

Climate change and the Law of the WTO: Emerging Relationships

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INTRODUCTION

- Prevalence of sustainable development (SD) concerns in the international climate regime

e.g. UNFCCC: Preamble; Art. 2; **Art. 3(4),(5)**; Art. 4(1)(d); Art. 4(2)(a)

KP: Art. 2(1); Art. 2(1)(a)(iii), (iv); Art. 10; **Art. 12**

- UNFCCC

*Art 3(4) The Parties have a right to, and should, promote **sustainable development**. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.*

*Art 3(5) The Parties should cooperate to promote a supportive and open international economic system that would lead to **sustainable economic growth and development** in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.*

- Kyoto Protocol

*12(2) The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving **sustainable development** and in contributing to the ultimate objective of the Convention, and to*

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assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

I. BASIC ISSUES

- Non-Annex I Development

Devt as primary national priority (to be balanced with FCCC PAMs)

Participation of NAs in global markets

Reliance on international trade norms

- Carbon Leakage

Emerging risk of carbon leakage

Entails loss of jobs in CC demanding territories and/or increasing aggregate emissions and/or undermines domestic support

NB leakage focussed in specific sub-sectors – cement, ferrous metals, nitrogen fertilisers, pulp/paper (see K Neuhoff)

Border adjustment emerging as preferred approach to address leakage for exposed sectors (also, conditional free allocation/state aid or government led sectoral agreement)

- Carbon Border Adjustment

Obligation to pay border taxes/surrender emission allowances on importers of goods produced under less demanding CC constraints

- Rationale of Border Adjustment

Incentivise other countries to adopt more demanding climate policy

Incentivise producers in countries not subject to carbon pricing

Assure domestic audiences re: competitiveness

Avoid leakage/reallocation of carbon intensive industries

Avoid free allocation and facilitate auctioning

2. EMERGING NATIONAL PRACTICES

- National Examples (US)

Waxman-Markey Bill (formally American Clean Energy and Security Act 2009)

Now substantially dead but, useful thought experiment

Imposes obligation to surrender allowances on importers of goods produced in countries without comparable CC constraints

- National Examples (EU)

European Council Oct 2009: comprehensive CC agreement best method to address leakage

“Appropriate measures” may be taken to address leakage

EU ETS, DIR 2009/29/EC, Art. 25:

The Commission should therefore review the situation by 30 June 2010...the Commission should identify which energy-intensive industry sectors or subsectors are likely to be subject to carbon leakage [and] base its analysis on the assessment of the inability of industries to pass on the cost of required allowances in product prices without significant loss of market share to installations outside the Community which do not take comparable action to reduce their emissions. Energy intensive industries which are determined to be exposed to a significant risk of carbon leakage could receive a higher amount of free allocation or an effective carbon equalisation system could be introduced with a view to putting installations from the Community which are at significant risk of carbon leakage and those from third countries on a comparable footing. Such a system could apply requirements to importers that would be no less favourable than those applicable to installations within the Community, for example by requiring the surrender of allowances. Any action taken would need to be in conformity with the principles of the UNFCCC, in particular the principle of common but differentiated responsibilities and respective capabilities, taking into account the particular situation of least

developed countries (LDCs). It would also need to be in conformity with the international obligations of the Community, including the obligations under the WTO agreement.

3. NATIONAL LAW AND WTO COMPLIANCE

- International Trade Rules and WTO Principles

National Treatment (Art III GATT): non-discrimination between own and like foreign products

Most Favoured Nation principle (Art I GATT): non-discrimination between like products from different trading partners

Environmental exemptions (Art XX GATT), especially: XX(b) “related to the conservation of exhaustible natural resources”; XX(g) “necessary to protect...life or health”; but NB Art XX chapeau, no “arbitrary or unjustifiable discrimination” or “disguised restriction of international trade”

- Trade Categories and CC Categories

Are EU ETS-type penalties an “internal tax”, per Art III: 2 GATT?

i.e. taxes and charges on imports should not be applied “in excess” to taxes levied on like domestic products or on input articles

Q: is a low carbon cement a like product to high carbon cement? (i.e. distinction on the basis of *production and process methods (PPMs)*)

Q: how to calculate “carbon border taxes” (i.e. “in excess” of LDP)? Based on average financial burden of the sector? BAT?

- MFN and EU ETS

Carbon border tax calculated according to CBDR and respective capabilities, with special treatment of LDCs.

- Art XX Exemptions

AB caselaw, two limbs:

- permissibility of good faith measures to protect legitimate interests
- impermissibility of requiring others members to adopt substantively similar regulations.

CONCLUSION

- Policy Failings of BA

Unlikely to encourage participation of NAI/their industries

Leakage only relevant for narrow range of sectors/commodities

- Legal Compatibility of BA with WTO

Open questions as to legal classification, though...

Violation of Art III GATT may nonetheless be availed of Art XX exemptions