

## CILG – The Climate Show

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### Transcript

00:00:04 Linnéa Nordlander

Hi and welcome to the Climate Show, a podcast that explores the law and politics of climate change. This podcast is brought to you by the University of Copenhagen.

00:00:16 Linnéa Nordlander

Hi we are Beatriz Martinez Linnéa Nordlander and Alessandro Monti. And we are your host at the climate show.

00:00:30 Alessandro Monti

In today's episode, we will discuss the interaction between climate change and international trade law here at the climate show. We have already discussed at length the possibilities for climate action beyond the international climate regime, but we never directly address the role of trade.

00:00:45 Linnéa Nordlander

Yes, we've previously covered other aspects of climate change and international economic laws such as carbon pricing and investment law, but it was definitely time to fill this important gap.

00:00:55 Beatriz Martinez

And indeed, so much has been happening lately on the front of climate change and trade, most notably, the European Union has just agreed on a carbon border adjustment mechanism to deal with carbon leakage in the European Union linked to the sectors covered by the EDF.

00:01:09 Alessandro Monti

To discuss this with us, our guest today is Doctor Elena Cima, who is a lecturer at the University of Geneva. Doctor Elena Cima holds a PhD in international law from the Graduate Institute of International and Development Studies.

00:01:29 Alessandro Monti

A Bachelor of Laws from the University of Milan, and an LLM degree from Yale Law School.

00:01:34 Alessandro Monti

She's also Chargee de Cours at the Law School of the University of Geneva and Co, director of the Geneva Summer. Goal in international law and international humanitarian law. And his research focuses on the interface between climate change and international economic law. She has extensively published on the topic of sustainability in trade and investment law, including with regard to legal issues that emerge from disputes with an environmental and energy component. In today's conversation, we will

particularly focus on the link between climate change and trade, which is also the subject of Elena's monograph from exception to promotion published by Brill in 2021. Elena, thank you for being with us today and welcome to the Climate show.

00:02:23 Elena Cima

Thank you so much Alessandro for the invitation. It's a pleasure being here. We have met literally discussing trading, climate change so I think it's only natural that we continue doing so in this format. So I'm looking forward to the conversation.

00:02:38 Alessandro Monti

It's a pleasure to have you here. And let me begin with a very general question because at first glance, trade and climate change appears two very different legal fields. So what are the connections between them and why are they important today?

00:02:52 Elena Cima

Well, I think the way in which you have phrased the question is especially interesting. Trade and climate change appear to be very distinct legal fields and it's true for for a very long time and maybe to some still today, trade and climate change have appeared as completely separate and distinct legal fields, each with its own objectives, its own principles. Legal instruments, institutions and so on. And this perception, I believe, explains, at least in part, the difficulty of linking in a constructive manner. Trade and climate change, even today. Now of course if we look at the history. Of the two regimes, they are clearly distinct. The multilateral trade regime was designed, was created in the 1940s with the GATT negotiations with the adoption of the GATT. In 1947 and since then it has developed 1st through several rounds of trade negotiations and then in the 90s with the Uruguay Round and establishment of the WTO. Now, as to climate change, it is only in the 1990s that we witnessed multilateral discussions and negotiations on the matter to be more precise, we have to wait until 1992 with the adoption of the UNFCCC, the United Nation's formal, conventional climate change. So for more than four decades, the trade regime has developed without the climate regime even exists. And since 1992, since the UNFCCC for many years, the two regimes have continued developing and evolving separately on parallel tracks. We could say, and all of this despite as you, as you rightly said, the inevitable connections between them. Now in fact. Even before climate change became an emergency worthy of international cooperation, countries have often relied on trade measures to pursue a wide range of environmental objectives. And these are precisely those measures that have triggered the very first environmental disputes at the GATT and then at the WTO. But this has become even more true with climate change now. Now international climate law does not tell countries what measures to adopt to reach their emission reduction targets. It never has, even under the current protocol, when the targets were set at the top in the protocol itself, countries could always choose. How to meet those targets? What measures to concretely adopt and even more so with the Paris Agreement, where countries decide both their emission reduction targets and how to meet them? And if we look at countries and emissions, which we look at their nationally determined contributions will see that most of them. And I would even go as far. As to say. All of them include several types of trade measures. And actually the role the the crucial, the crucial role of of trade measures in contributing to climate change mitigation has been emphasized. On several occasions, let's take, for instance, the latest report of the IPCC of the Intergovernmental Panel on Climate Change. Now this report was published just a few months ago in the spring of 2022,

and it highlights the critical role of technical regulations labeling schemes bonds. Stable energy subsidies fossil fuel subsidies reform and others for climate change mitigation. In 2015, Agenda 2030 for Sustainable Development also emphasizes that trade measures can be a powerful tool to achieve the different SDG's, including SDG 13, climate action, SDG 7, access to clean energy. So there is a clear role for trade measures within the climate regime. But at the same time, all these instruments, even climate law instruments, including the UNF triple C and the Paris Agreement, they all stressed the need for all these measures to be designed and implemented in a way that is consistent with the multilateral trading system, with the multilateral trade law framework. Trade the framework, which, if we rely on the preamble of the Marrakesh Agreement establishing the WTO, should have among its objectives sustainable development and Environmental Protection, so the reasoning here and connection between the two regimes, despite what what perception one may have.

00:07:17 Alessandro Monti

Thank you for this very exhaustive answer and in fact, if we look at climate change law, it is not probably enough to fully address the trade issue. So it's also important to look at the trade regime and how this relates to climate change. And if we look at international trade law, we realize that the interaction between climate and trade. Explains, in fact on two different levels because on one side there is the multilateral level with the framework of the World Trade Organization, WTO, and on the other side, climate and trade are also increasingly connected in a wide range of bilateral and regional trade agreements. So what are in your view the main differences and the respective potential for multilateral and bilateral regional agreements to foster synergies between climate and trade?

00:08:05 Elena Cima

So you're right to say that there are these two levels. So we see the interface progressing both at the multilateral and the bilateral and regional level. And the short answer will be. That this interaction is progressing at very different speed, a very different pace at the multilateral level, so meaning within the WTO and at the bilateral or or regional level, and this has this has always been the case, and this was especially the case at the very beginning. If we take the 1990s as the decade of reference. What do we see? We see that a lot is happening for the environment and for climate. We have the Rio Conference, the Declaration, the Real Declaration on Environment and Development. We have the UNF triple C, the CBD. Many other environmental agreements, the notion of sustainable development has just emerged. And of course, all of this has an impact on trade negotiations. But in trade negotiations we actually see different reactions. So in the context of the Uruguay Round, for examples and multilateral trade negotiations, the reaction is quite minor. Yes, we have the reference to sustainable development and Environmental Protection in the preamble to the market agreement. We have the creation of the CTE, but that's about it. The actual provisions, the actual rules, remain substantially blind to all that is happening with regard to the environment and climate. Now if we look at bilateral and regional negotiations, the things things are different, things are different already in the 1990s, and I'm referring in particular to all those FTA's, all those agreements concluded by the US, by the EU, by other. Countries that are already in the 1990s are pursuing a strong environmental agenda. These agreements are way more advanced from an environmental point of view. Let's take NAFTA as an example. NAFTA was being negotiated while the Uruguay Round was happening. But it looks very much different from an environmental perspective. There are environmental provisions in after there is a whole environmental side agreement. And most agreements concluded by the US and the EU since the 1990s, uh generally

feature an environment or a sustainable development chapter, and even when they simply repeat provisions that we find in the GATT, for example, thinking of GATT Article XXIV general exceptions, they do. Had a clear, explicit environmental dimension. That Article XXIV has been used has been interpreted by the appellate body as to apply to environmental measures, but the word environment is not there in the text of the of the provisions when we find. And the same provision. So when Article XXIV is basically copied and pasted in FTA's, there is generally the clarification that that this is actually an environmental exception. So there is this effort and and this has led to overall a discrepancy between what is going on in multilateral and in bilateral and regional. Negotiations and this is not at all surprising. For countries that have a strong environmental agenda and for countries that push this agenda in the trade negotiations, it is, of course much easier to exercise their bargaining power in bilateral and regional forums negotiations rather than in multilateral ones, rather than at the WTO. So this has been I think that that the landscape for a very long time, not today. I believe we start seeing some signs of change in these trends and it is not just and it is not necessarily the usual suspects that put forward and environmental a sustainable development, a climate agenda. And trade negotiations and trade forums. And we can see this if we look, for instance, at the role played by different delegations in the way in which they participate in the context of different initiatives within the WTO. I'm thinking of the fishery subsidies negotiations. I'm thinking of test D, the trade and environmental sustainability structure, discussions and thinking. Of the informal dialogue on plastic pollution. But many others, we can see this if we look at some of the recent trade and investment negotiations and the role that climate environment, sustainable development, have been playing in these negotiations so. In a nutshell, yes, if we if. We look at the existing rules today, the existing agreements today, maybe with the exception of the fishery subsidies agreement at the WTO, FTA's are a few steps forward, are more forward-looking when it comes to the environment and climate compared to what's going on at the WTO. The WTO but there may be the seeds of change and and the multilateral level might be finally ready to catch up.

00:13:07 Alessandro Monti

Thank you. And I will connect to this to stay on the multilateral level on which we have actually witnessed recently an increase in disputes that concern climate related technologies such as, for example, renewable energy equipment. These disputes have also exposed some of the limitations of the WTO legal framework when it comes to dealing with the issue of climate change. So if we want to focus on this dispute settlement dimension. Could you tell us why any of your renewable energy has been particularly targeted in WTO disputes and whether climate considerations have ultimately been taken into account adequately by WTO adjudicators?

00:13:48 Elena Cima

Right. So let me unpack. Maybe this question. There are a few interesting points in this question. So first, the increase in disputes concerning renewable energy technologies and and equipment and even renewable energy fuel. So yes, there has been a clear. Their increase. And I do. Believe it's it's only natural. It's only natural as countries are more and more adopting trade measures to fight climate change. In particular, we have seen the rise of what we generally call green industrial policies. So all these measures, like, for instance, green subsidies that have an environmental objective, sometimes the climate. Change mitigation objective but also have an industrial goal, an industrial purpose. So these are these are measures that. Allow countries, so to speak, to kill two birds with one stone, meaning that they allow countries to on one hand try and meet their climate targets, while at the same time

developing and strengthening their local economy and the local industry. So of course you know that's it's no surprise that there have been a few disputes. Regarding, you know all these all these support measures and there have been a few disputes in the past ten years on renewable energy subsidies, subsidy, sorry, disputes that have become fairly, fairly famous. Such as those, for instance, against Canada and and India. But many more disputes have actually revolved around so-called trade remedies being cultural in duties. So in reaction to subsidies and anti dumping duties or safeguards. Now there has been a clear spike. In these disputes. Now, how have they been dealt with by adjudicators? And now you mentioned 2 two sides. You mentioned the adequacy of the legal framework and and then the role of adjudicators and I and I would like to focus. More probably on the adequacy of the rule. Simply because, of course, interpretation by adjudicators can go a long way. And we, we've seen it many times at the WTO, in particular in environmental disputes as well, but adjudicators at the end of the day have to interpret and apply certain rules as they are drafted and. If rules are inherently inadequate, then the exercise for adjudicators becomes much, much more difficult. And there there are actually. There are several aspects of these rules which may benefit from a reconsideration or even a redesign or redrafting. I'm thinking of countervailing duties. For example, now the applicable rules, for instance, do not feature a public interest clause that could allow to balance the benefits. Of a car travelling duty for the domestic industry with the broader environmental costs, there is no neutral decision maker because determinations are made by domestic administrative agencies, although of course subject to the military added. But more broadly, and this is I. Think a common issue with WTO rules. These rules do not take into account the specific characteristics of the renewable energy sector. For instance, the five year duration of Trade remedies or or even longer depending on the outcome of of the review. Now the five year duration can be especially harmful for those renewable energy technology industries that are subject to rapid technological changes. And overall, when it comes in particular to multilateral trade remedy actions, although they may appear as less constraining on members green policy space, they actually generally produce an environmentally harmful result, which is the increase in the price of renewable energy technologies globally, which ultimately slows down the deployment. And diffusion of renewable energy. So overall, again just to to sum up, it's not surprised that all these disputes are emerging. And of course there is a lot that adjudicators can do. But I think that this is an area where reform could be, could be an interesting way.

00:18:02 Alessandro Monti

Thank you. And now to connect to your book that I mentioned before, from exception to promotion in your book, you argue that the international trade regime has been largely developing in two parallel tracks and you already mentioned before how, for example, exception clauses in trade agreements. In free trade agreements that are bilateral or regional are formulated differently from multilateral trade agreements. However, I would also like to hear what is it that differentiates exactly this exception model from the promotion model? How do they work in practice and would you say that the two models are now more or less equally represented in free trade agreements, or is there still a predominance of one over the other?

00:18:49 Elena Cima

So I came up with these two models. The exception based and promotion based model because it was trying to develop two different lenses that would allow us to to read, understand and explain the different dynamics of the trade and environment interface. And something that is interesting is that

although in my book I do talk about an evolution from exception to promotion, of course it's not clear cut and the result is rather a coexistence of provisions or initiatives that can be explained through the exception. Model exception based model and others that can be instead better explained the reference to what I. Call a promotion. A promotion based model so we can detect an evolution, meaning that for a long time we could only find provisions that could be explained through an exception based model, while today we start seeing something that we can look through the lenses of a promotion based model. But there is still very much a coexistence and to. Just, you know, quickly answer your your final question is still that we are still far from embracing the promotion based model entirely. But I'll just give you a few examples of what I mean. So for example, all the provisions that we find both in WTO agreements and in FTA's, where countries are simply allowed to pursue environmental objectives generally in a very narrowly defined way, in very narrowly defined circumstances, like, for instance, exception clauses like that. Article 20 or more generally, all the provisions that suggest or imply a hierarchy between trade and environmental values. Now all these provisions can be explained by reference to the exception based model. Precisely because the underlying idea of this of this approach of this model is to basically limit the space for for for the environment to corner. Literally the environment in narrow exception is to frame provisions in a way. So that trade rules simply allow countries to pursue environmental goals they do not block them. They do, don't they do not act as obstacles. Rules with regards to countries, efforts to to to protect the environment, on the other hand, the promotion based model can help us explain all those provisions, those agreements, those initiatives that frame trade rules as literally promoting, encouraging, facilitating environmental action. So the question becomes, you know, how can we design rules or do these rules actually promote environmental action rather than, you know, are these rules leaving enough space for countries to protect the environment? And we can see some examples we can see, for example, the fisheries subsidies agreement at the WTO is a good example at the multilateral level, this is an agreement that has been drafted. For you know the environment that the primary objective of the trade agreement here is the protection of a specific environmental component. It doesn't simply allow countries to protect the environment, but it promotes this protection, something that we can see instead at the level of FTA's is for for, for example, a new generation of FTA's concluded by the US. In particular, since 2007, while the non respect of the environmental provisions of of the agreements triggers economic sanctions, just like for for trade provisions. So these are just just to give you an idea of, you know, the the kind of provisions that can be explained with one model or the other. But as I was saying, I do see an evolution, a tendency trend from purely except. Towards promotion, but we are still very much in a situation where there is a coexistence of the two and again we are still far away from from embracing an entirely promotion based model.

00:22:59 Alessandro Monti

Thank you. And I will conclude with the final question about the very recent development, which is the introduction of a carbon board and adjustment mechanism or cbam by the European Union just now in December 22, as we are recording this interview, the European Union has reached a provisional agreement on the implementation of Sigma from October 23. This will of course have a significant impact on trade as the aim of CBAM is to introduce a tariff at the border on imported products based on the amount of greenhouse gas emissions. Do you think that international trade law will allow sufficient room for these type of measures, or should we expect a new wave of climate related trade disputes on CBAM?

00:23:43 Elena Cima

Well, you know, sebum is of course one of the hot topics of this past month, and in particular with this provisional agreement at EU of these past weeks. In any discussion on on trade and climate change, now we were actually already talking about the compatibility. Of a hypothetical carbon BTIA uh carbon border tax adjustment, maybe 10 years ago. But it was all very much in theory, and now we we have an actual provisional agreement on the implementation of SEEBBAUM by the EU, started, as you were saying, about about a year from now. Now two things I believe were crystal clear from the beginning of this whole process. Now first that there were and I believe still are several potential red flags in terms of consistency with. Due to your law, in particular with regards to non discrimination, so article one and three of the Gatt, but even potentially consistency with with the SCM in case that the adjustment also worked on exports which in the end wasn't wasn't the case and 2nd the second thing that was crystal clear from the beginning. Was that the seebaum designed by the EU? You had to be designed and implemented as much as possible in a way that was compatible with WTO law, precisely to be effective and to and proper disputes, and this is not something this is not a remark that came from trade circles alone, but from climate ones as well. The latest IPCC. Report that I mentioned at the beginning of this interview.

00:25:24 Elena Cima

Explicitly refers to sibum and clarifies that any sabans will have to comply with multilaterally agreed rules under the WTO agreements to be implemented. So there was this idea from the beginning that it was important to design and implement this program in a way that would be. Incompatible and I do believe that there have been important and serious efforts from the EU to to come up with the provisional agreement that is as much as possible. Comparable to to to avoid all potential conflicts with WTO. Yet there are still a few pieces of legislation which are still being negotiated, which will spell out some aspects that are relevant to see them, so we'll have. To see to see those to have an idea of the actual final design of the program. Uhm, but to kind of give a provisional, let's say assessment. I do believe that this is actually an area going back to what you you asked me earlier about the role of adjudicators, the adequacy of the rules and and the role of adjudicators. I don't think. That the rules necessarily, you know, stop. A program like this and here I do believe that there is a place. To for adjudicators to interpret these rules in different ways, their compatibility of see them with some key WTO principles and even with the language of of Article 20 in, in case you know in case of justification remains controversial and it will really depend on how on how adjudicators will interpret these rules. So to answer your questions with just one sentence, yes, I wouldn't be surprised. To see disputes, but i'm ready to be surprised by the outcome.

00:27:21 Alessandro Monti

Thank you so much. And before we wrap up, is there anything else you would like to add that we have not yet really covered in today's interview?

00:27:29 Elena Cima

Well, yes, just kind of a as a as a final thought, I think this is a very exciting time to be discussing trade and climate change. I've been working on the interface between trade and environment, trade and climate change for many, many years now, but I find this a particularly exciting time because they do

believe that. We are at all levels national, bilateral, regional, multilateral. Finally, seeing the signs of the synergy moving forward and for example. The the space, the place, the role. Uh played by the WTO at the at the last call is quite unprecedented and I do believe that it's a sign of the trade communities and environmental and climate communities coming closer and closer together. So I think that this is is going to be and even more exciting. Topic of discussion going forward.

00:28:25 Alessandro Monti

Well, I think it's great to conclude on this positive note. And let me just say that I'm as excited as you about this growing synergies between climate and trade and well, thank you so much, Elena, for taking the time to be with us today. We really enjoyed having you as our guests at the climate show and look forward to continuing our cooperation.

00:28:45 Elena Cima

Thank you for having me. It's been an absolute pleasure and anytime.

00:28:54 Alessandro Monti

Thank you for listening to this episode. If you would like to read more about Elena Shuman's book from exception to promotion, check out the links in the show notes. Stay tuned for our next episode.