

International Trade Committee: Inquiry on COP26 and international trade
“International Adjudication Under Pressure” research team response

September 2021

Summary

1. International trade has the potential to contribute significantly to securing global net zero, enabling and encouraging countries to protect communities and natural habitats and accelerating collaborative action to tackle the climate crisis.
2. Current global trade arrangements and institutions, however, are poorly equipped to assist in combating climate change. Revisiting states’ multilateral trade commitments and obligations to ensure these are more accommodating and supportive of efforts to combat climate change is accordingly a key element in ensuring that international trade regulation facilitates rather than impedes such efforts.
3. Enabling international trade regulation to take greater account of environmental considerations and efforts to combat climate change could form a key element in a broader initiative to revisit and reform WTO agreements and institutions. The UK has the potential to play a leading role in this endeavour, with priority given to reforming dispute settlement mechanisms, and ensuring that combating climate change is mainstreamed as a legitimate trade-relevant value.

Introduction

4. “International Adjudication Under Pressure” is a research programme of the Glasgow Centre for International Law and Security, part of the University of Glasgow School of Law.
5. The current submission draws on research conducted under the auspices of this programme since 2019 on “International Adjudication Under Pressure: The World Trade Organization Appellate Body”, led by Dr Henry Lovat, Lecturer in International Law and Politics, University of Glasgow, and Dr Shaina Western, Lecturer in International Relations and Quantitative Methods, University of Edinburgh.
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How can international trade and investment contribute to realising the goals of COP26?

A. Background

7. COP 26 has four main goals: to “Secure global net zero by mid-century and keep 1.5 degrees within reach... Adapt to protect communities and natural habitats... Mobilise finance [including via]... International financial institutions... [and] Work together to deliver.” (<https://ukcop26.org/cop26-goals/>).

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8. The UK is already active in promoting “green trade” within the World Trade Organization (WTO). The WTO and the broader multilateral trade order it enables, however, are themselves in difficult straits.
9. Political and economic tensions amongst the major trading powers have become increasingly marked in recent years, particularly between the US and China. At the same time, longstanding US dissatisfaction with the Appellate Body (AB) also came to a head during the Trump administration, rendering the AB non-functional in late 2019. Signalling the continuation of US concerns both about the WTO and the broader WTO regime, the Biden administration has indicated it intends to maintain Trump’s block on AB appointments.
10. The continued relevance of the broader multilateral trade regime is also in question, with a growing range of critical trade issues – including climate change - poorly covered by existing WTO agreements and plurilateral/regional trade initiatives continuing to proliferate. The treatment of environmental issues within the WTO has, moreover, been a persistent focus of US concern for decades.
11. Successive attempts to promote further multilateral trade liberalisation or to reform the Appellate Body/WTO dispute settlement have been stymied by the challenges of forging consensus across the WTO membership, compounded more recently by increasing US-China tensions and the rise of populist nationalism.
12. Taken together, these issues raise the question of how and to what extent governments may be able to work together to manage and navigate global trade and other cross-border public goods – including, critically, climate change - in the coming years.
13. There are three broad avenues down which international trade governance may develop in the coming years and decades. Broadly speaking, these are:
 - a. Seeking to maintain the current global trade “status quo”
 - b. Greater plurilateralism within the global trade regime
 - c. Institutional overhaul of the WTO
14. Each of these avenues has advantages, weaknesses, and challenges. Reflecting the global challenge of climate change, however, only option c. holds out a realistic prospect of designing a global trade architecture capable of effectively supporting efforts to combat climate change.
15. More generally, this is also the only option that of these three that does not raise the prospect of WTO institutions and rules more generally falling into desuetude in the longer term, with an accompanying rise in international legal fragmentation and uncertainty, increased costs of conducting cross-border/regional trade, and likely growth in protectionist practices.
16. Although the WTO has provoked the ire of the environmentalist movement, the alternatives risk a return to a return to beggar-thy-neighbour trade policies in the absence of globally accepted and enforceable rules. Increased barriers to multilateral trade cooperation in this manner will not only impede global economic growth, this will also make it more difficult for states to work globally and in a manner integrated across issue areas to combat climate change.

17. In the short term we anticipate a move towards plurilateral trade governance: such regional and other agreements can and should cater for and foster the promotion of efforts to combat climate change. Plurilateralism, however, also risks the creation of inconsistent and overlapping commitments, potentially further impeding global cooperation on, *inter alia*, climate change.
18. Regardless of any progress that might be made in promoting climate change-associated values within the WTO, moreover, in the absence a functioning dispute settlement mechanism capable of commanding consensus across the WTO membership there will be no means of enforcing any such arrangements if agreed.

B. Global Trade Regulation and Climate Change: An Agenda for Progress

19. At present, climate change is generally considered a non-trade value, with efforts to moderate environmental damage falling largely outwith the global trade regime. In consequence, global trade regulation provides few incentives and significantly constrains states' legally permissible scope to take measures in support of these endeavours where these may be inconsistent with multilateral trade obligations.
20. Given the global challenge presented by climate change it is critical that states collectively find ways to better accommodate and encourage efforts to combat climate change within the global trade regime. Indeed, the ongoing crisis in global trade governance arguably provides an opportunity for committed governments to commence a process of revitalising WTO institutions and agreements in this manner.
21. To prevent further deterioration in the WTO's operations in the near term, however, any such process must commence with addressing the key issues preventing the operation of WTO dispute settlement mechanisms.
22. This process is likely to require, at minimum, reforming the WTO Dispute Settlement Understanding to address US grievances about dispute settlement – especially in respect of the AB. Given the need for consensus across the WTO membership, this process is unlikely to be straightforward. There are, however, ongoing debates about plausible “landing zones” with the potential to identify a workable, efficient dispute resolution framework (perhaps borrowing from pre-WTO GATT arrangements) that would be minimally acceptable to all.
23. Other major trading powers (especially China and India) may be loath to initially make concessions on these (or other) issues. Given the likely costs of failure to reform these arrangements, however, these positions are likely to moderate as the costs of deteriorating global trade governance become more apparent.
24. Critically, US concerns about the WTO (and the concerns of other governments about US attitudes) go beyond dispute settlement, including broader “level playing field” issues such as trade defence. It is highly possible that absent the AB these concerns will in future manifest in conduct further weakening the residual elements of the multilateral trade regime, including (for example) increasing reliance on a de facto non-justiciable national security exception. While such measures may weaken the WTO, they also highlight the value of more substantive reform to bridge US and others' preferences and concerns – including in respect of climate change.

25. That said, prominent amongst the “level playing field” issues of concern to the US is the WTO’s treatment of environmental issues as a non-trade value. Given the increasing acceptance of climate change as a preeminent challenge facing the global commons, the time may accordingly be ripe to seek to revisit this treatment as a priority alongside the renegotiation of WTO dispute settlement arrangements.
26. This linkage may not only assist in unblocking US intransigence in respect of the latter, moreover: including climate change mitigation as a trade-relevant value may also open the way for states to utilise WTO dispute settlement mechanisms to hold one another to account, to some degree, in respect of associated commitments and policies. The converse is also true, however: improving the manner in which WTO arrangements cater for measures promoting environmental protection will be of little value if there is no prospect of enforcing associated commitments via an effective dispute settlement process.
27. In short, as we argue in a forthcoming policy paper, engaging in such a process of “institutional overhaul” stands not only to address the weaknesses of current WTO dispute settlement arrangements - revisiting existing WTO legal agreements also holds out the prospect of better accommodating pressing “global commons” issues such as climate change within the legal framework governing global trade.
28. This could include, for example, the development of a distinct WTO protocol recognising combating climate change as a legitimate trade-relevant value, providing states with greater scope to pursue measures to combat climate change than can be assured under current legal arrangements. To the extent that governments – including the UK, China and across the EU - may use non-market incentives to stimulate their economies, such a protocol could, for example, promote the adoption of climate-friendly such measures.
29. Negotiating such a protocol is unlikely to be straightforward. History suggests there may be scope to develop such an instrument on a standalone basis (see e.g. experience with negotiating post-1995 WTO trade facilitation and procurement agreements). Given the scope for a broadly understood “climate change exception” to cut across core WTO commitments, however, as well as tensions amongst key trading states, such an endeavour is likely to succeed only if there is scope additionally to revisit other core WTO arrangements, including regarding (as noted above) dispute settlement, as well as trade defence measures.

C. Recommendations

30. In light of the above and following the emergence of the UK from the EU’s common trade policy, we recommend that the UK take the lead in the development of a “climate change” protocol to the current WTO agreements in tandem with efforts to revitalise (and potentially redesign) WTO dispute settlement arrangements. A priority in these efforts should be seeking to identify and bridge gaps between the US and the other major trade blocs.
31. To optimise the chances of success and reflecting past experience as well as the current state of WTO institutions and the broader global trade regime, we recommend that this initiative should form part of a staged multilateral process revisiting and consolidating global trade legal and institutional arrangements.
32. A sustainable, effective global trade regime, catering for and promoting efforts to mitigate climate change, is a core UK interest. The current state of the WTO and associated agreements, however, leave this a remote prospect. We accordingly encourage the UK to take the lead, building on close

links with the EU, US and globally, in revisiting global trade rules and institutions to foster sustainable and growth-enhancing trade, including via promotion of efforts to mitigate climate change, as well as ensuring effective dispute settlement to enforce associated commitments.

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