

Diplomacy Dialogue



Greening

WTO Agreements

to **stop**

Climate Warming

Executive Summary

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Diplomacy Dialogue: Mission

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Greening WTO Agreements to stop climate warming¹

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Introduction: Global risk of “ecocide” through environmental destruction

Radical new approaches are urgently needed to reverse climate warming and to prevent the world from committing “ecocide” through environmental destruction. The atmospheric trends are clear: increased rainfall, a relentless march towards warmer temperatures, higher level of oceans, and ever-more-intense droughts. A “business as usual” approach could lead to global warming of 6°C or more in the long run. At the same time, the United Nations’ 2°C objective seems increasingly out of reach given the lack of progress on decarbonisation since 2000.ⁱ Furthermore, global carbon dioxide in the atmosphere has recently passed a milestone level: at the beginning of May, climate warming greenhouse gases reached 400 parts per million for the first time in human history.ⁱⁱ

In view of the life endangering risks of climate change, researchers and scholars highly recommended that low carbon production and investment at national and global levels is urgently needed.ⁱⁱⁱ Various attempts of state and non-state actors to cope with climate change were proposed and technical solutions were suggested but climate warming continues. Drastic and normative solutions are required. More straightforward solutions are needed instead of complicated technical solutions at micro-levels which are well intended but offer no stringent reduction of climate warming. The longer no solutions are found dealing with the relentless increase

of carbon and greenhouse gas emissions, the surer climate warming will continue inexorably.

Many environmental problems are related to the increased scale of global economic activity. On the one hand, the absence of effective environmental policies can contribute to environmental problems. On the other hand, trade can have positive effects by improving resource allocation, promoting economic growth and increasing overall welfare. Building on previous analysis and recommendations^{iv}, this policy brief proposes radical new solutions going beyond the incremental change of current policy practice, suggesting the need for a discontinuous change as the only means of halting the pervasive “tinkering along” approach of mainstream policy making which have not been able to bring about a halt to climate warming.

Addressing climate change: WTO? UNFCCC?

The World Trade Organization (WTO) and United Nations Framework Convention on Climate Change (UNFCCC) frameworks are intended to foster sustainable development. Although both treaty regimes provide means to address the issue of low-carbon production and investment, these means have not yet been made operational realities.

The aim of the UNFCCC is to prevent dangerous anthropogenic interference with the climate system.^v The Kyoto Protocol, established in 1997, is an international agreement which “operationalizes” the Convention. The Protocol commits countries to stabilize greenhouse gas emissions based on the principles of the Convention, while the Convention only encourages countries to do so.^{vi}

On the other hand, the WTO through its goals, rules, institutions, dispute settlement and trade & development agenda, provides important means of advancing international environmental goals. The WTO’s founding agreement recognizes sustainable development as a central principle. It is an objective that runs through all subjects of the current Doha negotiations^{vii} but these objectives remain a pious wish so far.

The WTO is the premier multilateral institution which could effectively generate legal constraints and political will to stop climate warming. UNFCCC has not sufficiently addressed trade. Although country group obligations under UNFCCC are related to trade issues (e.g. TRIPS and TRIMS issues) the UNFCCC does not provide enough legal provisions to link climate change and trade. References made to trade are *de minimis*. In

¹ CSEND Policy Study Nr. 2 (122 pp) written by Prof R Saner: <http://www.csend.org/csend-policy-briefs/studies>

light of this situation, the best approach is to focus on WTO and to search for solutions to arrest climate warming. The WTO agreements contain references to environment as an essential component of sustainable development. Furthermore, WTO Dispute Settlement cases pertaining to environment already exist and have been adjudicated; extremely relevant sectors for fighting climate change such as renewable energy, solar energy, solar panels and wind power equipment have been covered by WTO jurisprudence.^{viii}

An intra-regime solution within the WTO agreement (through a more systemic inclusion of stringent environmental clauses) could elicit the green investments and green production needed to successfully implement climate change mitigation and adaptation.

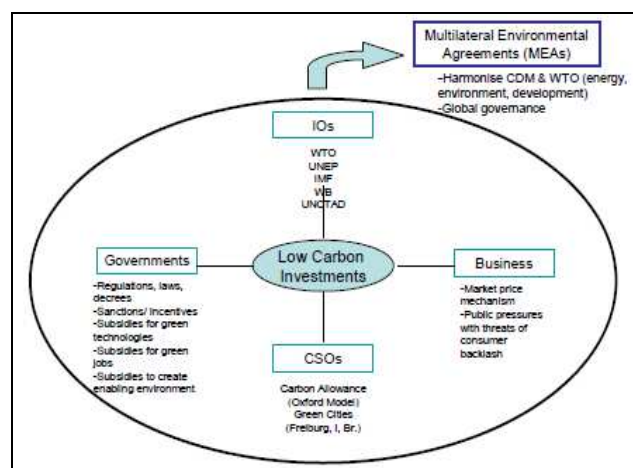
A cross-regime approach based on the principle of mutual supportiveness

A WTO-UNFCCC cross-regime agreement to stop climate warming does not exist and is not likely to emerge in the near future. This policy paper advises that negotiation space should be used within WTO to make the urgent policy decisions to stop climate warming. The principle of mutual supportiveness is a concept that can support this approach. This principle suggests that each international regime should take into account the scope and legal ramification of other agreements. It has its origin in a document adopted by the 1992 UN Conference on Environment and Development^{ix}. Mutual supportiveness is included as a principle in some legal international instruments such as the preamble to the Marrakech Agreement (1994)^x, the WTO 1994 Decision on Trade and Environment^{xi}, and the 2001 Doha Declaration^{xii}.

A set of clear and measurable guidelines could certainly be a major tool for accelerating the change of unsustainable patterns of consumption and production. In particular, low carbon investment could be achieved through incentives and sanctions which act as drivers and determinants influencing investors and investment flows towards low carbon investment. International and regional agreements and organizations deal with trade and environment issues. However, these agreements and their respective International Organizations are working in isolation and prevent a constructive and substantive interaction between the Multilateral Environmental Agreements, the Multilateral, Plurilateral and Regional Trade Agreements and related International organizations to stop climate warming.

As depicted in the figure below, low carbon investment and production could be achieved at national levels through green government policies, civil society pressures for sustainable growth and environmentally friendly business decisions by commercial actors.

Figure 1: Mapping of actors and regimes



Source: Saner (2011) "International governance options to strengthen WTO and UNFCCC", CSEND Policy Brief, http://www.diplomacydialogue.org/component/docman/doc_download/109-20110611-international-governance-options-to-strengthen-wto-and-unfccc.pdf

New thinking about the interface between trade, investment and climate change

Proposals by different international organizations address the problematic of green investment but from different cross-regime perspectives. Different initiatives by organizations such as UNCTAD, UNEP, OECD, WB, ICC, WEF but also non-governmental organizations such as ICTSD, IISD and CUTS, among many others, point to a new emerging thinking about ways to fully link trade, investment and climate change.^{xiii} Radical solutions like the adoption of a carbon tax have also been proposed.

These new initiatives suggest the need to bring back to the multilateral discussions issues like investment and competition as well as the need to rethink cross-regime approaches involving trade, investment and climate change. In conclusion, the various new proposals constitute different appeals to reconsider local content (TRIMS) and compulsory licensing (TRIPS) in the form of a pro-green / low carbon policies enhancing green investment and production. In other words, the majority of the suggested solutions to stop climate warming should be negotiated within the WTO agreements.

For instance, UNCTAD's World Investment Report 2010 focused on low-carbon investment and suggested different actions that are directly or indirectly related to the TRIMS and TRIPS agreements. In the Annex of this policy brief, there is an identification of the references made by the UNCTAD report and their link to TRIMS and/or TRIPS agreements.

Discontinuous change of WTO Agreements: solutions to fight climate warming

A cross-regime agreement between trade governance (WTO) and climate change (UNFCCC) could be a key driver and determinant to ensure the availability of low carbon investment and production needed to fight climate warming. What is needed is more "thinking outside of the box".

A great majority of countries cling to the WTO acquis but at the same time they do not want to ensure the successful closure of the DDA thereby endangering the future functioning of the rump WTO.

An important number of UNFCCC Members are concerned about environmental degradation and hope to halt the nefarious impact of climate change but seem unable to agree on mitigation, adaptation and new commitments. Instead, several options could be envisaged within the WTO context to provide solutions to stop climate warming - namely: Green TRIMS+, Green TRIPS++, and Green Plurilateral+++.

Green TRIMS+

This solution constitutes an option to renegotiate and re-activate the TRIMS agreement which came into force in 1995 as a result of the Uruguay Round negotiations. TRIMS included a list of local content requirements, trade balancing requirements and export restrictions which were made illegal through the old TRIMS Agreement. WTO member countries were given 90 days to notify WTO of any existing measures which did not conform with the TRIMS. There were a total of 43 notifications by 24 developing countries. After some request for extension of the transition period, all developing countries abolished their notified TRIMS and by 2007, the TRIMS agreement became extinct. TRIMS were experienced as a useful mechanism allowing developing countries to temporarily protect their own industries in select sectors until they were ready to drop these measures.

A second generation TRIMS agreement could be negotiated which would allow developing countries time to protect their infant industries in the sector of carbon

reduction technology which would hence make it easier for them to commit to carbon reduction targets within the UNFCCC agreement. Such a re-use of TRIMS+ could be guided by UNCTAD whose research on FDI and the green economy would be the appropriate International Organization to lead such an effort.

Green TRIPS++

A green approach to TRIPS could provide a framework to support technology transfer into developing and least developed countries in order to promote the development of low carbon production to fight climate warming. A Green TRIPS++ approach would revisit the TRIPS agreement and explore ways how to apply similar exceptions as are available for LDCs in the field of health. Faced with the full brunt of climate change like floods, drought and deforestation, exceptions could be considered to allow LDCs to get access to technology from developed countries to acquire carbon reducing machines through the clause of "compulsory licensing". Such use of the "compulsory licensing" option could entice LDCs in their UNFCCC's adaptation negotiations to accept setting CO2 emissions targets. In other words, TRIPS could be broadened to include TRIPS++ to safeguard against climate warming.

Brazil has called for a Doha Declaration on Climate Change, applying the same logic to the global public good of climate mitigation as was applied in the area of medicines to human health, namely taking full advantage of the flexibility within TRIPS (WTO Agreement on Trade-related Aspects of Intellectual Property Rights) to grant compulsory licenses to critical climate-friendly technologies. The Group of 77 and China has also called for compulsory licensing under the UNFCCC negotiations. On the other end of the spectrum, universities and public-private partnerships are beginning to voluntarily adopt alternative licensing solutions, such as including humanitarian or open licensing clauses within their licensing agreements. Another example is the US-CHINA Clean Energy Forum that has advanced the idea of establishing a joint intellectual property protection programme, with insurance jointly written by US and Chinese entities (for example by the US Overseas Private Investment Corporation and by People's Insurance Company of China), to lend credibility to IPR protection regimes.

Green Plurilateral+++ (tri-sectoral) Agreement

A green plurilateral agreement could provide a comprehensive solution to fight climate warming consisting of negotiations linking three domains within the WTO, namely:

1. *Environment: green goods and services relevant for fighting climate change (making “green” commitments in GATT and GATS related to environment and climate change)*
2. *Energy: green goods and services relevant for supporting green energy (making “green” commitments in GATT and GATS related to green energy)*
3. *Trade and Development: making green commitments in PTAs; trade facilitation; capacity building to help LI-DCs and LDCs to grow economically and reduce poverty within green growth parameters.*

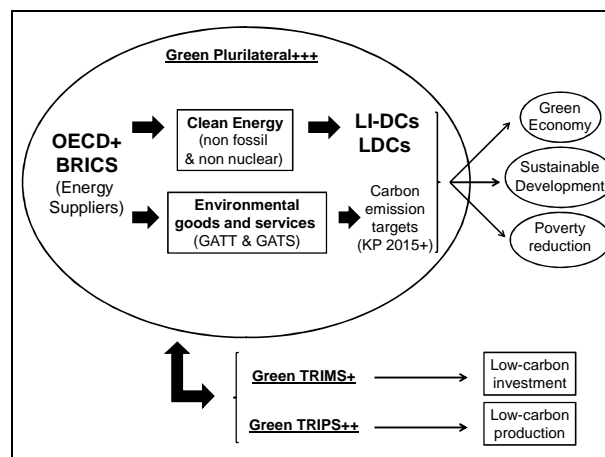
Such a suggested plurilateral (tri-sectoral) solution could support Low Income Developing Countries (LI-DCs) and Least Developed Countries (LDCs) to grow economically reduce poverty within green growth parameters and to set and apply carbon and greenhouse gas emissions targets. The tri-sectoral/plurilateral negotiation would involve countries having energy reserves (both producers and transmitters) such as OECD+ and BRICS countries as well as some energy endowed LI-DCs and LDCs (normally net energy importers). Energy Poor LI-DCs and LDCs could be given the right to discriminate between high carbon energy products versus low carbon energy products. Another solution could be to provide compulsory licensing for LI-DCs and LDCs to develop green technologies using environmental services and energy services (drilling, equipment, crude oil processing equipment, etc.) to generate more environmental-friendly energy sources.

If adaptation comes about as part of UNFCCC, it could inadvertently be considered a form of subsidy by developed countries having green technology. Why could this be acceptable? As part of the adaptation envelop, energy resource rich countries would contribute to reduce climate warming by giving privileged access to energy importing LI-LDCs and LDCs. In exchange, energy importing LI-DCs and LDCs would agree to set carbon emissions targets with UNFCCC and implement them. LDCs could be offered a quota of cheaper and cleaner energy provided they agree on specific carbon reduction targets. Avoiding a simple subsidization of wasteful consumption of energy, the access to cheaper energy would only be granted provided LDCs agree to become energy efficient, not to raise expectation of simply selling cheaper (subsidized) energy products.

Adopting this green plurilateral solution, WTO members would be negotiating their GATT and GATS commitments in regard to climate change and green environmental goods and services, green energy goods and services, trade facilitation, generation of supply and

capacity building). Such a plurilateral solution would be reached once a critical mass of WTO members has joined the green plurilateral agreement. This green plurilateral would then be multilateralized through MFN to all WTO members.

Figure 2: Green TRIMS+, Green TRIPS++, Green Plurilateral+++



Source: Raymond Saner, 2013

As depicted in the graph above, the solution of a green plurilateral agreement would be a complementary solution to those proposed earlier in this policy brief, namely the green TRIMS+ and the green TRIPS ++ intended to encourage the necessary low carbon investment and production in LDCs.

Conclusion

So far, global warming continues unabatedly and the level of GHG accelerates toward the bifurcation point or point of “no return” potentially resulting in catastrophic environmental crises. *Thinking outside of the box* to overcome this situation requires convergence of different internationally negotiated norms under one powerful legal instrument that could exert sanctions on non-compliant policies and deviant behaviour of state and economic actors. The multilateral instrument which could “bite” the lethargic international decision makers into action is green solutions within the WTO.

Greening of the WTO framework is needed to reduce barriers to the global trade of environmental goods and services. Adoption of a similar greener approach to GATT and GATS is required. A comprehensive green plurilateral agreement could facilitate access to clean energy and a green approach to TRIMS and TRIPS could allow developing countries and LDCs to successfully achieve transition into a green economy by fostering low carbon investment and production.



Annex:

WIR 2010 Example of references to low-carbon investment and their relation to TRIMS/TRIPS

WIR 2010 text	CSEND Proposition
Drivers (push factors) such as home-country policies, public opinion and shareholders' muscle are increasingly weighing on TNCs' decisions to invest in low-carbon activities abroad. P.xxix	
Developing countries are confronted with two major challenges in responding to climate change and moving towards a low carbon economy: first, mobilization of the necessary finance and investment; and second, generation and dissemination of the relevant technology. P.xxix	Green TRIPS needed
Creating an enabling policy framework. This includes the provision of adequate investment promotion, protection and legal security. Other supporting policies include the provision of incentives and regional integration agreements to overcome constraints of market size for low-carbon foreign investment. The emergence of new areas of low-carbon foreign investment – e.g. the production of renewable energy and associated products and technologies, fuel-efficient or alternative-fuel modes of transport and new building materials – is likely to require specific policies to complement the “traditional” elements of the policy framework. Foreign investment into new low-carbon industries may not be competitive in the start-up phase and may therefore need government support, such as feed-in tariffs for renewable energy or public procurement. In addition, such market-creation mechanisms are likely to require revisions to the regulatory framework, including the establishment of emission standards or reporting requirements. There is a need for capacity development in developing countries to enable them to deal with these complex tasks. P.xxx	Green TRIMS needed
In specific segments of industries and value chains, where the absorptive capacities of domestic companies are high but low-carbon technology and know-how are lacking, governments can target specific foreign investors in order to acquire the necessary know-how. P.xxxi	Green TRIPS needed
Creating a conducive framework for cross border flows of technology. The key elements of a favourable environment for cross-border flows of low-carbon technology include availability of the requisite skills, appropriate infrastructure (e.g. some countries are setting up low-carbon special economic zones), measures to define and create markets in low-carbon products, targeted incentives (e.g. to invest in the necessary R&D or technology adaption) and a strengthened legal system. How these issues play out varies between economies; for instance, some developing countries have the resources to bolster education and training in the necessary skills. Another issue for cross-border technology flows into host countries is intellectual property (IP) rights protection. Foreign investors in some sectors consider strong protection and enforcement a precondition for technology dissemination, but the actual effects differ from country to country. Concerns have been expressed by developing countries that an IP regime should not only support IP protection and enforcement, but also guarantee greater access to appropriate technologies. p.xxxi	Green TRIMS / TRIPS needed
Effective industrial and competition policies are key to tackling the negative effects of low-carbon foreign investment, such as crowding out and attendant dependency on foreign low-carbon technology suppliers. Industrial policies can help affected domestic companies to improve and upgrade; an effective competition policy framework can control the emergence of monopolies and prevent the abuse of dominant market positions. p.xxxii	Green TRIPS needed
Attention needs to be given to the dual edged nature of IIAs. On the one hand, by committing internationally to a stable and predictable investment policy environment and providing investment protection, IIAs can contribute to increasing a country's attractiveness for low-carbon foreign investment. On the other hand, IIAs can possibly constrain the host country's regulatory powers with respect to measures aiming to facilitate a transition to a low-carbon economy. p.xxxii	Green TRIMS needed
<p> Policymakers may also wish to consider complementary, broader approaches. A multilateral declaration, clarifying that IIA parties are not prevented from adopting climate change-related measures enacted in good faith, could help enhance coherence between the IIA and the climate change regimes. p.xxxii</p> <p> The potential relocation of carbon-intensive production from highly regulated places to countries with less stringent or no regulation on emissions has raised concerns. There are fears that this “carbon leakage” – due to free riding – impedes global emission reduction efforts, and that such relocations of production may result in a loss of investment-related benefits (e.g. tax revenues and employment) in the home country. A debate has begun on whether to introduce border adjustment measures (e.g. tariffs) to deal with the issue of carbon leakage. There are technical difficulties when it comes to assessing the carbon intensity of individual imported goods, and there are doubts as to whether different types of border adjustment policies would be consistent with World Trade Organization (WTO) rules. In addition, caution is warranted for countries to guard against possible protectionism affecting efficiency-seeking and export-oriented outward investment under the pretext of such carbon-related policy measures. pp.xxxii/xxxiii</p>	Green TRIMS needed
Some home countries also encourage their firms to export (low-carbon) technologies and products or to expand overseas through export credits, export sales guarantees and investment guarantees, thereby building on capabilities developed at home and benefiting from economies of scale. In addition, some developed countries have developed technical cooperation programmes with developing countries in order to promote low-carbon development and create additional export and investment opportunities for their firms in areas such as rural electrification through renewable energy. In developing home countries (and some developed ones) low-carbon development strategies, policies and regulations might also support their TNCs' outward foreign investment to obtain assets in lowcarbon know-how (section C.2; section D for a more detailed treatment).p.116	Green Tri-sectoral needed
Costs of production also relate to carbon leakage (section D.6), as TNCs try to optimize their exposure to carbon taxes. P.116	

Source: UNCTAD (2010), World Investment Report, http://unctad.org/en/Docs/wir2010_en.pdf

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- ⁱ PricewaterhouseCoopers (2013), "World in 2050 - The BRICs and beyond: prospects, challenges and opportunities", PwC Economics, http://www.pwc.com/en_GX/gx/world-2050/assets/pwc-world-in-2050-report-january-2013.pdf
- ⁱⁱ The Guardian (2013), "Global carbon dioxide in atmosphere passes milestone level", 10th May, <http://www.guardian.co.uk/environment/2013/may/10/carbon-dioxide-highest-level-greenhouse-gas>
- ⁱⁱⁱ See Intergovernmental Panel on Climate Change, Geneva. IPCC (Intergovernmental Panel on Climate Change), 2007: *Climate Change 2007 – Impacts, Adaptation and Vulnerability*. New York: Cambridge University Press, 976 pp. See also IPCC's Assessment Reports and Technical Reports available from http://www.ipcc.ch/publications_and_data/publications_and_data.shtml#1
- ^{iv} Think "out of the box" solutions: see Saner (2011) "International governance options to strengthen WTO and UNFCCC", CSEND Policy Brief, available from http://www.diplomacydialogue.org/component/docman/doc_download/109-20110611-international-governance-options-to-strengthen-wto-and-unfccc.pdf. See also Arquit, Gage & Saner (2011) and Arquit & Saner (2005) on CDM.
- ^v http://unfccc.int/essential_background/convention/background/items/1353.php
- ^{vi} http://unfccc.int/essential_background/kyoto_protocol/items/6034.php
- ^{vii} http://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm
- ^{viii} It is important to note that the fact that those products have been covered by WTO jurisprudence is a mere coincidence. The issue at stake was not the product's environmental nature but rather the fact that, in trying to promote them, governments used commercial measures that upset the level playing field for exports that should exist without discrimination against foreign trading partners.
- ^{ix} Agenda 21, paragraph 2.3(b), available at: www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml
- ^x http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm
- ^{xi} http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm
- ^{xii} http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm
- ^{xiii} It is worth noting that in some cases, the narratives do not refer at all to the WTO rules or to the UNFCCC framework.