At. 199.
[112] Subsidies and Countervailing Measures http://www.meti.go.jp/english/report/downloadfiles/gCT0006e.pdf At. 1.
[113] PR, US-Offset Act (Byrd Amendment), At. Para. 7.106.

Unlike the two types of subsidies that were previously analyzed, actionable subsidies require a market effect in order to be challenged. According to Article 5 of the SCM, *adverse effects* to the interests of other Members can happen through: (i) the injury to the domestic industry of another Member; (ii) the nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994; or (iii) serious prejudice to the interests of another Member.

The legal standard for the analysis of each of these categories is different and must be evaluated in particular for each case. In regard to the presence of an injury to the domestic industry of another Member, the Appellate Body in EC-Large Civil Aircraft determined the following:

> … the term 'injury to the domestic industry'… includes the question of causation. Thus, we consider that the consistent interpretation of the concept of 'injury to the domestic industry' requires us to examine, in considering causation, the effects of subsidized imports as set forth in Articles 15.2 and 15.4 in our analysis of material injury under Article 5(a).[114]

Therefore, the analysis of this *adverse effect* must be conducted following what is established under Articles 15.2 and 15.4 of the SCM, which state the following:

> Article 15 – Determination of injury
>
> 15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports,

[114] PR, EC-Large Civil Aircraft, At. Paras. 7.2068-7.2080.

> either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.
>
> 15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

On the other hand, when analyzing the nullification or impairment of benefits accruing directly or indirectly to other Members, the Panel in US-Offset Act determined that any claim arising under Article 3.8 of the Dispute Settlement Understanding (DSU) based on a violation, would relate to a nullification or impairment caused by the violation at issue.[115] In that sense, a Member claiming this *adverse effect* will have to prove that the use of a subsidy caused a nullification or impairment.[116]

Finally, when it comes to analysis of serious prejudice to the interests of another Member, the Panel in US-Upland Cotton interpreted its legal standard in the following way:

> …we believe that such 'serious prejudice' may involve the effects of subsidies on the complaining Member's trade in a given product. That is, it addresses the volumes and prices and flows of such trade, which may, by logical extension, affect a producing Member's domestic production of that product. We therefore consider that a

[115] PR, US-Offset Act (Byrd Amendment), At. Paras 7.118-119.
[116] Id. At. Paras. 7.118-119.

> detrimental impact on a complaining Member's production of, and/or trade in, the product concerned may fall within the concept of 'prejudice ' in Article 5(c) of the SCM Agreement. Moreover, the prejudice involved must be 'serious'. In one of its ordinary meanings, 'serious' means 'important' and 'not slight or negligible'.[117]

After analyzing the relevant SCM rules, it is possible to conclude that plenty of factors can determine the inconsistency of a measure under this Agreement. Since Green Subsidies are not shielded from the prohibitions and requirements of the SCM; its design, structure and implementation will have to be guided and shaped carefully in order to avoid a conflict between its environmental purposes and WTO Law.

In light of the above, a WTO-compliant Green Subsidy shall be designed taking into consideration the following aspects: (i) that there is no connection between the granting of the subsidy and export performance, (ii) that there is no connection between the granting of the subsidy and *import substitution*, and (iii) that the measure does not produce any *adverse effect* to other Members.

The mentioned design could be accomplished, e.g. by implementing a subsidy that promotes the use of clean energies in the production of certain product, without requiring the recipient any performance relating exportation or the use of domestic goods over imported goods. The granting authority shall avoid any connection with these two factors by pursuing only the implementation of green technologies, without aiming to change the behavior of the recipient towards export performance or *import substitution*.

[117] PR, US-Upland Cotton, At. Paras. 7.1392-1395.

As explained before, an inconsistency with Article 3 of the SCM can be found *de jure* or *de facto*. This means that the design of any Green Subsidy shall not only exclude a specific wording or reference to these factors from the law, but also consider whether the granting of the subsidy determines the behavior of the recipient towards them even without the existence of such wording.

Additionally, Members shall consider whether the implementation of the Green Subsidy produces any *adverse effect* to other Members. Said consideration requires a technical analysis of the all the factors included in Article 5 of the SCM, in order to determine that the measure will not injury the domestic industry of another Member, nullify or impair the benefits accruing to other Members, or generate serious prejudice to the interests of another Member. Thus, if the design, structure and implementation of the Green Subsidy follows the latter recommendations, the measure will achieve its environmental purpose while abiding by the obligations of the SCM.

V. Justifying Carbon Taxes and Eco-labels under Article XX of the GATT

As explained in the previous sections, there is a risk of non-compliance with WTO Law when designing environmental measures. Nevertheless, Article XX of the GATT provides Members the possibility to justify inconsistent measures when they protect a significant value listed in the subparagraphs of the referred provision.

In that sense, inconsistent Eco-labels and Carbon Taxes can be justified under Article XX of the GATT–also known as the General Exception Clause. However, applying this Article

represents a challenge because of several reasons. Thus, this section will analyze: (i) the object and purpose behind Article XX of the GATT; (ii) the applicability of Article XX of the GATT to the TBT and the SCM; (iii) subparagraph (b) and the protection of the environment; and (iv) the interpretation of the elements of the Chapeau.

A. The object and purpose behind Article XX of the GATT.

The Preamble of the Marrakesh Ministerial Decision on Trade and Environment issued on April 15th, 1995 which was reaffirmed by Doha's Ministerial Decision of 2001, identified the objectives of the WTO.[118] Among them, it was established that the WTO pursues "an open, non-discriminatory and equitable multilateral trading system"[119] along with the "protection of the environment…"[120]

These two principles may collide when environmental measures imply a restriction to trade. Thus, the WTO Law system confers Members the right to invoke the General Exception Clause in order to justify a measure which is inconsistent with the GATT.

Article XX of the GATT constitutes an exception, which allows Members to exercise a regulatory discretion within their sovereign rights. This, since "sovereigns have always chosen how, and to what extent, they would be bound by their treaty obligations."[121] Thus,

[118] Sanford E. Gaines. The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures. SSRN Electronic Journal. 2002.
[119] Id. At. Para 339.
[120] Id.
[121] Diane A. Desierto. Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation. At. 1. Ed., eBook.(2012).

this provision enshrines an *escape valve* that provides a balance between the multilateral agreement and the individual policy space that every Member is entitled to.

B. The applicability of GATT Article XX to the TBT and the SCM.

The policy space that is granted by this clause might not be extensive to all the Covered Agreements. In fact, the applicability of Article XX of the GATT to the SCM and the TBT constitutes an ongoing discussion among WTO Law experts.[122] Bearing this in mind, we will now present some arguments for and against the extension of the applicability of Article XX of the GATT to the TBT and the SCM.

In first place, those who support the extension of the applicability of the General Exceptions argue the following:

> The term 'this Agreement' in the Chapeau of Article XX of the GATT 1994 has no clear 'ordinary' meaning of its own. This term was contained in the GATT 1947, prior to the Uruguay Round, when the GATT 1947 itself constituted the primary multilateral trade agreement. The GATT 1947 was carried over into the WTO Agreement essentially as it is, without being rewritten to take into account its new place as one of many related 'goods' agreements, bound together in an annex. The reference to 'this Agreement' must, therefore, necessarily be interpreted in the light of today's placement of this provision and the link of the GATT 1994 to other Annex 1A agreements, as discussed above.[123]

[122] GATT Article XX as an Exception to the SCM Agreement International Economic Law and Policy Blog. http://worldtradelaw.typepad.com/ielpblog/2012/05/gatt-article-xx-as-an-exception-to-the-scm-agreement.html. (May 2012); GATT Article XX an Exception to the TBT Agreement International Economic Law and Policy Blog. http://worldtradelaw.typepad.com/ielpblog/2014/08/gatt-article-xx-and-the-tbt-agreement.html (August 2014).
[123] Id.

On the other hand, those who argue the non-applicability of Article XX of the GATT to the TBT and the SCM, invoke what the Appellate Body established in China-Rare Earths. In said case, the Appellate Body determined the following:

> In some instances, such examination will lead to the conclusion that exceptions in one covered agreement, such as Article XX of the GATT 1994, may be invoked to justify a breach of an obligation set forth elsewhere than in the GATT 1994. In principle, different types of provisions and circumstances may lead to such a conclusion. One clear example is found in Article 3 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), the express terms of which provide that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." In other instances, such examination may lead to the opposite conclusion. For example, Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement).[124] (emphasis added)

In regard to this discussion, it is our standing that since the TBT and the SCM do not make any reference to the application of the General Exceptions, Article XX shall not be applied to the measures under their scope. In that sense, Eco-labels and Green Subsidies will not be justified under this clause regarding a breach of the TBT or the SCM. Nonetheless, knowing that an Eco-label can result in an inconsistency with Article III:4 of the GATT, it could be justified in regard to the violation of said provision.

C. Subparagraph (b) and the protection of the environment.

Following the logic behind the object and purpose of this provision, the subparagraphs of Article XX of the GATT entail several situations that limit the exceptions. These subparagraphs must be analyzed before verifying the compliance of the measure with the

[124] ABR, China-Rare Earths, At. Para 5.56.

introductory clause of the Article –also known as the Chapeau. In that sense, the Appellate Body[125] has stated that a measure will be justified when it complies with a two-tier test: it must meet (i) the requirements of at least one of the subparagraphs; and (ii) the requirements of the Chapeau.

Subparagraph (b) includes measures which are "(b) necessary to protect human, animal or plant life or health". The Appellate Body in Brazil-Retreaded Tyres[126] determined that environmental protection is in the scope of subparagraph (b), since a risk to the environment can result in a risk to human, animal or plant life or health. In that sense, a measure that is aiming to protect the environment as a whole -and not only one exhaustible natural resource, which would be under the scope of subparagraph (g)- will fall under subparagraph (b).

Applying this subparagraph constitutes a considerable degree of difficulty, since it enshrines the *necessity test*. The Appellate Body in Korea-Beef[127] and in Brazil-Retreaded Tyres[128] developed this test through a weighting and balancing process that involves three relevant factors: (i) the importance of the interest and values at stake; (ii) the extent of the contribution to the achievement of the measure's objective; and (iii) the trade restiveness of the measure.

[125] ABR, US-Shrimp, At. Para. 118.
[126] ABR, Brazil-Retreaded Tyres, At. Para. 144.
[127] ABR, Korea-Beef, At. Paras. 161 and 162.
[128] ABR, Brazil-Retreaded Tyres, At. Paras. 178 and 182.

Said process entails "a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually in order to reach an overall judgement".[129]

In light of the above, in order to justify an Eco-label -which is inconsistent with Article III:4 of the GATT- and a Carbon Tax under subparagraph (b), an analysis of their contribution to the achievement of the objective shall be performed. Said contribution must be weighed against the measure's trade restrictiveness. Additionally, an evaluation of the available alternatives that might be less trade restrictive while providing an equivalent contribution to the achievement of the measure's objective, must be developed.

When it comes to environmental measures, the extent of the contribution can be a hard element to prove. Nonetheless, when a Carbon Tax is structured as a pigouvian tax,[130] it "is a full solution to the problem of how to internalize externalities… Such a tax is not only necessary but also sufficient."[131] Moreover, an Eco-label contributes to the protection of the environment since it reduces the information asymmetry by providing relevant information to the consumers about the environmental features of a product, which can encourage its purchase and therefore, its supply.[132]

[129] Id.
[130] According to the OECD: "A Pigouvian tax is a tax levied on an agent causing an environmental externality (environmental damage) as an incentive to avert or mitigate such damage." https://stats.oecd.org/glossary/detail.asp?ID=2065
[131] Thomas Sterner & Jessica Coria. Policy Instruments for Environmental and Natural Resource Management. At. 95 and 96. Ed. Resources for the future. (2011)
[132] Jasper Stein, The Legal Status of Eco-Labels and Product and Process Methods in the World Trade Organization, American Journal of Economics and Business Administration, (2009), At. 285.

D. The interpretation of the elements of the Chapeau.

As it was previously explained, according to the Appellate Body,[133] the analysis of the Chapeau of Article XX of the GATT must be developed after performing the analysis of a subparagraph. Said order aims to "…prevent the abuse or misuse of a Member's right to invoke the exceptions contained in the subparagraphs of that Article".[134] This, "…so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of right and obligations constructed by the Members themselves".[135]

The analysis of the Chapeau enshrines evaluating whether there is: (i) an arbitrary discrimination between countries where the same conditions prevail; (ii) an unjustifiable discrimination between countries where the same conditions prevail; and (iii) a disguised restriction on international trade. [136] However, the interpretation of these requirements has varied from case to case without following a uniform pattern.

For example, the Appellate Body in EC-Seal Products established that the arbitrary or unjustifiable discrimination between countries where the same conditions prevail is determined with the "assessment of whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same'".[137] On the contrary, the Appellate Body in Brazil-Retreaded Tyres focused on the "cause of the discrimination, or the rational put forward to explain its existence".[138]

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[133] ABR, US-Shrimp, At. Para. 118.
[134] ABR, US-Gasoline, At. Para. 22.
[135] ABR, US-Shrimp, At. Para. 159.
[136] ABR, US-Shrimp, At. Para. 150
[137] ABR, EC-Seal Products, At. Para. 5.299.
[138] ABR, Brazil- Retreaded Tyres, At. Para. 226.

Additionally, the Appellate Body in US-Shrimp, considered that the analysis depends on two main factors: (i) the flexibility in the application of the measure at issue; and (ii) the unilateral application or failure to consider different circumstances that may occur in the territories of other WTO Members, also named as *sense of negotiating efforts*.[139]

The latter demonstrates the divergent interpretation and application of the elements of the Chapeau, which sets a difficulty when it comes to exercising the right enshrined in Article XX of the GATT. In that sense, the objective that the General Exception Clause pursues is not duly achieved.

The mentioned issue can endanger the existence of the WTO itself. This, since it limits the possibility to invoke and use the exceptions listed in Article XX of the GATT. If the applicable legal standard for the analysis of said provision is not clear, then Members will be deprived of their right to implement measures which are inconsistent with the GATT but protect a value that the WTO community has recognized as fundamental. As a consequence, the *escape valve* might be reduced to inutility.

VI. Conclusion

As it was explained through this monograph, even though the international community seeks to protect both free trade and the environment, some issues may appear when bringing

[139] ABR, US-Shrimp Article 21.5 Malasya, At. Para. 168.

together these two factors. The WTO law system enshrines this problem, as one of its goals is to protect and promote them both. This situation also encounters a series of practical considerations that make harder the coexistence of trade and environment.

Even though there are some difficulties surrounding the enactment of environmental policy instruments, if these are carefully designed, they can both protect the environment and follow the rules contained in the Covered Agreements. In that sense, Eco-labels, Carbon Taxes and Green Subsidies can be structured in a manner in which they do not violate the principles of free trade enshrined as WTO provisions.

Promoting the use of this kind of environmental measures might be the solution to the environmental threats we are facing without damaging the law system that has preserved free trade for more than two decades. In that sense, WTO Members will have to be cautious when designing their green policies in order to achieve their environmental goals while securing the efficiency of the international market.

On the other hand, Members must understand how important is their right to use the exceptions contained in Article XX of the GATT. Said clause not only permits them to exercise the policy space and *escape valve* that they were granted by the system, but also to defend values that were categorized as fundamental to the system since its beginning. In that sense, it is clear that environmental protection has an important space range in the WTO law system that can be used and preserved by all Members.

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VIII. Annexes

1. EMC2 2017-2018 Case, Borginia–Measures Affecting Trade in Textile Products (Complainant: Syldavia), by James J. Nedumpara.

2. EMC2 2017-2018 Submission of the Complainant, Borginia–Measures Affecting Trade in Textile Products (Complainant: Syldavia), by Team 034.

3. EMC2 2017-2018 Submission of the Respondent, Borginia–Measures Affecting Trade in Textile Products (Complainant: Syldavia), by Team 034.