Climate Change, Energy and Trade Law

International Climate Change and Energy Law
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How does trade law (WTO) interfere with climate or energy regulation?

Use of economic instruments in climate/energy regulation

Why?:

**Regulatory choice:** traditionally command and control legislation – move to incentive-based regulation (“carrot and stick”)

**Use of market mechanisms:** demand and supply, financial mechanism, effectiveness (should reach a certain goal), cost-effectiveness (to reach a certain goal with the least possible costs = optimal use of environmental resources)
How does trade law (WTO) interfere with climate or energy regulation?

Use of economic instruments in climate/energy regulation:

Objectives

– Reducing compliance costs
– Increase cost-effectiveness
– Consumer behaviour and production
– Internalization of environmental costs
– Competitiveness (development or protection)
– Carbon leakage, pollution havens, environmental integrity
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Which?:

Subsidies, purchase guarantees, feed-in-tariffs, taxes and charges, emissions trading, renewable energy certificates (RECs) trading schemes, voluntary agreements by industry, certification or labelling (e.g. carbon footprinting and energy efficiency labelling schemes), standards (e.g. energy, sustainability), bans, domestic content requirements
Key objectives:
- Internalize environmental costs
- Promote development & deployment of climate-friendly technologies
- Improve energy efficiency and reduce GHG emissions

Key instruments:
- Carbon tax, emissions trading schemes
- Financial Mechanisms: R&D, fiscal, price and investment measures
- Emissions standards, labelling on energy performance

Key WTO Agreement:
- GATT
- SCM Agreement
- TBT Agreement
How does trade law (WTO) interfere with climate or energy regulation?

Economic instruments hold the potential to conflict with trade law:

- by providing a comparative advantage to domestic products (subsidies, border tax exemptions (Border Adjustment Measures), **SCM agreement**) / treating imported goods and services less favorably than national ones (**NT, GATT Article III**)
- by quantitatively restricting access to markets (bans/standards, **GATT Article XI**)
- by favoring services/goods from certain countries (**MFN, GATT article I**)

Rules on international trade could frustrate attempts to protect resources and the environment beyond areas of national jurisdiction (extra-territorial scope), e.g. sustainability standards for biofuels, certificates for sustainably harvested timber, emissions trading (e.g. aviation)
WTO Rules and Principles

Aim:

- Reduction of trade and market access barriers
- Promotion of non-discrimination
  - border measures, tariffs, quota, customs regulations, import licensing, certification
  - national regulations and practices that have a *protective* effect
- focus on explicit, government imposed trade obstacles
Most Favoured Nation (MFN)

GATT 1947
Part I, Article I: General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind ..., any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
National Treatment (NT)

GATT 1947
Article III:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
«Like products»

In WTO case law, four criteria have been used in determining whether products are “like”: *(EC-Asbestos, Japan – Alcoholic Beverages)*

(i) the physical properties of the products;

(ii) the extent to which the products are capable of serving the same or similar end-uses;

(iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and

(iv) the international classification of the products for tariff purposes

The issue of processes or production methods (PPMs)
Art. XX GATT: Environmental Exceptions:

Article XX: General Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ....

(b) necessary to protect human, animal or plant life or health; ....

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...
‘Environmental’ Provisions:

• **Subsidies and Countervailing measures (SCM)**: allows subsidies, up to 20% of firms’ costs, for adapting to new environmental laws

• **Intellectual property**: governments can refuse to issue patents that threaten human, animal or plant life or health, or risk serious damage to the environment (TRIPS Art 27)

• **GATS** Article XIV: policies affecting trade in services for protecting human, animal or plant life or health are exempt from normal GATS disciplines under certain conditions
‘Environmental’ Provisions:

• Art. 2.2 Technical Barriers to Trade (TBT) (i.e. product and industrial standards)
• Art. 2.1. Sanitary and Phytosanitary Measures (SPS) (animal and plant health and hygiene): explicit recognition of environmental objectives
• Agriculture: environmental programmes exempt from cuts in subsidies
Cases:

• European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 12 March 2001
• Brazil - Measures Affecting Imports of Retreaded Tyres 7 December 2007, WT/DS/332AB/R
WTO law and the promotion of development & deployment of climate-friendly technologies

- **DS412** Canada — Certain Measures Affecting the Renewable Energy Generation Sector (Complainant: Japan; EU, USA, China, Australia, Norway and others joined) 13 September 2010, Canada and Japan appealed in February 2013
- **DS426** Canada — Measures Relating to the Feed-in Tariff Program (Complainant: European Union) 11 August 2011; Canada and EU appealed 13 February 2013
- **DS419** China — Measures concerning wind power equipment (Complainant: United States) 22 December 2010
- **DS452** European Union and Certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector (Complainant: China) 5 November 2012
- **DS456** India — Certain Measures Relating to Solar Cells and Solar Modules (Complainant: United States) 6 February 2013

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- **DS437** United States — Countervailing Duty Measures on Certain Products from China (Complainant: China) 25 May 2012
- **DS449** United States — Countervailing and Anti-dumping Measures on Certain Products from China (Complainant: China) 17 September 2012
Canada-Certain Measures Affecting the Renewable Energy Generation Sector (DS412)
On September 16, 2010, Japan filed a request for consultations with the Government of Canada at the WTO. US, EU, Norway, Australia, and China joined the consultations. Relating to domestic content requirements in the Feed-in-tariff program established by the Canadian province of Ontario in 2009 (under the Green Energy Act 2009), the Feed-in-program provides for guaranteed, long-term pricing for the output of renewable energy generation facility that contain a defined percentage of domestic content to foster growth in Ontario’s green manufacturing, construction (incl. on-site labour) and installation sectors. As a result, holders of FIT contracts must ensure that a minimum percentage of their goods and services for their FIT projects originate from Ontario. At present, the minimum required domestic content level is 60 per cent.

China-Wind Power Equipment

Workers paint wind turbine blades at a factory in China's Hebei province. Photograph: Alexander F. Yuan/AP
Facts

• On 22 December 2010, US requested consultations with China under WTO rules (Art. 4.2 SCM)
• With regard to certain measures providing grants, funds or awards to enterprises manufacturing wind power equipment (overall unit and parts thereof)
• “Special Fund for Wind Power Equipment Manufacturing”, domestic content requirement: grants to Chinese wind turbine manufacturers that agreed to use key parts and components made in China rather than purchasing imports
• Providing these grants, funds or awards is contingent on the use of domestic over imported goods
• Measures inconsistent with Article 3 (b) of the SCM
• China has not notified these measures: violation of article XVI:1 GATT 1994
• EU and Japan joined
• No panel established
• China ended its funding programme in June 2011
Prohibited and actionable subsidies under WTO Law (SCM Agreement)

Prohibited Subsidy (Export Subsidy)
1) financial contribution by a government (Art. 1.1 SCM) (direct transfer of funds)
2) confers a benefit (Art. 1.1.a (2) SCM) and
3) funds are conditioned on sourcing to local firms (Art. 3.1.(b) (= deemed specific, Article 2.3 SCM)

Actionable subsidy:
1) financial contribution by a government (Art. 1.1 SCM) (direct transfer of funds)
2) confers a benefit (Art. 1.1.a (2) SCM) and
3) targets only a specific sectors (specificity, art.2 SCM),
4) funds are channeled to trade activities that harm other Member’s firms and workers (adverse effects, injury to the domestic industry of another Member: Art. 5 (a) SCM), or
5) serious prejudice to the interest of another Member: Art. 5 (c) SCM: Serious prejudice may occur when another member’s like products are discriminated against, in particular where the effects of the subsidy are to displace or impede another member’s import of like products into the market of the subsidizing member.
China challenges:

- Italy’s «Fifth Energy Bill» for incentivizing the production of electrical energy from photovoltaic solar installations
DS456 India — Certain Measures Relating to Solar Cells and Solar Modules (Complainant: United States) 6 February 2013
USA challenges certain measures of India relating to domestic content requirements under the Jawaharlal Nehru National Solar Mission ("NSM") for solar cells and solar modules. Specifically, it appears India requires solar power developers, or their successors in contract, to purchase and use solar cells and solar modules of domestic origin in order to participate in the NSM and to enter into and maintain power purchase agreements under the NSM or with National Thermal Power Company Vidyut Vyapar Nigam Limited. As a result, solar power developers, or their successors in contract, receive certain benefits and advantages, including subsidies through guaranteed, long-term tariffs for electricity, contingent on their purchase and use of solar cells and solar modules of domestic origin.
USA claims that India's measures appear to be inconsistent with:

• Article III:4 of the GATT 1994 because the measures appear to provide less favorable treatment to imported solar cells and solar modules than that accorded to like products originating in India;
• Article 2.1 of the TRIMs Agreement because the measures appear to be trade-related investment measures inconsistent with Article III of the GATT 1994;
• Articles 3.1(b) and 3.2 of the SCM Agreement because the measures appear to provide a subsidy contingent upon the use of domestic over imported goods; and
• Articles 5(c), 6.3(a), and 6.3(c) of the SCM Agreement because the measures appear to cause serious prejudice to the interests of the United States through displacement or impedance of imports of U.S. solar cells and solar modules into India and through lost sales of U.S. solar cells and solar modules in India.
Sustainable Development as a Principle of International Law
Resolving Conflicts between Climate Measures and WTO Law

Christina Voigt
Biofuels, climate change and renewable energy
Biofuels and renewable energy

- Goals of the Directive: increased security of energy supply and reduced GHG emissions
- 20% share of energy from renewable sources in energy consumption by 2020 and a 10% share of renewable energy specifically in the transport sector, mandatory shares vary from country to country (Annex I)
- Mandates implementation by member states by 5 December 2010
- For transport the main source is biofuels
- Biofuels could have negative social and environmental impacts, e.g. increase in food prices, reducing biodiversity, could lead to an increase in emissions because never CO2 neutral
- Sustainability criteria for biofuels (biofuels = liquid or gaseous fuel for transport produced from biomass) (article 2)
Preamble:
• (65) Biofuel production should be sustainable. Use of sustainability criteria
• (68) Sustainability criteria to ensure coherence between energy and environmental policies
• (69) Protection of biodiversity
• (70) Protection of terrestrial carbon stocks
• (74) Concern about third countries not respecting minimum environmental and social requirements, multilateral or bilateral agreements desirable “in order to promote the production of biofuels and bioliquids worldwide in a sustainable manner. In the absence of such agreements or schemes, Member States should require economic operators to report on those issues”.
3. Performance standards

• Article 17: two sets of *sustainability criteria* – biofuels must be sustainable in order to be counted towards the mandatory renewable energy targets (and 10% transport target) and in order to be eligible for financial support (e.g. tax reductions):
  
  – 1) greenhouse gas emission savings *and*
  – 2) land-use requirements (e.g. lands with high biodiversity value, primary forests, rare and endangered ecosystems or species, highly bio-diverse grasslands, lands with high carbon stock (e.g. wetlands, peat)}
Biofuels sustainability standards: greenhouse gas emission savings

Annex V C.1
Greenhouse gas emissions from the production and use of transport fuels, biofuels and bioliquids shall be calculated as:

\[ E = eec + el + ep + etd + eu - esca - eccs - eccr - eee, \]

where \( E \) = total emissions from the use of the fuel;

- \( eec \) = emissions from the extraction or cultivation of raw materials;
- \( el \) = annualised emissions from carbon stock changes caused by land-use change;
- \( ep \) = emissions from processing;
- \( etd \) = emissions from transport and distribution;
- \( eu \) = emissions from the fuel in use (considered zero);
- \( esca \) = emission saving from soil carbon accumulation via improved agricultural management;
- \( eccs \) = emission saving from carbon capture and geological storage;
- \( eccr \) = emission saving from carbon capture and replacement; and
- \( eee \) = emission saving from excess electricity from cogeneration.
Biofuels sustainability criteria and WTO Law

- MFN and NT principles in WTO law (Article I and III GATT)
- Like products and PPMs
- Discrimination (de lege eller de facto?)
  - GHG saving criteria
  - Land-use criteria
- Justification?
- 1. Article XX (b) necessary to protect human, animal or plant life or health
  - GHG saving criteria
  - Land-use criteria
  - “necessary”
- 2. Article XX (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption
  - GHG saving criteria
  - Land-use criteria
  - “relating to”
  - P Extraterritoriality: Does article XX GATT contain a jurisdictional limitation?
- 3. Article XX chapeau: arbitrary or unjustifiable treatment or disguised restriction on international trade
Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or a *disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...  
(b) necessary to protect human, animal or plant life or health;  
...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...
Price & market mechanisms to internalize environmental cost

2.1 Instruments to internalize environmental (climate) costs

2.2 Border “carbon” adjustment measures

2.3 Relevant WTO rules
2.1 Price & market mechanisms to internalize environmental cost
Two Key Instruments

- Tax on the carbon content of fossil fuels, often combined with a tax on energy use
- Emissions Trading Scheme
Effectiveness: Carbon tax vs. ETS

Carbon tax

Price is determined directly by the regulators through the tax rate (exogenously)

Environmental uncertainty?

Quantity of emissions to be reduced is a result of measures adopted by industry to reduce emissions (endogenously)

ETS

Price is determined by the market (endogenously)

Price uncertainty?

Quantity of emissions to be reduced is determined by regulators (exogenously)
Environmental effectiveness

2 key intended environmental effects of a carbon tax and an ETS

*Direct effect, i.e. reduction of GHG emissions, by setting a price on emissions*

*Indirect effect, through “recycling” of fiscal or auctioning revenues to fund e.g. investment in more climate-friendly technologies*
2.2 Border adjustments measures
Rationale

Emissions reduction policies and laws are not applied universally.

This may give rise to competitiveness loss and carbon leakage.

In particular for energy intensive industries.
To offset asymmetries in competitiveness
To avoid carbon leakage

Rationale

Border adjustment measures
2.3 Relevant WTO Rules
Coverage?

*Importance to define the instrument at hand to determine relevant WTO/GATT provisions*

- A border adjustment to a tax?
- A border adjustment to another carbon cost, e.g. an ETS?
Coverage?

A border adjustment to a regulation, e.g. an ETS?

Submit emissions credits acquired abroad to cover the emissions during the production process of the imported good.

Hold emission allowances, up to the amount of CO₂ emitted during the production of imported products and applied on a per unit basis to each good.

Potential requirements on importers
Can the price paid by an industry to participate in an ETS be qualified as an “internal tax or other internal charge of any kind”, covered under Article III.2?

Can an ETS be seen as a measure covered by Article III:4, i.e. as a law, regulation and requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use?
With basic principles, e.g. non-discrimination

National treatment, Art. III GATT

Most Favoured Clause, Art. I GATT

Prohibition to discriminate between “like” products
GATT 1994 Article III:4

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
Justifiability under Article XX GATT?

WTO rules, as confirmed by jurisprudence

Under certain conditions, Members can adopt trade-related measures aimed at protecting the environment

Essential to maintain a balance between

the right of Members to take regulatory measures to achieve legitimate policy objectives

the rights of other WTO Members under basic trade rules
Article XX
General Exceptions

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... 

(b) *necessary to protect human, animal or plant life or health*;

...

(g) *relating to the conservation of exhaustible natural resources if* such measures are made effective in conjunction with restrictions on domestic production or consumption;

...
Several disputes on measures that sought to achieve a variety of policy objectives.

- Conservation of clean air from air pollution
- Conservation of sea turtles from incidental capture in commercial fishing
- Protection of human health from risks posed by asbestos
- Protection of human health from risks posed by the accumulation of waste tyres

WTO jurisprudence has confirmed that WTO rules do not trump environment, as long as…
Cases (www.wto.org)


• **Brazil-Retreaded Tyres:** Brazil – Measures Affecting Imports of Retreaded Tyres, Report of the Appellate Body WT/DS/332/AB/R, 7 December 2007
Justifiability article XX GATT?

...as long as several carefully crafted conditions are respected...

Environmental measures must not be applied in a manner which constitutes

→ a means of arbitrary/unjustifiable discrimination or

→ a disguised restriction on international trade